

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW
PARKLANDS CAMPUS**

PROTECTION OF FOLKLORE IN KENYA: THE CASE OF MAASAI HANDICRAFTS

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) OF THE
UNIVERSITY OF NAIROBI**

BY

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NOVEMBER 2015

DECLARATION

I Mark Mukuha Wanjohi do hereby certify that the work presented in this dissertation, to the best of my knowledge and belief is original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this University or any other University or academic institution. I acknowledge that I have read and understood the University's rules, regulations, policies and procedures relating to my higher research award and to my dissertation. I certify that I have complied with the rules, regulations, policies and procedures of the University.

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DEDICATION

I dedicate this work to my mother Rachel Mukuha.

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LIST OF ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
GATT	General Agreement on Tariffs and Trade
HIV	Human Immunodeficiency Virus
IP	Intellectual Property
IPRs	Intellectual Property Rights
TCEs	Traditional Cultural Expressions
TK	Traditional Knowledge
TM	Traditional Medicine
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

TABLE OF STATUTES

Kenyan Statutes

The Constitution of Kenya, 2010

The Anti-Counterfeiting Act, No 13 of 2008

The Competition Act, No. 12 of 2010

The Copyright Act No. 12 of 2001

The Environmental Management and Coordination Act

The Evidence Act, Cap 80 Laws of Kenya

The Food, Drug and Chemical Substances Act chapter 254 Laws of Kenya.

The Industrial Property Act No. 3 of 2001

The Seed and Plant varieties Act, Cap 326 Laws of Kenya

The Trademarks Act Cap 506, Laws of Kenya

The Trade Descriptions Act, Chapter 505 Laws of Kenya

International Instruments

Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (1992)

Decree of the Government of the Russian Federation No. 132-r ‘Concept Paper on Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation’ 4 February 2009.

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

United Nations Declaration on the Rights of Indigenous Peoples, 2007,

United Nations Scientific and Cultural Organization (UNESCO), Model Provisions for national Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1985.

WIPO ‘Traditional Cultural Expressions (TCE)/Expressions of Folklore (EOF) – Revised Provisions for the Protection of Traditional Cultural Expressions (Expressions of Folklore) WIPO/GRTKF/IC/9/4 (Article 1).

World Intellectual Property Organization, Folklore, <www.wipo.int/tk/en/folklore/> accessed 20 September 2014.

TABLE OF CASES

Kenyan Cases

Kamete Ene Ateti Marine v Mosupai ole Ateti; Nairobi High Court Civil Appeal Number 224 of 1995.

Kitosiosio Ole Kutuk v. Safaricom (unreported)

Law Society of Kenya v Martyn Leigh Day and Kenya Human Rights Commission; Civil Case Number 457 of 2013.

CHAPTER ONE

PROBLEMATIZING THE PROTECTION OF FOLKLORE

1.0. General Introduction

Globalization, advances in technology and the rapid development of international trade have facilitated an unprecedented growth in the commercial exploitation of folklore. However, concerns have emerged that indigenous peoples are either being short-changed or harmed by this commercialization. In many instances, whenever Folklore is exploited, indigenous peoples either derive no economic benefit, or derive little benefits that pale in comparison to the profits reaped by commercial exploiters. In other instances, indigenous peoples are harmed either by forms of exploitation which lead to the permanent loss of irreplaceable folklore or by uses of folklore that degrades, misrepresents or contradicts its cultural value.

Folklore is part of traditional knowledge (TK). It has been defined to include traditional culture and knowledge in both tangible and intangible forms. It is categorized as follows:

- a. Verbal expressions, such as folk stories, legends and poetry;
- b. Musical expressions, such as folk songs and instrumental music;
- c. Expressions by action, such as popular dances, plays and shows; and
- d. Tangible expressions, such as productions of folk art, drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments as well as architectural works.

TK refers to knowledge, know-how, skills and practices developed, sustained and passed on from generation to generation within a community.¹ According to the International Convention on Biological Diversity (CBD) Article 8(j) TK is the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and

¹ World Intellectual Property Organization, *Traditional Knowledge*, <www.wipo.int/tk/en/tk/> accessed 20 September 2014.

sustainable use of biological diversity. The two main forms of TK are traditional medicine² and expressions of folklore (Folklore) or traditional cultural expressions (TCEs).³ TCEs include traditional culture and knowledge⁴ in both tangible⁵ and intangible forms⁶. They are divided into the following groups depending on the form of expression:

- a. Verbal expressions, such as folk stories, legends and poetry;
- b. Musical expressions, such as folk songs and instrumental music;
- c. Expressions by action, such as popular dances, plays and shows; and
- d. Tangible expressions, such as productions of folk art, drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments as well as architectural works.⁷

From the outset, this paper seeks to study the protection of Folklore in Kenya and the challenges encountered. The genesis of these challenges can be traced to the contemporary protection mechanisms founded on Western⁸ intellectual property (IP) law. The paper has established that the protection of Folklore does not lie under Western forms of IP law: patents, copyrights, trademarks, trade secrets or geographical indicators. This is because of several reasons including the fact intellectual property rights (IPRs) are premised on the Western conception of private ownership of property for limited periods of time while Folklore is communally owned for perpetuity. In addition, the subject of Folklore is too complex for IP law such that where commercial interests violate Folklore such violations do not necessarily constitute any breach of IP law.

² WIPO 'Traditional Cultural Expressions (TCE)/Expressions of Folklore (EOF) – Revised Provisions for the Protection of Traditional Cultural Expressions (Expressions of Folklore) WIPO/GRTKF/IC/9/4 (Article 1).

³ World September 2014.

⁴ Susan Scafidi, 'Introduction: New Dimensions of Cultural Property' (2008) 31 Fordham Intl LJ 264.

⁵ Tangible forms include drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments and architectural forms.

⁶ Intangible forms include of verbal expressions, epics, legends, poetry, riddles, musical expressions, dances, plays, ceremonies, rituals and other performances.

⁷ Jordanna Bowman, *Coping With Culture: Copyright Cultural Expressions and Inadequacy of Protection for Maori*, Unpublished Dissertation, University of Otago, Dunedin, New Zealand 2011).

This introductory section introduces the key concepts related to Folklore and goes on to problematise Folklore under various thematic areas. The first thematic area problematizes the concept of property and property ownership in the Western context. The second thematic area problematizes the concept of property and property ownership in the indigenous peoples' context. The third thematic area interrogates the interplay between Folklore and IPRs.

IPRs can be traced to the West⁹ where they were conceived as a mechanism to protect individual and industrial inventions.¹⁰ At the early developmental stages, it was unthinkable, that IPRs could be used to protect TCEs¹¹ which were at the time perceived as the epitome of the collective, trans-historical and vague nature of the culture of indigenous peoples.¹² However, indigenous peoples soon began clamouring for the protection of Folklore under the IPRs regime.¹³ About the same time, Folklore gained recognition as a highly valuable form of property.¹⁴

Today, the protection of Folklore appears to a case of reversed roles with the West advocating for the use of IPRs law in the protection of Folklore, while indigenous peoples contend that the IPRs law has no place in the protection of TCEs . To support their contention, indigenous peoples often cite Article 27(1) of the Agreement on Trade Related Aspects of Intellectual Property Agreement

⁹ Some of the earliest legislation especially in England include the 1624 Statute of Monopolies (regarding Patents), the 1710 Statute of Anne (regarding Copyrights).

¹⁰ Mark Van Hoorebeek, *Intellectual Property Law* (3rd edn. Thompson Reuters, 2009) 1.

¹¹ Jeremy de Beer, Chidi Oguamanam and Tobias Schonwetter, 'Introduction' in Jeremy De Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter, eds., *Innovation & Intellectual Property Collaborative Dynamics In Africa*, (University of Cape Town Press 2014) 2.

¹² Gino Cocchiaro, Johan Lorenzen, Bernard Maister and Britta Rutert. 'Consideration of a Legal Trust Model for the Kukula Healers' TK Commons in South Africa' in Jeremy De Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter, eds., *Innovation & Intellectual Property Collaborative Dynamics In Africa* (University of Cape Town Press 2014) 152.

¹³ See Saskia Vermeulen, *Intellectual Property Rights and Indigenous Peoples; A Case Study of the San in Southern Africa* (Centre for Environmental Strategy, University of Surrey, 2005)

¹⁴ See, United Nations Scientific and Cultural Organization (UNESCO), *Model Provisions for national Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 1985.

(TRIPS)¹⁵ Article 27(1) is cited because its provisions on patentable subject matter, exclude any possibility of patenting Folklore.

This paper is based on an ethnographic case study of a group of women from Kajiado County who are involved in Maasai handicrafts trade. The paper uses a human rights approach to consider the unique ways in which these Maasai Women perceive, use, and manage their TK and investigates how the human rights framework can be used to protect these Maasai handicraft away from the purview of IP law.

1.1.Statement of the Problem

The formal protection of Folklore under IP law is a fairly recent development. In contrast conventional IPRs such as patents, trademarks and copyrights have been protected by law for a long time. Indeed, international conventions, trade agreements and other instruments dealing with the protection of IPRs date back to the nineteenth century. In the case of trade agreements, the incorporation of IPRs has been driven by a desire on the part of the IPRs' holders to create a link between the enforcement of IPRs and the use of trade sanctions.¹⁶

However, among indigenous peoples, the protection of Folklore has existed since time immemorial. The formal recognition of Folklore was preceded by discussions at the national, regional and international levels. Initially, these discussions led to the recognition of the rights of indigenous peoples.¹⁷ The discussions subsequently shifted to the recognition of specific rights including rights

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

¹⁶ Bernard Hoekman and L. Alan Winters, 'Multilateralizing Preferential Trade Agreements: A Developing Country Perspective' in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System*, (Cambridge 2009) 655.

¹⁷ Fergus MacKay, 'Indigenous People's Rights and the UN Committee on the Elimination of Racial Discrimination,' in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press 2009) 188.

over Folklore.¹⁸ From that point a consensus was reached that indigenous peoples have a right to access, develop, maintain, utilize, control and protect their Folklore.¹⁹

On the international scene, key discussions took place during the negotiation of the TRIPS section of the General Agreement on Tariffs and Trade (GATT);²⁰ during the United Nations Conference on Environment and Development (the Earth Summit)²¹ which resulted in the adoption of the Convention on Biological Diversity (CBD)²²; during the adoption of the Akwe: Kon guidelines in 2007 to provide a framework for the consideration of the cultural, social traditional knowledge, innovations interests and practices of indigenous peoples²³ and in 2009, during the adoption of the ‘Concept Paper on Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation’.²⁴

The provisions of the IPR laws and Conventions arising out of these discussions have now even been enacted into national laws. However, these laws are biased against Folklore and appear to focus on

¹⁸ Charles Kamau Maina, ‘Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums’ (2011) 18 *International J of Cultural Property*, 143, 144. The United Nations (UN) General Assembly declared 1995-2004 the International Decade of the World's Indigenous Peoples and 2005-2014 the Second International Decade of the World's Indigenous Peoples.

