

Customary Law and the Protection of Traditional Cultural Expressions in Kenya

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By

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DECLARATION

I, SYLVIA WAIRIMU MUTHEMBA, 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: 29/05/2018

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

Signed: 

[Supervisor's Name] 28/05/18

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DEDICATION

I dedicate this work to the Almighty God for his guidance and strength and to my family for their encouragement, unwavering support and prayers throughout this study.

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ABSTRACT

Kenya is a culturally diverse country, rich in tradition and culture. Communities, as a product of their creativity have a vast collection of Traditional Cultural Expression or Expressions of Folklore. These expressions have faced threat of exploitation and extinction due to a failure to adequately protect them and secure the community interests. This study aims to assess the existing framework for their protection in order to identify gaps that exist which result in insufficient protection of TCEs. The main objective is to assert the importance and role of customary law in ensuring a more stable system for their preservation, promotion and protection.

The study is carried out systemically through an analysis of already existing literature and therefore identifying points of convergence and those of departure with the aim of the study. Both primary and secondary sources of data were relied upon and analyzed. It finds that the legal framework fails to institutionalize and formally recognize the application of customary law in matters regarding TCE protection. An argument is thereafter fronted that the community's interests are the primary consideration in providing protection to TCEs and this interest would only be adequately advanced through a formal recognition of the application of the customary law of the community concerned as regards their TCEs.

LIST OF ABBREVIATIONS

CS	Cabinet Secretary
GR	Genetic Resource
IP	Intellectual Property
IPR	Intellectual Property rights
IP/ICC	Indigenous Peoples and Indigenous Cultural Communities
KECOBO	Kenya Copyright Board
NCIP	National Commission on Indigenous Peoples
TK	Traditional Knowledge
TCE	Traditional Cultural Expressions

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya (2010).

The Constitution of the Republic of Philippines (1987).

Protection of Traditional Knowledge and Cultural Expressions Act (No 33 of 2016).

Copyright Act (2001).

Industrial Property Act (2001).

The Indigenous Peoples' Rights Act, (Philippines).

National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (2009).

National Policy on Culture and Heritage (2009).

Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. (1994).

LIST OF CASES

1. *Ojisua v Aiyebelehin* [2001]11 NWLR 44.
2. *Balogun v. Oshodi* [1929] 10 NLR 36.
3. *Kimdey v Military Governor of Gongola State* [1988] 2 NWLR 77.
4. *Owoyini v Omotosho* [1961] 1 NU N.L.R 309.

CHAPTER ONE

Introduction to the study

1.0 Introduction

This study is an inquiry into the legal framework for the protection, promotion, preservation and recognition of Traditional Cultural Expressions in Kenya. It pays greater emphasis on the role of customary law in the framework for protection of the same. It contains a background to the problem, a statement of the problem and a justification of the study all of which shall identify the legal problem being addressed and the need to tackle or solve it. The subsequent sections outline and discuss the statement of the research objectives, theoretical framework, literature review, the research methodology and chapter break down.

Traditional cultural expressions (TCE) are also referred to 'expressions of folklore' and may include music, dance, art, designs, names, signs and symbols, performance ceremonies, architectural forms, handicraft and narrative or many other artistic or cultural expressions.¹ TCEs contribute towards the cultural, social and spiritual wellbeing of a community.² They reflect a community's cultural and social background and consist of characteristic elements of a community's heritage therefore forming a very important part of a community's cultural identity.³ Due to the great role TCEs play in the life of the community, there is a great need to create a system for their protection, promotion, preservation recognition and enforcement.

1.1 Background to the problem

A system for the protection of intellectual property has been in existence in the west since the times of the industrial revolution that occurred in the late 18th century and the 19th century.⁴ It was based on the assertion that every individual has a right to the creation of their minds. Western Intellectual Property protection mechanisms are individualistic, limited in time, often have stringent formal requirements for recognition and have a greater focus on economic benefit. Conventional intellectual property protection mechanisms aim to offer

¹ World Intellectual Property Organisation: Traditional Cultural Expressions. <http://www.wipo.int/tk/en/folklore/> on 19th January 2017.

² World Intellectual Property Organisation: Traditional Knowledge and Intellectual Property – Background Brief. http://www.wipo.int/pressroom/en/briefs/tk_ip.html on 19th January 2017.

³ Singh & Associates – Leena Desai : Traditional Cultural Expressions' *Lexology India*, 30 November 2012. <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> on 27th January 2017.

⁴ World Intellectual Property Organisation: Traditional Knowledge and Intellectual Property – Background Brief. http://www.wipo.int/pressroom/en/briefs/tk_ip.html on 19th January 2017.

financial benefit and recognition to the author of such works⁵ and this is the reason for their individualistic approach in protection. This protection is granted by striking a balance between the interests of the innovators and the wider public interest.⁶ The public interest consideration explains why Intellectual Property protection is limited in time.⁷ Intellectual property rights are exclusive and in order for the public to benefit from the works of such an author, there needs to be a point where the exclusive rights cease to exist.

The creative expressions of indigenous communities were regarded as being part of public domain⁸ because they go back much further in time than the term of legal protection granted by the international conventions.⁹ As a result, they lacked a formal protection and recognition framework. However, in the recent past there has been a push by nations and indigenous communities towards the protection of traditional cultural expressions.¹⁰ The earliest attempts to protect TCEs were made through the application of Conventional IP protection mechanisms.¹¹ The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works made an attempt to introduce copyright protection for folklore at the international level.¹² This was due to the fact that they were familiar and highly institutionalized systems for the protection of the creations of the mind.

However, such attempts have been unsuccessful because there are certain essential differences between TCEs and the conventional forms of intellectual property that make

⁵ World Intellectual Property Organisation, *'What is Intellectual Property?'* WIPO Publication No. 450 (E), 2002, 2.

⁶ World Intellectual Property Organisation, *'What is Intellectual Property?'* WIPO Publication No. 450 (E), 2002, 3.

⁷ World Intellectual Property Organisation, *'What is Intellectual Property?'* WIPO Publication No. 450 (E). http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf on 4th February 2017.

⁸ Janice T Pilch, 'Traditional Cultural Expressions,' Library copyright alliance, Issue Brief, September 1 2009. <http://www.librarycopyrightalliance.org/storage/documents/issuebrieftce.pdf> on 1 February 2017.

⁹ Dionyssia Kallinikou, 'Protection of traditional cultural expressions or expressions of folklore,' Paper presented for the conference "Can Oral History Make Objects Speak?", Nafplion, Greece. October 18-21, 2005.

¹⁰ <http://www.wipo.int/tk/en/tk/> on 19th January 2017.

¹¹ World Intellectual Property Organization, Consolidated analysis of legal protection of Traditional Cultural Expressions/ Expressions of Folklore, May 2 2003, 21.

¹² Art 15(4), *Berne Convention for the Protection of Literary and Artistic Works*, Revised at Stockholm on 14 July 1967, 11850 UNTS 331.

western copyright systems ineffective in protecting TCEs.¹³ TCEs as opposed to other forms of intellectual property are communal in nature, trans-generational and they are often not created for commercial purposes, but as vehicles for religious and cultural expressions.¹⁴ Moreover western Intellectual property systems grant protection for a works that are materially expressed while TCEs in their nature are always developing and evolving as they are often recreated within the community.¹⁵ The aim of TCEs is to reflect a community's cultural and social background and consist of characteristic elements of a community's heritage therefore forming a very important part of a community's cultural identity.¹⁶ In addition to this, TCEs are a means through which cultural information is transmitted and the core values of the community are shared as well as preserved.¹⁷

1.2 Statement of the problem

The traditional cultural expressions of a community are of great sentimental value to the community to whom it belongs. However, there have been many previously reported cases of exploitation and misappropriation of TCEs by third parties for commercial gain without any benefits to the custodians of the knowledge. Worse still, there are cases where they are used contrary to the beliefs and practices of the community who are custodians of the same.¹⁸ There is therefore an immense need to ensure protection of the same from exploitation by outsiders and to enable the communities to derive benefit from them.

Despite the vivid necessity to have traditional knowledge and traditional cultural expressions protected by law, there is a glaring gap in the lack of proper recognition of the role of customary law in their protection. The attempts to protect them have been primarily made through the application of western intellectual property systems and hence undercutting

¹³ Jaszi P, 'Protecting traditional cultural expressions – some questions for lawmakers,' WIPO Magazine, August 2017. http://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html on 26th January 2017.

¹⁴ 'Singh & Associates – Leena Desai : Traditional Cultural Expressions' *Lexology India*, 30 November 2012. <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> on 27th January 2017.

¹⁵ <http://www.folklorefellows.fi/folklore-fellows-network-2/> on 27th January 2017.

¹⁶ 'Singh & Associates – Leena Desai : Traditional Cultural Expressions' *Lexology India*, 30 November 2012. <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> on 27th January 2017.

¹⁷ 'Singh & Associates – Leena Desai : Traditional Cultural Expressions' *Lexology India*, 30 November 2012. <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> on 27th January 2017.

¹⁸ 'Traditional Knowledge and Traditional Cultural Expressions in Kenya,' Copyright News Issue 4 October-December, 2011. <https://www.copyright.go.ke/awareness-creation.html?download=3:copyright-news-issue-4> on 27 January 2017.

the role of customary law and traditional justice systems. There is a need for inclusion of customary in the legal framework for recognition, promotion, preservation and protection of Traditional Cultural Expressions (TCEs).

