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Traditional Knowledge and the Inclusive Subordination of African Customary Law in Kenya: Lessons from Personal Law

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Abstract

Traditional knowledge forms the fabric of indigenous communities' social and economic life. Its attempted protection through intellectual property law has been dismal. There is now wide consensus that *sui generis* regimes should be employed for this purpose, and that customary laws are conceivable as an integral part of such protection. This article finds that the expressed legislative intent to protect traditional knowledge through customary law in Kenya is ill-fated. Sustained inclusive subordination of the latter will obstruct any meaningful efforts to protect the former. This finding is reached by an examination of the historical application of African customary law in personal law regimes that have it as the defining legal regimen. This history is one of subtle subordination, and such subtlety remains embedded even in Kenya's law on traditional knowledge. The unpleasant effects of this phenomenon as observed in personal law regimes are likely to recur for traditional knowledge.

Keywords

Inclusive subordination, personal law, African customary law, *sui generis*, traditional knowledge, intellectual property

INTRODUCTION

It is a concern of both intellectual property law[1] and human rights law[2] to protect the proprietary value inherent in the various heritages of indigenous and

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1 Traditional knowledge, for instance, is usually protected within the organizing framework of intellectual property systems. The World Intellectual Property Organization (WIPO) is engaged in capacity building and normative work on traditional knowledge at an international level. See World Intellectual Property Organisation "Traditional knowledge", available at: <https://www.wipo.int/tk/en/> (last accessed 25 May 2020).

2 For a human rights context, see art 20, Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3. See also, generally, United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295.

local communities. Traditional knowledge[3] systems have emerged as an important arena in which the value created by these communities is visible to the wider world. If the regimes of intellectual property law and human rights law are to be taken seriously, they must respond meaningfully to the accepted concern that traditional knowledge is not, at present, adequately protected. The concern is that this situation has led to the disenfranchisement of communities holding traditional knowledge.

"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.[4] 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.[5] Both groups will however usually generate and hold traditional knowledge.

Traditional knowledge can thus be considered to be the totality of all knowledge and practices, whether explicit or implicit, collectively used in the management of socio-economic and ecological facets of life, established on past experiences and observation.[6] Traditional knowledge is however not static, but dynamic. It grows together with community practice and awareness.[7] Thus, another widely used description of traditional knowledge is that it consists of "know-how, skills, innovations, practices, teachings or learnings" constituting a structure that is sustained. It reflects a "governing collection of principles around which the institutions of a group are developed, and within which values and norms are cultivated, dynamically implemented and sustained".[8]

African customary law, on the other hand, connotes: "rules of custom, morality, and religion that the indigenous people of a given [African] 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]

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3 In this article, the term "traditional knowledge" will also be employed to represent "traditional cultural expressions", as there is, according to the author, no major difference producing a fundamental doctrinal division between the two for the immediate purposes.

4 J Mugabe *Intellectual Property Protection and Indigenous Knowledge: An Exploration in International Policy Discourse* (1999, African Centre for Technology Studies) at 2.

5 Ibid. Indigenous people are identified mainly by virtue of cultural distinctiveness and prior territorial occupancy relative to a more recently-arrived population. Local peoples, on the other hand, are identified by virtual of habitual residence in a certain region, usually as a group.

6 Id at 3.

7 See UNESCO, "Adaptive knowledge for variability and change", available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/LINKS_ex_10.pdf> (last accessed 25 May 2020).

8 R Okediji "Traditional knowledge and the public domain" (2018), CIGI Papers no 176 *Centre for International Governance Innovation*.

9 M Ocran "The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa" (2006) *Akron Law Review* at 467–68.

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A "custom" can further be 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] To be valid, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its 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.[11] The definition of customary law might also be so wide as to include any unenacted law which by custom is followed by a given community.[12]

The conceptual framework underpinning this article maps out the intersection between *sui generis* (stand-alone) protection of traditional knowledge and the state's treatment of African customary law in Kenya. The framework entails an analysis of the general application of 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". It is the general application of the regime in the personal law regimes of marriage and succession that is proposed as offering lessons to the domain of traditional knowledge. Specifically, it is shown that African customary law is the appropriate *sui generis* regime to deal with the protection of traditional knowledge.

THE DILEMMAS OF TRADITIONAL KNOWLEDGE

Traditional knowledge poses unique challenges in terms of its regulatory framework. According to Sackey and Kasilo, approaches to the protection of traditional knowledge vary.[13] One approach proposes the more efficient use of existing intellectual property rights through capacity building, administrative initiatives and programmes that better recognize and defend traditional knowledge as a legitimate and valuable asset of the communities that have developed it.[14] Here, the key to realizing the benefits from existing intellectual property rights is the understanding of how the intellectual property system works and the identification of those kinds of traditional knowledge that can be protected. Literature making the case for utilizing intellectual property in protecting traditional knowledge, though in existence, is marginal. Conventional intellectual property may conceivably be extended to traditional knowledge in various ways. Trademarks and geographical indications could be

10 *Halsbury's Laws of England*, vol 10 at 318.
11 Ibid.
12 A Allott *New Essays in African Law* (1970, Butterworths) at 157.
13 See E Sackey and O Kasilo "Intellectual property approaches to the protection of traditional knowledge in the African region" (2010) *The African Health Monitor – Special Issue: African Traditional Medicine* at 89.
14 Ibid.