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 31, ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

²⁰ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

²¹ United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 available at <<http://www.un.org/geninfo/bp/enviro.html>> accessed 30 October 2014.

²² Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (1992)

²³ Secretariat of the Convention on Biological Diversity, CBD Guidelines, Akwe: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (2007).

²⁴ Decree of the Government of the Russian Federation No. 132-r ‘Concept Paper on Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation’ 4 February 2009.

entrenching the commercial exploitation of Folklore by undeserving multinational corporations without any benefit to the source indigenous peoples.²⁵

In Kenya, the protection of IPRs is governed by IP laws²⁶ although Folklore is not governed by any specific laws. In the case of Folklore, notwithstanding the presence of progressive²⁷ Constitutional provisions,²⁸ there remains unfavourable treatment in statutory provisions, in government policies

²⁵ Kamau (n 15). 'Various regional, national, and local initiatives to protect traditional knowledge have been put in place. These initiatives range from model legislations to national systems tailored to a specific country's traditional knowledge protection circumstances and priorities. Indigenous communities have also recognized the urgent need to protect their knowledge and practices and have, through various declarations, made known their views on international protection of their knowledge.'

²⁶ The most important of these include the Constitution of Kenya (2010); the Industrial Property Act No. 3 of 2001; the Trade Marks Act Chapter 506, Laws of Kenya; the Copyright Act, No. 12 of 2001; the Seeds and Plant Varieties Act, Chapter 326 Laws of Kenya; the Anti-Counterfeiting Act, No 13 of 2008; the Trade Descriptions Act, Chapter 505 Laws of Kenya; Competition Act, No. 12 of 2010; and the Food, Drug and Chemical Substances Act chapter 254 Laws of Kenya.

²⁷ These provisions relate to the promotion and protection of inter alia, culture, intellectual property rights, traditional knowledge as well as the rights of indigenous peoples.

²⁸ Constitution of Kenya 2010, art 11 states that: (1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. (2) The State shall- (a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) recognise the role of science and indigenous technologies in the development of the nation; and c) promote the intellectual property rights of the people of Kenya. (3) Parliament shall enact legislation to- (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

Art 40 further provides that: (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property- (a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that- (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Art 44 makes further provision to the effect that: (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice. (2) A person belonging to a cultural or linguistic community has the right, with other members of that community- (a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. (3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.

In addition, Art 56 makes provision that: The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups- (a) participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure.

and in practice. The relationship between Folklore and IPRs can be likened to that of the restrictive, strict and inflexible application of common law rules before the creation of the doctrines of equity.²⁹ This is unfortunate because the application of law ought to be characterized by an ongoing search for a balance between justice in the individual case and justice for the larger population.³⁰

The consequences of the lack of protection for Folklore under the existing laws coupled with the commercial exploitation of Folklore with little benefit to the source indigenous peoples became more pronounced during the study. The poor material living conditions of the Maasai women engaged in the Folklore trade were a true testament. For instance, although the traditional Maasai diet consists of meat, milk, and blood from their cattle, the community under the study has long since abandoned this traditional diet. This is because their herds have reduced so drastically that the majority do not slaughter cattle in their homes. Their diet now comprises of cereals such as maize and beans purchased from local markets.

Secondly, it was evident that even the families where women are involved in the Folklore trade have nothing to show from their trade. They live in mud walled huts (Manyattas) all the while struggling to put their children through school. In many of such families, girls are married off at a tender age in exchange of bride price in the form of livestock which serves as a source of income for the family. For many of these families, basic healthcare is beyond reach.

1.2.The Concept of Property and Property Ownership in the Western Context

The conceptualization of property depends on the presentation of information about property rights, the manner in which property laws are written and the way in which property entitlements are framed.³¹ In the West, strictly speaking, ‘property’ refers to rights to something rather than to the

²⁹ See Graham Virgo, *The Principles of Equity & Trusts* (OUP 2012) 5.

³⁰ Gary Watt, *Equity and Trusts Law: Directions* (3rd edn, OUP, 2012) 5.

³¹ Jonathan Remy Nash and Stephanie M. Stern, ‘Property Frames’ (2010) 87 *Washington UL Rev* 453.

thing that is ‘owned’.³² Property is a power relationship of social and legal legitimacy between a person and a valuable resource.³³ Property is embodied in forms such as rights to land, manufactured goods, commodities, services, resources, knowledge or other similar phenomenon which can be bought or sold and confer upon the proprietor rights such as the right to exclude others.³⁴

Property is also described as a legal, economic and social concept.³⁵ As a legal concept, it refers to a bundle of rights and expectations in a tangible or intangible thing that are enforceable against third parties.³⁶ As an economic concept, it refers to an area of law concerned with the function of allocating material resources.³⁷ As a social concept, it is a constructed concept, indirectly reflecting and reinforcing the extensive range of the power relations permitted within society.³⁸

Rights in property are separate from the physical objects in which they are embodied.³⁹ They are also essentially negative, meaning that they are rights to stop others from doing certain things.⁴⁰ They Rights in property protect the interests of their creators by giving them proprietary rights over their creation.⁴¹ This protection gives statutory expression to the moral and economic rights of the creators in their creation and to the rights of the public in accessing that creation.⁴² It also promotes creativity,

³² Dr Charles Harpum; Stuart Bridge and Dr Martin Dixon, *Megarry and Wade: The Law of Real Property*, (8th edn. Sweet & Maxwell 2012).

³³ Tom O Ojienda, *Conveyancing Principles & Practice* (rev edn, LawAfrica Publishing 2010) 6.

³⁴ Roger J Smith, *Property Law*, (7th edn, Pearson Education, 2011) 3; Gregory S. Alexander and Eduardo M Penalver, *An Introduction to Property Theory* (Cambridge University Press, 2012)

³⁵ Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 29.

³⁶ Ojienda (n 38) 5.

³⁷ Mariateresa Maggiolino, ‘The Economics of Antitrust and Intellectual Property Rights’ in Steven Anderman and Ariel Ezrachi (eds), *Intellectual Property and Competition Law* (OUP 2011) 87. See also Peter Mugambi, *Introduction to Law*, (LawAfrica Publishing 2011) 377; Gregory S. Alexander and Eduardo M. Penalver, *An Introduction to Property Theory* (CUP 2012) 3.

³⁸ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 87.

³⁹ Lionel Bentley and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP, 2008) 4. 2.

⁴⁰ William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property; Patents, Copyrights, TradeMarks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 6.

⁴¹ *Ibid.*

⁴² See Christina Bohannon and Herbert, ‘IP and Antitrust: Reformation and Harm’ (2010) LI Boston College L R, 905.

dissemination and application of its results as well as fair trade.⁴³ All this contributes to economic and social development.⁴⁴

There are different categorizations of property and for each category the law creates a special genre of property rights.⁴⁵ In addition to real property⁴⁶, one of the other key categories of property is IP. Although different in form and substance, common origin between the two is evident. For instance, under international law the right to IP is closely and directly linked to the right to property.⁴⁷ Two major schools of thought inform the Western concept of property ownership. These are the natural rights and the utilitarian schools of thought. The utilitarian school of thought was first articulated by Jeremy Bentham.⁴⁸ It holds that the pursuit of happiness and the avoidance of pain are foundational goods for human beings.⁴⁹ With regard to IPRs, utilitarian theorists propound that the creation of IPRs is an appropriate means to foster innovation. IPRs are necessary to further development and serve as an incentive to further advancement.⁵⁰ The utilitarian understanding of IPRs focuses on incentivizing the creation of more knowledge goods. However, utilitarianism does not ask who makes the goods and whether the goods are fairly distributed to all who need them.⁵¹ The theory propounds that governments should enact laws that guarantee the happiness of the majority. Consequently, IPRs should be granted to individuals in cases where such rights guarantee happiness of the larger society.

⁴³ Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System; The WTO and Beyond* (3rd edn, OUP 2009) 371.

⁴⁴ Jonathan Aldred, 'Copyright and the Limits of Law-and-Economic Analysis' in Lionel Bently, Jenifer Davis and Jane C. Ginsburg (eds), *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge University Press 2010) 128.

⁴⁵ Roger J Smith, *Property Law* (7th edn, Pearson Education 2011) 4. See also Stephen R. Munzer, *A Theory of Property* (CUP 1990) 1; J. E. Penner, *The Idea of Property* (Clarendon Press 1997) 1; W.T. Murphy and Simon Roberts, *Understanding Property Law* (3rd edn, Sweet & Maxwell 1998) 1; F.H. Lawson and Bernard Rudden, *The Law of Property* (3rd edn, OUP 2002) 3; Calvin Massey, *Property* (Aspen Publishers 2002) C-1.

⁴⁶ See Charles Harpum, Stuart Bridge and Martin Dixon, '*Meggary & Wade: The Law of Real Property*' (8th edn Sweet & Maxwell, 2012) 1; Judith Bray, *Unlocking Land Law*' (3rd edn, Hodder Education, 2010) 1. Edward Hector Burn and John Cartwright, *Maudsley & Burns Land Law: Cases and Materials* (9th edn, OUP 2009) 3; Kevin Gray, *Elements of Land Law*, (5th edn, OUP 2009) 8.

⁴⁷ See art 17, Universal Declaration on Human Rights; 'Everyone has a right to own property alone as well as in association with other.'

⁴⁸ Michael Freeman, *Lloyd's Introduction to Jurisprudence*, (9th edn, Sweet & Maxwell 2014) 248.

⁴⁹ This argument is derived from Jeremy Bentham, *A Manual of Political Economy* (Putnam 1839).

⁵⁰ John Stuart Mill, *Principles of Political Economy*, (5th edn, Appleton 1862).

⁵¹ A. C. Pigou, *The Economics of Welfare* (2nd edn, Macmillan 1924).