1.3 Justification of the study

Every person belonging to a community has a right to exercise and to participate and enjoy their cultural life and language.¹⁹ Kenya is a culturally diverse country, rich in tradition, culture and customs.²⁰ As a result of this cultural wealth, there exist a wide variety of traditional cultural expressions that require recognition, protection, promotion and enforcement mechanisms. TCEs are a great treasure to the Kenyan communities and Kenya but have remained insufficiently protected as a result we have witnessed instances where TCEs of Kenyan communities have been used by third parties for commercial gain to the exclusion of the communities. The Kiondo, certain beads, red ochre ornaments and the Kikoy are examples of TCEs belonging to Kenyan communities some of which foreigners have attempted to trademark therefore denying the communities their rights.²¹

Furthermore, these creations have the potential to bring great benefit to the communities and the country's economy as they can potentially be a means for tourist attraction. This benefit can only be drawn through proper mechanisms of recognition, protection and promotion. There is a responsibility placed on the state organs and public officers to address the needs of members of particular cultural communities.²² The study aims to analyze the systems of TCE protection and provide an understanding of the role of customary in the same. This understanding is therefore of utmost importance for an efficient legal framework to be established.

1.4 Statement of objectives

The aims hoped to be achieved at the conclusion of the study are the following;

- i. To assess the prevailing intellectual property framework for the protection of TCEs in Kenya.

¹⁹ Article 44, *Constitution of Kenya* (2010).

²⁰ 'Traditional Knowledge and Traditional Cultural Expressions in Kenya,' Copyright News Issue 4 October-December, 2011. <https://www.copyright.go.ke/awareness-creation.html?download=3:copyright-news-issue-4> on 27 January 2017.

²¹ Mulama J, 'Trade Kenya: East Africans may be striped of the Kikoi.' <http://www.ipsnews.net/2007/03/trade-kenya-east-africans-may-be-stripped-of-the-kikoi/> on 4th February 2017.

²² Article 21(3), *Constitution of Kenya* (2010).

- ii. To explore the appropriateness of using customary law in the protection of TCEs.
- iii. To make recommendations regarding the protection of Traditional Cultural Expressions.

1.5 Theoretical framework

This paper will contain certain jurisprudential theories that will form the underlying framework for the research. They will form the foundation in which the study will be based as well as give a clearer understanding of the topic of research. An intercultural legal theory will form the major jurisprudential basis for this paper. An intercultural legal framework refers to a system where laws manage to bring together a diversity of legally relevant social practices thereby regulating diversity without enforcing a rigid unity, while at the same time avoiding a normative chaos leading to legal uncertainty.²³

This theory explores the legal implications of cultural diversity and implies a need opening up to genuine intercultural dialogue that permits understanding and articulation the diverse legal experiences of the people of the world.²⁴ Its focus is on integration and merging of variant norms and practices from the groups concerned in order to achieve optimal results. This theory helps support the application of customary law through an integration of customary law and concepts in the Conventional IP protection mechanisms should only play a secondary role.

1.6 Literature Review

There are a number of published writings and authors that have addressed the subject of Traditional Cultural Expressions and Customary Law. They have given varied opinions on the extent in which the two intersect as well the extent of application of customary law in recognizing, protecting, promoting, preservation and enforcing TCEs. This section will be addressed thematically in accordance with the objectives stated above.

a. Assessment of prevailing Intellectual Property framework in protecting TCEs in Kenya

²³ Drosterij G, Hildebrandt M, Huppel-Cluysenaer L, 'The Possibility of Intercultural Law,' *Netherlands Journal of Legal Philosophy and Jurisprudence*, 2006, 216.

²⁴ Eberhard C, '*Towards an Intercultural Legal Theory: The Dialogical Challenge*,' SAGE Publications, London and New Delhi, *Social & Legal Studies*, 2001, 173.

In Kenya, Expressions of folklore have been provided for under the Copyright Act. The Act makes reference to Expressions of folklore but does not create a protection mechanism within it. More recently there has been enactment of The Protection of Traditional Knowledge and Traditional Cultural Expressions Act for the protection of TCE and TK. This is a comprehensive piece of legislation that deals exclusively with the protection of TCE and TK. It defines TCEs, outlines the characteristics that have to be met in order to be protectable as a TCE and guarantees the rights of the owners to TCEs. Furthermore it also creates liability for certain acts inconsistent with the rights of the owner of TCEs as well as outlining the sanctions for the same.

The WIPO publication *Consolidated analysis of legal protection of Traditional Cultural Expressions/ Expressions of Folklore* outlines the various forms of western intellectual property protection and how they are used or suitable for use in the protection of traditional cultural expressions.²⁵ It outlines the application of Copyright law for protecting TCEs as productions of the literary and artistic domain. It also discusses the application of trademarks to the extent that TCEs are unique expressions that are identified with the specific community. It also discusses TCE protection by Industrial designs due to the fact that TCEs can take the form of handicrafts and other artistic designs. Some handicrafts and designs are not only aesthetic but have a functional role in the society and can therefore acquire patent protection. The publication also discusses the ways through which application of conventional Intellectual Property mechanisms has contributed towards depriving communities of their expressions due to their stringent formal requirements.

However, the WIPO publication titled *Traditional Cultural Expressions/ Expressions of folklore Legal Policy Options*, outlines the limitations of copyright in protection of TCEs. It states that copyright protection has a limited period of protection, focuses on the rights of the individual author and his or her economic benefit. In addition to this the publication by the New York City Bar Association African Affairs Committee, *Legal Frameworks for protecting Traditional Cultural Expressions in West Africa* discusses the national and international legal frameworks in West Africa for extending intellectual property protections

²⁵ World Intellectual Property Organization, *Consolidated analysis of legal protection of Traditional Cultural Expressions/ Expressions of Folklore*, May 2 2003, 35.

to traditional cultural expressions. It proceeds to elaborate on the reason why these systems are inadequate for the protection and recognition of TCEs.²⁶

b. Appropriateness of Customary Law in protecting TCEs

Customary law in the book *The Nature of Customary law* refers to legal rules born out of informal social practices as opposed to being laid down by a legislator. Customary law in this sense is equivalent to the customs of best practice that formed the basis for the decisions of the courts.²⁷ African Customary Law as set out by Francis Kariuki developed out of the customs and practices of a people in response to the circumstances of their lives. African Customary Law is not uniform neither does it exist as a single custom but essentially differs from one ethnic community to another.²⁸

Authors such as Hobhouse referred to customary law as archaic, wild, primitive and rooted in superstition and dismissed its application completely.²⁹ However, customary law is directly related to the way of life of the particular community it concerns. Communities have a right people to freely pursue their economic, social and cultural development³⁰ and the application of customary law in matters relating to TCEs would be a proper exercise of their rights.

The publication *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues* discusses in great length the role of customary law in the protection of TCE. It makes particular reference to the recognition of the important role of customary law in order to achieve promotion and strengthening of TCEs.³¹ It states that the application of customary law would help to preserve TCEs as the communities customs are would be intrinsically linked with the expressions. Customary law application would promote the creation of new expressions as well as develop the already existing ones. Furthermore, a

²⁶ New York City Bar Association African Affairs Committee, Legal Frameworks for protecting Traditional Cultural Expressions in West Africa, February 23 2016, 1-2.

²⁷ Perreau-Saussine A and Murphy J B, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge University Press, 2007, 67.

²⁸ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems,'

²⁹ Kuriakose T, 'Sui Generis Protection of Traditional Cultural Expressions' in Desai B H & Hedge V G, *Legal analysis of international policy response to the protection of traditional knowledge*, JNU, 2010, 207.

³⁰ Art 3, Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. (1994).

³¹ World Intellectual Property Organization, 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues' 2013, 9.

discussion on the approaches taken to recognizing customary law³², the means to be used for recognition and the scope of its recognition will be discussed.³³

The WIPO publication titled *Traditional Cultural Expressions/ Expressions of folklore Legal Policy Options* specifically discusses the various suggestions as to the scope and extent of application of customary law.³⁴ First, they recommend the full application of customary law to questions concerning the acquisition, maintenance and enforcement of rights in TCEs. The second suggestion proposes internalizing of customary to the greatest extent possible for protection of TCEs. Thirdly, there should be engendering greater respect for customary law within communities especially among younger members. Lastly, resolving clashes between customary law and conventional IP systems in ways sensitive to customary law and the rights and responsibilities emanating from them.³⁵

Miranda Forsyth writes in her article *how a theory of legal pluralism can assist the traditional Knowledge debate?* and proposes a system of legal pluralism in creating a framework for the protection of traditional knowledge. However, due to its characteristics of bringing about legal uncertainty a system of intercultural laws would be a more efficient system. It would strive towards achieving legal harmony without subjugation of one system by another. According to Patricia Adjei, customary law is typically holistic in nature and often sits alongside human rights law, land rights and IP law to protect TCEs.³⁶

There will be a departure from the conventional Intellectual Property mechanisms for protecting TCEs and instead focus on promoting the use of customary law application in the legal framework. The study will apply the already existing knowledge on the nature and definition of customary law to identify and analyze the role that it plays or should play in the framework for the protection of TCEs. Furthermore the study will add to the roles that

³² Tobin, Brendan Michael, 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights,' PhD Thesis, National University of Ireland Galway, 30 September 2011, 17.

³³ World Intellectual Property Organization, 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues' 2013, 15-18.

³⁴ World Intellectual Property Organization, *Traditional Cultural Expressions/ Expressions of folklore Legal Policy Options*, December 1 2003, 10.

³⁵ World Intellectual Property Organization, *Traditional Cultural Expressions/ Expressions of folklore Legal Policy Options*, December 1 2003, 10.

³⁶ Adjei P. 'What is the place of Customary law in Protecting Traditional knowledge,' WIPO magazine, August 2010. http://www.wipo.int/wipo_magazine/en/2010/04/article_0007.html on 30th January 2017.

customary law plays in TCEs protection despite lacking formal recognition in the national legislation.

1.7 Hypothesis

Customary law should be primarily applied to questions regarding the protection, promotion, preservation, recognition and enforcement of rights relating to TCEs.

