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Protecting traditional knowledge in Kenya through African Customary Law: an analysis of inclusive subordination

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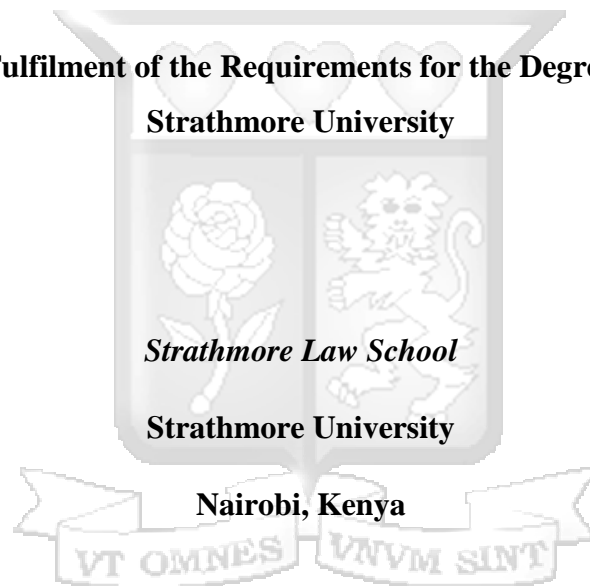
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**Protecting Traditional Knowledge in Kenya through African Customary Law: An Analysis
of Inclusive Subordination**

Mwangi Claude Kamau

**Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws at
Strathmore University**



Nairobi, Kenya

June, 2019

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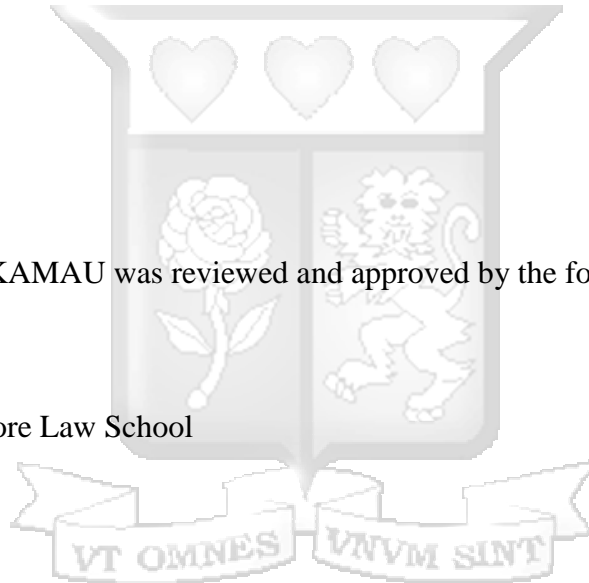
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ABSTRACT

Traditional knowledge as an intellectual resource has in recent decades gained increased legal recognition as a proprietary entitlement of indigenous and local communities. It forms the fabric of their social, economic and, sometimes, religious life.

Human rights law and intellectual property law have variously constituted regimes for the protection of traditional knowledge as a traditional right, but they have both, arguably, done a sub-optimal job. The basic reason for this failure has been the general incompatibility of traditional knowledge systems and conventional legal tools especially those under intellectual property law. Whilst it is recognised that there are many meaningful overlaps between conventional intellectual property forms and traditional knowledge, it goes without saying that there are significant departures made by the latter which would demand a more carefully calibrated scheme of protection.

There is now wide consensus in literature that a unique (*sui generis*) regime of law should be employed to regulate traditional knowledge rights and to protect traditional knowledge. On this point, it is possible to locate customary laws as an integral cog in the wheel of such protection, going by the nature of creation, use and transmission of traditional knowledge, which is within a communal setting for transgenerational purposes.

Adequate protection of traditional knowledge would thus require a robust scheme of customary law (and in the case of Kenya, African Customary Law) to form the normative and institutional foundation for protecting traditional knowledge.

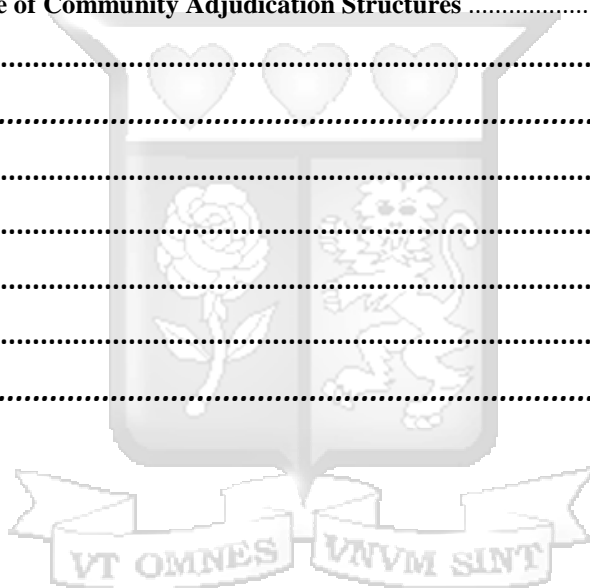
The history of application of African Customary Law in Kenya is fraught with a systemic legal technique whose effect is to subjugate African Customary Law even where it is the appropriate defining regimen. This trend is apparent from statutory instruments and, most explicitly, in judicial decisions.

An analysis of the legal environment surrounding traditional knowledge in Kenya suggests that the expressed legislative intent to protect traditional knowledge through African Customary Law is likely to yield no positive results. Inclusive subordination of African Customary Law, as long as it remains a reality in the Kenyan legal system, will stand in the way of any efforts to meaningfully protect traditional knowledge.

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3. *Judicature Act*, Chapter 8, Laws of Kenya, (Revised Edition 2016).



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1. *George Mwangi -Vs- Maria Wamugori*, Court of Review Case No. 14 of 1965
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3. *Gwao bin Kilimo v Kisunda bin Ifuti*, 91938) 1 T.L.R. (R) 403.
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5. *JMK v DMK*, Civil Appeal No. 7 of 2013.
6. *Murichu Ichurua -Vs- Sammy Kuria s/o Chege Githinji*, Resident Magistrate's Court at Thika, Civil Appeal No. 7 of 1980.
7. *Rex v Amkeyo*, (1917) 7 E.A.L.R. (Kenya).



LIST OF ABBREVIATIONS

1. KECOBO – Kenya Copyright Board
2. TRIPS – Trade Related Aspects of Intellectual Property Rights Agreement
3. UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples
4. WIPO – World Intellectual Property Organisation



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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

It is a concern of both contemporary intellectual property law and human rights law to protect the proprietary value inherent in creations and various heritages of indigenous and marginalised communities. Traditional knowledge systems have emerged as an important arena where the value created by these communities is visible to the wider world. If the regimes of human rights law and intellectual property law are to be taken seriously, they must respond to an ever-growing concern that traditional knowledge¹ is not, at present, adequately protected. The concern is that this situation has led to the disenfranchisement of traditional peoples.

‘Traditional’ peoples are those who hold an unwritten body of long-standing customs, beliefs, practices and rituals that have been handed down from previous generations. They do not necessarily have claim of prior territorial occupancy or indigeneity to the current habitat. Thus, traditional peoples are not necessarily indigenous even though indigenous peoples could be traditional.²

It follows that indigenous knowledge is “that knowledge that is held and used by a people who identify themselves as indigenous to a place based on a combination of cultural distinctiveness and *prior territorial occupancy* relative to a more recently-arrived population with its own distinct and subsequently dominant culture.”³ Traditional knowledge, then, would be that knowledge “which is held by members of a distinct culture or sometimes acquired by means of inquiry peculiar to that culture, and concerning the culture itself or the local environment in which it exists.”⁴ Traditional knowledge can thus be considered to be the totality of all knowledge and practices,

¹ In this study, the term “traditional knowledge” will presume to also represent “traditional cultural expressions”, as there is, according to the author, no major differences producing a fundamental doctrinal division between the two.

² Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, African Centre for Technology Studies, Nairobi, 1999, 2.

³ See Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 2-3.

⁴ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 3.

whether explicit or implicit, collectively used in the management of socio-economic and ecological facets of life, established on past experiences and observation.⁵

Traditional knowledge is dynamic in nature and changes its character as the needs of the people change, and it gains vitality from being entrenched in people's lives. Examples of traditional knowledge include knowledge about the use of the specific plants and/or parts thereof, identification of medicinal properties in plants and harvesting practices.⁶ This is the essential component of what has been termed as 'traditional medical knowledge'. 'Traditional medicine' includes a diversity of health practices, approaches, knowledge, and beliefs incorporating plant, animal and/or mineral-based medicines; spiritual therapies; manual techniques, and exercises.⁷ 'Traditional' can be taken to refer not to the antiquity of the knowledge but to the manner in which it is transmitted.⁸

In this study, "African customary law" is used to mean:

*"rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority, in the case of very serious forms of misconduct, or by the various social units such as the family..."*⁹

A 'custom' in the common law tradition is defined as "a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to, or not consistent with the common law of the realm."¹⁰ It is also conceivable that a custom could be complementary to the common law. In fact, the common law of England is known to be embodied in English custom.¹¹ To be valid it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its

⁵ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 3.

⁶ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 4.

⁷ WHO, *Legal status of traditional medicine and complementary/alternative medicine: A worldwide review*, Geneva, 2001, 1-2.

⁸ Correa CM, *Protection and promotion of traditional medicine – implications for public health in developing countries*, Geneva, 2002, cited in Deisser A and Njuguna M, *Conservation of natural and cultural heritage in Kenya: A cross-disciplinary approach*, UCL Press, 2016, 45-46.

⁹ Ocran M, 'The clash of legal cultures: the treatment of indigenous law in colonial and post-colonial Africa', *Akron Law Review*, 2006, 467-468.

¹⁰ 10 Halsbury, 2Ed, 2.

¹¹ Walker R, *The English legal system*, 4Ed, Butterworths, London, 1976, 3.

immemorial origin; and, fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain, and the persons whom it is alleged to affect.¹² Relatedly, the definition of customary law might be so wide as to include any unenacted law which by custom is followed by a given community.¹³

1.2 Background to the Problem

Generally, traditional knowledge as a branch of intellectual property poses unique challenges in terms of its regulatory framework. *Sui generis* (stand-alone) mechanisms, as will be seen in detail below, are an essential regulatory framework in this area. This is mainly because this type of knowledge does not fit into the existing intellectual property paradigm due to the need for protection in perpetuity in accordance with cultural norms, the difficulty in identifying the ‘author’ or ‘creator’ of the knowledge, and the failure of conventional intellectual property to recognise communal rights over that knowledge.¹⁴ The simple basis for this, therefore, is that traditional knowledge cannot be attributed to a particular owner (author/creator/inventor), it is dynamic (evolving over time), and it is often inextricably bound with the culture of communities.

The reality is that indigenous and local communities are largely the custodians¹⁵ of traditional knowledge. They have systems of customs and taboos in place to ensure that certain traditional knowledge is not made widely known, while at the same time ensuring it is preserved and passed on from one generation to the next within the indigenous and local communities. In the case of traditional medicine, for instance, specific families or persons, such as the *Olaibon* among the Maasai, hold this knowledge and put it into practice.¹⁶

¹² 10 Halsbury, 2Ed, 6.

¹³ Allott A, *New essays in African Law*, Butterworths, London, 1970, 157.

¹⁴ Stoianoff n, ‘A governance framework for indigenous ecological knowledge protection and use’, in Levy R, O’Brien M, Rice S, Ridge P, Thornton M (Eds), *New directions for law in Australia: Essays in contemporary law reform*, ANU Press, 2017, 236.

¹⁵ Under Section 2 of the Protection of Traditional Knowledge and Cultural Expressions Act, for instance, references to an “owner” mean local and traditional communities, and recognised individuals or organisations 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. References to a “holder” means recognised individuals or organisations within 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.

¹⁶ Ouma M, ‘The policy context for a commons approach to traditional knowledge in Kenya’ in de Beer J, Armstrong C, Oguamanam C & Schonwetter T (eds.) *Innovation & Intellectual Property: Collaborative Dynamics in Africa*, 2014, 133.

At the least, there is an absence of consensus on whether and how to extend intellectual property protection to traditional knowledge in general.¹⁷ This is partly because of differences in conceptual treatment and often, the lack of clarity on the two concepts.¹⁸ In any case, it should be clear that traditional knowledge is communal property, which under intellectual property law would be privatised, and this may deny future generations and industry access to such knowledge.¹⁹

The Kenyan State has a duty to promote all forms of national cultural expression, to recognize the role of indigenous technologies in development and to promote the protection of intellectual property rights.²⁰ In addition, the State has to support, promote and protect the IP rights of the people of Kenya,²¹ while at the same time also providing for the sustainable management and use of natural resources, and for protection of biodiversity and genetic resources.²²

The Constitution of Kenya, 2010 (“the Constitution”) provides a potentially strong framework for the creation of enabling policies to ensure that benefits of traditional knowledge accrue to indigenous local communities, and to promote access and preservation of traditional knowledge for the sustainability of indigenous local communities. The Constitution specifically defines property to include intellectual property.²³ The Constitution also recognizes culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and state.²⁴

Kenyan laws provide for the applicability of African customary law to their subject matter in various ways. The Constitution provides that “any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency...”²⁵ In delimiting the principles to guide the exercise of judicial authority, the Constitution provides that “traditional dispute mechanisms shall not be used in a way that- (a) contravenes the Bill of Rights; (b) is

¹⁷ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 8.

¹⁸ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 8.

¹⁹ Mugabe J, *Intellectual property protection and indigenous knowledge: An exploration in international policy discourse*, 8.

²⁰ Article 11(2), *Constitution of Kenya* (2010).

²¹ Article 40(5), *Constitution of Kenya* (2010).

²² Article 69(1)(c), *Constitution of Kenya* (2010).

²³ Article 260, *Constitution of Kenya* (2010).

²⁴ Article 11(1), *Constitution of Kenya* (2010).

²⁵ Article 2(4), *Constitution of Kenya* (2010).

repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or (c) is inconsistent with the Constitution or any written law.²⁶

Perhaps the most consequential formulation of the idea of inclusive subordination can be seen in the wording of the Judicature Act²⁷ of which two sections will be considered. The Judicature Act makes provision for the jurisdiction of courts of law in Kenya. Contrast the following provisions of the Act.