IPRs are therefore granted to ensure that enough intellectual products are available to the larger society.⁵²

The natural law theory informs the other version of the Western conception of property and property ownership. The natural law theory was propounded by John Locke and his contemporaries. Natural law theorists rely on the avoidance theory of labour, which holds that labour is uncomfortable and many would rather avoid it and accordingly, the few who agree to labour should be rewarded. John Locke established a link between the natural rights theory and the concept of property. He propounded that God gave the earth to mankind in common and that each person has property in their own person, the labour of their body and the work of their hands.⁵³ In *Two Treatises of Government* he says that:

Whatsoever, then, he removes out of the state that nature has provided and left it in, he has mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it has by this labour something annexed to it that excludes the common right of other men.⁵⁴

He therefore justified private property ownership on the basis that every person has a right to own what they produce from the commons and the Contractarian state has a duty to enforce this right.⁵⁵

Natural law theorists further posit that the production of ideas comes from a person's labour.⁵⁶ This justifies the grant of IPRs to those who labour. IPRs should therefore be granted due to the benefits that are likely to accrue to society.⁵⁷ A person has a natural right to their own creation and IPRs incentivize the development of creativity and allow investors to recoup their investment in creative

⁵² Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPR) Regime in Kenya' in Moni Wekesa and Ben Sihanya eds. *Intellectual Property Rights in Kenya*, (Konrad Adenauer Stiftung, 2009) 2.

⁵³ Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPR) Regime in Kenya' in Moni Wekesa and Ben Sihanya eds. *Intellectual Property Rights in Kenya*, (Konrad Adenauer Stiftung 2009) 2.

⁵⁴ John Locke, 'Two Treatises of Government: Civil Government' in Michael Freeman, *Lloyd's Introduction to Jurisprudence*, (9th edn Sweet & Maxwell 2014) 145.

⁵⁵ Ibid.

⁵⁶ John Locke, *Two Treatises of Government*, P. Laslett, ed., (Cambridge University Press, 1970).

⁵⁷ Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 178-82.

endeavor through profits.⁵⁸ They theorists hold that a creative mind is a scarce commodity, found only infrequently and it therefore deserves to be compensated for its creative value which becomes inherent in products, processes and creations.⁵⁹

However, the applicability of these schools of thought to Folklore is somewhat limited. To begin with, their conception of IPR is individualistic whereas Folklore is inherently collective in nature. Further, while under the IPR regime, the test for protection is based on the “novelty” concept, Folklore is a constantly evolving body of knowledge that builds upon the knowledge that has been available since time immemorial. IPRs are meant to serve as a time-limited monopoly since the rights are a trade-off between the individual and society. Folklore on its part is cross generational hence its protection ought to be perpetual. In addition, while IPRs grants protection on the basis of innovation so as to encourage innovation, Folklore is a product of a static culture without necessarily there being any addition by human effort.

1.3. Indigenous Peoples and the Concept of Property

Although, there is no universal definition for the term ‘indigenous people’,⁶⁰ the term is used to refer to groups of people who descended from the original or longtime inhabitants of lands now dominated by other groups.⁶¹ According to this definition, the two qualifying characteristics of indigenous peoples are first occupancy or last (prior) occupancy of certain areas.⁶² The term also refers to people who, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from those other societies. They form non-dominant sectors of society and are determined to preserve, develop and transmit their ancestral territories and

⁵⁸ Paul Nihoul, ‘The Limitation of Intellectual Property in the Name of Competition’ (2009) 32 Fordham Intl LJ 489.

⁵⁹ Dilip K. Das, ‘Intellectual Property Rights and the Doha Round’ (2005) 8 J of World Intellectual Property 33.

John Andrew McNeish and Robyn Eversole, ‘Introduction: Indigenous Peoples and Poverty’ in Robyn Eversole et al (eds) *Indigenous Peoples & Poverty: An International Perspective*, Zed Books (2005) 5. Given the great diversity of indigenous peoples, trying to include them under a single definition is difficult. Even the process of definition can become offensive to those tired of being categorized by outsiders.

⁶¹ Meghan Theresa McCauley, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, 41 Arizona State L J page 1167.

⁶² Meghan Theresa McCauley, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, (2009) 41 Arizona State L J, 1167.

their ethnic identity to future generations as the basis for their continued existence according to their own cultural patterns, social institutions and legal systems.⁶³

The term indigenous peoples in the plural recognizes their diversity in terms of language, region, history, culture, ethnic identity. Their TK is an integral part of their being and identity⁶⁴ but generally, they emerged as a product of the diffusion of colonialism.⁶⁵

The Constitution of Kenya⁶⁶ also recognizes the concept of indigenous peoples. It defines a marginalized community as:

‘(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; and (d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.’⁶⁷

From all the above definitions, the key traits of indigenous peoples include ‘non-dominance, or marginalization’, ‘cultural distinctiveness’ and ‘attachment to land’.

In Kenya, although the more than 42 ethnic groups⁶⁸ present pre-date colonialism, not many of them identify themselves as indigenous peoples. They prefer to be referred to as ‘tribes’ or ‘ethnic

⁶³ Chidi Oguamanam, *International Law and Indigenous Knowledge*, Intellectual Property, Plant Biodiversity and Traditional: general Introduction and Overview, University of Toronto Press, 2006, 3

⁶⁴ Ibid.

⁶⁵ Aquila Mazzinghy Alvarenga, *Who Cares About the Rights of Indigenous Children? Infanticide in Brazilian India Tribes*, 22 *Hastings Women’s L J* (2011) 17.

⁶⁶ Constitution of Kenya, 2010.

⁶⁷ Ibid, art 260.

⁶⁸ Phoebe Akinyi-Dar Nyawalo et al, *The Invisible Violence in Kenya: A Case Study of Rift Valley and Western Regions*, (Conrad Adenauer-Stiftung, 2011) 70.

groups'.⁶⁹ Indeed, questions even arise on the conceptual and strategic suitability of the application of the concept of indigenous peoples in the Kenyan context. This arises out of its association with displacement of the original inhabitants by colonial conquest and occupation which was never redressed after independence.⁷⁰ It also arises because like in other African countries, only a few ethnic groups have enjoyed political positions and socio-economic privilege with the majority relegated to the sidelines of economic activities and political processes.⁷¹

However, using traits such as 'non-dominance', 'marginalization', 'cultural distinctiveness' and 'attachment to land', it is possible to narrow down on the 'indigenous peoples' of Kenya. Even after identifying the indigenous peoples, protection of their rights is slowed down by a debate on whether their rights ought to be protected apart from those of others.⁷² It is argued that protection of their rights apart from those of others amounts to discrimination in a country that needs national unity.⁷³

Tat this point the argument transforms into one about negative ethnicity. Negative ethnicity can lead to ethnic violence as witnessed during general elections particularly in the 2007/2008 period.⁷⁴ This kind of ethnicity usually emerges whenever different groups are reminded of inequalities in the distribution of resources by politicians⁷⁵ and from that point 'a Gikuyu, Luo, Luhya, Giriama, Maasai, Rendile, Somali or Kalenjin begins to see themselves not as a Kenyan but as a member of their ethnic community.'⁷⁶

⁶⁹ Charles A. Khamala, 'US-Driven TRIPS or UNESCO Cultural Conventions? Regulating Global Film Impact in Kenya,' (2008-2010) II Kenya L Rev.

⁷⁰ Frans Viljoen, 'Reflections on the Legal Protection of Indigenous People's Rights in Africa,' in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2009) 76.

⁷¹ Ibid, 77.

⁷² Patricia-Kameri Mbote and Jacinta Anyango Oduor, 'Following God's Constitution: The Gender Dimensions in the Ogiek Claim to Mau Forest Complex,' in Anne Hellum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga eds., 'Human Rights, Plural Legalities and Gendered Realities; Paths are Made by Walking (Southern and Eastern African Regional Center for Women's Law and Weaver Press, 2007) 180.

⁷³ Ibid, 183.

⁷⁴ John O. Oucho, 'Undercurrents of Post-Election Violence in Kenya: Issues in the Long-Term Agenda', in Karuti Kanyinga and Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, (Society for International Development 2010) 491.

⁷⁵ Wanjiku Mukabi Kabira, *Time for Harvest: Women and Constitutional Making in Kenya* (UoN Press, 2012) 314.

⁷⁶ Ibid.

The easiest way to determine who the indigenous peoples of Kenya are, is to first eliminate the non-indigenous groups.⁷⁷ In the colonial period, those people groups who were cultivators and adopted sedentary agriculture took up commercial crop production and in post-colonial Kenya they became the mainstream population.⁷⁸ They include the Luhya, Luo, Kisii, Kuria, Kalenjin, Meru, Kikuyu, Embu and Mbeere. Conversely, the only communities that can be considered as indigenous peoples are the hunter and gatherer communities such as the Ogiek⁷⁹ and the predominantly nomadic pastoral communities who inhabit the arid and semi-arid areas such as the Maasai, Samburu, Turkana, Pokot, Borana, and Somali.

In the case of the Maasai, during pre-colonial times, they were economically and militarily dominant. During colonial times, they were accorded preferential treatment and although they lost land to European settlers, certain lands were set aside for them.⁸⁰ They were among the main supporters of Kenya African Democratic Union (KADU) party which represented minority communities that were afraid of domination by the majority communities during the pre-independence period.⁸¹ The other major political party in those times was the Kenya African National Union (KANU).⁸² In the run-up to independence it was clear that they would not become profitable cash crop farmers. After independence, they were therefore excluded from the white highlands because they could not make

⁷⁷ Robyn Eversole, 'Overview: Patterns of Indigenous Disadvantage Worldwide' in Robyn Eversole, John-Andrew McNeish and Alberto D Cimadamore (eds), *Indigenous Peoples and Poverty: An International Perspective* (Zed Books 2005) 32. See also Luke Freeman and others, 'Free, Prior and Informed Consent: Implications for Sustainable Forest Management in the Congo Basin' in Laura A. German, Alain Karsenty and Anne-Marie Tiani (eds) *Governing Africa's Forests in a Globalized World* (Center for International Forestry Research 2010) 320.

⁷⁸ Solomon A. Dersso 'Introduction' in Solomon A Dersso *Perspectives on the Rights of Minorities and Indigenous peoples in Africa*, (Pretoria University Law Press 2010) 7.

⁷⁹ See Patricia-Kameri Mbote and Jacinta Anyango Oduor, 'Following God's Constitution: The Gender Dimensions in the Ogiek Claim to Mau Forest Complex,' in Anne Hellum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga eds., 'Human Rights, Plural Legalities and Gendered Realities; Paths are Made by Walking, Southern and Eastern African Regional Center for Women's Law and the Weaver Press (2007) 164.