1.8 Research Methodology

The methods that will be employed during this research will be descriptive research, conceptual research and evaluative research. Descriptive research is research showing how the situation on the ground is at the present time, conceptual research is the research based on some abstract idea or theory while evaluative research is a mode of research that evaluates whether or not the rules work in practice and whether they are meeting their aims.

This study will be carried out systematically and this section will outline various stages of the research.

Data collection

For the purposes of this study information about the topic of research shall be gathered through studying of primary and secondary sources. The primary sources that shall be relied on during the writing of this paper include the Constitution of Kenya, The protection of Traditional Knowledge and Traditional Cultural Expression Act, Copyright Act, Trademarks Act and Industrial Property Act. Judicial decisions regarding the applicability of customary law and the extent of its application shall also be relied on. The secondary sources that shall be used for acquiring information shall be journal articles, books on the topic of research and other publications especially those by the World Intellectual Property Organization. Information shall also be collected through carrying out of internet searches.

Data processing

This stage involves the methods employed to organize, verify and integrate the information gathered during the first step. This will be achieved through studying a wide range of writings and publications and comparing them. Information shall also be sieved based on the context it applies for instance publications specific to Africa will be relied on more regarding African indigenous communities than the general writings on the same in case of a conflict.

Data analysis

This is the process of inspecting, cleansing, transforming, and modeling data with the goal of discovering useful information, suggesting conclusions, and supporting decision-making. Data analysis will be carried out by using the relevant material acquired from the data collection stage through the primary and secondary sources of data. It will involve arranging the information systemically in order to detect certain patterns. This will enable the testing of the hypothesis and therefore develop explanations and conclusions on specific matters addressed in the study.

The evaluative research method shall prove particularly useful for this section while assessing the effectiveness of existing IPR frameworks for TCE protection. This is because it provides a means to judge actions and activities in terms of values, criteria and standards. At the same time evaluation is also a practice that seeks to enhance effectiveness in the public sphere and policy making.³⁷

1.9 Limitations of the study

This section outlines the specific constraints and shortcomings that are present in the writing of this research paper.

- ✓ There is limited writing on the protection of Traditional Cultural Expressions specifically to Kenya and therefore international publications shall be relied on to give guidance to the discussion.
- ✓ Customary law in the context of this study is a general understanding of indigenous customary law thus may not be applicable across the board for all communities.

1.10 Chapter break down

The research paper will be divided into the following sections;

Chapter 1: Introduction to the study

The introduction contains a brief summary of and introduction to the topic of the research. It defines the major terms involved in the study and gives a description of the parameters within which the study will be undertaken. It contains a background to the problem, a statement of the problem and a justification of the study statement of the research objectives, theoretical framework, literature review, the research methodology and the limitations of the study.

Chapter 2: Assessing the prevailing IPR frameworks for the protection of TCEs

³⁷ <https://uk.sagepub.com/en-gb/eur/change-location/0> on 23rd July 2017.

A discussion on the application of western intellectual Property systems to protect TCEs forms the main part of this section. It expounds on the attempts to protect TCEs using these systems and how they were applied and the effectiveness of doing the same. It generally discusses the applicability of Western Intellectual Property System to protect, recognize, promote, recognize as well as preserve TCEs.

Chapter 3: A comparative analysis of the Philippines framework for TCE protection

This chapter is an analysis of the TCE protection framework in the Philippines. This involves an analysis of the legislation that governs the protection of TCEs as well as the institutions charged with that responsibility. The differences that exist between this framework and our local regime are identified and in addition to this, lessons drawn from their jurisdiction. This is especially as it relates to the institutionalization of the customary of indigenous communities in the framework for TCE protection.

Chapter 4: Appropriateness of Customary Law in protecting TCEs

This chapter defines the nature of customary and proceeds to discuss the place of customary law in the Kenyan jurisdiction. It identifies the role of customary law in protecting, promoting, recognizing and enforcement of TCEs and outlines the merits of applying customary law in comparison to conventional Intellectual Property mechanisms. Furthermore, it outlines the unique problems that the application of customary law solves. It also identifies the ways in which the use of customary law is limited despite potentially playing a particularly important role in the promotion and preservation of TCE. The theory of an intercultural legal framework places the use of customary law in the framework for TCE protection.

Chapter 5: Findings, Recommendations and conclusion

This section contains observations from carrying out the research. It contains a brief summary of the content of the discussion asserting the final hypothesis of the study. It further contains evidence backing the propositions, conclusions and recommendations of the author which result from the findings from the research. It shall also offer a conclusion to the study.

CHAPTER TWO

Assessment of the Legal Framework for Protection of TCE in Kenya

2.0 Introduction

This chapter analyzes the legal framework for the protection of Traditional Cultural Expressions (TCEs) in Kenya. Until the recent past, TCEs were not granted protection or recognition under any law and therefore were greatly susceptible to misuse and misappropriation.¹ On recognizing this gap, there were subsequent efforts to recognize, promote and protect TCEs. The result of these efforts have been the creation of policy documents for TCE protection and enactment of laws guaranteeing TCE protection.² The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions is the policy document dealing with the protection of TCEs.³ The domestic pieces of legislation that deal with the protection of TCEs include the Copyright Act and more recently the Protection of Traditional Knowledge and Cultural Expressions Act. TCEs in Kenya are also guaranteed, recognized and protected under the constitution of Kenya 2010.

2.1 National Policies

a. National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions

This as the name suggests, is a policy document that deals with the protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. It recognizes that there is need to not only protect, document and preserve the already existing TCEs but also to lead to the promotion and creation of new ones based on continuous

¹Victor Nzomo: Intellectual Property Concerns in Kenya's Draft National Culture Bill,' A blog on intellectual property, 7th January 2015.

<https://ipkenya.wordpress.com/category/traditional-knowledge-and-traditional-cultural-expressions/page/2/> accessed on 15th September 2017.

² 'Darius Bergkam, 'Will Kenya's policies for the protection of Traditional Knowledge and Genetic Resources pay off?' 9th February 2013.

<http://uchicagoulm.com/articles/2013/2/9/will-kenyas-policies-for-the-protection-of-traditional-knowledge-and-genetic-resources-pay-off> on 15th September 2017.

³ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

promotion of traditional practices.⁴ It admits that there are numerous cases where Expressions of Folklore have been exploited for gain and to be fodder for the market.⁵ It therefore continues to envisage an operational framework to which includes diverse stakeholders in the traditional knowledge, genetic resources and folklore/ Traditional Cultural Expressions sectors.⁶

The policy takes into account that Kenya's people are diverse with very rich cultural heritage. TCEs are a body of knowledge vital to the day to day life of local communities derived through generations of living in close contact with nature.⁷ They are transmitted through repeated practice, apprenticeship with elders and specialists and are used to teach and entertain.⁸ TCEs are characterized as holistic, inherently dynamic and are constantly evolving through innovation, fresh insight and external stimuli.⁹ To promote TCEs is to support indigenous peoples and local communities in their cultural, economic and social development and therefore at the heart TCE protection, are the interests of the indigenous communities.¹⁰

The fact that TCEs have cultural or spiritual value that cannot be quantified in monetary sense is important in identifying the interests involved in order to adequately have them protected.¹¹ They do not have a single credited inventor but are communally held.¹² The Policy identifies that the respective communities have locally specific jurisprudence regarding TCEs and additionally have proper procedures for acquiring and sharing

⁴ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

⁵ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions*(2009).

⁶ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions*(2009).

⁷ Paragraph 1.1.1, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

⁸ Paragraph 1.1.2, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

⁹ Paragraph 1.1.3, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁰ Wong T. and Fernandini C, 'Traditional cultural expressions: Preservation and innovation,' in Bell J Dutfield G, *Intellectual Property and Human Development*, PIIPA, 2011, 1.

¹¹ Paragraph 1.1.3, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹² Paragraph 1.1.2, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

knowledge and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language.¹³

Principles, goals and objectives of the policy

It outlines the guiding and underlying principles to the treatment of TCEs. The principles are the principle of respect, principle of full disclosure, principle of prior informed consent, principle of confidentiality, principle of good faith, principle of compensation, principle of equitable Benefit sharing, principle of access, principle of sustainable development and principle of international cooperation.¹⁴ The policy therefore recognizes the need to respect and consider the interest of the community in dealing with TCEs.

The goal of this Policy is to enhance the preservation, protection, and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions in Kenya.¹⁵ The objectives include providing a legal and institutional framework to support the integration of various aspects of TCEs in national development planning and decision making processes as well promote the preservation, protection and development of TCEs for multiple applications and use.¹⁶

The policy framework further acknowledges that TCEs are embedded in the social, cultural and moral aspects of people and outlines concerns of misuse and misappropriation of the same.¹⁷ Policy statements are subsequently made and the government is supposed to support, promote and protect TCEs, ensure communities have control over their TCEs, establish registries and data for TCEs among other responsibilities.¹⁸ It identifies that communities possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing

¹³ Paragraph 1.1.6, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁴ Paragraph 2.2, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁵ Paragraph 2.1, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁶ Paragraph 2.2, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁷ Paragraph 2.2, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

¹⁸ Paragraph 2.3, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

knowledge and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language.¹⁹

b. National Policy on Culture and Heritage

The need for a Kenyan Culture and National Heritage Policy is informed by the challenges posed by modernization as well as balancing the diversity of cultural expression with economic and sustainable development.²⁰ Culture is defined to encompass, in addition to art and literature, lifestyles, traditions and beliefs of people, it also includes the spiritual, material, intellectual and emotional features characterizing a society or social group.²¹ The policy is to ensure that national heritage in all their forms are preserved, enhanced and handed over to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity.²² It acknowledges that over the past few years, development theories have tended to undermine the role of culture in development and therefore asserts the need to protect and promote the application of cultural activities.²³

The policy aims to protect and promote craft, Kenya national dress, design, visual arts, food and drinks and historical monuments all which have been defined as Tangible Cultural Heritage.²⁴ Intangible Cultural Heritage is also recognized includes the practices, representations, expressions, knowledge and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.²⁵ It manifests itself through oral tradition, performing arts, social practices knowledge and practices concerning nature and the universe and traditional craftsmanship.²⁶

2.2 National Laws

a. The Constitution of Kenya

It provides a basis for which the protection and promotion of TCEs is guaranteed. It recognizes culture as the foundation of the nation and cumulative civilization of the people of

¹⁹ Paragraph 1.1.6, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

²⁰ Paragraph 1.3, *National Policy on Culture and Heritage* (2009).