The first provision is that the jurisdiction of the courts shall be exercised:

“in conformity with the Constitution; subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited... subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England... Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

The second provision provides that the courts:

“shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

It immediately becomes clear that these two positions embody very different ways of viewing the desirability (or implicit preference) of a regime of law. It is contended that the idea of viewing law as engendered by the latter formulation contributes to a systemic lack of commitment to, the “inclusive subordination” of,²⁸ customary law as a regime of law. The mere choice of the word

²⁶ Article 159 (3) (b), *Constitution of Kenya* (2010).

²⁷ Judicature Act, Chapter 8, *Laws of Kenya*, (Revised Edition 2016).

²⁸ This phrase was first encountered in the work of Prof. Sylvia Kang'ara, describing the legal technique through which African customary law was formally accepted but its application heavily qualified. See Kang'ara S, 'Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought', 9 *Hastings Race and Poverty Law Journal*, 353-396, 362.

“repugnant” reveals the presupposition of an almost-expected appalling or reprehensible character possessed by the thing being described.

Commentators have noted that legal and policy instruments in the area of traditional knowledge should seek to enhance communal approaches to traditional knowledge protection and management.²⁹ In recognition of these complexities, the recently-enacted law, The Protection of Traditional Knowledge and Cultural Expressions Act (“the Act”)³⁰ has made extensive references to African customary law as the operative regime in some key aspects of regulation of traditional knowledge. The Act is aimed at creating an appropriate *sui generis* mechanism for the protection of traditional knowledge and cultural expressions which gives effect to the constitutional provisions discussed above.³¹

In Kenya, African customary law is referenced severally as a source of law, but is, nevertheless, implicitly subjugated to other regimes of law, mainly statutory law and common law, notably under Section 3 of the Judicature Act. Historically, in Kenya, this ‘inclusive subordination’ of African customary law has had visible corrosive effects on other regimes previously organized under customary law norms, as will be seen shortly. The retention of laws that imply the inherent inferiority of African customary law, might impede the Act’s effectiveness to protect and manage traditional knowledge sufficiently.

This study aims to demonstrate that the full thrust of the project to properly operationalize the Act does not lie with this new law itself. In fact, as will be hypothesized, the effectiveness of the existing or anticipated provisions regarding African customary law will ultimately hinge on the relative treatment of customary law within the Kenyan legal system as a whole. Consequently, it will be unlikely that the new regime leads to a more successful protection of traditional knowledge.

1.3 Statement of the Problem

The nature of traditional knowledge demands qualifying the conventional intellectual property law regime as applied to that subject. It is now widely agreed that customary laws and norms under which such knowledge is held should inform the appropriate regulatory framework for such

²⁹ Ouma M, ‘The policy context for a commons approach to traditional knowledge in Kenya’ 134.

³⁰ *Protection of Traditional Knowledge and Cultural Expressions Act*, No. 33 of 2016.

³¹ In particular, these are Articles 11, 40 and 69(1)(c) of the Constitution.

knowledge,³² if its communal, cultural and transgenerational value is to be maintained. In Kenya, this would imply the utilisation of customary law systems and norms in managing and protecting traditional knowledge.

This position is incorporated in the Act. This recognition of the applicability of African customary law notwithstanding, it has been questioned whether the Act is likely to significantly improve the management and protection of traditional knowledge and the rest of its subject-matter. This is more so considering the mixed success in developing and protecting similar areas, such as community land rights.³³

Without a robust framework on African Customary Law to protect traditional knowledge, the aim of the Act in creating an effective and appropriate *sui generis* mechanism may remain a tall order.

1.4 Justification of the Study

As of 2014, one study identified that well over half of the world's population depend on traditional medicine for healthcare, with up to 80% situated in the developing world,³⁴ of which Kenya is part. Traditional knowledge has continuously faced many threats. The most prominent ones include the appropriation and the exclusion of the indigenous local communities that own it, from its benefits. It is noteworthy that in recent times, heightened focus on traditional knowledge comes from, among other things, evidence of increased commercialization of traditional knowledge in pharmaceutical industries.³⁵ Similarly, numerous documented examples³⁶ of third parties unscrupulously misappropriating traditional knowledge have been noted. This has resulted in suspicion and mistrust between indigenous local communities and third parties, thereby posing obstacles to potentially beneficial partnerships.³⁷

³² See World Intellectual Property Organisation, 'The protection of traditional knowledge: Draft articles', http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_facilitators_text.pdf, on 30th March, 2018. Part of the subject matter of the Articles is to "ensure the [use] safeguarding of traditional knowledge on the basis of customary laws, protocols and community procedures [with] through prior informed consent and exchanges based on mutually agreed terms..."

³³ See Katiba Institute, 'Traditional Knowledge and Cultural Expressions Act', at <http://www.katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/>, on 30 May, 2018.

³⁴ Salis-Lagoudakis, Hawkins J, Greenhill S, Pendry C, Watson M, Tuladhar-Douglas W, Baral S, and Savolainen V, 'The evolution of traditional knowledge: environment shapes medicinal plant use in Nepal', 281(1780) *Proceedings: Biological Sciences*, 2014, 2.

³⁵ See Ouma M, 'The policy context for a commons approach to traditional knowledge in Kenya.'

³⁶ Some cases are discussed exhaustively under Chapter 2.

³⁷ See Ouma M, 'The policy context for a commons approach to traditional knowledge in Kenya.'

In 1995 for instance, the German company Bayer filed a patent on a process for the biosynthesis of acarbose. This is a drug which regulates the entry of glucose into the blood system and is prescribed for type II diabetics. It was later confirmed that the process utilized a type of bacteria originally taken from Lake Ruiru in Kenya. Though sales of the same were worth 379 million dollars in 2004, none of these benefits were shared with the local community.³⁸ Though this might seem a dated event, Harrington observes that:³⁹

“The last fifteen years have seen a number of policy and legislative initiatives in relation to the regulation of traditional medical practice in Kenya. That none has so far been realized is significantly due to a fragmentation of responsibility within the state...”

The centrality of African customary in the regulation of traditional knowledge, and the subsequent promulgation of the enabling Act has been discussed. Even after its enactment however, the same challenges persist. Communities within which such knowledge is held still hold it at the threat of expropriation, having there been no significant institutional or management changes to reflect the objectives of the Act. There is therefore, a need to assess the likelihood of the Act achieving its goals. An examination of the supporting framework on the applicability of African customary law to this phenomenon may provide the answer.

Misappropriation is inevitable, as the necessary consequence of a weak regulatory framework articulating the rights of the knowledge holders and the systems of managing such knowledge. The study therefore arguably tackles this challenge, and the role of legal provisions on African customary law in retaining this weakness, almost by design.

1.5 Research Questions

This study will be structured around the following research questions:

- (i) Whether African Customary Law is the appropriate sui generis mechanism for protecting traditional knowledge.

³⁸ Harrington J, ‘Traditional medicine and the law in Kenya’, in Gale NK and McHale JV, *Routledge handbook of complementary and alternative medicine: Perspectives from social science and law*, Routledge Taylor and Francis Group, 2015, 189.

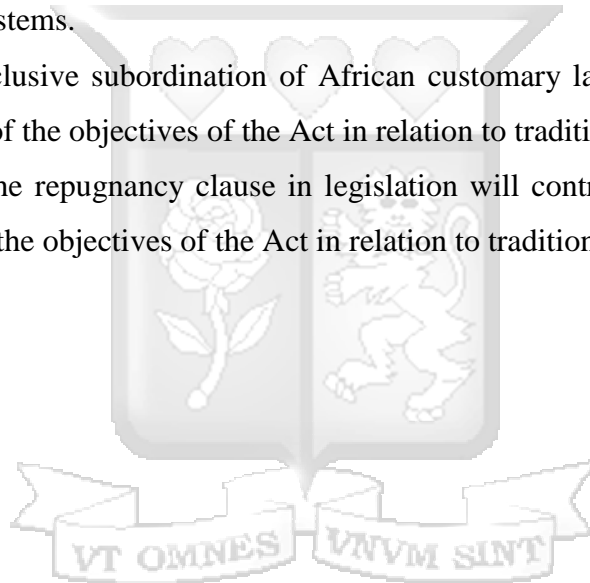
³⁹ Harrington J, ‘Traditional medicine and the law in Kenya’, 189.

- (ii) Whether the ‘inclusive subordination’ of African customary law, embodied in the repugnancy clause and to some extent in the constitutionality test, is a relevant factor in inhibiting the protection of traditional knowledge.
- (iii) Whether the retention of the repugnancy clause and the uncritical application of the constitutionality test, will significantly impede the achievement of the Act’s goals to protect traditional knowledge.

1.6 Hypotheses

Considering the research questions as framed, this study will hypothesise as follows:

- (i) *Sui generis* regimes are generally critical for the effective protection of traditional knowledge systems.
- (ii) Continued inclusive subordination of African customary law is likely to inhibit the achievement of the objectives of the Act in relation to traditional knowledge.
- (iii) Removal of the repugnancy clause in legislation will contribute significantly to the attainment of the objectives of the Act in relation to traditional knowledge.



1.7 Literature Review

There is a wide spectrum of literature on protection mechanisms for traditional knowledge. As is clear, the main fields in which these efforts are concentrated are intellectual property law and human rights law. There is also wide consensus that traditional knowledge is best-protected by employing customary laws in the respective regimes designed to protect it. The specific role of customary law in these endeavours is, however, not very clear.

(I) Traditional Knowledge and Customary Law

Writing on the history of traditional medicine in Kenya, Harrington has noted that while a vital source of health care for a majority of the population, the practice of traditional medicine is increasingly stratified, particularly for the poor and those living in remote areas.⁴⁰ Although the great bulk of state health care resources are allocated to the delivery of biomedical care, traditional healers are considerably more accessible to ordinary Kenyans, particularly in remote, rural areas. While the doctor-patient ratio is approximately 1:33,000, that for traditional healers is 1:950.⁴¹ Thus, contrary to popular belief, there is a stratified market for both forms of care in Kenya. It would therefore appear that an appropriate legal framework for robust protection and management of traditional knowledge is a subject worthy of concern. Such a framework does not necessarily have to be embedded in statutory law.

The core achievement of an effective regime governing traditional knowledge would entail non-appropriation, recognition of existing cultural norms and regulations that govern the knowledge.⁴² By its very nature, traditional knowledge requires to be valued and utilised in accordance with the indigenous protocols that govern its use and dissemination. This includes the need for prior

⁴⁰ Harrington J, 'Traditional medicine and the law in Kenya', in Gale NK and McHale JV, *Routledge handbook of complementary and alternative medicine: Perspectives from social science and law*, Routledge Taylor and Francis Group, 180.

⁴¹ Harrington J, 'Traditional medicine and the law in Kenya', in Gale NK and McHale JV, *Routledge handbook of complementary and alternative medicine: Perspectives from social science and law*, Routledge Taylor and Francis Group, 185.

⁴² Ouma M, 'The policy context for a commons approach to traditional knowledge in Kenya', 149. See also Article 8(j), *Convention on Biological Diversity*, 1992.

informed consent and the establishment of an appropriate benefit-sharing arrangement on mutually agreed terms.⁴³

The relation between modern *sui generis* laws and customary laws ranges between two principles: independence of the rights granted by the modern and traditional systems, and the state's direct recognition of the rights enshrined and protected under the relevant customary law. An important function of customary law would be to determine: the ownership of the elements of traditional knowledge, the responsibilities and equitable interests associated with traditional knowledge, the rights of customary use of traditional knowledge that should be permitted to continue under a traditional knowledge regime, and the entitlements to share benefits from such use.⁴⁴ Customary law would clarify how these various rights and entitlements are identified and distributed within traditional communities. The International Labour Organisation Convention 169 recognizes the rights of indigenous peoples to conserve their customs and institutions. It provides that when applying national legislation, customs and customary law should be taken into account without necessarily defining what is understood by customs or when customary law is required.⁴⁵

Customary law procedures may be the determinant of rules of access and holding traditional knowledge, and it might help if this is recognized by formal protection systems. Maintaining customary laws can also be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of indigenous peoples and local communities.⁴⁶ Accordingly, customary law can serve as the fundamental legal basis or source of law for a community's legal rights over traditional knowledge, a factual element in establishing a community's collective rights over traditional knowledge. Moreover, it could serve as a means of determining or guiding the procedures to be followed in securing a community's "free prior informed consent" for access to and/or use of traditional knowledge.

In his exposition on African Customary Law systems, Onyango considers the place of such systems in contemporary Africa, and notes that their influence and applicability has had a renewed

⁴³ Stoianoff N, 'A governance framework for indigenous ecological knowledge protection and use', in Levy R, O'Brien M, Rice S, Ridge P, Thornton M (Eds), *New directions for law in Australia: Essays in contemporary law reform*, ANU Press, 2017, 240.

⁴⁴ Sackey E and Kasilo O, 'Intellectual property approaches to the protection of traditional knowledge in the African region', *The African Health Monitor – Special Issue: African Traditional Medicine*, 2010, 10.

⁴⁵ Article 8 of the *International Labour Organisation Convention 169 on Indigenous and Tribal Peoples in Independent Countries*.

⁴⁶ World Intellectual Property Organisation, 'Background Brief No. 7: Customary law and traditional knowledge'.

attention. He observes that today more than ever before, the world is inclined towards global cultures, noble ideas and smart legal doctrines that would contribute effectively to the need for lasting development and poverty alleviation in Africa.⁴⁷ Consequently, revival of customary law as a legal discourse today should not appear as resurrecting it from the dead laws but highlighting the very legal phenomena that are existing in reality and posing serious challenges to the existing juridical orders.⁴⁸

(II) The Impact of Inclusive Subordination on Customary Law

The effect of inclusive subordination of African Customary law may be attributed to the repugnancy clause and the constitutionality test, in varying degrees. Customary law may in principle be the indicated law, but it will not be applied if it fails to satisfy the repugnancy and incompatibility tests.⁴⁹ The repugnancy test usually entails weighing African customary practices against the ‘ideal’ that is Western values.⁵⁰ According to Justice Ocran of Ghana:

“The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual standards of the colonisers. There were various formulations of these clauses. Some stated that the rules should not be repugnant to “natural justice, equity and good conscience.” Others read: “Not contrary to [religious] justice, morality or order.” Still others read: “Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives.”⁵¹

According to Onyango, repugnancy as a mere revolting against some habit or behaviour is essentially subjective cultural judgment. When repugnancy is used in the sense of a revolt against certain habits of behaviour in a given community or shared attitudes then the judgment is considered unfair for “what is repugnant to you may not be repugnant to me.”⁵² The repugnancy principle central to the critique in this study is the technique of ‘inclusive subordination’.