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used to protect indigenous products in much the same way as they are used for non-indigenous products.[15] They would, however, not protect traditional knowledge in itself, which is the primary subject matter in relation to which claims of misappropriation arise. The fact that these tools will also be applicable for products that are brought to market would demand a level of complexity that traditional peoples do not possess.[16] This is because they presuppose elaborate manufacture, market distribution under distinctive packaging, as well as organized regional lobbying. This notwithstanding, the patent regime has been observed as offering a bit more to traditional knowledge protection than other intellectual property tools. However, even patents may not be as effective for countries that have not scientifically integrated traditional knowledge.[17] Even more importantly, it has been argued that intellectual property systems increase the risk of misappropriation[18] 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 the protection of 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 Organization (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[19] 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 with information concerning the origin of the genetic resources in the invention or some proof of prior informed consent from traditional knowledge holders.

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

15 See M Eiland *Patenting Traditional Medicine* MIPLC (2009, Nomos Verlagsgesellschaft mbH), at 34–36.

16 Ibid.

17 Ibid. Eiland notes that the only regime that has meaningfully achieved such integration is China, meaning that patent protection of traditional knowledge may not be a blueprint that works for all societies.

18 For a detailed analysis of several misappropriation claims, see Eiland, *Patenting Traditional Medicine*, above at note 15; L Amusan, "Politics of biopiracy: An adventure into hoodia/xhobia patenting in Southern Africa" (2017) 14/1 *African Journal of Traditional, Complementary and Alternative Medicines*; and L Feris "Protecting traditional knowledge in Africa: Considering African approaches" (2004) 4 *African Human Rights Law Journal*; N Roht-Arriaza "Of seeds and shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities" (1996) 17/4 *Michigan Journal of International Law* 919.

19 Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

knowledge holders.[20] Such an approach may adopt measures of protection specific to traditional knowledge. However, it is imperative that the orientation of such a right is not calibrated as another "*sui generis* intellectual property right". It has been demonstrated that if such a right were to be based upon an intellectual property model, it would hinder access to affordable knowledge goods, even for communities holding such knowledge.[21]

Yet another 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 utilize 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 ("the Model Law").[22]

This study proceeds on the notion that the suitability of *sui generis* protection systems to traditional knowledge is a matter of extensive consensus.[23] The primary point of convergence in literature here is the intuitive understanding that classic intellectual property tools may be neither appropriate nor effective in the case of traditional knowledge given some unique or additional 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.[24]

Accordingly, *sui generis* mechanisms have gained traction as an attractive normative and regulatory framework in this area. This is mainly because

20 See Sackey and Kasilo "Intellectual property approaches" (2010), above at note 13 at 89.

21 O Janewa "A sui generis regime for traditional knowledge: The cultural divide in intellectual property law" (2013) 15/1 *Marquette Intellectual Property Law Review* 147 at 154.

22 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.

23 See, for instance, Feris "Protecting traditional knowledge in Africa", above at note 18 at 919; B Tobin "Redefining perspectives in the search for protection of traditional knowledge: A case study from Peru" (2001) 10/1 RECIEL; and M Muller "Protecting shared and widely distributed traditional knowledge: Issues, challenges and options" (2013) *International Centre for Trade and Sustainable Development*, among many others.

24 Muller "Protecting shared and widely distributed traditional knowledge", above at note 23 at 19.

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this type of knowledge does not fit into the existing intellectual property paradigm due to, among other considerations, 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 recognize communal rights over that knowledge.[25] 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.[26] Traditional ecological knowledge has in this regard been used as an example. It is not plausible to identify a single creator of such knowledge because it is "collectively and cumulatively generated, and thus incompatible with the individualized ideology informing intellectual property".[27]

At the least, there is an absence of consensus on whether and how to extend intellectual property protection to traditional knowledge in general.[28] This is partly because of differences in conceptual treatment and, often, the lack of clarity on the two concepts.[29] In any case, it should be clear that traditional knowledge is a communal resource, which under intellectual property law would be privatized, and this may deny future generations and industry access to such knowledge.[30] With the above in mind, it would therefore come as no surprise that the suitability of *sui generis* protection systems to traditional knowledge is a matter of extensive consensus.[31] The linkage between African customary law and traditional knowledge will be examined in closer detail below.

THE LEGAL LANDSCAPE OF AFRICAN CUSTOMARY LAW IN KENYA

In order to understand the conceptual linkages proposed between personal law regimes and traditional knowledge, it is important to understand the

25 N Stoianoff "A governance framework for indigenous ecological knowledge protection and use", in R Levy et al (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017, ANU Press) at 236.