²¹ Paragraph 1.2, *National Policy on Culture and Heritage* (2009).

²² Paragraph 1.4, *National Policy on Culture and Heritage* (2009).

²³ Paragraph 1.6, *National Policy on Culture and Heritage* (2009).

²⁴ Paragraph 2.1, *National Policy on Culture and Heritage* (2009).

²⁵ Paragraph 2.1.8, *National Policy on Culture and Heritage* (2009).

²⁶ Paragraph 2.1.8, *National Policy on Culture and Heritage* (2009).

Kenya.²⁷ A responsibility is placed upon the state to promote all forms of cultural expressions through literature, the arts, traditional celebration, mass media and other cultural heritage.²⁸ It charges Parliament with the responsibility to enact legislation to ensure that communities receive compensation for use of their cultural heritage.²⁹ Furthermore, it guarantees the rights of individuals and groups of people to own or acquire property.³⁰ The state should promote and protect the intellectual property rights of the people of Kenya³¹ and the diversity of language of the people of Kenya.³²

b. Copyright Act

Copyright is a form of intellectual Property law that governs the protection of original works of authorship including literary, dramatic, musical, and artistic works.³³ Copyright protection in Kenya is governed by the Copyright Act.³⁴ For a long period of time, there was no recognition of TCEs as a category that requires protection by law.³⁵ The Copyright Act made the first attempt at recognizing TCEs however it fails to significantly impact their protection.

According to the Act, folklore means a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya.³⁶ Its attempts at protecting Expressions of Folklore is through granting to the minister the power to create regulations to govern the authorization and prescription of terms and conditions while using any forms of folklore.³⁷ However, the Kenya Copyright Board does not need authorization (KECOBO) while using TCEs for a non-commercial purpose and in the case of importation of works made abroad that embody folklore.³⁸

²⁷ Article 11(1), *Constitution of Kenya* (2010).

²⁸ Article 11(2)(a), *Constitution of Kenya* (2010).

²⁹ Article 11(3)(a), *Constitution of Kenya* (2010).

³⁰ Article (40)(1), *Constitution of Kenya* (2010).

³¹ Article (40)(5), *Constitution of Kenya* (2010).

³² Article (7)(3)(a), *Constitution of Kenya* (2010).

³³ <https://www.copyright.gov/circs/circ01.pdf> on 1st Sept 2017.

³⁴ Section 2, *Copyright Act* (No 12 of 2001).

³⁵ <https://www.copyright.gov/circs/circ01.pdf> on 1st Sept 2017.

³⁶ Section 2, *Copyright Act* (No 12 of 2001).

³⁷ Section 49(d), *Copyright Act* (No 12 of 2001).

³⁸ Section 49(d), *Copyright Act* (No 12 of 2001).

The Copyright Act is limited in its ability to protecting TCEs because its period of protection is limited to 50 years³⁹ while TCEs are trans-generational and therefore require protection that spans a longer period. The Act guarantees rights of the individual authors and owners of the TCEs who are defined as the creators of the specific subject matter to be protected.⁴⁰ The individual creators of TCEs are often unknown and copyright does not recognize communal rights to intellectual property therefore making it inapplicable.

c. The Protection of Traditional Knowledge and Cultural Expressions Act

This is a more comprehensive piece of legislation which provides a framework for the protection and promotion of Traditional Knowledge and Traditional Cultural Expressions.⁴¹ It recognizes promotes and protects the rights to Traditional Knowledge and Traditional Cultural Expressions.⁴² It also recognizes the existence of traditional Knowledge and traditional cultural expressions as distinct forms of intellectual property.⁴³

(i) Definition of Traditional Cultural Expressions

According to the Act, cultural expressions means any forms in which traditional culture and knowledge are expressed or manifested and include verbal expressions, musical expressions, expressions by movement and tangible expressions.⁴⁴ TCEs therefore exist in two broad forms namely tangible and intangible forms.⁴⁵ Tangible forms are also known as fixed expressions and material forms. They are those whose embodiment has been sufficiently permanent or stable as to permit it to be perceived, is capable of reproduction and transmission.⁴⁶ Tangible forms of TCEs include baskets, beads forms of dress among others. Intangible forms should therefore be those that are nor fixed and are therefore not manifested in a physical state. Intangible forms include songs, dances and oral traditions and stories.

Traditional cultural expressions are also defined to comprise a wide spectrum, ranging from old and pre-existing materials developed communally or by ‘authors unknown,’ through

³⁹ Section 23, *Copyright Act* (No 12 Of 2001).

⁴⁰ Section 2, *Copyright Act* (No 12 Of 2001).

⁴¹ Preamble, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).

⁴² Preamble, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).

⁴³ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).

⁴⁴ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).

⁴⁵ <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> on 7th August 2017.

⁴⁶ https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression on 7th August 2017.

to the most recent and contemporary expressions of them.⁴⁷ They have an infinite number of incremental and evolutionary adaptations, imitations, revitalisations, revivals and recreations in between, some of which may still identify a particular culture or community and carry religious or other meanings, while others may have no relevance to their maker other than their sale value.⁴⁸

(ii) Rights guaranteed under TCE protection

The owners of TCEs are guaranteed protection⁴⁹ from misappropriation, misuse, unlawful access and exploitation for as long as they meet the criteria it sets out.⁵⁰ Owners are defined as local and traditional communities, and recognized individuals or organizations within such communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community.⁵¹

The owners of TCEs are guaranteed economic and moral rights to their works. The moral rights protected are the rights of attribution of ownership or paternity of the TCE to the community.⁵² These rights also include the right not to have ownership of TCEs falsely attributed to others, the right not to have their TCEs subjected to derogatory treatment, the right to protection from false and misleading claims to authenticity and origin.⁵³ Moral rights are inalienable non-transferrable and incapable of being waived and therefore continue to be in force despite any transfer of economic rights to exploitation.⁵⁴

The economic rights granted to the respective communities include the right to assign rights and conclude licensing agreements. It shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their TCEs to be

⁴⁷ World Intellectual Property Organization, 'Traditional Cultural Expressions/Expressions of Folklore Legal Policy Options,' Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 6th Session Geneva, March 15 -19, 2004, 5.

⁴⁸ World Intellectual Property Organization, 'Traditional Cultural Expressions/Expressions of Folklore Legal Policy Options,' Intergovernmental Committee on Intellectual Property and Genetic Resources , Traditional Knowledge and Folklore, 6th Session Geneva, March 15 -19, 2004, 5.

⁴⁹ Section 16, *Protection of Traditional Knowledge and Cultural Expressions* (Act No 33 of 2016).

⁵⁰ Section 17, *Protection of Traditional Knowledge and Cultural Expressions* (Act No 33 of 2016).

⁵¹ Section 2, *Protection of Traditional Knowledge and Cultural Expressions* (Act No 33 of 2016).

⁵² Section 21(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵³ Section 21(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵⁴ Section 21(4), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

determined by mutual agreement between the parties.⁵⁵ They may grant authorization for the exploitation and use of their traditional knowledge and cultural expressions.⁵⁶ They may also authorize the national government, county government or any other person to exploit their traditional cultural expressions, on their behalf.⁵⁷

Any arrangement to authorize the use of a community's TCEs must be notified to the Cabinet Secretary in writing.⁵⁸ Authorization may only be granted after documented and appropriate consultations with the members of the community have been undertaken in accordance with traditional practices.⁵⁹ The authorization must comply with the scope of protection provided for the TCE in question and shall also provide for the equitable sharing of the benefits arising from its exploitation and use.⁶⁰

There is a clear attempt at promoting economic exploitation of traditional cultural expressions for the purpose of obtaining some kind of economic benefit. However, the process of extracting TCE from their original communities and transposing them to the western world of commercial exploitation without fully understanding their meaning and purpose erodes, debases and ultimately destroys them.⁶¹ Moreover, the Act fails to recognize the use of customary law in the process of seeking authorization through consultation with the community as well as the process of arriving at a agreement on equitable sharing of benefits.

(iii) Requirements for protection

The TCEs to be protected under the act are those that are the product of creative and cumulative intellectual activities either by a group or by an individual where the individual is unknown.⁶² A system for the protection of intellectual property has been in existence in the west since the times of the industrial revolution that occurred in the late 18th century and the 19th century and is based on the assertion that every individual has a right to the creation of

⁵⁵ Section 24(1), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵⁶ Section 25(1)(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵⁷ Section 25(1)(b), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵⁸ Section 25(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁵⁹ Section 25(3)(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁶⁰ Section 25(3)(b), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁶¹ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

⁶² Section 14(1)(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

their minds.⁶³ TCE protection is a recognition and protection of the rights of communities to the product of the intellectual and creative discourse. The protection extends to TCEs that are either individually or collectively generated, preserved and transmitted within the community⁶⁴ and are distinctively associated with the community to which they belong to.⁶⁵

They should have the characteristics of a community's maintained cultural identity and heritage which are used or developed in accordance with its customary laws and practices.⁶⁶ The TCEs play a vital function in the lives of the indigenous group they belong to as they reflect their cultural and social identities and background.⁶⁷ They embody the cultural beliefs and values of communities and are therefore closely linked with the spiritual lives of these communities.⁶⁸ TCEs are shared by all members of community and are performed or used communally creating a bond of unity amongst members in addition to being a reflection of their cultural activities.⁶⁹ They are an embodiment and a means of transmission of the community's know-how and skills.⁷⁰ TCEs can also be a great indicator of the community's progress as they have the ability to record the community's history.⁷¹

(iv) Registration of TCEs

TCEs are not to be subject to any formalities in order to be protected.⁷² However, county governments are charged with the responsibility of collect information, document and

⁶³ World Intellectual Property Organisation: Traditional Knowledge and Intellectual Property – Background Brief. http://www.wipo.int/pressroom/en/briefs/tk_ip.html on 19th January 2017.