⁴⁷Onyango P, *African Customary Law: An Introduction*, LawAfrica, Nairobi, 2013, 5.

⁴⁸ Onyango P, *African Customary Law: An Introduction*, 5.

⁴⁹ Allott A, *New essays in African Law*, Butterworths, London, 1970, 158.

⁵⁰ Ambani J and Ahaya O, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’, 1(1) *Strathmore Law Journal*, 2015, 53.

⁵¹ Ocran, ‘The clash of legal cultures’, 475.

⁵² Onyango P, *African Customary Law: An Introduction*, 44.

Nevertheless, the general constitutional provision on the applicability of African customary law does not embody a repugnancy test but rather, a constitutionality test.⁵³ However, it is still submitted that the constitutionality test(s) to which African Customary Law is subjected in Kenya dilute the normativity of this regime of law. Accordingly, Ambani and Ahaya highlight that the Constitution contains provisions that negatively affect the applicability of African customary law in three ways. Firstly, it offers itself as the first most important yardstick against which the relevance of all other laws, religions, customs, and practices are measured. Secondly, it stipulates that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the State or under international law. Thirdly, the Constitution “restricts customary law and religion through certain other subtle provisions whose overall effect is to sideline traditional practices.”⁵⁴

Ambani and Ahaya proceed to note: “religious and cultural traditions not analogous to Christianity or English common law stand to face stiff opposition and obstructions, firstly, from the Constitution itself, then general Acts of Parliament and judicial precedents, Western traditions and even international human rights instruments to which Kenya is a party.”⁵⁵ In the same vein, various critics have faulted the repugnancy clause as being fraught with ambiguity. For instance, “morality” has been criticised as being the “least precise” component of such clauses. Allott noted in the postcolonial period that:⁵⁶

“On the whole the tendency of the courts in Africa has been steadily towards broadmindedness. As sociological knowledge of African peoples grows, and knowledge of the detailed rules of customary law becomes more ample and more accurate, there is less and less temptation to declare something that we do not understand to be repugnant to our ideas.”

Accordingly, it is within the discretion of a judge whether to allow a certain rule of customary law to operate or not; but this discretion is a judicial one which should be exercised, so far as possible,

⁵³ See Ambani J and Ahaya O, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’, 1(1) *Strathmore Law Journal*, 2015, 49-50.

⁵⁴ See Ambani J and Ahaya O, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’, 49-50.

⁵⁵ Ambani J and Ahaya O, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’, 2015, 42.

⁵⁶ See Allott A, *New essays in African Law*, Butterworths, London, 1970, 162. The clause will usually consist of a formulation of factors such as ‘natural justice’, ‘humanity’, and ‘equity’.

on clear and satisfactory principles.⁵⁷ Wilson J in *Gwao bin Kilimo v Kisunda bin Ifuti*⁵⁸ attempted an enunciation of these principles and observed as follows:

“Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality... To what standard, then, does the Order in Council refer – the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard.”

Even in contemporary Africa, it would not be safe to assume that because there is no great disparity between judges and parties to cases, the standard of morality would be more rigid, consistent or determinate. Thus of the judge, Allott notes that:

*“Even if he originates from the local community, moreover, there is an enormous educational and cultural gap between a senior judge, with a western education and among the most highly salaried posts in the country, and the ordinary farmers whose affairs he may be dealing with.”*⁵⁹

Ambani and Ahaya reformulate this idea to argue that the said racial distinction in the colonial period has now become one of class. Furthermore, the repugnancy clause has a less diminished role in property law. A number of unconscionable transactions involving property, are already caught by special legislation.⁶⁰ Consequently, there appears to be no visible utility in retaining the repugnancy clauses.

These stark realisations force us to confront the pointlessness of repugnancy clauses. However, this study focuses, not on the diverse interpretations of the repugnancy clause but rather, its broader effect on how African customary law is perceived in a legal system, including the uncritical application of the constitutionality test. These provisions are not merely irrelevant: they are the source of the systemic crisis under which African customary law finds itself in the Kenyan legal system.

⁵⁷ Allott A, *New essays in African Law*, Butterworths, London, 1970, 162.

⁵⁸ (1938) 1 T.L.R. (R.) 403.

⁵⁹ Allott A, *New essays in African Law*, Butterworths, London, 1970, 164. For a reformulation of this idea, see Ambani J and Ahaya O, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’, 1(1) *Strathmore Law Journal*, 2015.

⁶⁰ See, generally, Allott A, *New essays in African Law*, Butterworths, London, 1970, 164-180.

1.8 Conceptual Framework

The conceptual framework underpinning this study constitutes the intersection between sui generis rights and the behaviour toward African Customary Law in Kenya. The framework considers sui generis approaches as the most appropriate form of protection for traditional knowledge.

The framework proceeds to analyse African Customary Law, which has been tabled as the most suitable determinant of the sui generis rights entailed in traditional knowledge. Accordingly, the study investigates the nature of state recognition and application of this regime, uncovering the legal phenomenon termed as “inclusive subordination.”

(I) Sui Generis Regimes as the Ideal Protection Regime for Traditional Knowledge Systems

According to Sackey and Kasilo, approaches to the protection of traditional knowledge vary.⁶¹ One approach proposes the better use of existing intellectual property rights through capacity building, administrative initiatives, and programs that better recognize and defend traditional knowledge as legitimate and valuable intellectual property assets of the communities that have developed them.⁶² Here, the key to realizing the benefits from existing intellectual property rights is the understanding of how the intellectual property system works and identifying those kinds of traditional knowledge that can be protected. However, it has been argued that intellectual property systems increase the risk of misappropriation and therefore, may be partly responsible for the loss of traditional knowledge. The utilitarian objective of the intellectual property system also presents some difficulty for protecting traditional knowledge which is deeply embedded in the social and religious life of its communities.

The related international regime is also weak because source disclosure and prior consent requirements are not presently mandated under the World Trade Organisation (WTO) Trade-Related Intellectual Property Rights (TRIPS) Agreement. It does not require source disclosure of the invention or the prior consent of the holder for patentability, and does not provide for the absence of these conditions as a basis for invalidation/revocation. Thus, governments are not required to amend their domestic regulations to require patent applicants to provide patent offices

⁶¹ See Sackey E and Kasilo O, ‘Intellectual property approaches to the protection of traditional knowledge in the African region’, *The African Health Monitor – Special Issue: African Traditional Medicine*, 2010.

⁶² See, generally, Sackey E and Kasilo O, ‘Intellectual property approaches to the protection of traditional knowledge in the African region’.

with information concerning the origin of the genetic resources in the invention or some proof of prior informed consent from TK holders. This notwithstanding, it appears that the most effective form of positive protection of TK arguably lies in the area of patent law.

Another approach is extending or adapting the conventional systems of intellectual rights, to include *sui generis* elements that are especially designed to improve the way these systems serve the particular interests of traditional knowledge holders. Such an approach may adopt measures of protection specific to traditional knowledge. However, in countries of the African region, it has been noted that the expertise in legal drafting required under a *sui generis* system, and the lack of public enlightenment and institutional structures, are some of the major constraints in the design and implementation of an effective administration and enforcement of *sui generis* protection of traditional knowledge.

The third approach entails creating a distinct category of rights in traditional knowledge as such, through *sui generis* intellectual property systems designed specifically for this matter. A number of existing *sui generis* systems utilise references to customary laws and protocols as an alternative or supplement to the creation of modern intellectual property rights over traditional knowledge. What has been, in recent times, the international benchmark for a *sui generis* approach in this regard, was developed by the Organisation of African Unity: Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.⁶³

This study proceeds on the notion that the suitability of *sui generis* protection systems to traditional knowledge is a matter of extensive consensus.⁶⁴ The primary point of convergence in literature on here is the intuitive understanding that classic intellectual property tools may not be fully applicable or effective in the case of traditional knowledge given some unique or additional

⁶³ Presented in April 1998, to the then Organization for African Unity (OAU) (now the African Union (AU)), through its Scientific, Technical and Research Commission, which initiated a Draft Model Legislation on Community Rights and Access to Biological Resources. The Draft Model Legislation was sponsored by the government of Ethiopia at the 34th Summit of Heads of State and Government in June/July 1998, where it was decided that governments of Member States should formally adopt the Model Law. This initiative represents an attempt to provide an ideal legal framework for member states to develop their own policies, laws and regulations on access to bio-resources.

⁶⁴ See, for instance, Feris L, 'Protecting traditional knowledge in Africa: Considering African approaches', 4 *African Human Rights Law Journal* (2004); Roht-Arriaza N 'Of seeds and shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities' (1996); Brendan Tobin, 'Redefining perspectives in the search for protection of traditional knowledge: A case study from Peru, RECIEL 10(1) 2001; and Manuel Ruiz Muller, 'Protecting shared and widely distributed traditional knowledge: Issues, challenges and options', International Centre for Trade and Sustainable Development, 2013, among many others.

variables, which include difficulties in determining a right holder or singling out an inventor or creator, a cultural resistance to assigning monopoly-like property rights, and the collective nature of the innovation process within communities and transgenerational passing-on of specific traditional knowledge.⁶⁵

Having taken for granted the fundamental relevance of African customary law as the primary regulatory regimen for traditional knowledge, this study will proceed to assess the prospects of the Act in achieving significant progress in protecting such knowledge within the broader legal system in Kenya.

(II) The “Inclusive Subordination” of African Customary Law

“Inclusive subordination” is a legal technique the employment of which entails the formal recognition of the applicability of a law (or regime of law), coupled with little actual recognition or enforcement. This is primarily due to the existence of a broader or more over-arching, and implicitly preferred, law or regime of law.⁶⁶

In analysing the steps in the evolution of marriage rules in Kenya, Sylvia Kang’ara notes⁶⁷ that proponents of colonialism assumed that African and English land tenure concepts were irreconcilable, which justified expropriation and displacement. Resistance to colonialism influenced formal law to recognise customary marriages as valid and customary land tenure as worthy of protection. Nonetheless, colonial governments *maintained that the English form of marriage was superior* and offered incentives for conversion of customary marriages. This was the essence of inclusive subordination in the colonial⁶⁸ and post-colonial eras. Subsequent formal

⁶⁵ Manuel Ruiz Muller, ‘Protecting shared and widely distributed traditional knowledge: Issues, challenges and options’, International Centre for Trade and Sustainable Development, 2013,19.

⁶⁶ As mentioned earlier, the phrase was first encountered in the work of Sylvia Kang’ara, describing the legal technique through which African customary law was formally accepted but its application heavily qualified. See Kang’ara S, ‘Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought’, 9 *Hastings Race and Poverty Law Journal*, 353-396, 362.

⁶⁷ See, generally, Kang’ara S, ‘Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought’, 9 *Hastings Race and Poverty Law Journal*, 353-396.

⁶⁸ In the colonial era, the moral, economic, and political costs of colonial governance hinged on timely institutional evolution and reformulation of marriage law. British colonies retained customary marriages as it would have been impossible to execute a capitalist national economic policy if the idea of the customary family was dismantled. Therefore, it underwent doctrinal improvement in order to align the family with the new economic outlook of the state, diminishing the normative hierarchical polarization with Western-derived law.

recognition of both forms, Kang'ara submits, only meant an era of competitive and disharmonious coexistence, creating systemic problems and great need for state-directed marriage law reform.

1.91 Research Methodology

The study will constitute largely of qualitative data analysis and review of existing literature on African customary law, traditional knowledge and intellectual property law.

This study will also include two case studies. The first case study will involve an examination of the workings and effects of the legal technique of inclusive subordination in the personal law of marriage and property in postcolonial Kenya. The consequences of this technique will be examined, and parallels, where present, will be drawn with the case of traditional knowledge.

The second case study will involve a more specific analysis of the framework of protection of traditional knowledge in Kenya. This will contextualise the problems facing the adequate protection of traditional knowledge. The finer and more specific variables provided by this branch of knowledge will also provide a good testing ground for the findings of the first case study on inclusive subordination.

At the outset, however, it is important to make a qualification relating to the workings of the technique of inclusive subordination as observed in other regimes of personal law, particularly marriage and property law. First, customary law has, historically, not *formally* been employed in regulating traditional knowledge. It is only with the enactment of the Act that we see formal recognition of African customary law as being, to a good extent, the operative law on traditional knowledge. This recognition may be viewed as speaking to the limits of an effective juxtaposition of traditional knowledge and the mentioned regimes of personal law, within which the technique of inclusive subordination has been applied. To this extent, this may also be viewed as a potential limitation to this study.

The research will therefore undertake a wide literature review covering academic and policy texts, drawing from reports and studies on traditional knowledge, intellectual property law and African customary law. It will focus on documents published in the last two decades and will include unpublished literature only if it was provided by a known professional source. However, many discussions on African customary law will be drawn from literature from the first decades after independence. These will provide rich insights due to the specific measures undertaken by the

independence government in collaboration with the School of Oriental and African Studies London to document and systematise African customary law. This will be accompanied by the attendant commentary from the said period. The study will also draw from feedback from professionals and academics consulted in this area.

The study will be undertaken in twelve months from June, 2018 to April, 2019.

1.92 Limitations

The main limitation for the study is likely to be inadequate time and resources to commit to interaction with actual traditional knowledge practitioners and custodians of traditional knowledge in the process of gathering qualitative primary data.

1.93 Chapter Breakdown

The study will be divided into five chapters which will be structured as follows:

Chapter one will examine the linkage between African customary law and traditional knowledge. This discussion is meant to draw the background to an analysis of the centrality of formal and active recognition of African customary law to the protection of traditional knowledge. This Chapter will therefore lay the background that precedes an in-depth approach to the research objectives.

Chapter 2 will be an assessment of the legal and policy framework on the protection of traditional knowledge in Kenya. Over and above this, there will be an extensive discussion of the demonstrable attempts to apply African customary law in the regime of traditional knowledge, and any discernible statistics that suggest conclusions regarding the importance of African customary law. This discussion will lay the groundwork for the discussion to follow in Chapter 3 on the repugnancy clause.

This Chapter will disclose the formal ways in which African Customary Law has been integrated into the Kenyan legal system, which would in turn provide a pointer towards the first research question, which is the position of the Act in relation to protection of traditional knowledge.

Chapter 3 will entail a case study which will consider the history of the inclusive subordination of African customary law in personal law regimes (marriage and property) in Kenya. This Chapter will answer the second research question by demonstrating that inclusive subordination of African

Customary Law may have an adverse effect on the protected subject matter, if the former is not sufficiently integrated and respected.

