

Recognising The Intellectual Property in Indegenous Knowledge and Leveraging The Same for Sustainable Development in Kenya

By: *Kibet Brian**

Abstract

At the crux of this paper will be to show how intellectual property in indigenious knowledge can be protected from predatory exploitation to the detriment of the communities that have exclusively developed them and hence must have absolute property rights in them. A case for the full protection of these rights will be made whilst appreciating the advances that the Kenyan legal framework has made towards that end. The paper contends that whereas significant steps have been taken by the constitution and several other legislations to protect indigenious knowledge for sustainable development, the same remains a mirage.

It begins by giving the rationale for protection of indigenious knowledge as a form of intellectual property. It then proceeds to explore some of the property rights in indigenious knowledge in Kenya that have been expropriated exploitatively. A critical analysis of the legal framework on the protection of indigenious rights is then offered. The nexus between the protection of indigenious knowledge and sustainable development is then drawn and potential legal reforms that will enhance the protection of indigenious knowledge are given. It then concludes.

1. Introduction

Kenya boasts of a “unique culture” that puts it in a strategic position to innovate and generate skills that are critical in the development of the nation.¹ This means the cultural setup of the Kenyan hegemony is a replete with innovators whose innovations drive the Kenyan economy and contribute greatly to the wellbeing of the society by improving the quality of life.

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¹ The National Information Communication and Technology Policy, 2019. Available at <https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf> accessed on 04/06/2021

Lest we forget, ours is a history replete with mind blowing innovations of our forefathers which the current generations have inherited from them and are expected to bequeath to the yet to be born generations.² Such innovations which mainly take the form of knowhow and skills are called indigenous knowledge.

However, trouble arises in this Eden of sorts, in the sense that since the existing intellectual property rights regimes that exist are mainly concerned with protection of the property rights of individuals and corporations, it paves way for exploitative appropriation of this knowledge owned by our communities.³

Indigenous knowledge is a term can be used interchangeably with traditional knowledge and has been defined as ‘information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time and continue to develop’.⁴ The definition has been elucidated on and determined to be unlimited to specific a technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.⁵

Sustainable development has been defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁶ Recognized as one of the values and principles of governance in the Kenyan constitution,⁷ sustainable development, can only be achieved in

² Bujo B. *The Ethical Dimension of Community: The African Model and the Dialogue between North and South* 1998. Paulines Publications Africa.

³ The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf> Accessed on 05/06/2021

⁴ Stephen H, Justin F. *Issues and Options for Traditional Knowledge Holders in Protecting Their Intellectual Property*, Concept Foundation, IP Handbook of Best Practices Chapter 16.6 ,Available at Accessed on 05/06/2021

⁵ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

⁶ Brundtland, G.H. (1987) *Our Common Future: Report of the World Commission on Environment and Development*. Geneva, UN-Dokument A/42/427. (The Brundtland Commission Report.)

⁷ Article 10 of Constitution of Kenya, 2010.

development that involves the utilization of traditional knowledge if the traditional knowledge is adequately protected from predatory exploitation. Therefore, development can only be sustainable in such a setting if the intellectual property right in traditional knowledge is adequately protected.

The economic benefits derived by some nations from some forms of traditional knowledge are enormous and therefore the existence of traditional knowledge in Kenya presents an opportunity for the nation to benefit financially from them.⁸ A good example is the Philippines which got an estimated ten million US Dollars from traditional medicine alone in 2001.⁹ This presents a sneak peak of what may hold for the country if its traditional knowledge is well protected and harnessed to achieve sustainable development.