⁶⁴ Section 14(1)(c), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁶⁵ Section 14(1)(e), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁶⁶ Section 14(1)(b), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁶⁷ Desai L, 'Traditional Cultural Expressions' Singh & Associates, 30 November 2012. <https://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635> accessed on 7th August 2017.

⁶⁸ World Intellectual Property Organisation: Traditional Cultural Expressions'. <http://www.wipo.int/tk/en/folklore/> on 7th August 2017.

⁶⁹ World Intellectual Property Organization, Traditional Cultural Expressions/ Expressions of folklore Legal Policy Options, December 1 2003.

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3-annex1.doc on 19th August 2017.

⁷⁰ <http://www.wipo.int/tk/en/folklore/> on 7th August 2017.

⁷¹ New York City Bar Association African Affairs Committee, Legal Frameworks for protecting Traditional Cultural Expressions in West Africa, February 23 2016, 1-2.

⁷² Section 15, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

register cultural expressions within the respective counties.⁷³ County governments are also supposed to preserve, promote and protect TCEs and allocate financial resources towards the registration of TCEs.⁷⁴ The national government is to establish and maintain a repository at the Kenya Copyright Board.⁷⁵ The purpose of the repository is to record the TCEs of various indigenous communities in order to recognize their existence and therefore be better positioned to protect them.

Registration however is merely declaratory and does not in itself confer rights.⁷⁶ It is undertaken voluntarily by the owners of the TCEs upon acquiring prior informed consent.⁷⁷ Where a community in Kenya shares cultural expressions with a community outside Kenya, the owners inside Kenya shall be registered and relevant record maintained.⁷⁸ In adjudicating concurrent claims the national and county government shall determine the claim while considering customary law and protocols of the communities involved.⁷⁹

(v) **Liability and Sanctions**

There are certain acts that would amount to exploiting, misusing and misappropriating TCEs. They include reproduction, publication, performance, display and broadcast of TCEs.⁸⁰ The translation, adaption, arrangement, transformation or modification of TCEs, creation of derivative works and the making, use, offer for sale, sell, import or export of TCEs or products derived therefrom would also create liability.⁸¹ The owners of the TCEs are allowed to carry out these acts and therefore no liability attaches to them for performing these acts. Neither does it attach to other individuals who have been given express consent by their owners. The owners may grant authorization for the exploitation and use of their TCEs after necessary consultation.⁸²

A person who has in possession or control and manufactures, produces or makes in the course of trade or sells, barter or exchanges any goods or service using unauthorized

⁷³ Section 15(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁴ Section 4, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁵ Section 5(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁶ Section 15(7), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁷ Section 15(3), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁸ Section 15(4), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁷⁹ Section 15(6), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁰ Section 18, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸¹ Section 18, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸² Section 25(1), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

traditional knowledge or cultural expressions in the course of trade will be liable.⁸³ Similarly anyone who offers or exposes for sale, disposes, distributes, hires out exposes or exhibits for the purposes of trade imports into, transits through or exports from Kenya, except for private, domestic, industrial and commercial use of the importer or exporter, in any manner develops any goods or service using TCE in the course of trade will also be liable.⁸⁴ A person who engage in any of the acts above commits an offence and is liable on conviction to imprisonment for a term not exceeding five years, or to a fine of not exceeding five hundred thousand shillings in respect of each article.⁸⁵

A person, who without authorization makes a non-customary use of TCE whether or not such use is of a commercial or industrial nature, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.⁸⁶ A person who fails to acknowledge the source of TCE commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.⁸⁷ A person who distorts mutilates or does other modification or derogatory action in a way prejudicial to the cultural interests of the community concerned commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.⁸⁸

(vi) Granting and acquisition of a compulsory licence

The law provides for an instance where there is issuance of a compulsory licence by the Cabinet Secretary. A prospective user of a TCE for a non-customary purpose whether commercial or industrial shall apply to the Cabinet Secretary for the consent of the rights holders.⁸⁹ The application must be in the prescribed form, specify the manner in which the applicant proposes to use the TCE, state clearly the purpose for which it shall be used and must be accompanied by the prescribed fee.⁹⁰ The Cabinet Secretary shall upon receipt of the application under this section consider and determine the application within sixty days from

⁸³ Section 37, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁴ Section 37, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁵ Section 37(1), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁶ Section 37(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁷ Section 37(3), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁸ Section 37(4), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁸⁹ Section 27(1), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁰ Section 27(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

the date of receipt.⁹¹ An application may be rejected if the Cabinet Secretary shall upon receipt of the application under this section consider and determine the application within sixty days from the date of receipt.⁹²

The Cabinet Secretary shall before determining an application for consent for use of the TCE give a copy of the application for consent to the holders of the TCE to which the application relates.⁹³ Furthermore, the Cabinet Secretary shall publish a notification of the application in a newspaper with nationwide circulation stating the website and other public information centers where the interested persons may obtain a copy of the application.⁹⁴ Any person who claims to be a holder of the TCE, to which the application relates, shall in writing, make a representation to the Cabinet Secretary within twenty-eight days after the application is published or broadcasted, whichever is the late.⁹⁵ The Cabinet Secretary should take all necessary attempts to identify all the rights holders and in the event there is a dispute customary law should be used to identify the owner.⁹⁶

The owners whose consent is being sought after shall consider the user agreement application and shall determine whether to reject or accept it.⁹⁷ The holders shall inform the national government and the county government in writing and it shall be communicated to the applicant in writing.⁹⁸ An authorized user agreement shall provide for certain matters in its terms and conditions. It shall provide for the sharing of financial and other benefits arising from the TCE⁹⁹ and compensation, fees, royalties or other payments for the use.¹⁰⁰ Moreover whether the use will be exclusive or nonexclusive¹⁰¹, the duration of the use to be allowed¹⁰² and the rights of renewal disclosure requirements in relation to the use shall also be contained in the user agreement¹⁰³. It shall also provide access arrangements for the owners¹⁰⁴,

⁹¹ Section 27(5), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹² Section 27(6), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹³ Section 28(1)(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁴ Section 28(1)(b), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁵ Section 28(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁶ Section 30, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁷ Section 32(1), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁸ Section 32(2), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

⁹⁹ Section 34(a), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁰ Section 34(b), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰¹ Section 34(c), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰² Section 34(d), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰³ Section 34(e), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

applicable controls on publication¹⁰⁵, assignment of rights where appropriate¹⁰⁶ and dispute resolution mechanisms.¹⁰⁷ Finally it shall indicate, possible sharing by the owners of any intellectual property rights arising from the use of the TCE¹⁰⁸ and confidentiality and disclosure in relation to any TCE.¹⁰⁹

2.3 Commentary on the legal framework

The Kenyan legal framework does recognize customary law within some level of TCE protection such as dispute resolution, acquiring free, prior and informed consent.¹¹⁰ Customary law is also to be used in determining a claim where concurrent claims arise from different communities.¹¹¹ This is commendable, however, there are a number of ways in which the role of the community and customary law has been understated or diminished. The Act does not recognize the use of customary law in the process of seeking authorization through consultation with the community as well as the process of arriving at an agreement on equitable sharing of benefits.¹¹²

Liability attaches under the act for the use of TCEs in a manner that is a non-customary use. Customary law would be central in determining what exactly constitutes non-customary use but its role has not been recognized. This very important role has not been defined to be in the realm of customary law application.

Furthermore, placing the onus of preserving TCEs under the power of county governments and KECOBO reduces the role of the communities. The county governments have no obligation to consult the communities and apply their customary law. This threatens the community interest and subjects it to those of the county officers. In addition to this, the Kenya Copyright board has a mandate to deal with the protection of TCEs yet its competencies lie within the realm of the Western Intellectual Property regime. Therefore, the role of customary law and the community interest would be utterly subjugated.

¹⁰⁴ Section 34(g), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁵ Section 34(h), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁶ Section 34(i), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁷ Section 34(j), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁸ Section 34(f), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹⁰⁹ Section 34(k), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹¹⁰ Section 23(3), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹¹¹ Section 15(6), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

¹¹² Section 15, *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

3.0 CHAPTER THREE

An Analysis of Philippines' TCE Legal Protection Regime

3.1 Introduction

This chapter involves an assessment of best practices from another jurisdiction to be able to understand how to better protect, preserve and promote Traditional Cultural Expressions (TCEs) in Kenya. It focuses on Philippines because it is rich in cultural wealth and as a result there are a lot of TCEs that require protection.¹ The Philippines has also made great strides to protect the TCEs of their indigenous communities.² This chapter is an inquiry into their legal protection framework of TCEs in the Philippines in order to pick out lessons that would be instrumental in better protecting Kenyan TCEs. This includes looking into areas of similarity and differences in the form and application of the law when comparing Kenya's domestic law to the Philippines.