26 Ibid.

27 F Kariuki "Notion of 'ownership' in IP: Protection of traditional ecological knowledge vis-à-vis Protection of Traditional Knowledge and Cultural Expressions Act, 2016 of Kenya" (2019) 24 *Journal of Intellectual Property Rights* 89 at 94.

28 Mugabe *Intellectual Property Protection and Indigenous Knowledge,* above at note 4 at 8. Nonetheless, there exist various reasoned attempts to draw more parallels than are usual between the two regimes. See, for instance, Eiland *Patenting Traditional Medicine*, above at note 15. The fundamental incompatibility of the two systems, however, is rather plain.

29 Mugabe *Intellectual Property Protection and Indigenous Knowledge,* above at note 4 at 8.

30 Ibid.

31 See, for instance, Feris "Protecting traditional knowledge in Africa", above at note 18; Roht-Arriaza "Of seeds and shamans", above at note 18; Tobin "Redefining perspectives in the search for protection of traditional knowledge", above at note 23; and Muller, "Protecting shared and widely distributed traditional knowledge", above at note 23, among many others.

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formal application of African customary law in Kenya, the unifying strand between the two themes.

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 and local communities, and to promote access and preservation of traditional knowledge for the sustainability of indigenous and local communities. In many cases, traditional peoples may be "indigenous" or "local" to an area, though, as clarified earlier, this is not always the case. In many instances, "indigenous" peoples accrue more specific rights for being a more distinctive and less generic class. The Constitution specifically defines property to include intellectual property.[32] The Constitution also recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and state.[33]

In providing for the application of African customary law, the Constitution provides that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency…".[34] In delimiting the principles to guide the exercise of judicial authority, the Constitution proceeds to provide that "traditional dispute mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is 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".[35]

Perhaps the most consequential formulations on the applicability of African customary law can be seen in the wording of the Judicature Act,[36] 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 this 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."[37]

32 Constitution of Kenya, 2010, art 260.
33 Id, art 11(1).
34 Id, art 2(4).
35 Id, art 159(3).
36 Judicature Act, cap 8, *Laws of Kenya* (2016 revised ed).
37 Judicature Act, cap 8, *Laws of Kenya*, (2016 revised ed), sec 3(1). The Judicature Act provides for statutes of general application received in Kenya up until 12 August 1897. These laws remain applicable notwithstanding their position in the common law jurisdictions from which they are received.

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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".[38]

It immediately becomes clear that these two positions embody very different ways of viewing the desirability (or implicit preference) of a regime of law.

This article contends that the idea of viewing customary law by the lens of the latter provision contributes to a systemic lack of commitment to the "inclusive subordination"[39] of that regime of law. The mere choice of the word "repugnant" reveals the presupposition of an almost-expected appalling or reprehensible character inherent in the thing being so described that is characteristic of colonialism. "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 overarching, and implicitly preferred, law or regime of law.

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.[40] In recognition of these complexities, the recently enacted law, The Protection of Traditional Knowledge and Cultural Expressions Act (hereinafter "the Act"),[41] has made extensive references[42] to customary law as the operative regime in key aspects of the protection 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.[43] The Act defines "customary laws and practices" as the norms and practices of local and traditional communities that are legally recognized in Kenya.[44]

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38 Judicature Act, cap 8, *Laws of Kenya*, (2016 revised ed), sec 3(2).

39 This 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 S Kang'ara "Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought" (2012) 9 *Hastings Law & Poverty Law Journal* 353 at 362.

40 M Ouma "The policy context for a commons approach to traditional knowledge in Kenya" in De Beer et al *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (2014, UCT Press) 132 at 134.

41 Protection of Traditional Knowledge and Cultural Expressions Act, no 33 of 2016.

42 These references are evident in, among others, the definition of "holders" (sec 2), "owners" (sec 2), the formalities relating to registration of traditional knowledge (sec 7), as well as in the protection criteria for traditional knowledge (sec 14).

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

44 Protection of Traditional Knowledge and Cultural Expressions Act, no 33 of 2016, sec 2.

In legislation, 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. Personal law regimes are rife with examples of selective application of African customary law only in cases when its adoption is not inconsistent with the particular constructive state project[45] being pursued. According to Kang'ara, the historical state project in Kenya has been the careful and deliberate reformulation of the nature of legal rights and legal relations of the state's subjects by the state using its legal machinery in pursuit of its ends. The end has, in the case of personal law systems in Kenya, been noted as the progressive alignment of African society with the ideals of market capitalism, a liberal constitutional democracy and, reluctantly in some cases, legal pluralism.[46]

It is submitted that the full thrust of the project to properly operationalize the Act does not lie with this new law itself. The success of the existing or anticipated provisions regarding African customary law will ultimately hinge on the relative treatment of African customary law within the legal system as a whole.