2. Rationale for the Protection of Indigenous Knowledge in Kenya

Property rights have long been conceptualized in a western perspective to denote control over things by a single individual to the exclusion of all others.¹⁰ This presents a quagmire in the African setting where property was held in commons and not solely by individuals.¹¹ Does such a framework grant a right to property to the “community” that constitutes the commons? Hegel seemed to be of the view that since an African was “a natural man, in his untamed state” he could not have the wherewithal to develop and maintain a structure that could protect the rights of an individual in complex settings such as property.¹²

⁸ Wekundah J, *Why Protect Traditional Knowledge*, African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at <https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf> Accessed on 05/06/2021

⁹ World Health Organization, Regional committee of Western Pacific Region on Traditional Medicine, 2001

¹⁰ Jeremy Waldron In Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*. Blackwell (1996)

¹¹ Okoth Ogendo H, ‘*The Tragic African Commons: A Century of expropriation, suppression and submission*’ University of Nairobi Law Journal, in *Amplifying Local Voices: Striving for Environmental Justice*, Centre for International Environmental Law, et. al." In: *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66. *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66; 2002.

¹² Hegel, Georg W. F, and J Sibree. *The Philosophy of History*. New York: Dover Publications, 1956.

Okoth Ogendo tacitly replied to Hegel in his seminal treatise, *The Tragic African Commons*.¹³ In this work, Okoth Ogendo debunked the myth that the African person, who was described as a ‘completely wild’ by Hegel actually had a more advanced property rights regime that vested ownership in the whole community, and was held in trust by the living generations in trust of the future generations. This presents that a sustainable development framework of property rights in the African setting.¹⁴

As such, the property rights in Traditional knowledge vested in the “whole”¹⁵ community and not the living members alone. Thus, the living generations are obliged to take care of the property rights and defend them from predatory exploitation. The arrival of the colonialists disrupted this otherwise perfect framework and replaced it with an exclusionary system of rights to property.

In this new setting, it was possible for a select group of individuals to connive with parties and craft financial arrangements that would result in an exploitative use of an asset or knowledge of a community to the benefit of a few or in some instances none at all for the members of the community.¹⁶ In some instances, communities were made to believe that their knowledge was being studied further through intensive research only for it to be expropriated without their knowledge.¹⁷ It is at this point in time that rains began to beat communities that

¹³ OKOTH PROFOGENDOHASTINGW. ""*The Tragic African Commons: A century of expropriation, suppression, and subversion*, in *Amplifying Local Voices: Striving for Environmental Justice*, Centre for International Environmental Law, et. al.". In: *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66. *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66; 2002.

¹⁴ It is critical to point out that Okoth Ogendo holds that the right to use a particular thing in the African commons is not one where all and sundry have exclusive access but one which access is pegged on belonging to the community that owns the commons and it be used in a specific manner such as grazing, gathering, fishing or hunting.

¹⁵ Whole in this context means all the individuals in the community including the past, current and future generations.

¹⁶ Overton, John. “*War and Economic Underdevelopment? State Exploitation and African Response in Kenya 1914-1918.*” *The International Journal of African Historical Studies*, vol. 22, no. 2, 1989, pp. 201–221. *JSTOR*, www.jstor.org/stable/220031. Accessed 5 June 2021.

¹⁷ Busienei W, Otswang’o F, and Munyi P. ‘National Experiences, Kenya: Enzyme case study in Lake Bogoria’ Access Benefit Sharing and Intellectual Property Rights Workshop, September, 2011.

possessed traditional knowledge that was of interest to technological, agricultural and medicinal needs of the modern world.

This creates a basis for the protection of ownership rights of these communities to this knowledge and the need to ensure the entire community benefits from the knowledge they possess and in order for it to benefit the futures generations.

The protection of this *sui generis* property will yield immense economic, social and cultural benefits. Firstly, the communities will be in a position to derive financial benefits from the property in their traditional knowledge which enables them to realize other human rights such as access to food, quality healthcare and reasonable housing. The same would also pave way for the development of an intellectual property rights regime that covers traditional knowledge the same way patents and copyrights protect the rights of inventors and the creators of original forms of expressions respectively.¹⁸

The protection of Traditional Knowledge also results in a sustainable manner of expropriating and exploiting traditional knowledge. This arises when subsequent generations are in a position to enjoy the benefits of the property rights of their forefathers as opposed to a situation whereby only the living generations benefit and the subsequent ones are left with a reminiscetial memory whereby they see their traditional knowledge being put to commercial use but derive no real benefits from them.