3.2 Traditional Cultural Expressions in Philippines

There are 110 tribes in the groups of islands that constitute the Republic of the Philippines and the indigenous people of the Philippines roughly form 10% of its population of approximately 60 million people.³ Music is an essential part of the lives of indigenous communities and reflects itself in the rituals, feasts, harvest festivities and other religious and social ceremonies and recreation.⁴ Traditional music instruments are used widely in expressing a wide variety of sounds and symbols typically depicting the ethos of the tropical life and their folk beliefs and customs.⁵ Philippines also has unique textile designs of the minority cultural communities such as the *abaca* clothes decorated with resist-dye techniques, tapestry techniques and applique embroidery decoration is also seen among others.⁶

¹ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 23.

² http://shodhganga.inflibnet.ac.in/bitstream/10603/14157/11/11_chapter%206.pdf on 23rd September 2017.

³ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 23.

⁴ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 23.

⁵ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 23.

⁶ http://shodhganga.inflibnet.ac.in/bitstream/10603/14157/11/11_chapter%206.pdf on 23rd September 2017.

Basketry is another important component of the folk craft which reflects the unique ways of life of the agricultural people of the indigenous communities in the Philippines. The products of this craft have various uses such as making basket cradles for babies, vessels for daily and ritual use and containers for human remains. Moreover, basketry hats and rain caps are used for protection from sun and rain during agricultural activities. These articles also serve as objects of ornamentation and decoration.⁷ Folk literature of the Philippines is also another important factor contributing to the rich heritage of the Filipinos oral riddles, chants, poetry and proverbs being some examples.⁸ Another important component of the folklore traditions of the Filipinos is the tribal dance traditions. These vibrant dance forms are reflections of the peoples' zest for life.

With all this wealth and depth in culture and forms of Traditional Cultural expressions, it is no wonder that they have an elaborate framework for the protection of the same.

3.3 Philippines' legal framework

In the Philippines, the 1987 Philippine Constitution mandates the recognition, respect and protection of the rights of the indigenous cultural communities and indigenous peoples (referred to as "ICCs/IPs").⁹ The Philippines exercised the choice to legislate on a *sui generis* protection of TCEs owing to certain special features in its social-political, cultural and economic life.¹⁰ This *sui generis* law enacted was known as Philippines Indigenous Rights Act of 1997.

3.3.1 Philippines Indigenous Rights Act

The Philippines Indigenous Peoples' Rights Act just like the Kenyan Protection of Traditional Knowledge and Traditional Cultural Expression Act imposes certain responsibilities on the State. It is a declaration of state policy with regards to indigenous peoples and indigenous cultural communities (IP/ICC) which is that the State shall recognize and promote all the rights of (IP/ICC) within the framework of national unity and

⁷ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 24.

⁸ World Intellectual Property Organization, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, November 25 2002, 24.

⁹ Article 22, The Constitution of the Republic of Philippines (1987).

¹⁰ Kuriakose T, 'Sui Generis Protection of Traditional Cultural Expressions' in Desai B H & Hedge V G, *Legal analysis of international policy response to the protection of traditional knowledge*, JNU, 2010, 205.

development.¹¹ It establishes a right to the restitution of cultural, intellectual, religious and spiritual property taken in violation of the laws, traditions and customs of the indigenous communities.¹² It asserts that access to indigenous knowledge is subject to prior informed consent obtained in accordance with customary laws and when disputes arise, customary laws and practices shall be used to resolve the dispute.¹³

a. State Responsibilities

The state is under an obligation to protect the ancestral domains of IP/ICCs to ensure their social and cultural wellbeing and therefore recognize the applicability of customary law in governing the property rights and ownership.¹⁴ Ancestral domain to the indigenous peoples is a holistic concept encompassing not only the land but including its resources: the rivers, forests, the flora and fauna, the minerals underneath, the air above and other community artifacts.¹⁵ It is not a commodity to be sold or exchanged but a resource to be nurtured for future generations.¹⁶

The state must recognize, respect and protect the rights of IP/ICCs to preserve and develop their cultures, traditions and institutions and consider the same in the formulation of national laws and policy.¹⁷ The principle of non-discrimination, public participation and an obligation to respond to IP/ICCs strong expression regarding their cultural identity are supposed to guide the state.¹⁸ The state is therefore charged with the responsibility of instituting and establishing the necessary mechanism to enforce and guarantee the realization of these rights in order to meet their ends.¹⁹

The Act makes references to terms such as sustainable traditional resource rights and the importance of free and prior informed consent of indigenous peoples and communities.²⁰

¹¹ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

¹² World Intellectual Property Organization, '*Customary law and Traditional Knowledge*,' http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf on 16 December 2018.

¹³ Section 32, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

¹⁴ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

¹⁵ <https://www.slideshare.net/PNFSP/pnfsp-ip-customarylaws> on 18th December 2017.

¹⁶ <https://www.slideshare.net/PNFSP/pnfsp-ip-customarylaws> on 18th December 2017.

¹⁷ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

¹⁸ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

¹⁹ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁰ Kuriakose T, 'Sui Generis Protection of Traditional Cultural Expressions' in Desai B H & Hedge V G, *Legal analysis of international policy response to the protection of traditional knowledge*, JNU, 2010, 219.

This is in all cultural and development activities and also envisages the role of a Memorandum of Agreement (MOA) between proponent, host ICC/IP community and the National Commission on Indigenous People (NCIP).²¹

A specific reference to the Intellectual Property rights of the communities is made within the Act. IP/ICCs in the Philippines have a right to manifest, practice, develop and teach their tradition, customs and ceremonies and the right to use and control of ceremonial objects.²² The communities are also entitled to recognition of the full ownership, control and protection of their cultural intellectual rights.²³ Furthermore, IP/ICCs have the right to develop cultural manifestation and indigenous practices such as oral traditions, literature, designs and visual and performing arts.²⁴

b. Role of Customary law in the protection of TCEs

The Act states that ancestral domains shall be presumed to be communally held and they shall not be presumed to be co-owned.²⁵ Customary laws, traditions and practices of the ICC/IP of the land where conflict arises shall be applied with respect to property rights, claims and ownerships.²⁶ Moreover any doubt and ambiguity in the application and interpretation of laws is to be resolved in favor of the IP/ICCs. This act is therefore an express recognition of the use of customary law as concerns the lives of indigenous communities.

The Act moves further to recognize the rights of the communities to govern themselves and pursue their economic, social and cultural development.²⁷ The use of the communities commonly accepted justice systems, conflict resolution institutions, peace building processes and other customary laws and practices as may be compatible with the national legal systems are to be promoted by the state.²⁸ Moreover, IP/ICCs have a right to participate in decision making in matters that affect their rights, lives and destinies.²⁹ This

²¹ Section 3(g), *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²² Section 33, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²³ Section 34, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁴ Section 34, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁵ Section 56, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁶ Section 64, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁷ Section 13, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁸ Section 15, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

²⁹ Section 16, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

also includes a right to determine and decide their own priorities for development, beliefs, institutions and spiritual wellbeing.³⁰

3.4 Philippine's Institutional Framework

National Commission on Indigenous Peoples

Philippines has established a National Commission on Indigenous Peoples (NCIP) that carries out the policies set forth in the Act.³¹ It is the primary government agency in charge of formulation and implementation of policies, plan and programmes to promote the rights and wellbeing of the IP/ICC.³² It should carry out its mandate with due regard to the beliefs, customs, traditional and institutions of IP/ICCs.³³ The powers, function and jurisdiction are clearly outlined. It serves as the agency through which IP/ICCs use as a medium to seek government assistance, to review and asses existing laws and policies, to formulate and implement policies for cultural development and monitor the implementation, to coordinate development programmes and advise the presidency on issues affecting IP/ICCs.³⁴

The NCIP evolved through a series of governmental reorganizations in an effort to properly address the multifarious issues and concerns confronting the country's diverse Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs), and to effectively, efficiently and responsively deliver basic services to them.³⁵

3.5 Lessons to learn from the Philippines

Philippines offers a wide array of lessons to Kenya with regards to the protection of traditional cultural expressions more so the institutionalization of customary law application on matters regarding the protection, promotion and preservation of TCEs. The approach taken by the Philippines in protecting TCEs is to grant autonomy to communities to participate in their activities with little interference from the government.³⁶ The state recognizes customary law in legislation as the applicable law when dealing with ancestral domain which includes

³⁰ Section 17, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³¹ Section 38, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³² Section 34, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³³ Section 39, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³⁴ Section 44, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³⁵ <https://www.ncipro67.com.ph/transparency/about-us/history/> on 16th December 2017.

³⁶ <https://www.slideshare.net/PNFSP/pnfsp-ip-customarylaws> on 18th December 2017.

TCEs.³⁷ In this manner, the TCEs are able to be used for the customary purpose intended without unwarranted interference and further promote creativity while preserving the already existing TCEs.³⁸

Customary laws, traditions and practices of the ICC/IP of the land where conflict arises shall be applied with respect to property rights, claims and ownerships.³⁹ There is recognition of the informal nature of TCEs and therefore the process of acquiring protection for TCEs is quite straight forward.⁴⁰ Customary law also ought to be applied during the process of acquiring free, prior and informed consent.⁴¹

The legal framework in the Philippines pays great emphasis on the need for the indigenous communities to revitalize and practice their traditions, beliefs and customs.⁴² Furthermore, the state makes effort to recognize and protect the rights of ICCs/IPs within the framework of national unity.⁴³ This expressly strengthens the place of customary law within their justice system and specifically in protecting and promoting TCEs. Moreover, the Act also envisages the role of a Memorandum of Agreement (MOA) between party intending to exploit TCE, the host ICC/IP community and the National Commission on Indigenous People (NCIP).⁴⁴ Therefore the place of the community is not replaced by a bureaucratic institution but room is left for them to act directly for themselves.

