

## 7. PROTECTING TRADITIONAL KNOWLEDGE IN KENYA: TRADITIONAL JUSTICE SYSTEMS AS APPROPRIATE SUI GENERIS SYSTEMS

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### ABSTRACT

Generally, the protection of traditional knowledge and the development of effective and appropriate frameworks for its protection have long since eluded policy makers at the global, regional and national levels. Current global efforts within the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore are a testament to this phenomenon. Prevailing intellectual property laws, environmental and human rights frameworks, institutions mandated to protect traditional knowledge, and existing literature have not examined the role of traditional institutions in

well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.<sup>3</sup>

Therefore, TK *lato sensu* the 'ideas and expressions thereof developed by traditional communities and indigenous peoples, in a traditional and informal way, as a response to the needs imposed by their physical and cultural environments and that serve as means for their cultural identification.'<sup>4</sup> This definition, however, seems to cover both aspects of protection of TK *stricto sensu* and TCEs. In a narrow sense, TK refers to,

knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medical knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.<sup>5</sup>

The main features of TK are reflected in its holistic nature (interconnection between people, knowledge and space) and the fact that it is collectively and inter-generationally held (unwritten but preserved in the oral tradition and collective memory); has cultural, historical, ecological and spiritual value; is culturally situated (and informed by customs,

practices, rituals, proverbs, oral stories); governed by customary laws, and is dynamic and fluid.<sup>6</sup>

Protection of TK is largely advocated for through the intellectual property (IP) framework. However, the term protection has been interpreted variedly, and consequently, TK protection 'initiatives and measures vary considerably in their form and substance.'<sup>7</sup> Some scholars have described TK protection measures to include: compensation; social recognition of certain rights (e.g. the right to be asked for consent; right to be acknowledged as creators or descendants or share benefits); safeguarding; and maintaining, preserving and controlling access to and uses of TK through unfair competition principles.<sup>8</sup> In this paper, the term protection is used in the classic IP sense to mean the grant of exclusive rights to inventors and creators using different IP tools (patents, copyright, trademarks et cetera) and/or preventing unauthorised dealings in protected IP.<sup>9</sup> Thus, and as Andanda postulates, the protection of TK is 'distinguishable from the efforts that have been made to promote and safeguard TK,'<sup>10</sup> since safeguarding measures aim at preserving aspects of TK through photographs, sound recordings, films and manuscripts, itineraries, cultural mapping, video recordings, and the preservation of artefacts in libraries and museums.<sup>11</sup> Also in this study, it is noteworthy that 'protection' is not tantamount to 'safeguarding,' since the latter may engender

<sup>3</sup> 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Thirty Seventh Session, Geneva, 27 – 31 August 2018) WIPO/GTRKF/IC/37/INF/7, 40.

<sup>4</sup> See (n 2) 71.

<sup>5</sup> See (n 3) 40.

<sup>6</sup> Rodrigo de la Cruz, 'Regional Study in the Andean Countries: 'Customary Law in the Protection of Traditional Knowledge' (WIPO 2006), 36. See also Elmien du Plessis, 'Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution' in Caroline Ncube & Elmien du Plessis (eds) *Indigenous Knowledge & Intellectual Property* (JUTA 2016) 76.

<sup>7</sup> Manuel Ruiz Muller, 'Legal Protection of Widely Shared and Dispersed Traditional Knowledge' in Daniel F. Robinson et al (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental*

*Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 123-140, 123.

<sup>8</sup> *ibid*, 123. See also Sue Farran, 'Access to Knowledge and the Promotion of Innovation: Challenges for Pacific Island States' in Caroline Ncube & Elmien du Plessis (eds), *Indigenous Knowledge & Intellectual Property* (JUTA 2016) 22-23.

<sup>9</sup> *Ibid*, 123. See also Ken Chisa & Ruth Hoskins, 'African Customary Law and the Protection of Indigenous Cultural Heritage: Challenges and Issues in the Digitization of Indigenous Knowledge in South Africa' (2016) 15 *African Journal of Indigenous Knowledge Systems* 1-15, 3.

<sup>10</sup> Pamela Andanda, 'Striking a Balance between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge' (2012) 17 *Journal of Intellectual Property Rights*, 547-558, 547.

<sup>11</sup> *ibid* at 547. See also Farran (n 8) 22.

the identification, documentation, transmission, revitalization and promotion of TK to ensure its continued existence and viability, hence risk placing TK unintentionally in the public domain, thus necessitating the need for protection in the legal sense.<sup>12</sup>

As a member of the World Trade Organization (WTO) and World Intellectual Property Organization (WIPO), Kenya has enacted a number of IP laws.<sup>13</sup> Kenya is also a signatory to the Convention on Biological Diversity (CBD)<sup>14</sup> and the related Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their





agency). Rights in TK are conferred without formalities<sup>53</sup> and exist in perpetuity as long as the subject matter complies with the requirements for protection.<sup>54</sup>

While the county and national governments are charged with the responsibility of establishing TK databases,<sup>55</sup> the role of communities in that regard is not clear. Equally, it is not apparent who 'owns' the databases once established and the documented TK. Is it the communities or the county or national government? Likewise, the law fails to address the role of customary laws and traditional governance structures (like TJS) in the protection of TK.

Further, the law treats TK as a natural resource that 'belongs to the people of Kenya' collectively, like land in Kenya, raising *inter alia* the question as to who should be rewarded for creativity. Likewise, benefits from protection of TK are framed as primarily local (for communities in Kenya) and national (for Kenya as a nation state),<sup>56</sup> as is the case with other forms of real property, essentially undermining or ignoring the creative contributions of local communities as envisaged in the National Policy on Culture and Heritage, 2009. Benefits from TK protection ought to be derived by communities that

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is a taboo to enter, bring flames, fence, or cut trees in the *kaya* without the consent of the elders. Additionally, the transmission of healing knowledge is complex and is determined by the elders (*kamb*) through a rating process assessing the personal conduct and motive of the applicant.<sup>62</sup> Alternatively, an individual healer could select a family member or friend as a helper and the latter would ultimately access the knowledge upon payment of a predetermined token (*kadzama*) by the apprentice.<sup>63</sup>

The second case study discusses the *njuri nche*<sup>64</sup> institution, the supreme decision-making organ among the Ameru

society organisations (CSOs)<sup>69</sup> and officials from different









heritage management systems were being imposed on local communities, 'traditional custodianship systems neither disappeared nor remained static;' rather, 'they shifted so as to remain relevant alongside the new models.'<sup>98</sup>

The effectiveness of TJS in TK protection is also undermined by factors such as leadership wrangles, which create factions among elders, each claiming to be the legitimate elder; cultural erosion; loss of indigenous territories to pave the way for developmental projects; and the influence of modern education and religions that contributed to the loss of traditional beliefs and values.<sup>99</sup> For example, *kaya* elders lamented that they are despised and live in constant threat of attack and being labelled witchdoctors and, at times, killed by the community. Unlike in Kilifi, *kayas* in Kwale have since lost the traditional touch due to the influence of Islam in that there are no rules requiring people to remove shoes before getting into *kayas* (even in *kaya Kinondo*). Traditional prayers are often altered to align them with Islamic religion, and the traditional Mijikenda clothing has been abandoned in favour of the *kanzu*





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