The adequate protection of traditional knowledge will also tame bio piracy and ensure that communities are adequately compensated for the use of their knowledge as well as accord the community recognition as innovators and generators of path breaking knowledge.¹⁹

3. Cries for Recognition and Justice: Traditional Knowledge that has been utilized exploitatively in Kenya.

¹⁸ Kariuki F, Ouma S, Ngetich R. *'Property Law'* Strathmore University Press, 2016

¹⁹ Wekundah J, *Why Protect Traditional Knowledge*, African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at <https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf> Accessed on 05/06/2021

An Intellectual Property Rights Regime that is nonresponsive to the *sui generis* needs of property rights in Traditional Knowledge has presented a pitiful situation whereby traditional knowledge is exploited by persons for a fortune and the holders of the property, who in most scenarios are poor communities in the rural areas, do not realize the benefits of the same in any way.²⁰ This breeds a feeling of discrimination on grounds of poverty and neglect amongst the members of the community. It must be remembered that an infringement to an individual's access to their property rights has been held to an affront to their other rights such as right to water, shelter and housing.²¹ This part highlights some of these instances.

Prunus Africana is a tree whose bark has been exploited by many ethnic communities in Kenya for their medicinal purposes. It was used by the Marakwet community of Kenya to control and manage hypertension amongst other ailments.²² It had also been used for generations in African communities to treat prostate cancer.²³ This knowledge was exploited in the development of medicines that treat benign prostate hyperplasia, and trade in its products in the world has a current market value of around \$150 million every year.²⁴ This led to the exploitation of the tree to near extinction.²⁵

²⁰ Kariuki F, Ouma S, Ngetich R. 'Property Law' Strathmore University Press, 2016

²¹ See the decision in *Satrose Ayuma & 11 others V Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* (2011) EKLK Available at <http://kenyalaw.org/caselaw/cases/view/90359/> Accessed on 06/06/2021

²² Kipkore w, Wanjohi B, Rono H. Kigen G, A study of the medicinal plants used by the Marakwet Community in Kenya, *Journal for Ethnobiology and Ethnomedicine*, Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3974104/> Accessed on 06/05/2021

²³ Komakech R, Kang Y, Lee J.H. Omuja F, A Review of the Potential of Phytochemicals from *Prunus africana* (Hook f.) Kalkman Stem Bark for Chemoprevention and Chemotherapy of Prostate Cancer, Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5327751/> Accessed on 06/06/2021

²⁴ Terry S. in *The exploitation of Prunus africana on the island of Bioko, Equatorial Guinea*. Available at https://www.researchgate.net/publication/268044578_The_exploitation_of_Prunus_africana_on_the_island_of_Bioko_Equatorial_Guinea Accessed on 06/06/2021.

²⁵ *Prunus africana* is currently classified by the International Union for the Conservation of Nature (IUCN) as vulnerable and is listed in Appendix II of the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), IUCN 2015

Though world has benefitted immensely by the medicinal traditional knowledge of the barks of the tree which was originally held by African communities, most of these communities have neither been adequately compensated for the utilization of their knowledge nor have the big pharmaceutical corporations that have used the same knowledge attempted to recognize the input of these communities to the development of the end products of their traditional knowledge.

A shrub known as *Maytenus buchananii* was known and used by the Digo community, one of the Mijikenda sub tribes of Coastal Kenya, for its medicinal value. The American National Cancer Institute collected the shrub and used it to manufacture a drug for treatment of Pancreatic Cancer since it contains maytansine.²⁶ The community did not get any recognition or proceeds from the use of their traditional knowledge without consent.²⁷

Extremophiles are an enzyme in bacteria which is industrially used in the fading of denims and whose trade is in the excess of 500 Million US Dollars every year.²⁸ It was collected from Lake Bogoria by scientists who have since gone ahead to clone it to enhance its efficacy at the industrial level without the input of the local community.²⁹

Lake Ruiru in Kenya hosts a microbe called *Actinoplanes sp* which has been used to develop drugs that are used in diabetes management.³⁰ Its trade in the world

²⁶ Maytansine is known to exhibit cytotoxicity against many tumor cell lines and may inhibit tumor growth. See generally the uses and definition of Maytansine as defined by National Cancer Institute of the United States. This information is available at <https://www.cancer.gov/publications/dictionaries/cancer-drug/def/maytansine> Accessed on 06/06/2021.