THE INCLUSIVE SUBORDINATION OF AFRICAN CUSTOMARY LAW

With the background above, it is time to enter the controversial arena of the application of African customary law as an independent regime ordering social interaction. This section will analyse a cross-section of judicial decisions in Kenya around the application of African customary law. Personal law regimes have been chosen for this purpose mainly because of the express legal recognition as to the applicability of African customary law to them. A relevant statute[47] provides that a magistrates' court shall have jurisdiction in proceedings of a civil nature falling within a prescribed list of personal law areas.[48] The following analysis considers decisions in some of those areas:

45 This connotes the carefully orchestrated reformulation of the nature of legal rights and legal relations of a state's subjects by the state using its legal machinery in pursuit of its ends. Such ends have, in the case of personal law systems in Kenya, been noted as the progressive alignment of African society with the ideals of market capitalism, a liberal constitutional democracy and, reluctantly in some cases, legal pluralism. See generally, Kang'ara "Beyond bed and bread", above at note 39.

46 Ibid.

47 Magistrates' Courts Act no 26 of 2015, sec 7. The position was identical to that of the repealed Act.

48 The list constitutes:
(a) Land held under customary tenure;
(b) Marriage, divorce, maintenance or dowry;
(c) Seduction or pregnancy of an unmarried woman or girl;

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seduction, marriage, divorce and inheritance. Beyond the justification already offered for this choice, another reason for utilizing these personal law areas is that it is mostly decisions in these areas that have been extensively reported.

It is not a controverted fact that African customary law is formally recognized as a valid source of law. Instead, what is interesting, namely the source of the controversy and mystery, is that African 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 and, tragically, as will be shown, any other whimsical benchmark.[49] The repugnancy test usually entails weighing African customary practices against the "ideal" that is Western values.[50]

According to Onyango, repugnancy as a mere revolting against some habit or behaviour is essentially subjective cultural judgement.[51] When repugnancy is used in the sense of a revolt against certain habits of behaviour in a given community or shared attitudes, then the judgement might be considered unfair for "what is repugnant to you may not be repugnant to me".[52]

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 to which African customary law is subjected in Kenya dilutes the normativity of this regime of law. For instance, Ambani and Ahaya highlight that the Constitution contains other provisions that negatively affect the applicability of African customary law in three ways. First, it offers itself as the primary 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]

Usually, 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

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contd

(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.

49 Allott *New Essays in African Law*, above at note 12 at 158.

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

51 P Onyango *African Customary Law: An Introduction* (2013, Law Africa) at 44.

52 Ibid.

53 See Ambani and Ahaya "The wretched African traditionalists in Kenya", above at note 50 at 49.

54 Ibid.

should be exercised, so far as possible, on clear and satisfactory principles.[55] Wilson J in *Gwao bin Kilimo v Kisunda bin Ifuti*[56] attempted an enunciation of these principles and observed that morality and justice are abstract conceptions for which communities have different absolute standards. The standard for the British court in Africa was the British standard applied in British courts.

Even in contemporary Africa, it would not be safe to assume that because there is generally no racial disparity between judges and parties to cases, the standard of morality would be more nuanced, contextual or determinate. Thus, of the native judge, Allott notes that he maintains an educational and cultural gap detached from the ordinary farmers with whose affairs he deals.[57]

This notwithstanding, this analysis 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 shaky; they are the source of the systemic crisis under which African customary law finds itself in the Kenyan legal system.

Kang'ara notes that the resultant problem from the colonial era adjudication of African customary law, which was indeterminate[58] and highly artificial,[59] 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).[60] Inevitably, then, the post-colonial doctrinal development of African customary law forms has had the effect of opening up Western-derived law to influence African customary law.[61]

As a preliminary note to reports of African customary law cases, Allott profoundly comments that the evidence of Kenya rebuts the assumptions of those who prophesied the early demise or irrelevancy of African customary law.[62] The regime continues in vigour and resilience. It is precisely this fact that African customary law is not displaced completely, which completes the idea of inclusive subordination, the formal recognition of a regime attended

55 Allott *New Essays in African Law*, above at note 12 at 162.
56 (1938) 1 TLR (R) 403.
57 Allott *New Essays in African Law*, above at note 12 at 164.
58 Recognition of African customary law forms may be divided into various historical "phases". These are: (i) the era of mass invalidation; (ii) the era of presumptive validity; (iii) the era of legal dualism; and (iv) the era of doctrinal staging. See Kang'ara "Beyond bed and bread", above at note 39.
59 "Artificial" because the selective application of African customary law was only contingent upon its utility in facilitating the creation of a colonial state embodying the economic ideal of market capitalism.
60 Kang'ara "Beyond bed and bread", above at note 39 at 365.
61 Id at 354.
62 E Cotran *Casebook on Kenya Customary Law* (1987, Nairobi University Press) at xi–xv.