⁸⁰ Kealeboga N Bojosi, 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Work so Far', in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press 2009), 120.

⁸¹ Robert M. Maxon, 'Kenya's Independence Constitution: Constitution Making and the End of an Empire (Fairleigh Dickinson University Press 2011) 18.

⁸² Gamaliel Mgongo Fimbo, *Multipartyism, Constitutions and the Law in Africa*, (LawAfrica Publishing, 2013) 44.

‘optimal economic use’ of the land.⁸³ Today the Maasai live in Southern Kenya and Northern Tanzania. Their recognition as indigenous peoples is attributed to their relative visibility and prosperity as compared to other indigenous peoples.

One of the earliest accounts of the indigenous peoples’ conceptualization of property is found in the work of Jomo Kenyatta:

‘The sense of private property vested in the family was highly developed among the Gikuyu, but the form of private ownership in the Gikuyu community did not necessarily mean the exclusive use of the land by the owner, or the extorting of rents from those who wanted to have cultivation or building rights. In other words, it was a man’s pride to own a property and his enjoyment to allow collective use of such property. This sense of hospitality which facilitated the communal use of almost everything, has been mistaken by the Europeans who misinterpreted it by saying that the land was under communal or tribal ownership...’⁸⁴

Another account is found in exposition of the Nandi customs by G. S. Snell who said that:

There were two sorts of land – grazing and cultivated. Grazing was in turn of three categories ... *kaptich* land beyond the tribal frontiers and unsettled pockets within them; *akwot* land comprising the main all-weather grazing grounds of the *kokotinwek*; *kurget land* , the area immediately surrounding a dwelling hut. The two former were communal...⁸⁵

According to these two accounts, owing to the importance attached to land, systems of land tenure were carefully and ceremonially laid down, so as to ensure to an individual or a family group a peaceful settlement on the land they possessed. Under customary land tenure every family unit had a right of one form or another. While the whole tribe defended collectively the boundary of their

⁸⁴ Jomo Kenyatta, *Facing Mount Kenya* (Vintage Books, 1965) 27.

⁸⁵ S. G. Snell, *Nandi Customary Law*, (Kenya Literature Bureau 1954) 43, 44.

territory, every inch of land within it had its owner.⁸⁶ Europeans misinterpreted this to mean ‘Tribal ownership or communal land’.⁸⁷

Among the Maasai, the right to livelihood resources is non-exclusive. Resources are shared among individuals, families and social groups, each of which may have ‘bundles’ of graded rights to the same resources within a given area. Such rights are considered inalienable; they cannot be transferred, either as gifts or through commercial transactions. Knowledge and resources are communally held and although some specialized knowledge may be held exclusively by males, females, certain lineage groups, or ritual or specialists, this does not give that group the right to privatize the communal heritage. They follow their traditional lifestyle, maintaining strong clan and age-group affiliations.

Members of the community mostly hold their land according to customary law with no individual rights of ownership.⁸⁸ This is because they inhabit savannahs and semi-arid plains whose most viable economic activity, nomadic pastoralism, demands communal ownership. Each person can access the land, but there are clear guidelines governing access and control and the community determines the best way to use their land.⁸⁹

In the case of Folklore, ownership is at three levels; individual, several individuals across various communities such as a clan or relations within a clan and the entire community. Folklore is passed on from generation to generation largely through oral tales or apprenticeship. An individual may possess exceptional knowledge about some aspects of Folklore perhaps having learnt it from some ancestor. Such Folklore may be passed to only one person at a time such that within a given generation, only one person is vested with the Folklore but nonetheless such a person cannot be referred to as the inventor. At the second level, several people may have acquired similar or near similar Folklore from

⁸⁶ Kenyatta (n 94) 22.

⁸⁷ Ibid, 23.

⁸⁸ This was the *raison d’être* for the enactment of the Land Group Representatives Act, Chapter 287, Laws of Kenya.

⁸⁹ George Mukundi Wachira, ‘Rights to Land and Natural Resources,’ in Solomon A Dersso(ed,) *Perspectives on the Rights of Minorities and Indigenous peoples in Africa*, Pretoria University Law Press (2010) 302.

different sources. At the last level of ownership of Folklore is the whole community. This is particularly common in the area of handicrafts. In addition, the arts and crafts of different indigenous peoples groups dwelling in similar environmental conditions may be similar. Accordingly, in contradistinction to the West, property ownership among indigenous peoples is said to be communal in nature.

The Maasai, use customs and taboos to protect Folklore. The systems ensure that certain Folklore is not widely known but is still preserved and passed on to the next generation. Specific families or persons, such as the *olaibon*, hold knowledge and practice it. Some forms of Folklore are thus kept in the custody of selected few, to the exclusion of all others.⁹⁰ Customary law may even outlaw the sale of Folklore. The good thing about customary law is that it is recognized under Kenya's legal system. For this reason, there are dual legal systems, such that civil disputes can either be settled within the community or decided in the courts according to local custom.⁹¹

Indeed the Courts have held that customary law should not be treated lightly. In the words of Amin J:

The Learned trial magistrate in my view was in error to hold that the 'Maasai customary law is repugnant to justice and morality'. These are time tested customs and traditions which are based on wisdom and experience and are not to be brushed aside lightly however, tempting it might be to do so unless it is done for sound reasons which are deliberated and determined judicially.⁹²

Folklore has existed for centuries and has remained more or less static over this period. Proper authorship cannot be determined because it has been handed down through oral tradition and not written text. Even if it were to be found in written texts, it is improbable that a single author can be located. Partly because of the difficulty of fitting Folklore into the western frameworks, indigenous

⁹⁰ Marisella Ouma, 'The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya', in Jeremy De Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter, eds., *Innovation & Intellectual Property Collaborative Dynamics In Africa*, University of Cape town Press (2014) 133.

⁹¹ The Judicature Act, Section 32 of the Law of Succession Act.

⁹² Amin J, in *Kamete Ene Ateti Marine v Mosupai ole Ateti*; Nairobi High Court Civil Appeal Number 224 of 1995.

peoples livelihoods are channeled into technology transfer, foreign direct investment, access to Western education and at best, equitable benefit sharing. Little attention is given on how Folklore can become beneficial to the source indigenous communities. Although, foreign direct investment, technology transfer and education projects are welcome, they end up benefiting other communities perceived as more business friendly, more educated and therefore receptive to technology and better connected politically. In exchange for these developments, TK is documented and disseminated to corporations which use patents, copyrights, trademarks and other forms of intellectual property rights to preclude even the source indigenous communities from benefiting from the proceeds of the commercialization of their TK.

The greatest undoing of customary law protection of Folklore is the fact that it relies on norms and sanctions to impose a duty on members of the community to recognize and respect Folklore. Today, even among members of the community the fear of norms and sanctions has been greatly eroded by modernization, which has caused individual interests to subdue communal interests. In the case of external commercial exploiters, the norms and sanctions have no relevance whatsoever and are unlikely to influence behavior.

1.4.The Conceptualization of the Interplay Between Folklore and IPRs

Intellectual property refers to creations of the human mind existing in the form of information or knowledge that can be incorporated in tangible objects in an unlimited number of copies.⁹³ It involves the establishment of property protection over intangible things such as ideas, inventions, signs and information⁹⁴ and covers their creation, use and exploitation of mental or creative labour.⁹⁵

⁹³ William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th edn, Sweet & Maxwell 2007)3. See Ben Sihanya, 'Intellectual Property and Mentoring for Innovations and Industrialization in Kenya, (2008) 4 UoN L J, 20.

⁹⁴ Bently and Sherman (n 30) 2.

⁹⁵ Lionel Bently, Brad Sherman, *Intellectual Property* (3rd edn, OUP 2009) 1.

Intellectual property exists in various formulations⁹⁶ including patents, designs, trademarks, trade secrets, domain names, copyrights, neighbouring rights as well as specialized formulations such as plant breeders' rights and TK.⁹⁷

Several arguments have been advanced in support of the contention that IP law does not protect Folklore adequately. As one author explained, the use of a 'strong property rights model assumes that culture is a fragile flower whose integrity must be zealously defended. It seeks to safeguard tradition against insults and exploitation when more serious threats arguably arise from indifference, neglect, and lack of economic viability.'⁹⁸ Firstly, this is so because the Western conception of property is very different from that found among indigenous peoples. As one scholar, put it the concept of property is so fragile yet elusive and frequently misused.⁹⁹ The IPRs regime is based on the Western concept of allocation of property rights that is in turn borrowed from the Western conception of property. Even the international dispute resolution mechanism is based on the Western notion of property.¹⁰⁰ This is no doubt prejudicial to the indigenous peoples conceptions.¹⁰¹ The Western notion of property is built around the individual while the indigenous notion revolves around a group such as the family or community.¹⁰² IP law therefore does not even conceptualize Folklore accurately.¹⁰³ Secondly, IPRs ownership is acquired through legal processes involving registration with government authorities.¹⁰⁴ Registration is often difficult, time-consuming and expensive.¹⁰⁵ In addition, once acquired, IPRs must be defended. In defending IPRs, indigenous peoples encounter the same

⁹⁶ Graeme B. Dinwoodie, 'The Architecture of the Intellectual Property System' in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Praeger Publishers 2007) 2.

⁹⁷ William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property; Patents, Copyrights, TradeMarks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 6.

⁹⁸ Sean Pager, 'Folklore 2.0: Preservation Through Innovation' (2012) 4 Utah Law Review 1835, 1894.

⁹⁹ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 86

¹⁰⁰ 1975 ICJ Rep. 12 (Advisory Opinion)

¹⁰¹ Karen E. Makuch and Rocardo Pereira, *Environmental and Energy Law*, (Blackwell Publishing 2012) 209

¹⁰² Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPR) Regime in Kenya' in Moni Wekesa and Ben Sihanya eds. *Intellectual Property Rights in Kenya*, (Konrad Adenauer Stiftung, 2009) 272

¹⁰³ Oguamanam, (n 61) 6

¹⁰⁴ Wekesa and Sihanya (n 112)

¹⁰⁵ Ibid.

difficulty, delay and expense. The acquisition and defense of IPRs requires access to information, sound legal advice and tangible financial resources. It should be remembered that advocates are prohibited from charging below the recommended fees¹⁰⁶ and they cannot therefore give fee rebates to the indigenous peoples as this will amount to undercutting.¹⁰⁷ Even the involvement of Non-Governmental Organizations offering pro bono legal services to indigenous peoples would not be an adequate solution. A case in point is the case of the Mau Mau veterans who, despite the existence of pro bono legal services were not compensated for atrocities committed against them by the British Government since the beginning of the twentieth century until more than a century later when the British firm of Leigh Day intervened. During one of the compensation related cases, the Mau Mau Governing Council of Kenya's application to be enjoined in the cases was declined on the basis that the Council has no capacity to sue or be sued since it was not deemed to be a corporate body but merely a society registered under the Societies Act.¹⁰⁸ This case clearly demonstrates the possibility that the interaction between indigenous people and modern laws is full of misapprehension.