²⁷ Magube J.Kameri M., and Mutta D, ‘ Traditional Knowledge, generic resources and Intellectual Property protection; Towards a new international regime’ International Environmental Law Research Center Working Paper, 2001

²⁸ Wekundah J, *Why Protect Traditional Knowledge* , African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at <https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf> Accessed on 05/06/2021

²⁹ Heur S, “The Lake Bogoria extremophile; A Case Study.

³⁰ Third World Network, Biopirates earn millions in profits from African bio-resources, Available at <https://www.twn.my/title2/health.info/twninfohealth017.htm> Accessed on 06/06/2021

market has been estimated to be worth around 278 Million Euros.³¹ There is no evidence that the communities around the lake have been compensated or recognized for exploitation of this resource that was derived from a lake that has been conserved and utilized by the neighboring community for ages.

This enumeration is not exhaustive. However, it presents the sad tale of bio piracy of our traditional knowledge by monstrous corporations and individuals. The financial value of the same has been highlighted to indicate the enormity of the economic loss hence the need to develop strong intellectual property rights regime in the realm of traditional knowledge.

4. The Kenyan Legal Framework on Protection of Traditional Knowledge

Kenya has employed constitutional, statutory and policy frameworks in a bid to protect and preserve the traditional knowledge of its peoples. The endgame of these legal framework can be deduced to be an attempt to actualize the pride the Kenyan People have in their cultural and ethnic diversity which are productions of nations within the Kenyan state and the aspiration to live in it as one indivisible nation where peace and unity reigns.³²

Kenya's autochthonous Constitution, 2010 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.³³ Article 11 (2) of the Constitution obliges the government to recognize the role of science and indigenous technologies protect and to the development of the nation. The state is also obliged to protect and enhance the intellectual property in the indigenous knowledge of the communities of Kenya.³⁴

The Constitution also goes ahead to impel parliament to enact a legislation that will "ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognize and protect the ownership of

³¹Wekundah J, *Why Protect Traditional Knowledge*, African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at <https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf> Accessed on 05/06/2021

³² A close reading of the preamble of the Kenyan Constitution gives life to this cogitation. The relevant section is the people of Kenya are; **PROUD** of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation

³³ Article 11 (1) of The Constitution of Kenya, 2010

³⁴ Article 69 (1) (c) of The Constitution of Kenya, 2010

indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya”.³⁵ Parliament was supposed to enact this legislation within five years on promulgation of the Constitution of Kenya, 2010.³⁶

The protection of Traditional Knowledge and Cultural expressions Act, 2016 is the main legislation in Kenya that sets out the framework for the protection of indigenous knowledge rights in Kenya. The Act defines traditional knowledge in a broad manner that encompasses the innovations, practices and knowhow of Kenyan communities or knowledge which may be contained in codified languages passed from generation to another in various fields ranging from medicine to agriculture.³⁷

The Act places county governments at the center of protection of Traditional Knowledge. The county executive committee member who is in charge of matters relating to culture is mandated to create and maintain a repository that is created from the primary registration of traditional knowledge and cultural expressions within a county.³⁸ The County government is also expected ‘to facilitate the collaboration, access and the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.’³⁹ This is a very progressive provision which factors in the consideration that individuals of the same ethnic group were separated from one another in the mapping of internal boundaries of districts in the colonial times most of which have been retained to this day and form the county boundaries.