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by an 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. Instead the analysis is focused on revealing an implicit and systemic tendency of adjudicative organs to conveniently ignore African customary law rules and principles and 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.

The first illustrative case is *George Mwangi vs Maria Wamugori*,[63] which was an appeal that arose from proceedings taken under section 3 of the then Affiliation Act[64] that 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 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 realization 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 went ahead, intrusively from an African customary law perspective, to rely on two English cases in supporting its rather flagrant disregard of a customary law rule.[65] As will be seen shortly in the most recent cases discussed below, even the abolition of this dual

63 Court of Review Case no 14 of 1965, ibid.

64 Cap 142, Laws of Kenya *(Repealed)*.

65 The Court cited *Moore vs Hewitt* [1947] KB 832 and *Lawrence vs Ingmire* (1869) 33 JP 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, admissions 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

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court system has not precluded the recurrence of the problem. The specific modalities of a dual court system are however slightly beyond the scope of this analysis.

In any event, as a challenge to the ostensible soundness of the English position, the following dictum of the Court of Review in that case would appear highly suspect as an authority (one 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 decision what legal authorities would support the idea that silence amounts to admission at law.

The second case is *Esther Karimi vs Fabian Murugu*.[66] The claim by the plaintiff was that on diverse dates the plaintiff, relying on a verbal promise to marry, permitted the defendant 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".[67]

It is important to clarify the considerations upon which this case hinged. To begin, the court noted that an action for breach of promise to marry is not recognized in customary law, whereas the same is recognized in the case of a civil or Christian marriage, which is 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 determine the case, *primarily*, on principles of the English law, despite not being convinced that the proposed marriage would have been a monogamous one.[68]

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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.

66 *Esther Karimi v Fabian Murugu* (High Court of Kenya at Nairobi Civil Case no 745 of 1973).

67 Ibid.

68 In the relevant passage, the court reasoned thus:

> "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

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The invalidity of a 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.

The third illustrative case is *Hortensiah Wanjiku Yawe vs Public Trustee*.[69] The claimant in succession claimed that she was the deceased's widow and that she had four children by him. The opposing parties argued the non-existence of the alleged marriage. Kneller J, in the High Court, found that the appellant was not the deceased's wife according to Kikuyu customary law in that the performance of the "*Ngurario*"[70] was not proved to the required standard. The appellant then appealed against the finding that she was not the deceased's wife. On appeal, it was argued that the learned judge failed to consider the presumption arising from long cohabitation. 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 organized around African customary

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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."

69 Court of Appeal for East Africa, Civil Appeal no 13 of 1976.

70 The essentials of a valid marriage under Kikuyu law are: capacity, consent, *ngurario* (slaughter of a ram), *ruracio* (part dowry), and cohabitation.

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law. This is more so the case because the alleged marriage in this case was a Kikuyu customary law marriage,[71] not just a marriage generally.

It is perhaps worth mentioning briefly that the debate is still rife in Kenya as to the position of a marriage by cohabitation vis-à-vis other forms of marriage.[72] 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 debatable. 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.

The point being continuously proved by these cases is that, in denying validity to customary marriages or other African customary law 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 judicial thinking as confined to a different context and time in history, and the tensions as only existing because of 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*:[73] "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. The Constitution also omits the repugnancy clause (per se). 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". Were the formalities undergone under African customary law (in the first union) of no legal effect, especially considering that African customary law marriages are expressly recognized under the Marriage Act?[74] It is equally puzzling that under the same legislation, it is possible to convert a customary law marriage to a Christian or civil marriage, yet the reverse is impossible.[75]

This contribution, predicated on the revelations above, therefore must insist that the competitive or disharmonious coexistence of the different legal

71 See Cotran, *Casebook on Kenya Customary Law*, above at note 62 at 65.

72 The Marriage Act, no 4 of 2014 defines the term "cohabitation" but does not include the same alongside the recognized "types" of marriage.

73 *JMK v DMK*, Civil Appeal no 7 of 2013.

74 Marriage Act, no 4 of 2014, sec 6.

75 Ibid, sec 7.

regimes at play can only yield a need for increased state intervention in creating a proper balance. Unsurprisingly, such intervention will be by state law. Having noted the unsuitability of the general intellectual property regime to traditional knowledge, this article notes a crisis for the protection of such knowledge through African customary law as *sui generis* and a (relatively) independent regime.

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

INCLUSIVE SUBORDINATION AND THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS ACT

The previous sections have explored the relationship between African customary law applied under various systems of personal law, and the possible utility of the former for traditional knowledge. The enquiry is directed towards discovering what lessons these regimes, which both utilize African customary law, have to offer *sui generis* systems for traditional knowledge.