In addition, the prosecution of any claim for instance of infringement under IPRs law requires evidence.¹⁰⁹ For evidence to be relied on as proof of a fact, it must conform to the strict requirements of the law¹¹⁰ on the burden and standard of proof.¹¹¹ These requirements are beyond the reach of indigenous peoples. In addition, the lack of economic self-sufficiency amongst indigenous peoples when juxtaposed against the unequal power relations between them and corporations makes the situation worse. Indigenous peoples are therefore unable to access the IPRs legal framework in pursuit of their rights and if they do, they are continuously disadvantaged by either lack of

¹⁰⁶ See The Advocates Act, Chapter 16, Laws of Kenya, Advocates (Remuneration) (Amendment) Order 2014, r 4.

¹⁰⁷ Tom Ojienda and Katarina Juma, *Professional Ethics: A Kenyan Perspective*, (LawAfrica Publishers 2011) 75.

¹⁰⁸ *Law Society of Kenya v Martyn Leigh Day and Kenya Human Rights Commission*, Civil Case Number 457 of 2013.

¹⁰⁹ See Peter Murphy and Richard Glover, '*Murphy on Evidence* (12th edn, OUP, 2011) 2.

¹¹⁰ See, *the Evidence Act, Chapter 80, Laws of Kenya*.

¹¹¹ See Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (9th edn, OUP, 2012) 82.

comprehension of the legal processes due to illiteracy, misinformation or inadequacy of the system to redress their rights.¹¹²

Thirdly, whereas IPRs protection is majorly economic, the interests of indigenous peoples in Folklore go beyond economics. They involve questions of spiritual value, cultural significance as well as socio-political importance including the right to self-determination. In addition, among indigenous peoples, Folklore is generally shared without any restriction and without commercial gain. Fears about over-exploitation of physical resources which make private ownership the most satisfactory allocative model, do not apply to Folklore. Instead, the converse is true; the more the people who can get access to the works, the better.¹¹³ Even where the sharing of Folklore is restricted, the holders thereof still do not have the right to commercialize it for personal gain.

This aspect was also revealed during the field study. The Respondents interviewed explained that the Maasai traditional handicrafts have cultural significance. Traditionally, the handicrafts were not meant for sale. However, due to the changes in the economic fortunes of the community and the demand for their handicrafts, the community begun selling their handicrafts. The traditional handicraft have so much significance that before a Maasai girl can get married, there is a requirement that her suitor must give her parents enough money or other form of property to enable them buy her special necklaces for the bride to wear on her wedding day.

The respondents revealed that intricate handicraft making has been an art form for Maasai women for centuries. Traditionally the colours used in the beadwork bore significance. For instance, blue colour correlated to the sky and signified God (Enkai). Green colour correlated to the pastures or vegetation after rainfall and signified peace. White colour correlated to milk and signified purity. Red colour correlated to blood, warriors or danger and signified bravery. Black colour correlated to the rain. Orange colour was one of the colours preferred by women. Yellow colour correlated to sunshine as

¹¹² George Mukundi Wachira, 'Rights to Land and Natural Resources, in Solomon A Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous peoples in Africa*, Pretoria University Law Press (2010) 299.

¹¹³ Lionel Bently and Brad Sherman, *Intellectual Property*, (3rd edn, OUP 2009) 38.

well as fruit. However, today, the designs and colours used in the handicrafts depend on the prevailing fashion. Apart from colour, the shape of the handcraft produced bore significance to the community. For instance, the bow and multiple stands necklaces were mainly worn by women and girls. The bracelets are worn by both men and women while the necklaces and a special arm band are worn by women only. There is also a special necklace that is made for the bride. Both the necklaces and bracelets can be passed from one person to another or from one generation to the next.

Fourthly, it is wrong to justify IPRs based on the assumption that indigenous peoples have no indigenous way to protect their Folklore. There is a long tradition among indigenous peoples of using customary law in the management of resources.¹¹⁴ Before the adoption of English law, Kenyan communities had their laws in the form of African Customary Law.¹¹⁵ This later became one of the sources of law in Kenya.¹¹⁶ These resource management systems exist even if many of them have never been documented or recorded because even in the pre-colonial period, Kenyan communities had oral cultures.¹¹⁷ As Kenyatta put it

‘Without note-book or diary to jot down memoranda, the African learns to make an impression on his own mind which he can recall whenever it is wanted. Throughout his life, he has much to commit to memory, and the vivid way in which stories are told to him and their incidents acted out before his eyes helps the child to form an indelible mental picture from his early teaching.’¹¹⁸

¹¹⁴ Tudor Jackson, *The Law of Kenya*, (3rd edn. Kenya Literature Bureau 1988) 21.

¹¹⁵ See William Burnett Harvey, *An Introduction to the Legal System in East Africa*, (Kenya Literature Bureau, 1975) 415.

¹¹⁶ The Judicature Act, Cap 8. Laws of Kenya, s 3(2) provides that: ‘The High Court and all subordinate 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.

¹¹⁷ Wangari Muta Maathai, *Unbowed A Memoir* (Anchor Books, 2007) 9.

¹¹⁸ Jomo Kenyatta, *Facing Mount Kenya* (Vintage Books, 1965) xvi.

Even as they trivialized many aspects of the local culture, including various art forms, they also recorded them and saved some of the artifacts, which now reside in European Museums.¹¹⁹ Although years of external dislocation and globalization of resource management have eroded many local resource governance institutions, some are still in place.¹²⁰ Surprisingly, African Customary Law has not been used as a source of law in the case of Folklore.

Fifthly, dividing Folklore into distinct categories of intellectual, cultural, medicinal and scientific does not capture the aspirations of indigenous peoples because they see Folklore as one continuous conception without the distinct classes introduced by IPRs.

Finally, among the indigenous peoples IPRs ignore the social context in which the people live. The suggestion that Folklore can become individual property owned by anyone ignores the legal capacities that are alive among indigenous peoples. IPRs blur the lines of gender, age, clan, status and profession. Among indigenous people women and youth for instance do not own property. The status of the Maasai woman in the ownership of property is best told in the words of Ruth Mbonge who said that:

“I was born here and married here. It is true that among the Maasai, a woman is not counted as an important person. She is counted just as a shepherd or as a watchman or just as a tool which is weak. This is especially so when I look at the side of inheritance, which is one of the areas where she is not considered. You know that she is the one who built the boma... but she is not considered. ... We are shocked as women when we find that the family land was sold a long time ago and we don't know how or where the money went. You will be lucky if you are brought something small. But when that happens and you start asking where the money has come from because you don't know what work he does, you are not told at that moment, you

¹¹⁹ Wangari Muta Maathai, *Unbowed A Memoir*, Anchor Books (2007) 9.

¹²⁰ Dilys Roe, Fred Nelson and Chris Sandbrook, 'Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions' International Institute for Environment and Development (IIED)' (2009) 31.

will be told the source of the money more than one year after the land was sold. Sometimes, you are even told to move out of your home because the land has been sold...”¹²¹

This customary form of property ownership has even been recognized in law¹²² and applied to intestate succession in areas occupied by the Maasai.¹²³ Other aspects of indigenous people include polygamy which has a bearing on property relationships.¹²⁴

Folklore is also the vested in certain clans, or professions such as prophets, seers, medicine men, witch doctors, rain makers and magicians or status such as eldership. According to indigenous peoples leaving out such cultural undertones from ownership of Folklore, is tantamount to disregard for their culture.

1.5. Justification of the Study

Although a lot of research has been carried out on IPRs protection in Kenya there are still gaps in the protection of Folklore. This study utilizes an ethnographic case study of Maasai women from Kajiado County whose struggle to reap the fruits of their Folklore in the face of strong opposition from exploitive multinationals is a representation and perhaps a more publicized example of the struggle of indigenous peoples. In addition to the daily struggles encountered by the whole community, the women have to struggle for recognition of their rights to their Folklore. On top of this, the women have to compete with their husbands for access and control of the proceeds from the sale of Folklore. The United Nations estimates that there are about 300 million indigenous people in the world consisting of about 5, 000 groups found in 70 countries. Many of them are subjected to activities

¹²¹ Wanjiku Mukabi 154-155. Narok South Constituency Public Hearings, at Ole Ntutu Arid Zone Primary School on Tuesday July 9th 2002. Section 5 Voices from Rift Valley Province.

¹²² Law of Succession Act, Chapter 160, Laws of Kenya, ss 32 and 33 allows the application of customary law applicable to the deceased’s community in the distribution of property on intestacy.

¹²³ See Kenya Gazette Notice Number 94 of 23 June 1981, which applies customary law to areas occupied by the Maasai including Narok and Kajiado .

¹²⁴ See generally, William Musyoka, *A Casebook on the Law of Succession*, (LawAfrica Publishers, 2010) 243.

designed for other cultural groups in utter ignorance of their history, knowledge and values.¹²⁵ The Maasai are one such group. The conceptualization and protection of their Folklore has been subjected to Western Culture and to the cultures of the dominant communities in Kenya.

Over the past century, the Maasai have been struggling to maintain their traditional pastoral and nomadic culture in the face of colonial invasion and the post-colonial regimes.¹²⁶ Their cultural livelihood of pastoralism has been diminishing due to increased fragmentation of land and deterioration of pastures. Today, the Maasai also have to contend with the uninhibited exploitation of their Folklore and their indigenous image by third parties without any tangible benefit to the community.

1.6.Objectives of the Study

- a. To examine the existing legal framework for the protection of Folklore with a view to finding solutions for any inherent gaps.
- b. To investigate the social, economic, cultural and other significance of Folklore among the Maasai with a view to understanding how to protect it.
- c. To provide recommendations on the best model of protecting Folklore in Kenya.