Chapter 4 will be an analysis of the repugnancy clause and its relationship to the protection traditional knowledge, based on the findings above. It will also attempt to conclude the prediction made under hypothesis (ii) above. This Chapter will answer the third question by exploring the prospects for protection of traditional knowledge if the repugnancy clause is deleted and the constitutionality test is applied more critically.

Chapter 5 will constitute a brief overview of the research in totality. It will also involve an analysis of the findings, which will form the basis of the recommendations made. recommendations.



CHAPTER TWO

SUI GENERIS APPROACHES, TRADITIONAL KNOWLEDGE AND AFRICAN CUSTOMARY LAW

2.1 Introduction

This Chapter explores the legal foundations of the various sui generis approaches proposed for the protection of traditional knowledge. It proceeds to detail why Customary Law, particularly African Customary Law in the case of Kenyan communities, is integral and most desirable as the defining regimen of a sui generis system for traditional knowledge.

2.2 The Existing Legal Framework

The Constitution of Kenya specifically defines property to include intellectual property.⁶⁹ In addition, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people.⁷⁰ The Kenyan state also has a duty to promote all forms of natural cultural expression, to recognise the role of indigenous technologies in development and to promote the protection of intellectual property rights.⁷¹ In addition, the Kenyan State is required to support, promote and protect the intellectual property rights of the people of Kenya.⁷² The Constitution also requires that natural resources be sustainably managed, and that biodiversity and genetic resources be protected.⁷³

Before statutory intervention in 2016, Kenya had a National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (“the Policy”)⁷⁴ which was in various aspects the forerunner to the statutory law to be discussed shortly.

The Policy was aimed at laying the ground for a national framework that recognizes, preserves, protects and promotes sustainable use of traditional knowledge as well as the mainstreaming of traditional knowledge systems in view of national development targets. Other than equitable

⁶⁹ Article 260, Constitution of Kenya 2010.

⁷⁰ Article 11(1), Constitution of Kenya 2010.

⁷¹ Article 11(2), Constitution of Kenya, 2010.

⁷² Article 40(5), Constitution of Kenya, 2010.

⁷³ Article 69(1), Constitution of Kenya, 2010.

⁷⁴ Kenya, National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009; at <http://www.wipo.int/wipolex/en/details.jsp?id=11300>, on 11th March, 2019.

benefit-sharing, sustainable development and international cooperation, the Policy had prior informed consent and good faith as guiding principles. It is notable that employing a sui generis regime suited to particular local communities finds significant grounding in the two latter objectives. The question is, however, how faithful the subsequent regime is to such foundational principles.

The Policy emphasizes that historically, communities have voiced concerns about unauthorised reproduction of their traditional knowledge and traditional cultural expressions. Consequently, not only do third parties neglect to seek authority, but also fail to acknowledge the source of the relevant knowledge or expressions.⁷⁵

The Protection of Traditional Knowledge and Traditional Cultural Expressions Act (“the Act”) was passed in 2016 after a protracted process of policy discussions and reviews involving the relevant organs in the areas of culture and intellectual property. The Act was passed with the objective of creating a framework for the protection and promotion of traditional knowledge and traditional cultural expressions in Kenya. The nature of the sui generis right granted by the Act is that it allows the relevant “holders” to exclude traditional knowledge from use, or to license it at a fee. Under the Act, a “holder” is defined as a recognised individual or organisation within the community entrusted with the custody of traditional knowledge or traditional cultural expressions according to customary law.⁷⁶

2.3 Sui Generis and Other Approaches in Protection of Traditional Knowledge in Kenya

Having come to fruition as a matter of law in Kenya, we have established that traditional knowledge is protectable through a sui generis system. The next meaningful inquiry is the nature of the regime specifically designed to protect it. The import of a sui generis system is a regime that modifies features of existing intellectual property rights.⁷⁷ According to Ferris, the idea of a sui

⁷⁵ See also Kongolo T, *African contributions in shaping the worldwide intellectual property system*, Routledge, New York, 2013., 63.

⁷⁶ Section 2, The Protection of Traditional Knowledge and Traditional Cultural Expressions Act of 2016.

⁷⁷ Primarily the tools available under patent law, copyright law, trademark law and geographical indications law. Also relevant are the fields of trade secret law and contract law. For the application of the latter to intellectual property rights in general and traditional knowledge in particular, see Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255.

generis right is “derived from the vacuum that exists within the area of intellectual property to cater for those areas that do not fit within traditional notions of intellectual property.”⁷⁸

Such an approach was initially legally conceptualised, in the African context, by the Organisation of African Unity through the Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.⁷⁹ The Model Law represented an attempt at providing the benchmark for a legal framework against which African states could develop their own policies and laws on access to biological resources, including traditional knowledge to the same.

The Model Law notes that in Africa generally, some form of formal or informal communal control over biological resources usually does exist. This is founded upon, and perhaps is in furtherance of, the well-accepted rule that a state and its people exercise sovereign and inalienable rights over their biological resources. The Model Law also recognises that states have not always shown initiative in protecting communal rights to resources which are the subject of such inalienable rights on behalf of communities. The Law notes as well that traditional knowledge is in various ways dissimilar to Western concepts of intellectual property, implying a need for distinct protection.⁸⁰

Article 16 of the Model Law states, inter alia, that indigenous and local communities have the right to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity. Another equally important right of such communities is the exercise of collective rights as the legitimate custodians and users of their resources. In furtherance of these ends, Article 17 requires the recognition and protection of community rights under the principles and practices of customary law. Article 23 is subsequently cognisant of the fact that the previous provision would be meaningless if communities were not allowed to formulate their own principles and practices independently. This recognition allows the communities, already well versed in their own customary rules and practices, to apply them in the manner in which they have been designed. The knock-on effect is that the dynamism of traditional knowledge is not at odds with the legal

⁷⁸ Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 251-252.

⁷⁹ At the 34th Summit of Heads of State and Government in 1998, the initiative was sponsored by the Ethiopian government.

⁸⁰ See Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 251.

regime managing it. Thus, communities are, under this provision, to be the primary determinants of the contents of the rights tied to their traditional knowledge.

2.4 Various Sui Generis Approaches

(I) Human Rights Law

A. Application

A recent sui generis approach to protecting traditional knowledge has been located in the international human rights framework. On this view, the key international human rights instruments may be deployed to protect traditional knowledge through the various rights that they entail. The human rights approach is centred on a recognition of the human rights obligations attaching to states that have ratified international human rights instruments. In Africa, the primary instrument is the African Charter on Human and Peoples' Rights⁸¹

Of primary importance to this approach is Article 14 of the African Charter guaranteeing the right to property. This right may only be limited in view of public need or in the general interest of the community and in accordance with relevant laws. Since it has been long settled that traditional knowledge is intellectual property, and that intellectual property is a form of intangible property, then the right to property in relation to traditional knowledge falls within the scope of Article 14.

Ferris has taken this further to submit that the right to a satisfactory environment suitable for development encapsulated under Article 24 may ultimately contribute to the promotion of traditional rights, needs and values of indigenous communities.⁸² This is because, according to the African Commission on Human and Peoples' Rights, this right requires governments to, amongst other obligations, provide access to information to communities involved in conservation and to grant those affected an opportunity to be heard and participate in the development process.⁸³ Thus, the connection between the environmental right and traditional knowledge is that the conservation

⁸¹ Organisation of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), at <https://www.refworld.org/docid/3ae6b3630.html>, on 11th March, 2019.

⁸² See Ferris L, 'Protecting traditional knowledge in Africa: Considering African approaches', 4 *African Human Rights Law Journal*, 2004, 242-255, 254.

⁸³ Ferris L, 'Protecting traditional knowledge in Africa: Considering African approaches', 4 *African Human Rights Law Journal*, 2004, 242-255, 254.

of natural and ecological resources implicated by the right is largely organised around the traditional ecological knowledge of communities towards this purpose.

In the same token, the right to development is seen as contributing to protection of traditional knowledge, to the extent that such protection is grounded on the idea of social and economic development that may be realized by communities by utilising their traditional knowledge.⁸⁴

B. Limitations

A weakness of a human rights approach is that it may not be holistic enough to correspond to and cover the entire breadth of what will usually comprise traditional knowledge. At this point it is worth recollecting that this study considers traditional cultural expressions to be part and parcel of its description of “traditional knowledge”; the differences between the two are too negligible to have any doctrinal implications. Therefore, considering traditional knowledge in the entire width of its scope, it would be a clear challenge to purport to locate a sui generis regime merely in the environmental right or a broad right to property.

However, a key benefit of the human rights approach is that it offers much in the way of procedural rights, that is, the rights engendered by the state’s obligation to provide access to information to communities involved in conservation, as well as granting those affected an opportunity to participate in the development process. Procedural rights are critical to the exercise of substantive rights.⁸⁵

(II) Information Communication Technology and Related Tools

A. Application

According to Ouma, instruments of law and policy ought to aim at enhancing communal approaches to protection and management of traditional knowledge, through “enabling environments for documentation and value enhancement practices that can ensure perpetuity and dynamism” of such knowledge.⁸⁶

⁸⁴ Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 255.

⁸⁵ Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 254-255. Similarly, Principle 10 of the Rio Declaration on Environment and Development recognizes the need to have access to information in order to protect the environment.

⁸⁶ Ouma M, ‘The policy context for a commons- based approach to traditional knowledge In Kenya’, 134.

As one of the elements of the said communal approaches, Ouma proposes the “commons” model. This model is centred around making the relevant knowledge increasingly available to third parties as a part of larger networked, collaborative relationships.⁸⁷ Once commons structures are formalised, the relevant information would be shared and preserved within a community in a manner guided by an agreed instrument giving a degree of formality and enforceability to the traditional knowledge commons.⁸⁸ What is notable about the commons model is that it is not a mere exercise in defensive protection of traditional knowledge. Defensive protection entails “taking measures to ensure that unauthorised parties do not unfairly acquire intellectual property rights over other people’s traditional knowledge.”⁸⁹ Despite deploying one of the conventional tools⁹⁰ of defensive protection, namely databases, the commons model is not merely defensive in nature, and databases generated in its furtherance serve a much broader role.

Thus, under this model, databases form part of an online licensing system which should ideally provide a large degree of transparency. Digitised traditional knowledge is stored in an electronic database that has controlled and limited access.⁹¹ The additional utility of such a database – in that it enables licensing and transparency, adds a component of positive protection, under which the rights of existing traditional holders are recognised and enforced.

Another arena through which information and communication tools can be utilised in the protection of traditional knowledge and traditional cultural expressions is through the interaction between the digital environment and copyright law. In the analogue environment, most traditional cultural expressions, for instance, were localised within particular communities. The digital environment on the other hand has provided a perfect opportunity for the increased distribution

⁸⁷ Ouma M, ‘The policy context for a commons- based approach to traditional knowledge In Kenya’, 134.

⁸⁸ Ouma M, ‘The policy context for a commons- based approach to traditional knowledge In Kenya’, 134.

⁸⁹ WIPO, ‘Defensive protection measures relating to intellectual property, genetic resources and traditional knowledge: An update’, Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2004, at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_8.pdf on 10th March, 2019.

⁹⁰ Three types of defensive protection are possible: (i) usage of databases to identify prior art that would stand in the way of the granting of an illegitimate patent; (ii) secrecy; and the (iii) imposition of requirements of disclosure as a condition for acquiring intellectual property rights, all of which would limit the acquisition of rights over the subject matter of traditional knowledge.

⁹¹ See, generally, Ouma M, ‘The policy context for a commons - based approach to traditional knowledge In Kenya’.

and use of this subject-matter, at the same time providing a platform for works that would otherwise have disappeared.⁹²

Using digital technologies, therefore, digitisation projects⁹³ carry the promise of assisting indigenous and local communities to protect, manage and promote their cultural heritage for their cultural and economic development.⁹⁴ This approach is further buttressed by the fact that documentation is vital for continuity and diversity of traditional knowledge and cultural expressions, by virtue of the fact that the relevant knowledge or expressions are stored in a permanent form.

B. Limitations

Whereas this is an approach to eventually enhance communal management, it is not, strictly speaking, an African customary law model, but rather a technological tool. In fact, technology is crucial for the creation of databases. One way in which the commons model is implemented is by digitally documenting traditional knowledge in a “manner that enhances preservation and equitable exploitation and simultaneously encouraging follow-on innovation.”⁹⁵ Failure to protect communal resources using African Customary law as the primary source of norms and structure may run into many of the failures occasioned by protection through conventional intellectual property tools.

Nonetheless, it is clear that protection in the online environment may not encompass all rights implicated by traditional knowledge. Particularly, the ubiquitous utilisation of copyright to protect expressions in online platforms does not have a clear relationship with fields of traditional knowledge such as traditional medical knowledge and ecological knowledge. Since the threat in this area usually constitutes misappropriation posed by illegitimate patenting, copyright may not be a well-equipped regime in that regard.

⁹² Ouma M, ‘Copyright as an incentive and as a growth driver for digital development: Cultural heritage in the digital era’, Paper Presented by Marisella Ouma at the African Ministerial Conference 2015 on Intellectual Property for an Emerging Africa, Dakar, Senegal, November 3, 2015, 4.

⁹³ In 2009, WIPO, under the creative heritage project undertook to help in the documentation of the Maasai culture with the help of two members of the community. The key purpose was to help in documenting folk songs, dances among others.

⁹⁴ Ouma M, ‘Copyright as an incentive and as a growth driver for digital development: Cultural heritage in the digital era’, 3.

⁹⁵ Ouma M, ‘The policy context for a commons- based approach to traditional knowledge In Kenya’, 134.

(III) African Customary Law

It is probably fairly apparent that traditional knowledge in the context of this study relates to knowledge tied to bioresources or other cultural resources that is held in a communal context by indigenous African groups. This is already a preliminary pointer to the orientation in which management of such a resource should be ordered, at least insofar as, as was alluded to in the discussion on the TK Policy, the guiding principles of prior informed consent and good faith are concerned.

Contrary to the popular belief that traditional knowledge is in the public domain, indigenous and local communities who are the custodians of traditional knowledge in fact have systems of customs and taboos in place to ensure that certain traditional knowledge is not made widely known, while at the same time being passed on within the community.⁹⁶ In this respect, there is great consensus that respect and recognition of customary law is integral to the appropriate protection of traditional knowledge.⁹⁷

As discussed earlier, the notion of “customary law” connotes the laws, practices and customs of indigenous and local communities.⁹⁸ The protection of traditional knowledge using customary law is, over and above the technical benefits of utilising that system, founded on the recognised need to enhance communities’ control over commercialisation and exploitation of their traditional knowledge. Customary law norms are important in this regard because they are regarded as obligatory rules of conduct.