There are various possible meanings of African customary law constituting a *sui generis* regime in relation to traditional knowledge. These include being a basis for sustainable community-based development and cultural diversity; a distinct source of law binding even externally; a means of factually guiding laws external to it; a component of culturally appropriate dispute resolution; a condition of access to traditional knowledge; and the basis for continuing use rights and limitations.[76] 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 tools being uncritically extended to traditional knowledge. It is precisely this approach to protection of traditional knowledge that diminishes the impact of African customary law in endeavours to protect traditional knowledge in a holistic sense. For instance, under the African Regional Intellectual Property Organization (ARIPO) Protocol,[77] there is a huge overlay of patent law above the regime meant to address the specific demands of traditional knowledge. Traditional knowledge will invariably owe its existence to communities who have developed it over generations, acquiring, consequently, de facto rights over it. There are strong moral and

76 See generally, WIPO, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues* (2013).

77 Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010.

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legal justifications for retaining control and norm-making at the community level.[78] The *sui generis* approach was initially conceptualized in the African context by the Model Law discussed earlier.[79] This law attempted to provide 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.

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 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.[80] Consequently, revival of customary law as a legal discourse today should not appear as resurrecting it from the dead laws, but instead highlighting the very legal phenomena that exist in reality and pose serious challenges to the existing juridical orders.[81]

It is now widely agreed that customary laws and norms under which such knowledge is held should inform the appropriate regulatory framework for such knowledge[82] if its communal, cultural and transgenerational value is to be maintained. This position is echoed in the Act. This notwithstanding, it might be questioned whether the Act is likely to achieve its stated end. This is particularly considering the mixed success of similar laws in developing and protecting subjects of broadly similar orientation, such as community land rights.[83]

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.[84] By its very nature, traditional knowledge requires being valued and utilized in accordance with the indigenous protocols that govern its use and dissemination.

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78 K Swiderska et al "Protecting community rights over traditional knowledge: Implications of customary laws and practices" (2009), available at: <https://pubs.iied.org/sites/default/files/pdfs/migrate/14591IIED.pdf> (last accessed 15 February 2021).

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

80 Onyango *African Customary Law,* above at note 51 at 5.

81 Ibid.

82 See World Intellectual Property Organisation "The protection of traditional knowledge: Draft articles", available at: <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_facilitators_text.pdf> (last accessed 30 March 2019). 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 …".

83 See Katiba Institute "Traditional Knowledge and Cultural Expressions Act", available at: <http://www.katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/,> (last accessed 30 May 2019).

84 Ouma "The policy context for a commons approach to traditional knowledge in Kenya", above at note 40 at 149. See also art 8(j), *Convention on Biological Diversity*, 1992.

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This includes the need for prior informed consent and the establishment of an appropriate benefit-sharing arrangement on mutually agreed terms.[85]

In view of this, 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.[86] African customary law would clarify how these various rights and entitlements are identified and distributed within traditional communities. The International Labour Organization 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.[87]

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.[88] 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.

The Act, as discussed, was enacted with the objective of providing *sui generis* protection for traditional knowledge and traditional cultural expressions. A critical examination of it will, however, reveal subtle invasions by state law that might compromise the normative nature of African customary law in

85 Stoianoff "A governance framework for indigenous ecological knowledge protection and use", above at note 25 at 240.

86 Sackey and Kasilo "Intellectual property approaches", above at note 13 at 10.

87 Art 8 of the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples in Independent Countries. See also the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), above at note 3. The UNDRIP is significant for, among other things, providing the free, prior, informed consent criterion for takings of resources involving indigenous peoples.

88 World Intellectual Property Organisation, "Background Brief no 7: Customary law and traditional knowledge".

that space. Firstly, the Act inexplicably confounds, or mixes up, ideas of conventional intellectual property protection and *sui generis* approaches without going further to harmonize them or to restrict the problematic consequences from the different approaches taken.[89] 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.[90] The relationship between these entities and how they are to be identified is not clear from the law.[91] This confusion is apparent when the law seeks to confer the right to protection of traditional knowledge on both "owners" and "holders".[92] The ARIPO Protocol[93] avoids this problem by defining owners as the holders of traditional knowledge, namely the local and traditional communities, and the recognized individuals within such communities who create, preserve and transmit knowledge in a traditional and intergenerational context.[94]

Similarly, both moral[95] and economic[96] *sui generis* rights akin to intellectual property rights are conferred on "owners" and "holders" (or in their absence, a state agency). There are additional cultural rights in traditional knowledge, which include any subsisting rights under any law relating to copyright, trademarks, patents, designs or other intellectual property,[97] affirming the questionable attempt to treat traditional knowledge and conventional intellectual property tools as identical.

Interestingly, the Act also contemplates the possibility of assignments of traditional knowledge. This is difficult to reconcile with the well-known transgenerational character of assets under the African commons: they remain

89 V Nzomo "The Protection of Traditional Knowledge and Cultural Expressions Bill (2015)" (December 2015), available at: < https://ipkenya.wordpress.com/2015/12/16/comments-on-the-protection-of-traditional-knowledge-and-traditional-cultural-expressions-bill-2015/ > (last accessed 25 March 2019).