The Philippines has a body whose responsibility is solely to deal with matters regarding the rights of the indigenous people.⁴⁵ In Kenya, KECOBO, which is the body dealing with TCEs protection has a mandate that mostly involves copyright protection therefore putting the Western Intellectual property system at the forefront. This is a testament to how highly they regard the rights of indigenous people. The body in charge of TCE protection must implement policies and programmes in conformity with customs and

³⁷ Section 2, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

³⁸ Wong T. and Fernandini C, 'Traditional cultural expressions: Preservation and innovation,' in Bell J Dutfield G, *Intellectual Property and Human Development*, PIIPA, 2011, 1.

³⁹ Section 64, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

⁴⁰ <https://www.slideshare.net/PNFSP/pnfsp-ip-customarylaws> on 18th December 2017.

⁴¹ Section 3, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

⁴² Section 15, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

⁴³ Wong T. and Fernandini C, 'Traditional cultural expressions: Preservation and innovation,' in Bell J Dutfield G, *Intellectual Property and Human Development*, PIIPA, 2011, 3.

⁴⁴ Section 61, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

⁴⁵ Section 38, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997).

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traditions of the communities.⁴⁶ This means that the National Commission on Indigenous Peoples is obligated to consult widely with the indigenous communities to ensure that the Peoples' interests are given the first priority.

⁴⁶ Section 34, *The Indigenous Peoples' Rights Act*, (Act No 8371 of 1997)

CHAPTER FOUR

4.0 The Appropriateness of Using Customary Law for the Protection of TCEs

4.1 Introduction

This chapter is an inquiry into the nature of customary law and an assessment of its applicability in the protection of traditional cultural expressions. It shall discuss the nature of customary law and the specific characteristics that make it suitable for protecting TCEs. In addition to this, the roles that customary law would play in the protection of TCEs are outlined.

4.2 Definition of Customary Law

Customary law is a body of customs and traditions that regulates various kinds of relationships between members in community.¹ According to the black's law dictionary customary laws comprises "customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws."² Customary law has also been defined as locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.³ Furthermore, in *Oyewunmi v Ogunesan*, Justice Obaseki defined customary law as the living or organic law of the indigenous people that regulates and controls the lives of the people subject to it.⁴

Customary law in the context of this discussion refers to the social norms, cultural practices and traditions that belong to a particular ethnic group.⁵ Prior to colonization, Africans were organized into political structures along ethnic communities and they each had their own set of laws that governed their day to day activities.⁶ African Customary Law evolved out of the customs, traditions and practices of a particular community from their

¹ <http://www.kenyalawresourcecenter.org/2011/07/genesis-of-african-customary-law.html> on 27th December 2018.

² Black's Law dictionary, 8th Edition, 2004.

³ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 11.

⁴ *Oyewunmi v. Ogunesan* (1990) NWLR (Pt.137)182.

⁵ Ndulo M, 'African Customary law, Customs and Women rights,' *Indiana Journal for International studies*, 2011, 3.

⁶ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implication for Traditional Justice Systems,' 3.

daily undertakings as they adapted to the changing circumstances of their lives.⁷ Customary laws and practices are central to the lives of indigenous peoples.⁸

During the colonial period, the laws belonging to different African communities were disrupted by the imposition of foreign legal systems on the African.⁹ The use of customary law was limited by the colonial government and would only be applied if they passed a repugnancy test meaning that it was not barbarous and also the compatibility test, that is, the custom applied must not be inconsistent with the colonial statute.¹⁰ As a result of this disruption, the national legal system of African states mirrors that of their former colonial government.¹¹

However, this phenomenon did not however hinder Africans from the perpetual struggle to maintain their legal identity as Africans making many states superimpose customary law within their Constitutions.¹² Therefore, a great majority of the African people conduct their personal activities such as marriage, inheritance among others in accordance with and subject to customary law.¹³ Therefore, it is not uncommon to find that the legal system of many African countries is pluralistic in its nature.

4.3 Nature and characteristics of Customary Law

From the various definitions of customary law as outlined above, one can readily identify salient characteristics of customary law. In *Ojisua v Aiyebilehin* the learned summarized the characteristics of customary law by stating that; it must be in existence, it must be custom as well as law, it must be acceptable, it is largely unwritten and related to this

⁷ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implication for Traditional Justice Systems,' 6.

⁸ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

⁹ Fenrich J, Galizzi P, Higgins T. E, *The Future of African Customary Law*, Cambridge University Press, England, 2012, 499.

¹⁰ Fenrich J, Galizzi P, Higgins T. E, *The Future of African Customary Law*, Cambridge University Press, England, 2012, 499.

¹¹ Ndulo M, 'African Customary law, Customs and Women rights,' *Indiana Journal for International studies* (2011) p 3.

¹² Onyango P, 'African Customary Law System,'

https://www.academia.edu/10451696/AFRICAN_CUSTOMARY_LAW_SYSTEM?auto=download on 8th January 2018.

¹³ Ndulo M, 'African Customary law, Customs and Women rights,' *Indiana Journal for International studies* (2011) p3.

trait it is highly flexible and it is universally applicable within its area of acceptance.¹⁴ These characteristics are important to identify because they help create a better understanding of the importance of customary law, when it is best applicable and to what extent it should be applied.

Customary law is unwritten. It is often a result of some form of deliberations amongst members of the society and in most cases the community elders. The oral aspect of customary law is linked to a people's belief in mysticism surrounding their nature and traditional social world-view.¹⁵ This particular trait makes customary law a bit uncertain as noted by Charles Njonjo, former Attorney General, stated that one of the greatest problems that has faced the smooth administration of justice in Kenya, and indeed in most parts of Africa, for a very long time has been the fact that the customary laws of our various peoples have been unwritten.¹⁶ However its oral nature allows it to be quite adaptable and flexible which leads to another characteristic of customary law.

Customary law is very dynamic as it results from attempts to meet the needs of the members of the society as they undergo various changing circumstances.¹⁷ In the West African case of *Balogun v. Oshodi* the learned judge stated pointed out that he took notice of the fact that Native Law and Custom were in essence living things that were susceptible to change. Kingdom CJ stated that, 'Living things grow and change, so customary law is organic and flexible because it grows to keep pace with changes in society.'¹⁸ This makes it very easy for customary law to meet the needs of the current time without too much hassle. In *Kimdey v. Military Governor of Gongola*, Justice Karibi-Whyte stated that one of the characteristics of native law is its flexibility and capacity for adaptation which provides for its resilience. It modifies itself to accord with changing conditions.¹⁹

Another major trait of customary law is that it must be accepted by the members of the community in which it exercises authority over. Justice Bairamian emphasized on the importance of acceptance in the case of *Owoyini v Omotosho* by stating that customary law is a mirror of accepted usage and therefore it was not enough to show that it was once in

¹⁴ *Ojisua v Aiyebilehin* (2001) 11 NWLR 44, 723.

¹⁵ Onyango P, 'African Customary Law System.' LawAfrica Publishing (K), 2013, 4.

¹⁶ Cotran, E., *The Restatement of African Law*, University of London. School of Oriental and African Studies, 1968, 1, 5.

¹⁷ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implication for Traditional Justice Systems'

¹⁸ *Balogun v. Oshodi* (1929) 10 NLR 36 at 57

¹⁹ *Kimdey v Military Governor of Gongola State*[1988] 2 NWLR pt 77 p 445 at 461.

existence.²⁰ Moreover, it must be the current binding custom of the people not that of past days. Customs of the old have lost the element of acceptability needed to make it binding and are also no longer a reflection of the ways of life of a people and therefore do not qualify as customs.²¹ This requirement for acceptance by those subject to it makes it difficult to put outsiders in breach of customary law under its authority. This necessitates recognition of customary law application in the national legal framework.

4.4 Applicability of Customary Law in protecting TCEs

The customary law of various indigenous communities has a major role to play in the protection of TCEs. Customary law can therefore be useful in protecting TCEs by forming the fundamental legal basis or source of law for indigenous people and local communities.²² Customary law would be used to determine whether the community has rights over the TCE as it would help determine ownership as through custom the owners of TCEs would be identified.²³ Therefore, customary law would be important in asserting the legal rights and collective rights of communities over their TCEs.²⁴

Customary law application in the protection of TCEs allows for maximum involvement by members of the community in securing and asserting the rights over their TCEs. Indigenous islanders and communities of Australia, Philippines and New Zealand for instance follow a number of strict customary laws to protect the use of their stories and music.²⁵ Anyone from outside the community wishing to use a song or a dance must first consult with the elders of the specific island concerned to obtain permission to do so.

²⁰Owoyini v Omotosho (1961) 1 NU N.L.R 309, 304.

²¹ Attoh N. R, 'Characteristics of Customary Law,' University of Nigeria, 2015/2016 session, 9.

²² World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

²³ Kuruk P, 'The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge,' 19.

<https://mckinneylaw.iu.edu/iiclr/pdf/vol17p67.pdf> on 4th January 2018.

²⁴World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

²⁵ World Intellectual Property Organization, *What Place for Customary Law in protecting Traditional Knowledge?* August 2010.

http://www.wipo.int/wipo_magazine/en/2010/04/article_0007.html on 8th January 2018.

Increased community involvement in the protection of TCEs will ultimately lead to greater conservation of TCEs as members of the community are indeed their greatest custodians.²⁶

Customary law can also assist the protection of TCEs by providing a means of determining or guiding procedures to be followed in order to secure free, prior and informed consent from the indigenous people or local communities.²⁷ Indigenous peoples would apply customary law and practices in order to determine whether to grant consent to outsiders intending to use their TCE.²⁸ Customary law would further guide the means and processes to be followed in order for such a decision to be reached as well as determine the parties involved in the decision making process. Customary law would similarly form the basis of granting specific use rights and exceptions and would therefore act to exempt the continuing customary uses and practices from other legal restrictions on the use of the TCEs.²⁹

The use of customary law would also offer a great guide for assessing the existence and extent of cultural or spiritual offence or damage caused as a result of inappropriate forms of uses of TCEs.³⁰ In the event, it is found that such an offence has been committed customary law would be applied in order to determine the appropriate sanctions, remedies or restitution to be made as a result of the particular breach.³¹ Furthermore, customary law would also guide the very important process of resolving disputes that may arise as a result of illegal exploitation of a community's TCE.