1.7.Hypothesis

- a. Maasai Folklore has great economic value around the world but it is appropriated without the community deriving any economic benefit.
- b. Kenyan IPRs law is premised on the Western concept of individual property ownership whereas the ownership of Folklore among the Maasai is communal. Consequently, the law has little room for the protection of the Folklore.

¹²⁵ John-Andrew McNeish and Robyn Eversole, 'Introduction: Indigenous Peoples and Poverty' in Robyn Eversole, John-Andrew McNeish and Alberto D Cimadamore (eds) *Indigenous Peoples And Poverty; An International Perspective* (Zed Books 2005) 3.

¹²⁶ Joseph Kieyah and Patricia Kameri-Mbote, 'Securing Property Rights in Land' in Christopher S. Adam, Paul Collier and Njuguna Ndung'u (eds) *Kenya: Formal versus Informal Policies for Prosperity* (OUP 2010) 318; Jefferies, (n 47) 973.

- c. There is need for sui generis laws specifically tailored to fit Folklore and which recognize communal ownership of property. Such laws would afford adequate protection to the Folklore of the Maasai.

1.8. Research Questions

1. What is the status of Folklore under the law in Kenya?
2. What is the status of Folklore in other legal jurisdictions around the world?
3. What is the best form of protection for Folklore in Kenya?

1.9. Theoretical Framework: The Place of Human Rights in the Protection of Folklore.

The most common theoretical foundation to IPRs is the utilitarian approach which posits that protection of inventions and creative works through patents, copyrights, trademarks and other similar rights provides incentives for creativity and innovation. However, this theory is not properly applicable in the Folklore context because in the case of Folklore, protection is sought for knowledge that has already been in existence for a long period of time. The knowledge does not depend on the protection or any incentive that is granted now or in the future to come into existence. The protection of Folklore therefore does not provide any incentive to encourage creative work. This therefore calls for a rethink of the theoretical foundation for the protection of Folklore.¹²⁷

The protection of Folklore aims at ensuring that indigenous peoples can obtain commercial benefits deriving from their works. There has been an argument for the protection of Folklore under a human rights framework. Arguing for protection from a human rights foundation centralizes the people component in the relationship between people, knowledge and property rights. A human rights approach allows indigenous peoples' rights in Folklore control to be considered as one part of the larger rights framework.

¹²⁷ Chih-Chieh Yang, 'A Critical Perspective on Taiwan's Aboriginal Traditional Knowledge Creation Protection Ordinance,' (2010) 21 *Entertainment L Rev*, 229, 231.

There have been calls for fair distribution of both IPRs and for the proceeds of the expropriation of these rights especially to the developing world. These calls have in turn created the need to protect Folklore. This protection discourse has benefitted immensely from the recognition granted to cultural rights as well as the establishment of a link between trade and IPRs. The link between IPRs and trade became more pronounced in the Agreement on Trade-Related Aspects of Intellectual Property Law (TRIPS) as well as in the ‘TRIPS plus’ treaties.¹²⁸

The result is a connection between Folklore and the economic and political rights of indigenous people. This has brought the protection of Folklore squarely into the purview of the human rights discourse. International law includes instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Labour Organization’s (ILO) Convention Number 169 on the rights of Indigenous and Tribal Peoples of 1989¹²⁹; the United Nation’s Declaration on the Rights of Indigenous Peoples;¹³⁰ the World Intellectual Property Organization’s (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore;¹³¹ the United Nations’ Sub-Commission on the Protection and Promotion of Human Rights¹³² as well as the adoption of the United Nations’ Resolution on ‘Intellectual Property and Human Rights’¹³³. These instruments not only guarantee fundamental rights and freedoms to labor, culture and property but also portray IPRs as human rights and may therefore be used in the protection of Folklore.

In the field of Folklore, the extension of protection is akin to acknowledging the human right to culture¹³⁴. The advent of the right to culture can be traced to the International Covenant on Economic,

¹²⁸ Michael Handler and Bryan Mercurio, ‘Intellectual Property, in Simon Lester and Bryan Mercurio, *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Cambridge University Press, (2009) 308.

¹²⁹ 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

¹³⁰ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 Sept. 2007.

¹³¹ See < <http://www.wipo.int/tk/en/igc/>> accessed 29 October 2014.

¹³² See < <http://www2.ohchr.org/english/bodies/subcom/>> accessed 29 October 2014.

¹³³ Available at < http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_24/wo_ga_24_3.pdf> accessed 29 October 2014.

¹³⁴ In this instance culture refers to social culture which pertains to people’s forms of societal organization – how they interact and organize themselves in groups and ideological culture which relates to what people think, value, believe and

Social and Cultural Rights (ICESCR)¹³⁵; the Universal Declaration on Human Rights (UDHR)¹³⁶; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹³⁷ as well as the ICCPR¹³⁸.

ILO Convention 169, recognizes collectively or the communal element. This is important because the transmission, use and protection of Folklore depend on collectivity.

In addition to the human rights perspective, the link between the culture and economics of indigenous peoples is evident. Consequently, the protection of cultural rights and the protection of economic rights are inseparable.¹³⁹ In relation to the ICESCR, in 2008, the General Assembly introduced an individual and group petition procedure upon alleged violation of human rights.¹⁴⁰

A shift in the argument positions indigenous peoples' rights to control, use and derive benefit from indigenous knowledge as fundamental human rights, and therefore treated as part of a human rights discourse rather than as part of an IP framework. This is useful because protecting Folklore outside the very contexts which facilitate its production and transmission is flawed.

IPRs can also be regarded as human rights. Indeed they are regarded as manifestations of basic human rights. In international law, the genesis of the recognition of these basic human rights is the UDRH¹⁴¹ and the ICESCR.

hold as ideal. See Frances Raday, 'Culture, Religion and Gender; An Overview' in Meena Shivdas and Sarah Coleman (eds) *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context*, Commonwealth Secretariat (2010) 19.

¹³⁵ International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967)

¹³⁶ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948)

See, Kathleen Renee Cronin-Furman, 60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect, (2009) 25 *American University International Law Journal* 175.

¹³⁷ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

¹³⁸ International Covenant on Civil and Political Rights 999, UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967)

¹³⁹ Angela R Riley Indigenous Peoples and Emerging Protections for Traditional Knowledge, in Peter K Yu *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, Volume 4, International Property Law and Policy Praeger (2007) page 377.

¹⁴⁰ Martin Dixon, *Textbook on International law*, (OUP 2013) 363.

¹⁴¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 30 October 2014.

Support for the very communities from which Folklore derive and is sustained is a necessary component of any Folklore protection strategy. Support and sustainability mechanisms for indigenous cultures include issues of health, housing, land rights, and the capacity for cross-generational transfer and transmission of knowledge. While the shift to a human rights discourse offers useful possibilities for re-interpreting the issue, the capacity for effecting fundamental changes within the IPR regime is minimal. In this sense, indigenous issues start to again be treated as ‘exceptional’ rather than showing the problems to lie within the genesis and operation of IPR law itself. Another potential tension involves the relationship between individual rights and collective rights. There are the additional and pragmatic questions as to what extent nation states take human rights issues seriously, and where and how any abuses or violations are to be meaningfully overcome.

At the international level, international legal instruments have been crafted to guarantee the full range of human rights to indigenous peoples.¹⁴² Some of these rights have developed to the extent of attaining the status of international customary rights.¹⁴³ The move towards a human rights framework began in 1982 when the UN Human Rights Commission (now Human Rights Council) established a working Group in Indigenous Populations¹⁴⁴ Which prepared the Draft Declaration on the Rights of Indigenous People.¹⁴⁵ The Declaration produced changes such as the creation of the UN Permanent Forum on Indigenous Issues; the extension of the mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples and the creation of the Expert Mechanism on the Rights of Indigenous People.¹⁴⁶

¹⁴² U.N. Development Group, Guidelines of Indigenous People’s Issues, U.N. DOC. HRIP/PT/16 AT 4 (Apr. 2009)

¹⁴³ Luke Freeman and others, ‘Free, Prior and Informed Consent: Implications for Sustainable Forest Management in the Congo Basin’ in Laura A. German, Alain Karsenty and Anne-Marie Tiani (eds) *Governing Africa’s Forests in a Globalized World* (Center for International Forestry Research 2010) 323

¹⁴⁴ Malcom D. Evans, *International Law* (3rd edn, OUP 2010) 301.

¹⁴⁵ The UN Declaration on the Rights of Indigenous People was adopted in 2007 by a majority of the general Assembly with only 4 votes against it. It was drafted with the participation of indigenous peoples. Malcom D. Evans 301.GA Res 6/1295, 13 September 2007 (143-4 (Australia, Canada, New Zealand and the US) : 11(Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine) A number of these countries have subsequently endorsed the Declaration. See Malcom D. Evans, *International Law*, 301

¹⁴⁶ James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 649.

There has also been increasing recognition of the interrelationship between the natural environment, sustainable development and the wellbeing of indigenous people.¹⁴⁷ The argument is that people with a unique relationship with the environment should be able to call upon human rights protection to preserve that relationship.¹⁴⁸

In the case of the Maasai Folklore, the economic rights stand out because the Folklore has been commoditized and commercially traded without the Maasai getting anything in return. The majority of the Maasai people rely on pastoralism for sustenance but in recent times, pastoralism has been severely affected by climate change¹⁴⁹ Leading to extreme weather events such as floods which occurred in 1997-8 and 2006, droughts which occurred in 1998- 2000, 2004-05 and 2009..¹⁵⁰ This has in turn been linked to greenhouse gas emissions.¹⁵¹

Droughts turn pasture lands into bare fields as rainfall volumes shrink and water sources dry up.¹⁵²

Consequently, the Maasai has no option but to rely their Folklore for sustenance for survival. This

¹⁴⁷ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 626.

¹⁴⁸ Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine* (2008) 86 Washington ULR, 56.

¹⁴⁹ See Patricia Birnie, Alan Boyle and Catherine Redgwell, 'International Law & the Environment (3rd edn, OUP 2009) 335.

¹⁵⁰ Patricia Kameri-Mbote and Collins Odote, 'Kenya' in Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunnee (eds) *Climate Change Liability: Transnational Law and Practice* 300.

¹⁵¹ Jonathan B. Wiener, Property and Prices to Protect the Planet, 19 *Duke Journal of Comparative & International Law* (2009) 515, 516.