Protection of traditional knowledge through African Customary Law is based on several elements inherent in the nature of such knowledge-holding amongst traditional communities. These may accordingly be viewed as “guiding principles” in conceptualising a sui generis regime that primarily incorporates African Customary Law.

Firstly, most African indigenous groups view traditional knowledge as having communal value, to be publicly available (but not in the “public domain”) and not necessarily as a profit-bearing commodity. The reason for the qualification of “publicly available” knowledge as distinguished

⁹⁶ Ouma M, ‘The policy context for a commons- based approach to traditional knowledge In Kenya’, In *In De Beer Et Al Innovation And Intellectual Property: Collaborative Dynamics In Africa* UCT Press, 2014, 132-150.

⁹⁷ See WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 5.

⁹⁸ WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 2.

from the “public domain” is that the latter is a term of art under intellectual property law that does not depict the “public” nature of knowledge in quite the same way for traditional knowledge. In intellectual property, a work comes into the “public domain” upon the rights holder renouncing rights over it, or upon expiry of the term of protection, and so on. The term, therefore, implicates the absence of legal protection for the relevant subject-matter. A description of traditional knowledge as “publicly available”, on the other hand, carries the different meaning that despite the subject-matter being available to the public, the knowledge is legally protectable, whether through formal instrumentalities of state law or through community protocols and established practices.

Hitherto, resistance to traditional knowledge protection has been justified, at least partly, by reference to the importance of protecting the public domain.⁹⁹ However, since traditional knowledge and traditional cultural expressions were not at any time protected by intellectual property rights in the conventional sense, they cannot legally be termed as having fallen into the public domain.

As a legal concept, therefore, knowledge that is “publicly available” should be distinguished from knowledge that is in the “public domain.” It would appear that the key element in making this distinction is that “publicly available” traditional knowledge is still widely regarded as a proprietary entitlement by the holders who would seek to protect it from wanton use and unauthorised commercialisation. Knowledge in the public domain, on the other hand, is free to access and use, that is, devoid of any censure or proprietary claim.

The idea that traditional knowledge and traditional cultural expressions are in the “public domain” is based on the notion that they constitute “*res nullius*”, that is, are unowned.¹⁰⁰ This is the same socio-evolutionist bias used as a conceptual tool to justify the seizing of African territories in the colonial era.¹⁰¹ According to the various communities, affected regimes include traditional medical knowledge, cultural expressions such as oral traditions, literature, designs and visual and

⁹⁹ Okediji R, ‘Traditional knowledge and the public domain’, *Centre for International Governance Innovation Papers*, No. 176, 2018,

¹⁰⁰ Commission on Human Rights, ‘Review of developments pertaining to the promotion and protection of the rights of indigenous peoples, including their human rights and fundamental freedoms’, Joint Statement from the Indigenous World Association and Indigenous Media Network, E/CN.4/Sub.2/AC.4/2005/CRP.3, 13 July 2005, 2.

¹⁰¹ See Okoth-Ogendo HWO, ‘The tragic African commons: A century of exploration, suppression and subversion’ *Land reform and agrarian change in southern Africa*, 2000.

performing arts.¹⁰²

The implication here is that African Customary Law and its attendant fabric will typically provide the regime of local management and use of traditional knowledge, whether such knowledge is publicly available¹⁰³ or not. A regulatory vacuum on the degree of “availability” of traditional knowledge, which in most cases will be dictated by community rules, will ultimately mean that third parties would obtain unfettered access to such knowledge and commercialise it to the exclusion of others, including the relevant communities.

Secondly, the earlier analysis of the international framework on the sui generis right to traditional knowledge revealed that customary law generally is expected to take centre stage in the management of this communal resource. Particularly, indigenous and local communities are meant to determine the content of the ensuing rights. Specifically, elements such as the orientation and content of the right, how the right is to be acquired, and how the right is to be enforced would depend on customary norms and practices,¹⁰⁴ presumably those of African Customary Law. Therefore, in such a case, African Customary Law would form the foundation of rights of use, attendant exceptions, as well as exempting the continuing customary uses and practices from other legal restrictions on the use of traditional knowledge.¹⁰⁵

Thirdly, African Customary Law may be an element, the very definition of traditional knowledge. The operation of customary law in such cases would be the reason why certain types of knowledge, innovation, or expressions would be labelled “traditional”. Similarly, the holders and beneficiaries of such knowledge may sometimes only be determined by reference to the relevant African Customary Law.¹⁰⁶

Fourthly, recourse to African Customary Law may be necessary if the correct procedures underlying access and informed consent are to be followed. The latter is a cross-cutting legal requirement under human rights law and genetic resources law, most specifically provided for under the Act. The requirement is also consistent with Article 32 of the United Nations Declaration

¹⁰² Commission on Human Rights, ‘Review of developments pertaining to the promotion and protection of the rights of indigenous peoples, including their human rights and fundamental freedoms,’ 3.

¹⁰³ Traditional knowledge may be publicly available, secret, or sacred.

¹⁰⁴ Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 252.

¹⁰⁵ See WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 4.

¹⁰⁶ WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 13.

on the Rights of Indigenous Peoples,¹⁰⁷ which requires informed consultations to be conducted with indigenous peoples before states can undertake projects that will affect indigenous peoples' rights to their territories and resources. Further justification of applying African Customary Law to management of traditional knowledge is that the system may be used to establish remedies against misappropriation, as well as the appropriate dispute resolution mechanisms in the event of disagreement.

Lastly, the context of exploitation of traditional knowledge in Africa alone may, surprisingly, point towards the necessity of utilising African customary laws and protocols as the protection mechanism for traditional knowledge. The perspective is clarified once one considers the import of the tremendous literature covering what has been dubbed the “decolonisation” movement in nearly all areas of social science study: law, literature, art, history and so on.¹⁰⁸ Decolonisation studies have tended to reveal that there has been a destructive influence by the West across economic, social and political circles in Africa, lingering vestiges of the violent occupation and subjugation engendered by colonisation in the twentieth century and before. Further, that power dynamics in key political and norm-setting institutions across the world have been pre-arranged to sustain the legacy of subjugation of African institutions, culture, and knowledge systems.

As one of the many flashpoints for decolonisation thought, critique of the prevailing intellectual property regime has shown that the Global North has been responsible for mass misappropriation of African traditional knowledge and biological resources. The more relevant point however is the accusation¹⁰⁹ that conventional intellectual property at the international level has remained oblivious of traditional knowledge with the Global North lacking the willingness to develop a strong international regime for protection of traditional knowledge and enforcement of attendant rights.

¹⁰⁷ A/RES/61/295.

¹⁰⁸ See generally, Motshabi K, ‘Decolonising the university: A law perspective’, 40(1) Strategic Review for Southern Africa, 104-115, at [https://www.up.ac.za/media/shared/85/Strategic%20Review/vol%2040\(1\)/Mosthabi.pdf](https://www.up.ac.za/media/shared/85/Strategic%20Review/vol%2040(1)/Mosthabi.pdf), on 12th March, 2019.

¹⁰⁹ See generally, Motshabi K, ‘Decolonising the university: A law perspective’, 40(1) Strategic Review for Southern Africa.

Examples to highlight the observations above in the area of traditional knowledge are rife. These include the earlier-mentioned case involving the multinational company, Bayer, in Kenya, the hoodia case in South Africa,¹¹⁰ and the katempfe and serendipity case¹¹¹ to name just a few.

The central theme in these cases is the claim that traditional knowledge and innovations about the medicinal, cultural, cosmetic and other kinds of value have been widely misappropriated.¹¹²

2.5 Conclusion

The existing legal framework on traditional knowledge demonstrates wide consensus that a sui generis regime is critical to the protection and management of traditional knowledge held by indigenous and local communities.

Various approaches to sui generis protection have been proposed, all with notable strengths as well as some noticeable gaps. Human rights law proposes an approach to sui generis protection centred on the right to property and the right to a clean and healthy environment. However, it is clear that these two rights neither capture the entire content of traditional knowledge, nor lead to any unique institutional mechanism for protecting traditional rights that is not already within the existing formal legal system. Intellectual property tools, specifically the commons model, may provide unique legal protection by being a source of both negative and positive protection of traditional knowledge.

African Customary Law may provide a wide array of benefits in the same endeavour, not least because the very definition of what is “traditional” in the knowledge and expressions of

¹¹⁰ This is a plant which served as food and water for the San hunters and gatherers in the Kalahari Desert for ages. It is a hunger and thirst suppressant, and these properties were utilised by San hunters. The plant’s composition as an anti-obesity compound is a traditional knowledge of the San people, though restricted to a certain cultural form of life. Knowledge gathered from the San led to laboratory research commissioned by the Council for Scientific and Industrial Research (CSIR), leading to the development and patenting of a drug, P157, by a British pharmaceutical company. The San people were not consulted in this process. See, generally, Amusan L, ‘Politics of biopiracy: An adventure into hoodia/xhobia patenting in Southern Africa’, 14(1) *African Journal of Traditional, Complementary and Alternative Medicines*, 2017.

¹¹¹ The katempfe and serendipity berries have long been used by African peoples for their sweetening properties. The University of California and Lucky Biotech, a Japanese corporation, were granted a patent for the sweetening proteins naturally derived from these plants. Ferris has noted that it is said thaumatin, the extract that makes katempfe sweet, is two thousand times sweeter than sugar, and is calorie-free. The relevant patent covers any transgenic plant containing the derived sweetening proteins. No attempts have been made to share benefits with local communities. See Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 244.

¹¹² See Ferris L, ‘Protecting traditional knowledge in Africa: Considering African approaches’, 4 *African Human Rights Law Journal*, 2004, 242-255, 244.

communities may be dependent on operation of various customary law rules and norms, as may the procedural and dispute resolution mechanisms. Accordingly, African Customary Law dictates must, in the various ways in which it can, form the fabric of a protection regime for traditional knowledge.

The next Chapter will analyse the historical treatment of African Customary Law in Personal Law regimes applying it as their defining regimen. Particularly, the concept of inclusive subordination discussed earlier will be brought out in more detail.



CHAPTER THREE

EXPERIENCES IN FORMAL APPLICATION OF AFRICAN CUSTOMARY LAW IN KENYA

3.1 Introduction

This Chapter investigates the treatment of African Customary Law in Kenyan legal history in the area of Personal Law. The enquiry is specific to this regime since in the post-independence era, African Customary Law has largely only been deployed by statute to cover personal law matters.¹¹³ British governance of colonised territories typically began with reception statutes that stipulated sources of law and their internal hierarchy.

3.2 Application of African Customary Law to Personal Law Regimes in Kenya

The provision applying African Customary Law in Kenya was in the shape of the repugnancy clause (now under Section 3 of the Judicature) that recognised African customary law with the voiding proviso. This statutory mandate gave colonial courts broad interpretive discretion, which they wielded to generate a schematic colonial family law that bolstered colonial domination. They “did not merely decide cases”, Kang’ara submits, but also “drew conclusions about the validity of customary law relationships from a system of rules whose integrity and coherence it was [*ostensibly* (emphasis mine)] their duty to protect”. Thus, the formal definition of marriage under English law had essential classical elements such as individualism, free will and exclusivity, a checklist by which colonial courts found African customary marriages not valid.¹¹⁴

The reality of inclusive subordination in the colonial era may seem incomprehensible given that the primary enabler of this technique, the colonial state, was no longer in existence after Kenya obtained independence. However, Kang’ara notes that the resultant problem from the colonial era was that the ensuing problems from this disharmony only convinced the colonial government of the superiority of English moral and economic individualism (and conventional intellectual property tools are modelled around moral and economic individualism).¹¹⁵ Inevitably, then, the

¹¹³ This is readily apparent in the class of disputes towards which the Magistrates’ Act (discussed earlier) extends the reach of African Customary Law.

¹¹⁴ Kang’ara S, ‘Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought’, 9 *Hastings Race and Poverty Law Journal*, 353-396, 357.

¹¹⁵ Kang’ara S, ‘Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought’, 365.

postcolonial doctrinal development of customary marriage law has had the effect of opening up Western-derived law to influence customary law.¹¹⁶

As a preliminary note to an analysis of African customary law cases, Cotran profoundly comments:

“Those who prophesied the early demise, or the supervening irrelevancy, of customary laws must admit that the Kenya evidence is against them. What emerges from the cases reported here is the continuing vigor and relevance, despite all the changes wrought by an evolving society and governmental legislation, of customary law in the daily lives of people from all backgrounds and social classes. The major transformation of indigenous land tenure systems through the Registered Land Act, the adoption of the new law of succession in 1981, the growth of female as well as male employment, urbanization inter-ethnic mixing, education, religion, new forms of property and the rest, though traumatic, have not succeeded in marginalizing the customary laws, though the cases record many examples of their modification. Even integrating statutes do not necessarily displace customary law completely.”

It is precisely this fact that “African customary is not displaced completely”, which gives rise to the idea of inclusive subordination. This is the formal recognition of a regime attended by a (rather counterintuitive) active ignorance of it, when the application of the same is not considered convenient.

As a preliminary point, it is worth noting that the critique of the authorities analysed below is not a critique on the merits of the decisions, per se. In essence the analysis is instead focused on revealing an implicit and systemic tendency of adjudicative organs to conveniently ignore African customary law rules and principles and instead substitute them, deliberately or otherwise, with English law norms. This trend is visible without necessarily saying anything about the merits of the adjudicative body’s decision, which may at times, nonetheless, be important to consider.

¹¹⁶ See Kang’ara S, ‘Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought’, 354.

Section 7 of the Magistrates' Courts Act¹¹⁷ provides that a magistrates' court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law:

- (a) Land held under customary tenure;
- (b) Marriage, divorce, maintenance or dowry;
- (c) Seduction or pregnancy of an unmarried woman or girl;
- (d) Enticement of, or adultery with a married person;
- (e) Matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and
- (f) Intestate succession and administration of intestate estates, so far as they are not governed by any written law.

The following analysis considers decisions in the area of marriage, divorce, seduction and enticement, as well as matters concerning status. Beyond the justification already offered, it is worth noting that it is mostly decisions in these areas that have been extensively reported.