90 Kariuki "Notion of 'ownership' in IP", above at note 27 at 97. Sec 2 of the Act defines "owners" as local and traditional communities, and "recognized individuals or organizations within such communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary laws and practices of that community". "Holders", on the other hand, are defined as "recognized individuals or organizations within communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary laws and practices of that community". The conceptual ambiguity between these terms, which are meant to be specific and distinctive, is plain to see.

91 Ibid.

92 The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2016, sec 9.

93 Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010.

94 Sec 6, Swakopmund Protocol.

95 The Protection of Traditional Knowledge and Cultural Expressions Act, secs 19(2) and 21 (4).

96 Id, secs 18, 20, 22 and 24.

97 Id, sec 28(1).

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inalienable since they are held for the benefit of present, past and future generations.[98]

Definitionally, the Act runs into even further problems. Traditional knowledge, properly defined, relates to knowledge that is intergenerational, is distinctly associated with the source community, and is core to the community's cultural identity, with custodianship being managed through customary protocols.[99] Traditional knowledge here is considered to be that knowledge:[100]

> "(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's definition confounds various elements by offering diverse formulations. The definition itself provides two disjunctive formulations. The two formulations do not include the same elements, and none is comprehensive, given the ideal definition offered above. Notably, the first formulation 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"[101] for traditional knowledge confounds things even further, as it is not clear how this is to be reconciled with the definition of the term itself. Reading that section, it is not clear what purpose an additional definition of traditional knowledge would be serving.

Thirdly, the Act centralizes the authority of management on state institutions 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.[102] On its part, the national government is to, inter alia, establish and maintain a national traditional knowledge repository at the Kenya Copyright Board

98 See generally, F Kariuki, S Ouma and R Ng'etich *Property Law* (2016, Strathmore University Press) at 47–50.

99 M Ouma "Lectures on traditional knowledge" (2019) on file with author.

100 The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016, sec 2.

101 See id, sec 6.

102 Id, sec 4.

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(KECOBO) and to preserve, conserve and protect traditional knowledge from misuse and misappropriation.[103] 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 rights attach according to their own customary norms. Therefore, communities should bear central responsibility for protecting, conserving and safeguarding traditional knowledge and the attendant right to prevent misuse and determine access.[104] Although registration of traditional knowledge in a repository is purely declaratory and does not confer rights in itself,[105] the role of communities in establishing the registers and in the protection and promotion of traditional knowledge is not clear.

Fourthly, the Act has the rather counterintuitive and draconian provision on compulsory licensing, which does not easily lend itself to the notion of centring authority in community organs based on African customary law. Thus, where protected traditional knowledge is not being sufficiently exploited by the owner or rights holder, or where the owner or holder of rights in traditional knowledge refuses to grant licences for exploitation, the Cabinet Secretary may, with prior informed consent of the owners, grant a compulsory licence for exploitation.[106] The possibility (just like with patents) might deter registration of knowledge that might otherwise be secret, hampering collaborative development as in, for instance, the "commons model"[107] as a *sui generis* approach to protection. Similarly, the metric of "insufficient exploitation" leading to compulsory licensing has not in any way been clarified. Thirdly, it leaves up to non-traditional authorities the question of what constitutes "reasonable economic terms" for the award of a licence to third parties, such that traditional knowledge could be "forcibly" exploited under compulsory licences at terms that may be unacceptable to the community.[108]

It appears that a philosophy of "property" common to real property is being applied to traditional knowledge such that the latter is treated like a resource that can be alienated from the holders by the state. Some concerns arise from this approach. For instance, traditional knowledge is part of the cultural identity of a people, an aspect of their right to self-determination and 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. Moreover, there is a wrong assumption that communities will grant free prior

103 Id, sec 5.

104 See Nzomo "The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015)", above at note 90.

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

106 Id, sec 12(1). See also ARIPO Protocol, sec 12(1).

107 For further discussion on the "commons model", see Ouma "The policy context for a commons approach to traditional knowledge in Kenya", above at note 40 at 149.

108 T Kongolo *African Contributions in Shaping the Worldwide Intellectual Property System* (2013, Ashgate Publishing) at 98.

informed consent to the compulsory licensing. This is incorrect as communities have the right not to grant such consent.

Over and above the inadequacies of the Act in relation to the application of African customary law, it can be criticized for not providing a holistic protection framework for traditional knowledge. To begin with, the Act has been criticized[109] 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 definition could be interpreted to cover various distinct ministries, namely the Ministry of Industrialization, Arts, Culture or Agriculture, among others.[110]

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.[111]

There is also a lack of harmony between the Act and the provisions of the Copyright Act relating to folklore. In the latter, the Attorney General is vested with powers to authorize and prescribe terms and conditions governing specified use of folklore or generation of works embodying folklore.[112]

Further, sections 37 to 41 of the Act on remedies and sanctions have been called into question for applying indiscriminately to both third parties as well as to bona fide members of a community,[113] erasing the idea that use in a customary manner by members of a community may not amount to violation of traditional rights.