¹⁵² See, Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (3rd edn. OUP 2009) 335; Patricia Kameri- Mbote and Collins Odote, 'Kenya' in Richard Lord, Sike Goldberg, Lavanya Rajamani and Jutta Brunnee, *Climate Change Liability: Transnational Law and Practice*, (Oxfam International, 2012) 296.E Rania Rampersad, 'Indigenous Adaptation to Climate Change: preserving Sustainable Relationships through Environmental Stewardship Claim & Trust Fund Remedy' (2009) XXI *Georgetown International Environmental L Rev*, 591, 594. Indigenous peoples are among the most vulnerable to climate change impacts because they are often extremely poor, have little access to government support and have an intimate connection to the land and ecosystem that is disrupted. Secondly, climate change threatens significant harm not only to their property and livelihoods but also to their very way of life, as plants and animals on which they rely for food, medicine, religious ceremonies and cultural identity are also threatened with extinction.

See Eric Kwa, 'Climate Change and Indigenous Peoples in the South Pacific: the Need for Regional and Local Strategies,' in Benjamin J. Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray and Stepan Wood, *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing, 2009) 102; Jolene Lin, 'Supporting Adaptation in Developing Countries at the National and Global Levels in Benjamin J. Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray and Stepan Wood, *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing, 2009) 127; Saja Erens, Jonathan Verschuuren and Kees Bastmeijer, 'Adaptation to Climate Change to Save Biodiversity: Lessons Learned From African and European Experiences in Benjamin J. Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray and Stepan

situation can be contrasted with the situation of non-nomadic communities, whose populations are better educated and have far better access to sources business capital, training in entrepreneurial skills, formal employment as well as non-rain fed agriculture.

At the same time, the Maasai are yet to conceptualize the non-tangible intellectual element of Folklore as property. To them, the term property is reserved for ‘serious’ items such as land, money or livestock. The theory underpinning Folklore must therefore be aligned to the aspirations of the indigenous peoples.¹⁵³

1.8.Literature Review

In this literature review, I explore a number of themes as set out below. In each of these themes, there are gaps identified and which this work shall attempt to fill.

1.8.1. The Concept of Indigenous Peoples

Some scholars question the application of the term ‘indigenous peoples’ in Africa. Among them is Professor Viljoen who interrogates the application of the concept and suggests that the question of determining a claim as indigenous people should not consume anyone’s time or energy or frustrate the protection of the rights of indigenous peoples. In his work, he suggests a pragmatic and claims based approach.¹⁵⁴ Another scholar, Bojosi, challenges the applicability and legitimacy of the concept of indigenous peoples in an African context. He even rejects the distinction between indigenous people and the mainstream society. He rejects the contention that indigenous peoples are characteristically attached to land as evident in the case of pastoralist and hunter-gatherer communities. In addition, he disputes the narrative that the discourse on indigenous people is a result

Wood, *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing, 2009) 206.

¹⁵³ George Mukundi Wachira, “Indigenous Peoples’ Rights to Land and Natural Resources,” in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*, Pretoria University Press (2010) 304.

¹⁵⁴ Frans Viljoen , ‘Reflections on the Legal Protection of Indigenous Rights in Africa’ in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2009) 299.

of the struggle of indigenous peoples in Africa and beyond.¹⁵⁵ According to another author, Henrard, the application of the term minority is not limited to countries that have a majority. For Henrard, what determines the status of a group as a minority is its relative position relative to the rest of the population of the state.¹⁵⁶

This paper adopts the view that indigenous peoples have unique characteristics such as discrimination and attachment to land. This view is based on international legal instruments, regional jurisprudence and national practice. The paper identifies the validity and relevance of the use of the term ‘indigenous peoples’ in Africa and uses the criteria of self-determination, cultural rights, non-discrimination and the rights to land in articulating the case for special Folklore rights for the Maasai. The decolonization processes in Africa put state power in the hands of the dominant ethnic groups. Some ethnic groups remained closely attached to their Folklore and were reluctant to assimilate and embrace Western development paradigms adopted by the dominant groups. It is some of these minorities who identify themselves as indigenous peoples today and who demand recognition and protection of their fundamental rights in accordance with their culture. Indigenous peoples are generally excluded from utilizing available resources due to circumstances such as dire poverty levels.¹⁵⁷ Among the Maasai, habitation of savannahs and semi-arid lands means that their economic activity of monadic pastoralism demands that the land is held under communal land tenure.¹⁵⁸

For pastoralist communities, the genesis of the continuing damage to the indigenous way of life can be traced to the independent state which took on a mission to civilize pastoralists. Pastoralist land was perceived as barren wilderness without defined owners and awaiting development through crop

¹⁵⁵ Kealeboga N Bojosi, ‘The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Work so Far’ in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*, (Pretoria University Law Press, 2009) 95.

¹⁵⁶ Kristin Henrard, ‘Minorities in Africa and the Right to Equality and Non-Discrimination,’ in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* Pretoria University Law Press (2009) 207.

¹⁵⁷ George Mukundi Wachira, ‘Indigenous Peoples’ Rights to Land and Natural Resources,’ Fergus MacKay, ‘Indigenous People’s Rights and the UN Committee on the Elimination of Racial Discrimination,’ in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2009) 299.

¹⁵⁸ *Ibid*, 302.

irrigation, creation of urban areas for settlement or development of game parks and reserves.¹⁵⁹ Accordingly, in the case of the Maasai large tracts of land were converted into game parks such as Nairobi National Park, Tsavo National Park, Amboseli National Park, Masai Mara Game Reserve and the Mount Kenya National Park. This meant that the Maasai could no longer access the dry season water reserves and pastures that were now enclosed by game parks and reserves. The Maasai who had lived in harmony with wild animals now had to play second fiddle to wildlife.

This paper uses the human rights theory to justify the protection of Folklore of the Maasai people.

1.8.2. Property Rights among Indigenous Peoples

According to Hugh Collins, the modern idea of human rights, building on natural law theories, proclaims that all human beings should be accorded certain fundamental rights by virtue of their humanity. Collins further states that human rights are universal and imperative. The human rights discourse place the dignity and autonomy of the individual at the core of its framework. It treats individuals as ends rather than means to an end. Invocations of human rights can be used to argue for conditions of material social justice such as adequate housing, healthcare and food.¹⁶⁰

Generally, property rights are said to create legal relations between a person and a thing, between persons with respect to things, and between persons without reference to things. In the Western conception of property, right bearing entities are only those entities capable of having interests and making choices. Only living human beings, non-human persons and certain animals fit this criteria. However, some scholars have identified that some African communities regard inanimate entities like

¹⁵⁹ See, Patricia Kameri-Mbote, et al, *Ours by Right Title Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013)

¹⁶⁰ Hugh Collins, 'Theories of Rights as Justifications for Labour Law,' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*, (OUP, 2011) 142.

dead bodies of ancestors and sacred forests as spiritual and organic entities capable of having relationships with human beings.¹⁶¹

In the case of Folklore, it has been said that Folklore has both tangible and intangible aspects and its dual forms may appeal to an understanding of property as a right to a thing as well as a bundle of rights.¹⁶²

Some scholars argue that formal codification of property rights in an indigenous setting without contextual understanding of the multiple interests in and multiple meanings of land is dangerous.¹⁶³

According to these scholars, communal land tenure arrangements depart from the Western view of land. This has led some scholars to wonder whether there should be an African-based lexicon to better define land tenure within an African context and move away from the view that a title deed is the hallmark of tenure conferring jurisdiction and exclusive control.

Indigenous property law is based on customary rules and practices. It is both a juridical system and an integrated social system based on the following tenets. First, access to land is a function of membership in a specific community. Secondly control and management of land resources is vested in the governance organs of the community.

1.8.3. Indigenous People and Human Rights

Scho According to Susan Ariel Aaronson and Jamie M Zimmerman it has already been established that property rights are among the rights that must be protected for trade to flourish. Aaronson and Zimmerman also note that studies indicate that trade policies, agreements and even trade itself can

¹⁶¹ Remigius N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body parts and Genetic Information* (Ashgate Publishing, 2007) 8.

¹⁶² Remigius N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body parts and Genetic Information* (Ashgate Publishing, 2007) 233.

¹⁶³ Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 41.

undermine human rights.¹⁶⁴ A case in point is the IPRs under the TRIPS regime which helped reduce no-tariff trade barriers and also helped establish transparency standards but which may undermine access to essential medicines to diseases such as Malaria, Ebola and AIDS.

Dejo Olowu writes on a rights based framework for human development in Africa. He argues that effective protection and implementation of economic, social and cultural rights constitute a proper pedestal for addressing the plight of the most venerable people in Africa. He argues that effective implementation of economic, social and cultural rights has the potential of promoting social justice and creating truly participatory democratic societies.¹⁶⁵

Human rights are embedded in both western documents such as the English Magna Carta, the American Declaration of Human Rights as well as in traditional African customs.¹⁶⁶ The United Nations estimates that developing countries lose billions of dollars in royalties annually from the unauthorized use of TK.¹⁶⁷ Indigenous peoples claim to the protection of TK is founded on economic, social as well as cultural considerations.¹⁶⁸ They have a right to the recognition of their creativity as well as their contribution to science and art. Indigenous peoples need to be empowered through the protection of their Folklore from unauthorized exploitation.

While I acknowledge the efforts of legal theorists in theorizing the role of IPRs in protecting TK, there yet remains their obvious inability to integrate their ideas when intersecting Folklore. While the work of these theorists convey genuine concerns about the implications of economic policies on TK, they fail to comprehensively articulate the integrative reality based responses to arguments based on

¹⁶⁴ Susan Ariel Aaronson and Jamie M Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policy Making*, (Cambridge University Press, 2008) 1.

¹⁶⁵ Dejo Oluwu, *An Integrative Rights-Based Approach to Human Development in Africa*, (Pretoria University Press, 2011) 9.

¹⁶⁶ George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2nd Impression, LawAfrica Publishers 2010) 75.

¹⁶⁷ Sumathi Subbiah, Reaping What They Sow; The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge, XXVII Boston College International and Comparative L Rev.

¹⁶⁸ Graham Dutfield, 'Legal and Economic Aspects of Traditional Knowledge' in Keith E. Maskus and Jerome H. Reichman (eds), *International Public Goods and Transfer of Technology* (2005) 495.

political or economic expediency. Proper responses to TK problems, cannot work in isolation but must consider interdisciplinary and multidimensional approaches to translate theory into practice.