³⁵ Article 11 (3) of The Constitution of Kenya, 2010

³⁶ The Fifth Schedule of the Constitution of Kenya, 2010. The Kenyan Parliament failed to meet the timeline of five years given to it to enact this legislation. This legislation was passed on 15/03/2015 against a Constitutional deadline of 27/08/2015.

³⁷ Section 3 of The Traditional Knowledge and Cultural Expressions Act, 2016 defines Traditional Knowledge as; any knowledge- (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.

³⁸ Section 4 of Traditional Knowledge and Cultural Expressions Act, 2016

³⁹ Ibid

The National Government is tasked with among other things to promote and conserve traditional knowledge in Kenya as well as establish and maintain a Traditional Knowledge Repository at the Kenya Copyright Board.⁴⁰ The repository contemplated in this provision is the Traditional Knowledge Digital Repository which contains the contain information relating to traditional knowledge and cultural expressions that have been documented and registered by county governments.⁴¹

The act also provides for the right to protect traditional knowledge that is enjoyed by the owners and holders of traditional knowledge in Kenya.⁴² The communities also have exclusive rights to authorize the exploitation of their traditional knowledge and to prevent any person from exploiting their traditional knowledge without their prior informed consent. In addition this, the owners shall have the right to institute legal proceedings against any person who exploits traditional knowledge without the owner's permission.⁴³ The communities are also entitled to make rules of procedure to guide the process of authorizing individuals to exploit their traditional knowledge.⁴⁴

Kenya has a national policy on Traditional Knowledge. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009⁴⁵ is a policy that was conceived crafted to enhance the

⁴⁰ Ibid Section 5

⁴¹ Ibid Section 8 (3)

⁴² Section 9 of Traditional Knowledge and Cultural Expressions Act, 2016

⁴³ See generally Section 10 of Traditional Knowledge and Cultural Expressions Act, 2016

⁴⁴ Section 10 (3) of Traditional Knowledge and Cultural Expressions Act, 2016

⁴⁵ The objectives of this policy are to; (a) Provide a legal and institutional framework to support the integration of various aspects of traditional knowledge, genetic resources and traditional cultural expressions in national development planning and decision making processes. (b) Promote the preservation, protection and development of traditional knowledge, genetic resources and traditional cultural expressions for multiple applications and use. (c) Promote and foster the documentation, use and dissemination of traditional knowledge, genetic resources and traditional cultural expressions with mechanisms to acknowledge, protect and benefit the sources and/or custodians. (d) Promote the protection of traditional knowledge associated with conservation and sustainable use of biological diversity and equitable sharing of accrued benefits. (e) Enhance collaboration and partnership in the generation, access to and utilization of traditional knowledge, genetic resources and traditional cultural expressions.

protection of traditional knowledge in Kenya.⁴⁶ The policy identifies its guiding principles to include, confidentiality which denotes a community's right to keep parts of their culture, respect of the traditional knowledge of the communities, prior informed consent to be sought before any activities can be undertaken with regards to traditional knowledge of individuals amongst others.⁴⁷ Of great importance to this work is the incorporation of the principle of sustainable development as one of the guiding principles. This affirms that traditional knowledge should be managed in a way that meets the needs of the current and future generations thus the need for its protection.

The policy begins by pointing out that traditional knowledge alongside genetic resources and traditional cultural expressions are relied on by rural communities yet they are not recognized in many national policy and legal frameworks.⁴⁸ It also aptly captures the predatory exploitation of traditional knowledge by positing that there are concerns that some of our traditional knowledge has been expropriated and patented by multinationals which conflicts with the values that govern traditional knowledge.⁴⁹

The policy point out that it envisages a Traditional Knowledge protection system that does not just protect the knowledge created in the past and passed from generation to generation but one which preserves and promotes innovation of the same to accelerate national development.⁵⁰ This explains why it goes ahead to put out policy statements that are particular to every theme of traditional knowledge.⁵¹

The policy also recognizes that the existing Intellectual Property Rights framework does not meet the needs of Traditional Knowledge since they are

⁴⁶ See generally the goals of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf> Accessed on 05/06/2021