(I) Seduction or Pregnancy of an Unmarried Woman or Girl

The first case of relevance is *Murichu Ichurua -Vs- Sammy Kuria s/o Chege Githinji*,¹¹⁸ which was an appeal against the judgment of a District Magistrate. The appellant was the plaintiff in the lower court suing the defendant for pregnancy compensation because it was alleged that the defendant was the father of a child born to the girl, the allegation being that on a specified date the Respondent and the girl had sexual intercourse and she became pregnant as a result.

In the Resident Magistrate's decision, ostensibly founded on Kikuyu customary law, he held that the plaintiff was time barred after six months from the date of sexual intercourse. He also held that no action could be taken by the father if the girl did not declare the pregnancy to the proposed defendant or his parents. Both these lines of reasoning were criticised by Porter, R.M. in appeal as not being founded in the Kikuyu customary law (or not being proved to be), as they were not included in Eugene Cotran's *Restatement of African Law*.¹¹⁹

¹¹⁷ Act No. 26 of 2015. The position was fully similar in the repealed Act.

¹¹⁸ Resident Magistrate's Court at Thika, Civil Appeal No. 7 of 1980, reported in Cotran E, *A casebook on African customary law*, 3-4.

¹¹⁹ See Cotran E, *A casebook on African customary law*, 4.

Despite noting that the District Magistrate's reasoning was founded on principles alien to customary law (but, arguably, reposed in English law), the Resident Magistrate proceeded to uphold the said decision, albeit for different reasons (challenges of evidence).

The second illustrative case is *Githirwa Muoya -Vs- Njeri Kamau*,¹²⁰ which was a Court of Review decision by Ainley, P. in this case the plaintiff alleged that the defendant had seduced her daughter and made her pregnant. She sued therefor for the customary compensation. A particular passage is noteworthy:

“The Magistrate to whom [the plaintiff] appealed felt confident that [the witness] was telling the truth. We do not think that there was any proper basis for his confidence, nor do we think that he gave any satisfactory reason for reversing the decision of the African court. Though the custom which governed this case does not require corroboration of the evidence of a girl who alleges that a particular man is the father of her child, yet in the great majority of cases of this nature a precedent court will seek for and insist upon corroboration.”

Despite this decision appearing seemingly sound, it nonetheless demonstrates the shockingly unchecked propensity of judicial officers to selectively apply dictates of African law after a convenient sieving exercise. The collateral result is that the rules of African customary law carry a lesser and lesser binding normative force - in the minds of judicial officers at least - as they can be bent or adjusted at the officers' "reasonable" discretion.

Having already established in the *Githirwa* Case that corroboration of the mother's testimony was not a customary law requirement, another case might help to illuminate the statutory position vis-à-vis the normativity of customary law rules. In *George Mwangi -Vs- Maria Wamugori*,¹²¹ the appeal arose from proceedings taken under section 3 of the then Affiliation Act¹²² which provided as follows:

“If the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the court, it may adjudge the defendant to be the putative

¹²⁰ Court of Review Case No. 8 of 1965, reported in Cotran E, *A casebook on African customary law*, 6.

¹²¹ Court of Review Case No. 14 of 1965, reported in Cotran E, *A casebook on African customary law*, 7.

¹²² Chapter 142, Laws of Kenya (*Repealed*).

father of the child and may also, if it sees fit in all circumstances of the case proceed to make against him an order for the payment ... of certain sums and expenses.”

In giving force to this provision, Ainley, P, remarked as below:

“The African Court has assumed that these very clear provisions preclude any adjudication and therefore an order, in default of corroboration of the evidence of the mother. The African Court’s assumption was perfectly correct... We can think of no other material interpretation of the subsection, and we would also point out that the interpretation which we have adopted is the interpretation given by the English Courts for many years to almost precisely similar words in various English Affiliation Acts.”

Very significant in this case, therefore, is the realisation that the law applied, in a customary law dispute, was a clear and significant variation of what was already the legal position under Kikuyu customary law. Even more significant is that the relevant court, while adjudicating over a customary law matter whose customary law rules were clear, elected to be persuaded by English law principles and English law techniques of legal interpretation and adjudication. In fact, the Court of Review proceeded, intrusively from an African Customary Law perspective, to rely on two English cases in supporting its rather flagrant disregard of a customary law rule.¹²³

In any event, as a challenge to the ostensible normative soundness of the English position, the following dictum of the Court of Review in that case would appear highly suspect as an authority (worthy enough to displace express African customary law rules):

“Evidence of a conversation with a putative father in which he said to the witness, on his telling him that he was the father of the child and must keep it, that he would not but would rather go to America, was held over one hundred years ago in England to be corroboration of the mother’s story.”

Rather interestingly, the Court proceeded to note that “silence in the face of accusation may amount to an admission, and therefore may be corroboration...” On that view, it is not clear from the

¹²³ The Court cited *Moore -Vs- Hewitt* [1947] K.B. 832 and *Lawrence -Vs- Ingmire* (1869) 33 J.P. 630. In the former case, there was evidence that over a long period including the time of conception, the mother had associated with the alleged father, and there was no evidence that she had associated with any other man. In the latter case, admission by the defendant in cross-examination that he had had connection with the mother at times considerably previous to the date at which the child must have been begotten, and also at times subsequent to the birth of the child, and that the mother had had goods from his shop without payment were allowed to be sufficient corroboration.

decision what legal authorities would support the idea that silence would amount to admission at law.

The fourth case in this category is *C.T. -Vs- M.W.*,¹²⁴ where again the court ignored the treatment of corroboration in a matter on pregnancy compensation. Although it is conceded that this appeal was on the sole ground of lack of corroboration, the court curiously failed to address itself to the question as a customary law question. In fact, it is puzzling that the entire decision of the court was rendered without a single reference to the African Customary Law, but rather to several supposedly authoritative English authorities. Invoking the aforementioned Affiliation Act, the Court proceeded to observe:

“The law in regard to affiliation is not materially different in this country from the law in force in England, and it is only necessary to refer to two cases¹²⁵ to show there was ample corroboration of the complainant’s evidence in this case.”

The fifth case is *Esther Karimi -Vs- Fabian Murugu*¹²⁶. The claim by the plaintiff was that on diverse dates the plaintiff, relying on a verbal promise to marry, permitted the plaintiff to seduce her and to have sexual intercourse with her, as a consequence whereof she conceived and delivered a child. The defendant denied these claims despite the plaintiff’s extensive evidence supporting her position, leading the judge, *Waiyaki J.*, to brand him a “very smooth and blatant liar” who “got what he wanted by playing a very clever and crafty game.”¹²⁷

From the onset, it is important to clarify the considerations upon which this case hinged. To start, the court noted that an action for breach of promise to marry is not recognised in customary law, whereas the same is recognised in the case of a civil or Christian marriage, which are monogamous. On first glance, this fact should have made it easy for the court to determine the matter according to the relevant law on monogamous marriages (as customary law marriages are potentially polygamous). However it is instructive that the court noted that the evidence was not conclusive on which kind of marriage the parties intended to contract. Nonetheless, the court proceeded to

¹²⁴ High Court of Kenya at Nairobi Miscellaneous Appeal No. 254 of 1968, [1969], reported in Cotran E, *A casebook on African customary law*, 13.

¹²⁵ The court in fact ended up referring to three English cases. The first, *Moore -Vs- Hewitt* has been discussed above. The second case was *Simpson -Vs- Collinson*, [1964] 1 All ER 262, and the third case was *Cole -Vs- Manning* (1877), 2 QBD 611. Both cases were relied upon on the basis that corroboration was found in acts of familiarity.

¹²⁶ High Court of Kenya at Nairobi Civil Case No. 745 of 1973.

¹²⁷ *Esther Karimi -Vs- Fabian Murugu*, reported in Cotran E, *A casebook on African customary law*, 25.

determine the case, *primarily*, on principles of the English law, despite not being convinced that the proposed marriage would have been a monogamous one:

“However, I am confronted here with a problem in law. First of all, did the defendant promise to marry the Plaintiff in church or in the civil registry? The plaintiff says that they intended to have a church wedding. But very early during her evidence in chief she said “He said if I became pregnant, we would get married.”

The type of marriage was then not spelled out, which leaves me in doubt as to whether when the promise was made to her, the parties contemplated a monogamous marriage.

Secondly, if what she says is true, and I have no doubt it is, then I must hold the promise null and void, since a promise of marriage made in consideration of the promise permitting the promisor to have carnal intercourse with her or him is [not] valid. I am satisfied that the plaintiff permitted the defendant to have sexual intercourse with her, because he promised to marry her if she became pregnant.”

The promise to marry made in consideration of the promise permitting the promisor carnal intercourse is a principle of the English civil law of marriage. Yet, it was this principle that was employed in adjudicating this case, despite the court’s concession that the facts did not lend themselves to the conclusion that the intended marriage would be a civil law marriage.

(II) Essentials of Marriage

Disregard (or diminished regard) for African customary law dictates, in their strict sense, is also evident in case law on the essentials of marriage.

In *Hortensiah Wanjiku Yawe -Vs- Public Trustee*,¹²⁸ Paul Mukambi Yawe, a Ugandan by birth, and resident in Nairobi, was killed in a motor vehicle accident in Uganda. He was employed as a pilot by the East African Airways Corporation at the time of his death. He died intestate. The Public Trustee of Kenya was granted letters of administration to his estate. The report of death of the deceased to the Public Trustee was made by Hortensia, the appellant, who claimed that she was the deceased’s widow and that she had four children by him. The Ugandan claimants, on the

¹²⁸ Court of Appeal for East Africa, Civil Appeal No. 13 of 1976.

other hand, gave their particulars to the Public Trustee and also alleged that the appellant was not married to the deceased.

Kneller, J. in the High Court found that the appellant was not the deceased's wife according to Kikuyu customary law¹²⁹ in that the performance of the *Ngurario* was not proved to the required standard:

“Secondly was Hortensiah Wanjiku his wife according to Kikuyu custom? She had to prove this and the standard required was the usual one on a civil matter, namely, ‘on the balance of probabilities.’

The custom of Kikuyus for their marriages is documented in the Restatement of African Law, Kenya I Marriage and Divorce, (1968) by Eugene Cotran Ch. 2 section iv, pp. 15, 16. It was agreed to be so. Evidence was led as to the consent of the parties and their respective families, the ngurario, the ruracio and so on but was not proved to the standard required, cf. Mwangi v. Mumbi [1967] E.A. 639, 642. I answer the second question saying that Mrs. Hortensia Wanjiku was not the wife of Mr. Paul Yawe, the deceased, by Kikuyu custom or at all.”

The appellant appealed against the finding that she was not the deceased's wife. On appeal it was argued that the learned judge failed to take into account the presumption arising from long cohabitation.

The position of Kneller, J. on the argument on cohabitation was highlighted during the submissions on appeal,¹³⁰ as being that the appellant had taken on herself to prove a Kikuyu customary marriage, and had failed to do so. There was also doubt whether a presumption arising from long cohabitation based on English Common Law was an element in Kikuyu customary marriage, and in any event, it was for the appellant to establish that it was so applicable, which the appellant had

¹²⁹ The essentials of a valid marriage under Kikuyu law are:

- (a) Capacity: the parties must have the capacity to marry and also the capacity to marry each other.
- (b) Consent: the parties to the marriage and their respective families must consent to the union.
- (c) *Ngurario*: no marriage is valid under Kikuyu law unless the *ngurario* ram is slaughtered.
- (d) *Ruracio*: no marriage is valid under Kikuyu law unless a part of the *ruracio* [dowry] has been paid.
- (e) Commencement of Cohabitation: the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated under the eight days' seclusion, and nowadays when the bride comes to the bridegroom's home.

¹³⁰ See Cotran E, *A casebook on African customary law*, 66-67.

not done. It was also submitted that the appellant did not rely on cohabitation as a factor in her favour, and that the matter could therefore not be raised in appeal.

The appellate court held as follows:

“I can find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing, and formed part of the issue concerning the fact of marriage, and even if no specific submission on that point was made by [counsel], I do not think that [counsel] is precluded from relying on it before us.”

Evidently therefore, the provisions of the relevant customary law were here circumvented to afford the court justifiable cause to impute English law principles on social phenomena meant to be organised around African customary law. This is more so the case because the alleged marriage in this case was a Kikuyu customary law marriage,¹³¹ not just a marriage generally.

It is perhaps worth mentioning that the debate is still rife in Kenya as to the position of a marriage by cohabitation vis-à-vis other forms of marriages.¹³² This would at least suggest that the holding by the trial court in this case may in context be conceivably good at law, in which case the decision of the appellate court reversing the earlier decision on the customary law in question would be questionable. A necessary corollary to that would be that the technique applied by the appellate court supplanting the authority of the customary law in favour of the English presumption of cohabitation would be illegitimate.

¹³¹ See Cotran E, *A casebook on African customary law*, 65.

¹³² The Marriage Act, No. 4 of 2014 defines the term “cohabitation” but does not include the same alongside the recognised “types” of marriage.

In the classical case, *Rex v Amkeyo*,¹³³ the court refused to accept the legal status of a wife married under customary law as such (terming her a “concubine”), leading to the absurd outcome of the wife being compelled to give evidence against her husband, thus openly flouting the common-law principle of spousal privilege. The postcolonial and modern court, as seen, still retains the heritage and technique of inclusively subordinating African customary legal forms. The point being continuously proved by these cases is that, in denying validity to customary marriages or other legal forms, colonial courts followed ‘careful’ deductive application of law, aiming to make colonial laws coherent and predictable.

It might be tempting to consider this kind of thinking as confined to a different context and time in history, and the tensions as only existing in the difficult nature of pluralism that was the mainstay of colonial law. Interestingly, however, the notable dicta of a postcolonial court in a succession and family law matter in 2013 proceeded as follows, in *JMK v DMK*¹³⁴:

“When the Respondent and the deceased made a decision to solemnise their customary marriage in church, they unequivocally chose to have their marriage governed by a statute known as The African Marriage and Divorce Act, Cap 151 of the Laws of Kenya. This choice removed their marriage from the ambit of Kamba customary law.”

To comprehend the full implications of this logic, it is important to note that the Constitution of Kenya, promulgated three years before this decision, does not provide a hierarchical ordering of laws that expressly subordinates African customary law to statutory law. As seen above, the Constitution does not in principle have a repugnancy clause (*per se*) on the general applicability of African customary law. Considering this, it comes as a surprise that a postcolonial court in such a framework could have no qualms invalidating an existing customary law marriage merely because it was “solemnised in church”. Were the formalities and processes undergone under customary law of no legal effect, especially considering that African customary law marriages are expressly recognised under the Marriage Act?¹³⁵ It is equally inexplicable that under the same

¹³³ *Rex v Amkeyo*, (1917) 7 E.A.L.R. (Kenya).