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 recognized beyond the community level by the state.[114] Diminished regard for African customary law, its formal recognition notwithstanding, may have some undesirable consequences. For indigenous communities holding traditional knowledge, the right to use such knowledge resides with the traditional owners and custodians, who have the collective right to determine how the traditional 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

109 See V Nzomo "Kenya's Protection of Traditional Knowledge and Cultural Expressions Act comes into force" (September 2016), available at: <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/> (last accessed 20 January 2019).

110 Ibid.

111 Ibid.

112 Ibid.

113 Ibid.

114 WIPO, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues* (2013) at 13.

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of African customary law.[115] In fact, this position on prior informed consent is enshrined in other instruments of law not dealing directly with traditional knowledge. Particularly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[116] at article 32 requires 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 with 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 scenario described presents the classical tussle between formal and informal rights, in which contest 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 as against third parties benefitting from state incentives.

Many times, African customary law will be linked to the particular structures that apply and transmit law in a trans-generational sense.[117] Separating protection endeavours over traditional knowledge from this fabric may weaken the social systems uniquely suited to preservation of traditional knowledge in accordance with community practices. As has been noted, one aspect of recognizing the principle of locality[118] is that related legal mechanisms should not interrupt the ongoing operation of customary laws and practices.[119]

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.[120] Unsurprisingly, only one sub-section alludes to – and even then, only in passing – appropriate customary law structures to resolve disputes. The said provision is merely that:

> "In addition to the remedies provided under this Act, any dispute may be resolved through – [121]

115 Id at 22.

116 United Nations Declaration on the Rights of Indigenous Peoples, above at note 3.

117 WIPO, *Customary Law, Traditional Knowledge and Intellectual Property*, above at note 114 at 14.

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

119 WIPO, *Customary Law, Traditional Knowledge and Intellectual Property*, above at note 114 at 15.

120 Secs 37 and 38, Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

121 Id, sec 40.

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(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, merely formal recognition of the applicability of African customary law and protocols, the legislature finds it important to also require that even these be subjected to a test mirroring the repugnancy test.

Quite clearly, so deeply entrenched is the inclusive subordination of African customary law that even the academically settled 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. Importantly, it may be that the utility of these 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 examples 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. As an example, the Philippines Indigenous Peoples' Rights Act of 1997[122] provides for a right of restitution of cultural, intellectual, religious and spiritual property taken, amongst others, in violation of customary laws and customs.[123] Prior informed consent regulating access to indigenous knowledge, under this law, must be secured in accordance with the relevant customary laws.[124] In the case of disputes arising, customary laws and practices are applied.[125]

In the same token, under the Biodiversity Law of Costa Rica,[126] community rights of the *sui generis* kind are determined by an inclusive process with indigenous and local communities. The law recognizes custom as a source of law for establishing such rights which exist and are legally recognized by the mere existence of the community protocol or knowledge. Such recognition does not require "prior declaration, explicit recognition nor official registration".[127]

CONCLUSION

This article has interrogated the literature around protection of traditional knowledge and uncovered a general consensus leaning towards the utilization

122 Republic Act no 8371.
123 Philippines Indigenous Peoples' Rights Act, sec 32.
124 Id, sec 35.
125 Id, sec 65.
126 Law no 7788 of 1998, arts 82 to 84.
127 See WIPO, *Customary Law, Traditional Knowledge and Intellectual Property*, above at note 114 at 23.

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of *sui generis* regimes for this purpose. African customary law has proven its cultural and structural value as a plausible regime for the protection of traditional knowledge. In fact, relevant Kenyan legislation has expressly recognized this.

Interestingly, the historical treatment of African customary law by statute and the judiciary however does not mirror this expressed confidence in African customary law. African customary law has instead been subordinated to state law and rendered of little to no normative force in personal law regimes where it has previously been applied. The prevalence of systemic biases against African customary law are, as the article argues, likely to ensure the lingering iterations of this phenomenon as far as traditional knowledge is concerned. The stated purpose of the Act will therefore only remain aspirational, to the eventual detriment of traditional knowledge holders.

In various ways, there have also been illegitimate interventions by the state relating to the 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 over traditional knowledge are carried out by non-community actors. The impact of these interventions is the reduced normative significance of African customary laws and procedures in protecting the subject matter which they are openly acknowledged to be protecting.

All of this is a far cry from what the Act provides in terms of the relevance and importance of African customary law. This is ironic, given that the Act prominently 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 state law.

These observations, however, 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. Accordingly, the prospects of Kenya's new dispensation in addressing challenges tied to traditional knowledge seem ill-fated from the onset. The hurdles transcend the text or content of the law itself, and permeate into systemic techniques of applying and interpreting law in a pluralistic legal context.

CONFLICTS OF INTEREST

None

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