⁴⁷ See generally the guiding principles of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf> Accessed on 05/06/2021

⁴⁸ Ibid 1.2.1.1

⁴⁹ Ibid 3.1.2

⁵⁰ Ibid Preamble

⁵¹ The Policy Document gives policy statements that are particular to the several strands of Traditional Knowledge ranging from Agriculture to Medicines and Public Health to Biodiversity Conservation.

primarily engineered to meet the private and corporate needs and not the Trans generational needs of Traditional Knowledge which is owned by the present, past and future generations.⁵²

Article 2 (6) of The Constitution of Kenya, 2010 provides that any treaty or convention ratified by Kenya forms part of the laws of Kenya. Whereas Kenya is a signatory to several conventions that protect Intellectual Property Rights⁵³, this work will discuss the Swakopmund Protocol, 2010.⁵⁴ This convention is selected since it best captures the spirit that this paper adopts in the senses that the Swakopmund Protocol emphasizes on that legal protection of traditional knowledge must be tailored; “to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community’s cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned”.⁵⁵ This demonstrates that the protocol captures the traditional knowledge as is in Kenya, in the sense that it is trans generational in nature and therefore has “specific characteristics” which need to be considered when vouching for their protection.

The protocol offers a framework for the registration of traditional knowledge that is shared by two or more communities that happen to be in different countries.⁵⁶ The protocol also identifies the beneficiaries of the protection of traditional knowledge as the holders of the traditional knowledge who create, preserve and transmit knowledge in a traditional and intergenerational context.⁵⁷ The owners

⁵² Ibid paragraph 4.5.1

⁵³ Kenya is a signatory to *Convention on Biological Diversity*, 1992, *International Treaty on Plant Genetic Resources for Food and Agriculture*, 2001 all of which form parts of the laws of Kenya.

⁵⁴ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

⁵⁵ Preamble of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

⁵⁶ Section 5.4 Ibid

⁵⁷ Section 6 Ibid

of traditional knowledge have the right to prevent anyone from exploiting their knowledge without their prior informed consent.⁵⁸The protocol also calls for the equitable sharing of the proceeds of the expropriation of the knowledge and the recognition of the knowledge holders.⁵⁹

5. The Nexus between Protection of Indigenous Knowledge and Sustainable Development

Indigenous knowledge and sustainable development are joined at the hip in the sense that the former is owned by the past, present and future generations and is therefore a trans generational asset. The latter is a concept that seeks to preserve the right of future generations to provide for themselves and to enjoy human rights which includes the rights to health, safe environment and in the case of traditional knowledge, a right to culture.⁶⁰ Therefore, a framework that protects the property rights in indigenous knowledge implicitly advances the spirit of sustainable development.

The World Bank in 1993, which was an International Year for the World's Indigenous People, sponsored a conference whereby the role of traditional knowledge in contributing to creation of more environmentally and socially sustainable forms of development in the world.⁶¹ From this conference a framework that guides development in settings where indigenous people live was conceptualized.⁶² The tone of the proceedings of the conference reveals that

⁵⁸ Section7.2 Ibid

⁵⁹ See generally sections 9 & 10 of the Swakopmund Protocol.

⁶⁰ Kariuki Muigua, *Actualising Socio-Economic Rights for Sustainable Development in Kenya*, Available at <http://kmco.co.ke/wp-content/uploads/2019/02/Actualising-Socio-Economic-Rights-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-9-February-2019.pdf> Accessed on 06/06/2021

⁶¹United Nations International Year of the World's Indigenous Peoples' Conference (1993: World Bank) *Traditional knowledge and sustainable development: A conference sponsored by the World Bank's Environment Department and the World Bank Task Force on the International Year of the World's Indigenous People held at the World Bank, Washington, D.C., September 27-28, 1993*