¹³⁴ *JMK v DMK*, Civil Appeal No. 7 of 2013.

¹³⁵ Section 6, Marriage Act, No. 4 of 2014.

legislation, it is possible to convert a customary law marriage to a Christian or civil marriage, yet the reverse is impossible.¹³⁶

It follows that this study, bottomed on the revelations above regarding the workings of inclusive subordination, must advance the idea that the competitive or disharmonious coexistence of the different legal regimes in such a framework can only yield a need for increased state intervention in creating a proper balance. Having noted the unsuitability of the general intellectual property regime (primarily directed by formal law and official government structures) to traditional knowledge in Chapter One, this study notes a crisis for the protection of such knowledge through African customary law as a *sui generis* and (relatively) independent regime.

Increased state intervention through formal instruments of law is precisely the antithesis of the concept of according local communities *sui generis* rights to their traditional knowledge. This idea is inspired by the general consensus that African Customary Law must play a driving role, for reasons discussed earlier, in crafting a *sui generis* regime for administering communities' intellectual property resources.

3.3 Conclusion

This Chapter has explored the parallels between various Personal Law regimes legally organised under African Customary Law. The invariable trend detected is that there is an implicit state project to systematise phenomena under formal law, including phenomena best left to informal laws. This practice has the tendency to create disharmonious coexistence between African Customary Law and statutory law. Naturally, the bigger consequence is that communities applying African Customary law are excluded from the table of legal pluralism *par excellence*.

Jurisprudence from African Customary Law court decisions indicates a very diminished level of reverence accorded to African Customary Law, as a matter of fact. In summary, it has been seen that Kenyan courts are ready and willing to, when convenient to the interests of the State, abandon the normative forcefulness of African Customary Law and apply statutory law to phenomena organised around the former regime of law. It is also evident that this subordination of African Customary Law is the result of a deliberate state project to elevate formal law, which is more suited to Western moral and economic individualism.

¹³⁶ Section 7, Marriage Act, No. 4 of 2014.

The next Chapter tries to find linkages between the lessons learnt from formal experiences with African Customary Law under Personal Law regimes and the modalities of its incorporation to sui generis regimes for traditional knowledge.



CHAPTER FOUR

INCLUSIVE SUBORDINATION AND TRADITIONAL KNOWLEDGE

4.1 Introduction

This Chapter discusses the utility of African Customary Law in protecting traditional knowledge and considers how the present statutory framework takes such utility into account. It proceeds to investigate whether the statutory environment is in any perceivable way inclusively subordinating African Customary Law within the ostensibly sui generis framework.

4.2 African Customary Law and Traditional Knowledge

Presently, literature has already explored the relationship between the workings of African Customary Law under systems of Personal Law primarily governed by that regime, and the possible utilisation of the regime in intellectual property discourses. WIPO has, for instance, investigated the nature of customary law in these systems, namely family law, the law of succession, the law of land tenure and natural resources among others, including branches of public law.¹³⁷ The enquiry is typically towards the end of discovering what lessons these regimes, which together utilise customary law as their defining regimen, have to offer sui generis systems under intellectual property law.

WIPO has identified the following as the possible meanings of African Customary Law constituting a sui generis regime in relation to traditional knowledge:

- (i) As a basis for sustainable community-based development, strengthened indigenous peoples and local communities' identity, and promotion of cultural diversity;
 - (ii) As a distinct source of law, legally binding in itself internally and externally;
 - (iii) As a means of factually guiding the interpretation of laws and principles that apply beyond the traditional reach of customary law and protocols;
 - (iv) As a component of culturally appropriate forms of alternative forms of alternative dispute resolution;
 - (v) As a condition of access to traditional knowledge and traditional cultural expressions;
- and

¹³⁷ See, generally, WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013.

- (vi) As the basis for continuing use rights, recognised as exceptions or limitations to any other rights granted over traditional knowledge, traditional cultural expressions or related and derivative subject matter.

Thus, the mere “respect and recognition” of African Customary Law is not enough to guarantee its incorporation and utility in a *sui generis* framework, if its *centrality* in that system is not guaranteed.

The existing international and local framework is rife with conventional intellectual property rights tools being uncritically extended to traditional knowledge. It is precisely this approach to protection of traditional knowledge that lessens the impact of African Customary Law in endeavours to protect traditional knowledge in a holistic sense. For instance, under the ARIPO Protocol, there is a huge overlay of patent law above the ostensible regime meant to address the specific demands of traditional knowledge. This has a wide array of negative implications.¹³⁸ Firstly, as will be seen with the Kenyan Act below, the possibility of traditional knowledge being compulsorily licensed (just like patents) might deter registration of knowledge that might otherwise be secret. This would in turn hamper collaborative development as in, for instance, the commons model as a *sui generis* approach to protection. Secondly, as will be highlighted shortly, the metric of “insufficient exploitation” leading to compulsory licensing has not in any way been clarified by law. Thirdly, it leaves up to the rationale of non-traditional authorities what is to constitute “reasonable economic terms” for the award of a license to third parties, so that traditional knowledge can be “forcibly” exploited by third parties under compulsory licenses at terms that may be unacceptable to the traditional community.¹³⁹

4.3 Illegitimate Legislative Interventions in Kenya Relating to Traditional Knowledge

Traditional knowledge will invariably owe its existence to indigenous and local communities who have developed it over generations, acquiring, consequently, *de facto* rights over it. There are strong moral and legal justifications for retaining control and norm-making at the community level.¹⁴⁰

¹³⁸ See Kongolo T, *African contributions in shaping the worldwide intellectual property system*, Routledge, New York, 2013., 98.

¹³⁹ Kongolo T, *African contributions in shaping the worldwide intellectual property system*, 98.

¹⁴⁰ Swiderska K, Song Y, Argumedo A, Li J, ‘Protecting community rights over traditional knowledge: Implications of customary laws and practices’, 2009, 5, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiPk_uj

The TK and TCEs Act was enacted with the objective of providing sui generis protection for traditional knowledge and traditional cultural expressions. The Act aims ‘to provide a framework for the protection and promotion of traditional knowledge and cultural expressions’ in Kenya, giving effect to articles 11, 40 and 69(1)(c) of the Constitution 2010.

A critical examination of the Act will reveal subtle invasions by formal law that might compromise the normative nature of African Customary Law in ordering the protection and management of traditional knowledge.

First, it is notable that the Act inexplicably confounds, or mixes, ideas of conventional intellectual property protection and sui generis approaches without going further to harmonise them or restrict the problematic consequences from the different approaches taken.¹⁴¹ There is an apparent mixing up of the notion of ‘ownership’ and custodianship in the definition of an ‘owner’ and a ‘holder’ which creates confusion and ambiguity in the law. The relationship between ‘owners’, ‘holders’, ‘custodians’, and ‘members of the communities’ and how they are to be identified is not clear from the law.¹⁴² This confusion is apparent when the law seeks to confer the right to protection of traditional knowledge on both ‘owners’ and ‘holders’.¹⁴³ The Swakopmund Protocol avoids this problem by defining owners as the ‘holders of traditional knowledge’ namely the local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context.’¹⁴⁴

Similarly, both moral¹⁴⁵ and economic¹⁴⁶ *sui generis* rights akin to IPRs are conferred on ‘owners’ and ‘holders’ of TK (or in their absence, a state agency). There are additional cultural rights in TK which include any subsisting rights under any law relating to copyright, trademarks, patents,

[re3iAhUixoUKHQdWCfAQFjAAegQIBRAC&url=http%3A%2F%2Fpubs.iied.org%2Fpdfs%2F1459IIED.pdf&usg=AOvVaw0V-Qi7LY9cGeGMtM0olTsR](http://www.pubs.iied.org/pdfs/201459IIED.pdf&usg=AOvVaw0V-Qi7LY9cGeGMtM0olTsR) on 15th January, 2019.

¹⁴¹ Harrington & Hughes ‘The Protection of Traditional Knowledge and Cultural Expressions Bill (2015)’, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwiOmMG9ve3hAhVtxoUKHSFkAKgQFjACegQIAhAB&url=https%3A%2F%2Fipkenya.wordpress.com%2F2015%2F12%2F16%2Fcomments-on-the-protection-of-traditional-knowledge-and-traditional-cultural-expressions-bill-2015%2F&usg=AOvVaw2MDp5TsTih0rhLd9wZTN_L, on 15th March, 2019.

¹⁴² Harrington & Hughes ‘The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015).

¹⁴³ The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill , s 9.

¹⁴⁴ S 6, Swakopmund Protocol.

¹⁴⁵ Protection of Traditional Knowledge and Cultural Expressions Act, ss 19(2) and 21(4).

¹⁴⁶ Protection of Traditional Knowledge and Cultural Expressions Act, ss 18, 20, 22 and 24.

designs or other intellectual property¹⁴⁷ affirming the misguided attempt to treat traditional knowledge and conventional intellectual property tools as synonymous to each other.

Interestingly, the Act also contemplates the possibility of rights of assignment as obtaining to traditional knowledge. This position is difficult to reconcile with the well-known character of holding of trans-generational assets under the African commons, they remain inalienable since they are held for the benefit of present, past, and future generations.¹⁴⁸

Definitionally, the Act runs into even further problems. Traditional knowledge, properly defined, relates to knowledge that is:

- (i) generated, preserved and transmitted intergenerationally for economic, ritual or decorative purposes;
- (ii) is individually or collectively generated;
- (iii) distinctly associated with the community from which it emanates from;
- (iv) core to the cultural identity of the community and custodianship is managed through customary practices or protocols.¹⁴⁹

Under the definition section in the Act, traditional knowledge is considered to be that knowledge:¹⁵⁰

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

As is clear, the Act, in defining “traditional knowledge”, confounds various elements by offering diverse formulations. The definition itself provides two disjunctive formulations. The two

¹⁴⁷Protection of Traditional Knowledge and Cultural Expressions Act, s 28(1).

¹⁴⁸ See, generally Chapter 3, Kariuki F, Ouma S and Ng’etich R, *Property law*, Strathmore University Press, Nairobi, 2016.

¹⁴⁹ Ouma M, Lectures on Traditional Knowledge, January 2019 (on file with author).

¹⁵⁰ Section 2, The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

formulations do not include the same elements, and none is comprehensive given the definition offered above. Notably, the first formulation above omits the intergenerational nature of traditional knowledge, and does not take into account the centrality of traditional knowledge to the identity of the relevant community.

Secondly, the inclusion of another section on the “protection criteria”¹⁵¹ for traditional knowledge confounds things even further, as it is not clear how this is to be reconciled with the definition of the term offered earlier. Reading that section, it is not clear what purpose an additional definition of traditional knowledge would be serving.

Thirdly, the Act centralises the authority of management on formal instruments of state within the formal levels of government. Both the county and national governments are charged with the responsibility of protecting traditional knowledge. The county government is to *inter alia* establish a traditional knowledge repository within a county and to preserve, conserve, protect and promote the traditional knowledge of communities within the county.¹⁵²

On its part, the national government is to, *inter alia* establish and maintain a national TK Repository at the Kenya Copyright Board (KECOBO) and to preserve, conserve and protect TK from misuse and misappropriation.¹⁵³ However, as seen earlier, a proper *sui generis* regime founded on African Customary Law must of necessity empower communities to conceive of rights and manage the resources towards which the right attach according to their own customary norms and practices. Therefore, communities should bear central responsibility for protecting, conserving and safeguarding TK and that ‘owners’ or holders within these communities have the right to prevent misuse and determine access.¹⁵⁴ Although registration of TK in the repository is purely declaratory and does not confer rights in itself,¹⁵⁵ the role of communities in establishing the registers and in the protection and promotion of TK is not clear.

Fourthly, the Act has the rather counterintuitive and draconian provision on compulsory licensing, which do not easily lend itself to the idea of centering authority in community organs based on

¹⁵¹ See Section 6 of the Act.

¹⁵² Protection of Traditional Knowledge and Cultural Expressions Act, s 4.

¹⁵³ Protection of Traditional Knowledge and Cultural Expressions Act, s 5.

¹⁵⁴ Harrington & Hughes ‘The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015).

¹⁵⁵ , The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015) ss 2, 4, 5 and 7(7).

African Customary Law. Thus, where protected TK is not being sufficiently exploited by the owner or rights holder, or where the owner or holder of rights in TK refuses to grant licenses for exploitation, the Cabinet Secretary may, with prior informed consent of the owners, grant a compulsory licence for exploitation subject to Article 40(3)(b) of the Constitution.¹⁵⁶

It appears a philosophy of ‘property’ common to real property is being applied to TK such that the latter is treated like a resource that can be alienated/compulsorily acquired from TK holders by the State. Some concerns arise from this approach. For instance, TK is part of the cultural identity of a people, an aspect of their right to self-determination and is essential for their survival and livelihood. Therefore, it cannot be treated like private property with respect to which the State can exercise its eminent domain powers of compulsory acquisition. Moreover, there is a wrong assumption that communities will grant free prior informed consent to the compulsory licensing. This is incorrect as communities have the right not to grant such consent.

In the same token, the degree of ambiguity and uncertainty engendered by the phrase “when the knowledge is not being sufficiently exploited” appears to be rather intolerable. It is not clear what the threshold of “sufficient exploitation” is, in order to permit the Cabinet Secretary to license compulsorily.

4.4 Other Legislative Failures Relating to Traditional Knowledge

Over and above the inadequacies of the Act in relation to the application of African Customary Law, the Act has been criticised for not providing a holistic and proper protection framework for traditional knowledge. To begin with, the Act has been criticised for lacking a framework for implementation and enforcement and being without a clear parent Ministry. Under Section 2 of the Act, the term “Cabinet Secretary” is defined in an ambiguous way as the Cabinet Secretary responsible for matters relating to intellectual property rights. This is because the definition could be interpreted to cover various distinct ministries namely the Ministry of Industrialisation, Arts, Culture, Agriculture among others.¹⁵⁷

¹⁵⁶ The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015 s 12(1). See also s 12 (1), Swakopmund protocol.

¹⁵⁷ See Nzomo V, ‘Kenya’s Protection of Traditional Knowledge and Cultural Expressions Act’ comes into force’, at <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/>, on 20th January, 2019.