In instances where an outsider has been able to obtain free, prior and informed consent from the community, customary law would also play a major role in determining what benefit would be due to the community.³² Moreover, a guide of how benefits from the

²⁶ Oguamanam C, *Intellectual Property in Global Governance: A Development Question*, Routledge 2013, 197.

²⁷ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

²⁸ World Intellectual Property Organization, 'Customary law and Traditional Knowledge,' http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf on 9th January 2018.

²⁹ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

³⁰ World Intellectual Property Organization, 'Customary law and Traditional Knowledge,' 2012, 2. http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf on 9th January 2018.

³¹ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

³² World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

use of TCE should be equitably shared within the community would be provided under customary law. Customary would be used by members of the community to identify the immediate needs and interests of the community and therefore inform the discussions on benefit sharing amongst them.

Any dispute that would arise from the same would be settled in accordance to the customary law of the community.³³ The transmission over rights to a specific TCE from one generation to the next would also be guided by customary law.³⁴ In adjudicating concurrent claims to a particular TCE the national and county government is required by the Protection of Traditional Knowledge and Cultural Expressions Act to determine the claim while considering customary law and protocols of the communities involved.³⁵

4.5 Conclusion

From the discussion above, it is apparent that the use of customary law would provide an ideal framework for protecting TCEs. This is because community involvement at the highest level as the primary stakeholders would not only protect TCEs but also promote creation of more TCEs. In addition to this, customary law would play a primary role in ensuring that TCEs are protected, preserved and promoted. Due to the nature of customary law, its application would more likely result in success as a result of its flexibility and ease of being adapted into a particular situation.

³³ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

³⁴ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 2013, 4.

³⁵ Section 15(6), *Protection of Traditional Knowledge and Cultural Expressions* (Act No. 33 of 2016).

5.0 CHAPTER FIVE

Findings, recommendations and conclusion

5.1 Introduction

This study undertaken aimed to show that customary law has a primary role to play in the framework for protecting TCEs. It has been common practice in the past to lump TCEs with other forms of creative works under the artistic domain that is protected under Copyright law and other forms of western Intellectual Property.¹ However, this approach has been defective in reaching the ends of not only protecting and preserving the existing TCEs but also promoting the creation of more artifacts and expressions of folklore amongst the communities. In order to achieve this objective, an analysis on the effectiveness of the existing Intellectual property legal framework for the protection of TCEs was carried out. This is done with the premise that TCEs are of great cultural, spiritual and sentimental value to the indigenous communities they belong to and therefore it is of absolute necessity that they be protected, promoted and preserved for future generations.

5.2 Findings

This study found that that there is a legal framework in existence for the protection of TCEs in Kenya. A policy document was created in recognition of a legal gap with regards to protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. It provides a general understanding of the government's intention, aims and objectives regarding the protection of TCEs.² It further outlines the general principles and standards to guide the treatment of the TCEs belonging to the indigenous communities of Kenya. The policy therefore aims to develop a system that does more than merely document and preserve TCEs created in the past which may be on the brink of disappearance.³ The policy document in many ways places the interest of the community at the forefront and identifies that TCE related issues need to be addressed in the context of the community for instance the application of their indigenous practices.

¹ Jaszi P, 'Protecting traditional cultural expressions – some questions for lawmakers,' WIPO Magazine, August 2017 http://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html on 9th January.

² <http://www.differencebetween.net/miscellaneous/politics/difference-between-law-and-policy/> on 9th January 2018.

³ Preamble, *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (2009).

The Protection of Traditional Knowledge and Cultural Expressions Act grants rights to indigenous communities to their TCEs. However, the Act does not recognize expressly to the extent necessary the importance of the role of the community in the protection of the TCEs. In fact, it takes away the autonomy of the communities by allowing for the issuance of a compulsory license by the Cabinet Secretary (CS) sighting the reason that its customary use does not sufficiently exploit the TCE in question.⁴ Moreover, this study finds that it fails to recognize and institutionalize the application of customary practices in the processes involving the use and creation of TCEs. This failure is a departure from the aims of the policy which is not only to protect old TCEs but to promote the creation of new ones amongst the communities. This goal can only be achieved by recognizing the central role of the communities and their need to apply their customary practices and laws.

This study undertook to do a comparative study of the legal protection framework for TCEs in the Philippines. It was found that Philippines has a very elaborate system for the protection of the rights of their indigenous communities. It recognizes their autonomy and therefore the communities are granted rights to carry out their internal activities in accordance with their customary laws and practices. This translates to a strong legal framework for the protection, preservation and also promotion of TCEs for the community. The role of customary law is recognized in the process of dispute resolution, acquiring free prior informed consent among other processes.

The study also finds that the nature of customary law makes it suitable to be applied in the protection of TCEs. Customary law, being as flexible as it is, would be ideal to solve disputes and would be able to meet the current needs of the community by creating a balance between the need to preserve the TCEs and the commercial gain that would be drawn from their exploitation. It would be applicable for a wide range of processes involved in the protection of TCEs due to its dynamism. However, it was found that customary law in its nature requires acceptance by the people to whom it applies to. This is problematic because the parties that illegally exploit the TCEs of indigenous communities often are not subject to the customary practices of the communities. Therefore, there is need to institutionalize the application of customary practices in issues that regard TCEs.

5.3 Recommendations

- 1. Recognize the primary interest of the indigenous communities in the protection of TCEs**

⁴ Section 27, *Protection of Traditional Knowledge and Cultural Expressions* (Act No 33 of 2016).

As has been discussed earlier, giving the indigenous community a secondary role in the process of protecting TCEs can only lead to depletion of TCEs. The primary interest of the community can be recognized by charging parties with the responsibility to consult with the communities at every level of use or protection of TCEs. Further a legal acknowledgement of the role of community elders in the TCE protection process would also go a long way in asserting that the primary interest to be considered in TCE protection is that of the community.

2. Institutionalize and recognize the application of customary law for the purpose of protecting, preserving and promoting TCEs.

There is a need to expressly recognize the application of customary law on any individual or party that desires to use a TCE for a non-customary use within the current national legislation. This would be applied in such a manner as to imply acceptance by an outsider to the application of customary law of the community by their intention to exploit their TCEs. This would definitely help promote the interests of the community as well as ensure that outsiders do not use the Cultural expressions of a community. From the discussion above, it is clear that customary law plays a major role in TCE protection and therefore it must be recognized for it to be used to meet the ends of TCE preservation, protection and promotion

3. Create a body solely mandated to deal with matters evolving from the rights of indigenous communities.

KECOBO, being a body whose mandate flows from an application of western IP rights, would lack the capacity to represent the interest of the indigenous communities to the required extent. Their mandate flows from the IP systems and therefore ability to focus on community interest would be very limited. Similarly, leaving the fate of the indigenous communities and their TCEs to the county governments would also be quite dangerous. County governments have a very wide mandate and it is very likely that the property rights of indigenous communities in their TCEs would not be considered a priority. An independent body should be created in order to take charge of the protection of the rights of indigenous communities. Their mandate should require them to compulsorily consult with communities either directly or through their elders at every level in the process of securing their rights.

4. Less government interference on matters to do with rights of TCEs.

The powers of the CS to offer a compulsory license for the exploitation of TCEs should be limited if not non-existent. The fact that the customary use of a TCE does not appear to result in sufficient exploitation of the same should not be reason enough to take away the exclusive rights of the community especially when they object to the same. Instead, through application of customary law the outsiders should negotiate with communities to the point of agreement. In the absence of an agreement the outsiders should not be allowed to exploit the TCE anyway. In addition to this the Protection of Traditional Knowledge and Cultural Expressions Act gives powers to the court to adjudicate disputes over compensation between the outsider and the community. It gives the court power to determine what would amount to just compensation. In my opinion, the role of determining benefits falls squarely within the purview of customary laws and practices and therefore there should not be an imposition by the court. The role of the court should only extend to recognizing the agreements arrived at through the use customary laws and practices.

5.4 Conclusion

In conclusion, the research objectives of this study have been met.

- i. To assess the prevailing intellectual property framework for the protection of TCEs in Kenya.**

An assessment of the legal framework for the protection of TCEs has been carried out. From the assessment it is clear that an elaborate TCE protection mechanism is in place. It secure and recognizes the rights of communities to their TCEs, However, it fails to put the interest of the communities at the forefront by failing to accord appropriate recognition to the application of customary law and practices.

- ii. To explore the appropriateness of using customary law in the protection of TCEs.**

This research objective has been achieved by carrying out a comparative study on Philippines. This was with the aim of understanding the extent to which the community interests are secured and the extent of recognition of the application of customary law within the national framework for the protection of TCEs. In addition to this, the key roles that customary law plays in the protection of TCEs have been identified.

- iii. To make recommendations regarding the protection of Traditional Cultural Expressions.**

This Chapter has outlined various steps to be taken in order to better protect, preserve and promote TCEs and the rights of the individual communities to their indigenous works.

5.5 Hypothesis

The study has shown that customary law has not been recognized in the legal framework for the protection of TCEs. This is despite the fact that customary laws and practices play a very key role in meeting the ends of the communities, protecting community rights and the preserving TCEs.

The study has proven the hypothesis that customary law should be applied in the protection, promotion and preservation of TCEs. It has identified the several key roles that can only be effectively performed through the application of customary law.

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