⁶² See Appendix 4 of the Report ; *Traditional knowledge and sustainable development: proceedings of a conference sponsored by the World Bank's Environment Department and the World Bank Task Force on the International Year of the World's Indigenous People held at the World Bank, Washington, D.C., September 27-28, 1993* / Shelton H. Davis, Katrinka Ebbe, editors; Alicia Hetzner, editorial consultant. Available on

the delegates were more than convinced that development is only sustainable when it protects the indigenous peoples rights to their traditional knowledge.⁶³

The concept of sustainable development therefore advances the protection of traditional knowledge as a form of intellectual property rights. This enhances its preservation and protection from predatory exploitation thereupon ensuring that communities that own the intellectual property rights benefit from any proceeds of their utilization. Thus sustainable development practices should be encouraged given that they entrench the protection of intellectual property rights in traditional knowledge.

6. Safeguarding Indigenous Knowledge in Kenya; Potential Legal Reforms

This paper recommends that since The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 puts out that the existing Intellectual Property Framework does not create the aegis for the protection of intellectual property rights in Traditional Knowledge, a framework that seeks to protect the same should be developed. This should be done since traditional knowledge may not meet the tests of some forms of intellectual property rights such as patents which are only extended when the test of novelty is met.⁶⁴

This work also recommends a reevaluation of the Witchcraft Act, which confers on a District commissioner powers to compel an individual who is suspected to practice witchcraft to live in a designated area.⁶⁵ This power may be abused in a situation where the District Commissioner is not a local of the area and may be misled by a section of members of the community who no longer want to be seen as holders' of a traditional knowledge which may have some benefits but is

<https://documents1.worldbank.org/curated/en/517861468766175944/pdf/multi-page.pdf> Accessed on 06/06/2021

⁶³ See generally the proceedings of the conference as contained in the document referenced in footnote 63. A particular emphasis is on the contribution of Jorge Terena in page 35.

⁶⁴ Section 22, *Industrial Property Act*, (Cap. 509, Laws of Kenya)

⁶⁵ Section 9 of *Witchcraft Act*, (Cap. 67, Laws of Kenya). This Act of Parliament is yet to be brought into conformity with the new Kenyan Constitution, 2010 which does not provide for an office of a "District Commissioner". This Act can be purposively read to refer to the office of the County Commissioner in the current constitutional dispensation.

viewed as witchcraft given the rise of the influence of Abrahamic religions in Kenya some of which abhor some traditional African religion practices which they may wrongly classified as witchcraft.

This work would recommend the withdrawal of such discretionary power and the replacement of it with a juridical one where the suspected witch is heard and the knowledge they possess independently verified whether it is beneficial or harmful. Thus the provisions of the Witchcraft act as of now seems to fight the protection of property rights in traditional knowledge

This work also recommends the fast tracking of the setting up of the Traditional Knowledge Trust fund⁶⁶. These funds will go a long way in facilitating the collation, registration and protection of traditional knowledge under a new sui generis framework specifically created for that purpose.

7. Conclusion

This paper has provided a basis for the protection of Traditional Knowledge in Kenya and discussed the existing legal framework for the same. It has also offered recommendations on how this legal framework can be enhanced. It also briefly gave examples of traditional knowledge that have been exploitatively utilized to the detriment of the community that have owned them for generations. It also took cognizance of and highlighted the link that exists between sustainable development and protection of the property rights in traditional knowledge.

The paper argues that time is nigh for the development of frameworks to protect the property rights in traditional knowledge. Doing so would set a good foundation for leveraging traditional knowledge for sustainable development.

⁶⁶ See Policy statement number 6 under Section 5.4 of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf> Accessed on 05/06/2021

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Busienci W, Otswang'o F, and Munyi P. 'National Experiences, Kenya: Enzyme case study in Lake Bogoria' Access Benefit Sharing and Intellectual Property Rights Workshop, September, 2011.

Constitution of Kenya, 2010.

Convention on International Trade in Endangered Species of Fauna and Flora (CITES), IUCN 2015

Hegel, Georg W. F, and J Sibree. *The Philosophy of History*. New York: Dover Publications, 1956.

Heur S, "The Lake Bogoria extremophile; A Case Study.

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