Secondly, another hurdle to the implementation of the Act is that in the event of concurrent claims by communities, it is not clear whether KECOBO or the concerned county government(s) will have the primary role of resolving the ensuing disputes.¹⁵⁸

Thirdly, there is a lack of harmony between Section of this Act and the provisions of the Copyright Act relating to folklore. In the latter, the Attorney General is vested with powers to authorise and prescribe terms and conditions governing specified use of folklore or generation of works embodying folklore.¹⁵⁹

Fourthly, sections 37 to d1 on remedies and sanctions have been called into question for applying indiscriminately to both third parties as well as bona fide members of a community,¹⁶⁰ erasing the idea that use in a customary manner by members of a community may not amount to violation of traditional rights.

4.5 Inclusive Subordination and Traditional Knowledge

The normative force of African Customary Law may be felt within a particular indigenous or local group, yet at the same time carry a legal or moral expectation that it will be recognised beyond the community level by the formal organs of state.¹⁶¹ Diminished regard for African Customary Law, its formal recognition notwithstanding, may have several undesirable consequences.

(I) Reduced Exercise of Collective Rights

For indigenous communities holding traditional knowledge, the right to use such knowledge resides with the traditional owners and custodians of the knowledge. Thus, they have the collective right to determine how the relevant knowledge is accessed and used by third parties.

Sui generis regimes that regulate biological and genetic resources may therefore require prior informed consent of traditional communities for access to traditional knowledge. This will, probably invariably, involve the application of customary law.¹⁶² In fact, the position on prior informed consent is, nonetheless, also enshrined in other instruments of law not dealing specifically with traditional knowledge. Specifically, the United Nations Declaration on the Rights

¹⁵⁸ See Nzomo V, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' comes into force'.

¹⁵⁹ See Nzomo V, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' comes into force'

¹⁶⁰ See Nzomo V, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' comes into force'

¹⁶¹ WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 13.

¹⁶² See WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 22.

of Indigenous Peoples (UNDRIP) at Article 32 requires that. Particularly, the requirement is that such processes are to be conducted in accordance with the communities' appropriate structures and practices.

As has been seen, traditional holders have the primary right to use their knowledge and delimit access to it. Presuming a situation in which the holders have granted access to such knowledge or are predisposed to doing so, the interaction between African Customary Law in that scenario does not merely entitle those holders to take action to defend appropriated or reproduced material against inappropriate use, but positively obliges them to take steps, leading in some cases to an emphasis on custodial responsibilities as against legal entitlements.

The described scenario presents the classical tussle between formal and informal rights, in which case the latter is usually the loser. In the case of traditional knowledge, it would possibly result in the reduced capacity of indigenous groups to enforce their collective rights over knowledge, especially as against third parties with a conceivable legal stake (under formal law).

(II) Diminished Role of Community Adjudication Structures

Many times, African Customary Law will be linked to the particular structures that apply and transmit law (in its various shapes and formulations) in a trans-generational sense.¹⁶³ Separating protection endeavours over traditional knowledge from this fabric may therefore weaken the social systems uniquely suited to preservation of traditional knowledge in accordance with community practices. As has been noted, one aspect of recognising the principle of locality¹⁶⁴ is that legal mechanisms, which include sui generis regimes aimed at protecting traditional knowledge, is that they should not interrupt the ongoing operation of customary laws and practices.¹⁶⁵

As the case in point, the Act, in providing sanctions and remedies, primarily focuses on those of a civil nature, to be administered by civil courts.¹⁶⁶ Unsurprisingly, only one sub-section alludes to, and even then in passing, appropriate customary law structures to resolve disputes. In fact, the provision is merely that:

¹⁶³ WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 14.

¹⁶⁴ Customary laws will typically be linked to the specific social structures that apply and transmit law in a transgenerational sense.

¹⁶⁵ WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 15.

¹⁶⁶ Section 37 and 38, Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

“In addition to the remedies provided under this Act, any dispute may be resolved through-¹⁶⁷

- (i) Mediation;
- (ii) Alternative dispute resolution procedures; or
- (iii) Customary laws, practices and protocols not inconsistent with the Constitution.”

Considering the previous analysis of inclusive subordination, it is perhaps not surprising that, even in its cursory, mere formal recognition of the applicability of African Customary Law and protocols, the Act finds it important to also require that even these be subjected to a test mirroring the repugnancy test.

It is submitted that so deep is the entrenchment of this inclusive subordination of customary law and its structures in the formal law, that even the academically unquestionable utility of African Customary Law structures finds no place in the extensive statutory provisions ostensibly dealing with protection of traditional knowledge through African Customary Law.

It may be that the utility of these African Customary Law structures lies not in their machinery, but rather on the knock-on effect of building confidence and awareness amongst holders of traditional knowledge. If they believe that their commodity has value, it might in turn promote their internal preservation and development of traditional knowledge.

On this point, it might be helpful to consider some legal provisions that approximate the inclusion of all these elements: respect and usage of customary law for prior informed consent, and mandatory application of customary law in resolving disputes. The Philippines Indigenous Peoples’ Rights Act of 1997 establishes provides of a right of restitution of cultural, intellectual, religious and spiritual property taken, amongst others, in violation of customary laws and customs.¹⁶⁸ Prior informed consent regulating access to indigenous knowledge, under this law, must be secured in accordance with the relevant customary laws.¹⁶⁹ Equally important is the provision that in the case of disputes arising, customary laws and practices are to be used to resolve those disputes.¹⁷⁰

¹⁶⁷ Section 40, Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

¹⁶⁸ Section 32, Philippines Indigenous Peoples’ Rights Act.

¹⁶⁹ Section 35, Philippines Indigenous Peoples’ Rights Act.

¹⁷⁰ Section 65, Philippines Indigenous Peoples’ Rights Act.

In the same token, under the Biodiversity Law of Costa Rica,¹⁷¹ community rights of the sui generis kind are determined by an inclusive process with indigenous and local communities. The law recognises custom as a source of law for establishing such sui generis rights which exist and are legally recognised by the mere existence of the community protocol or knowledge. Also, such recognition does not require “prior declaration, explicit recognition nor official registration”.¹⁷²

All of this is a far cry from what the Kenyan Act provides in terms of the relevance and importance of African Customary Law. This is ironic given that the Act declares its intention of creating a sui generis regime for traditional knowledge, and proceeds to make various allusions to the importance of African Customary Law. When it matters, however, the law fails to specifically establish requirements giving African Customary Law specific normativity and institutional importance. The show is instead stolen by the County Government, the National Government (through the Kenya Copyright Board), and formal courts applying civil statutory law. But this observation cannot at all be shocking to the keen critic; inclusive subordination of African Customary Law has been a mainstay of Kenya’s legal-political system for decades.

4.6 Conclusion

This Chapter has explored the interaction between traditional knowledge and African Customary Law. An analysis of the operative regimes of law, regionally and locally, has revealed that there is a systemic lack of commitment to fully incorporating African Customary Law as the primary normative regime.

In various ways, there have been illegitimate interventions by the State with regard to legal protection of traditional knowledge. These include the application of Western philosophical understandings of property to traditional knowledge, the confounding of traditional knowledge with intellectual property tools, including compulsory acquisition and assignability of rights. Similarly, it is significant that probably all meaningful management, administrative and adjudicative functions in relation to traditional knowledge are carried out by non-community actors. The impact of these interventions is the reduced normative significance of African customary rules and procedures in protecting the subject matter which they are openly acknowledged to be protecting.

¹⁷¹ Law No. 7788 of 1998, at Articles 82 to 84.

¹⁷² See WIPO, *Customary law, traditional knowledge and intellectual property: An outline of the issues*, 2013, 23.

Failure to fully integrate African Customary Law structures into the workings of traditional knowledge legislation has the knock-on effect of diminishing the capacity of communities to exercise their collective rights to such knowledge, to grant free, prior and informed consent, and to provide appropriate structures for alternative dispute resolution.



CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This Chapter reflects on the findings of the study as developed and broken down in the previous chapters. It proceeds to offer some recommendations geared towards making the Kenyan legal environment on protection of traditional knowledge more receptive to concerns of African Customary Law.

5.2 Findings

This study has investigated the phenomenon of inclusive subordination and its workings in Personal Law regimes, as well as possible implications of the same notion on traditional knowledge protection.

Whether the retention of the repugnancy clause and the uncritical application of the constitutionality test will significantly impede the achievement of the goals of the Act with regard to protection of traditional knowledge

Chapter One laid out the background to inclusive subordination and the state of traditional knowledge in Kenya. It disclosed that there are conceptual differences between conventional intellectual property tools and traditional knowledge, which difference has precipitated calls for the protection of the latter through African Customary Law. The Chapter also laid out the objectives of the research, established the specific questions to be researched, reviewed relevant literature, and laid out the conceptual framework of the study. Firstly, the research sought to answer the question whether African Customary Law is the appropriate sui generis regime to protect traditional knowledge. The second research question was whether the inclusive subordination of African customary law, embodied in the repugnancy clause and to some extent in the constitutionality test, is a relevant factor in inhibiting the protection of traditional knowledge. Thirdly, the research considered the question whether the retention of the repugnancy clause and the uncritical application of the constitutionality test will significantly impede the achievement of the Act's goals to protect traditional knowledge.

Chapter Two analysed the legal and normative foundations of the various sui generis approaches used (or proposed) to protect traditional knowledge from misappropriation. It distinguished the

human rights approach, information communication technology tools, and African Customary Law. It was established that there are overwhelming reasons for adopting customary law in general as the integral framework for a sui generis approach, due to its holistic and authentic nature.

This Chapter explored the idea that under African Customary Law, there are unique systems and structures that provide the most holistic preservation and protection mechanisms regarding traditional knowledge. Usually, the obligation to ensure that traditional knowledge is used in an appropriate way will translate into a responsibility on the part of custodians or owners to safeguard the relevant knowledge. Accordingly, authority will vest in such custodians under an elaborate system of relationships and authority. It is therefore central to the protection of traditional knowledge that the individuals and customary institutions that hold the traditional responsibility remain in control of the dissemination and management of elements of that knowledge. By providing this assessment, the Chapter answered the first research question in the affirmative by establishing that sui generis regimes must generally be anchored on customary laws, and in this case African Customary Law, to be holistic.

Chapter Three entailed an inquiry into the nature of treatment of African Customary Law in Kenya's legal history as a pluralistic country. The specific fields of research were Personal Law regimes, both due to statutory restrictions of the applicability of African Customary Law as well as the unavailability of reported decisions on that regime outside Personal Law.

The discussion in this Chapter disclosed that there is a systemic lack of commitment to the comprehensive application of African Customary Law rules and norms in regimes that are organised around it. The trend is apparent in the jurisprudence of relevant courts traced from the pre-colonial, colonial and even post-colonial (contemporary) legal eras. In the ensuing analysis, the Chapter answered the second research question in the affirmative by showing that the repugnancy clause and the constitutionality test have been employed in a covert way to subdue the comprehensive application of African Customary Law in various Personal Law regimes.

Chapter Four explored the utility of African Customary Law in protecting traditional knowledge. It proceeded to investigate whether the present statutory framework on traditional knowledge is sufficiently inclusive of African Customary Law concerns. Predictably, the findings were that African Customary Law, despite being formally recognised, is hopelessly relegated to formal civil law.

The Chapter demonstrated that various illegitimate legal interventions have been made in the Act with regard to legal protection of traditional knowledge. These include the application of Western philosophical understandings of property to traditional knowledge, the confounding of traditional knowledge with intellectual property tools, including compulsory acquisition and assignability of rights. These are all expected to impact, in a negative way, attempts to mainstream the application of African Customary Law norms to traditional knowledge. Effectively, this Chapter answered the third research question in the affirmative, by showing that the Act in various ways continues to embody the inclusive subordination of African Customary Law, extending the same technique to the protection of traditional knowledge.

The present Chapter concludes the analysis of the study by outlining the findings, offering recommendations to address the present gaps and legislative failures, and giving concluding remarks as a general overview.

5.3 Recommendations

The study proposes the following measures to remedy the gaps located:

1. That the formulation of Section 3 of the Judicature Act implying the subordination of African Customary Law be repealed or amended to bring African Customary Law within the same legal status of statutory law.
2. That sections 39 and 40 on sanctions and remedies under the Act be reviewed to obligate the disputants to engage within the alternative dispute resolution frameworks of the relevant African Customary Law.
3. That section 12 of Act on compulsory licensing be deleted in full, as the same is a continuing hurdle towards protecting traditional knowledge, representing the failed attempt to treat traditional knowledge and conventional intellectual property tools as synonymous to each other.
4. Section 35 of the Act should be reviewed to reduce the latitude awarded to the Cabinet Secretary vis-à-vis the power of communities and the appropriateness of their African Customary Law structures. Free, prior and informed consent must be sources from communities in accordance with their customary laws and the appropriate community structures.

5. Community organisations should be awarded a more elevated consultative role and be awarded veto powers as against decisions of the Cabinet secretary, the county governments and the Kenya Copyright Board on matters of management of their traditional knowledge.
6. In applying the constitutionality test, courts of law should be enjoined to refrain from applying the test in an uncritical manner noting that there is no inherent normative hierarchy between statutory and customary law, and that the latter regime can stand alone.

5.4 Conclusion

In general, the study has found that there is near-unanimity as regards the importance of African Customary Law in protecting traditional knowledge. There is, however, little consensus on the specific ways in which customary law generally and African Customary Law in specific should be integrated with the formal system of intellectual property law. Despite the invariable formal recognition of African Customary Law as a critical component of protection mechanisms, there is, in Kenya at least, a subtle hierarchical ordering of laws that is designed deliberately to subjugate African Customary Law.

Even more significant is the realization that there is a specific technique of legal interpretation and adjudication that has historically been the platform for the subtle subjugation of African Customary Law: inclusive subordination. The analysis of reported African Customary Law decisions by Kenyan courts made this clear. In those regimes organised under African Customary Law norms, this technique has had a clear dislocating factor in that the subject matter of regulation is ultimately subjected to an alien, or at least external, organising rule (i.e. English and statutory law), thereby weakening the domestic customary structures that are so well-suited to their original mandate.

More specifically, a knock-on effect of this approach to law is that the dynamism of traditional forms of value, such as traditional knowledge, remain at odds with the legal regime managing them. Thus, communities are denied, under such a system, the opportunity to be the primary determinants of the contents of the rights tied to their traditional knowledge. Ultimately, at the end of the chain the door to unauthorized commercialisation of traditional knowledge would lie wide open.

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