Since the twentieth century, there has been an influx of scholastic effort directed towards Folklore.¹⁶⁹

In Kenya, the conceptualization of IPR has been adversely affected by the inherited western conceptualization of IPR. By casting IPR as rights protecting the holder against interference, western scholarship has focused on property rights as negative civil or political rights. However, in Kenya and Africa in general, IPR have such major social and economic implications that they are best cast as positive economic, social and cultural rights. Indeed, in Africa property is a precondition for a life in dignity.¹⁷⁰

Such rights-based approaches encompass, inter alia, civil and political rights as well as economic social and cultural rights. The approach works in tandem with international development targets, focusing on the twin issues of poverty alleviation and human development. The approach therefore considers all human rights to be components of human development as well as platforms for achieving it.¹⁷¹

However while many scholars from other parts of the world have done extensive work in defining economic, social and cultural rights implementation as an effective platform for development, the contribution of Kenyan scholars on the Kenyan context of the subject remains negligible. The genesis of this inertia can be traced to the general pre-occupation of Kenyans with post-colonial governance conflicts, democratization, transitional justice, reconciliation processes, the ambivalent attitude

¹⁶⁹ See Saskia Vermeulen, *Intellectual Property Rights and Indigenous Peoples; A Case Study of the San in Southern Africa* (Centre for Environmental Strategy, University of Surrey, 2005)

¹⁷⁰ Ingunn Ikdahl, 'Engendering the Human Rights Protection of Property Rights; Women's Local Land Use in Tanzania,' in Anne Hellum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga eds., *Human Rights, Plural Legalities and Gendered Realities; Paths are Made by Walking*, Southern and Eastern African Regional Center for Women's Law and the Weaver Press (2007) 265.

¹⁷¹ Dejo Olowu, *'An Integrative Rights-Based Approach to Human Development in Africa'* (2009) Pretoria University Law Press, 7.

among many Kenyans that human development is strictly determined by the level of involvement of the government in tackling everyday problems while the citizenry watch and wait.

While this paper appreciates the efforts made in theorizing the impact of economic policies on human development, there has been obvious inability to link these ideas with human rights. This work therefore seeks to develop a theoretical basis for understanding and analyzing human rights as they relate to the challenges of poverty, human deprivation and under development among the Maasai community; to evaluate the capacity of existing as well as evolving human rights law standards and mechanisms in meeting the challenges of development; to determine how these standards and mechanisms can be translated into platforms for effectively addressing the problems of underdevelopment and mass deprivation in Africa, defining remedial strategies that will ensure that end; and to fill the gap in the existing human rights literature in relation to the implementation of economic, social and cultural rights.

An underlying argument in this work is that economic, social and cultural rights are human rights that have a special role to play in the protection of TK. This paper argues that effective protection and implementation of economic, social and cultural rights offers the best platform for the protection of Folklore. Developments within both the international law and domestic laws herald an emerging framework in which indigenous peoples could base their demand for rights protection on international human rights law.¹⁷²

1.9.Limitations of the Study

Intellectual property law is a rather wide area of law. Although this paper studies intellectual property law, it is limited in its coverage in a number of ways. First, the respondents involved in the primary data collection were adult Maasai women from Kajiado County. Owing to the size of the area and the distances involved, participation was limited further to women from Ngolie Location in Kajiado

¹⁷² George Mukundi Wachira, 'Indigenous Peoples' Rights to Land and Natural Resources,' Fergus MacKay, 'Indigenous People's Rights and the UN Committee on the Elimination of Racial Discrimination,' in Solomon Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2009) 297.

County. Women were selected as respondents because they are the primary handicraft makers in the community. Although both girls and women are involved in making handicraft, only the women were selected as respondents. This is because of ethical considerations such as child labour and the anticipated difficulty in obtaining parental consent particularly due to low literacy levels. The field study involved looking at the impact of the TCEs on the material conditions of the women in totality. This involved looking at their living standards, their daily activities and their role in the society.

Secondly, although the study acknowledges that there are many forms of IPR including patents, trademarks, copyrights, trade secrets and geographical indicators, the paper is limited to the study of Folklore. This paper also has a limited scope in terms of the indigenous people covered. Although there are 42 separate tribal groupings in Kenya, the paper concentrates on the Maasai community only. Although, regard is had to the fact that the Maasai community lives in both Kenya and Tanzania, the focus of this paper is the Maasai living in Kenya. Thirdly, the paper goes further to narrow down on the Maasai community of Kajiado County. It does not consider the traditional cultural expressions of the Maasai communities living in Narok County, Laikipia County, Nairobi County and Transmara County. Fourthly, the study focused on the Maasai community only although there are many other communities in Kenya with a rich heritage of TK. This is primarily because the collection of data through an ethnographic case study is both time-consuming and expensive. In addition to the challenges in data collection, further challenges lie in data analysis which is both laborious and time-consuming. The idea of multiple ethnographic case studies was abandoned out of a conviction that it would invariably have resulted in a conservative study through compromise on the quality of data collection or data analysis thereby diluting the value and credibility of the research findings. Finally, although there are many aspects of Folklore that are relevant in a contemporary setting, the study is limited to the legal protection of Folklore.

1.10. Chapter Breakdown

Chapter One introduces the research problem by exploring the thematic areas of property, indigenous peoples, traditional cultural expressions and intellectual property rights. Chapter Two presents the research methodology whose underlying framework is the human rights theory. It shows how this methodology guided the fieldwork which involved interviews, focus group discussions and observation. It also shows how the human rights framework guided the comparative study done on other jurisdictions. Chapter Three highlights the law applicable to Folklore in Kenya and explores the practical ways in which this protection is manifested in the IPRs regime. Chapter Four presents the argument that the IPRs regime is inadequate in the protection of Folklore. The argument is presented in the form of a comparative analysis of the approaches taken by other countries in the protection of Folklore. It brings out the lessons from those other countries that can be used to enrich Kenyan law. Chapter Five presents the recommend model of sui generis laws and initiatives for protection of Folklore. Chapter Six is the concluding chapter. It wraps up the entire discussion and shows the capacity of this research to influence the law.

CHAPTER TWO

RESEARCH METHODOLOGY

2.0.Introduction

The research questions that this paper set out to answer are first, what is the status of Folklore under the law in Kenya? Secondly, what is the status of Folklore in other jurisdictions around the world? , and thirdly, what is the best form of protection for Folklore in Kenya? To answer these questions the paper used both primary and secondary data within a human rights approach. To obtain primary data, I conducted an ethnographic case study¹⁷³ with the aim of interacting more closely with TCE in its cultural context. The primary methods used are observation, interviewing and focus group discussions. To obtain secondary data, I conducted a comparative study of the other methods used to protect Folklore. The comparative study looks at the legal frameworks adopted in several jurisdictions where success has been registered in the protection of Folklore.

2.1.Research Design

In conducting the research, a combination of interviews, focus group discussions and interviewer observations were used to obtain qualitative information. In the case of the interviews, the questions used were open ended questions. Open-ended questions were selected because they stimulate free thought and enable an interviewer to probe the respondents' memories, solicit suggestions and clarify positions. Face-to-face interviews were used because of its reputation for high response rates And capability of obtaining further clarification and elaboration of questions and responses. The focus group discussions and interviews were used to obtain qualitative research.

2.1.1. Why the Maasai in Kajiado County?

The term 'indigenous people' refers to groups of people who descended from the original or longtime inhabitants of lands now dominated by other groups. The term also refers to people who, having a

¹⁷³ Here case study is used to refer to the process of conducting systematic, critical inquiry into a phenomenon of choice from multiple perspectives in a 'real life' context. See Helen Simons, *Case Study Research in Practice*, (Sage Publications) 2009 18.

historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from those other societies. They form non-dominant sectors of society and are determined to preserve, develop and transmit their ancestral territories and their ethnic identity to future generations as the basis for their continued existence according to their own cultural patterns, social institutions and legal systems. The term in the plural recognizes their diversity in terms of language, region, history, culture, ethnic identity. Their TK is an integral part of their being and identity but generally, they emerged as a product of the diffusion of colonialism.

The Constitution of Kenya recognizes indigenous peoples. It defines a marginalized community as:

‘(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; and (d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.’

From all the above definitions, the key traits of indigenous peoples include ‘non-dominance, or marginalization’, ‘cultural distinctiveness’ and ‘attachment to land’.

In Kenya, most ethnic groups prefer to be referred to as ‘tribes’ or ‘ethnic groups’. Questions therefore arise on the conceptual and strategic suitability of the application of the concept of indigenous peoples. However, using traits such as ‘non-dominance’, ‘marginalization’, ‘cultural distinctiveness’ and ‘attachment to land’, it is possible to narrow down on the ‘indigenous peoples’ of

Kenya. Additional questions arise about whether the rights of indigenous peoples ought to be protected apart from the rights of all the other ethnic groups because this amounts to discrimination.

The easiest way to determine the indigenous peoples of Kenya, is to first eliminate the non-indigenous groups. In the colonial period, those people groups who were cultivators and adopted sedentary agriculture took up commercial crop production and in post-colonial Kenya they became the mainstream population. They include the Luhya, Luo, Kisii, Kuria, Kalenjin, Meru, Kikuyu, Embu and Mbeere. Conversely, the only communities that can be considered as indigenous peoples are the hunter and gatherer communities such as the Ogiek, Sengwer, Yaaku, Waata, El Molo, Aweri (Boni) Malakote, Wagoshi and Sanye and the predominantly nomadic pastoral communities who inhabit the arid and semi-arid areas such as the Maasai, Samburu, Turkana, Pokot, Borana, Rendille, Ilchamus, Gabra, Pokot, Endorois and Somali.¹⁷⁴

In the case of the Maasai they are viewed as indigenous because they lost land to European settlers and because they depend on natural resources for their livelihood and depend heavily on cultural, human and social assets including Folklore, traditional systems and institutions.¹⁷⁵ The Maasai live in Southern Kenya and Northern Tanzania.

The field study was conducted in at Ngoile Location, Kajiado County in Southern Kenya. The area was selected firstly, because the predominant community in the area is the Maasai community and secondly because the local community relies solely on Folklore and pastoralism. Kajiado County is a semi-arid area with a relatively hot climate, low humidity and receives little rainfall in any given

¹⁷⁴ International Work Group for Indigenous Affairs, *Indigenous World 2013* (2013) 370.

¹⁷⁵ Patricia Kameri-Mbote and Elvin Nyukuri, 'Climate Change, Law and Indigenous Peoples in Kenya: Ogiek and Maasai Narratives' in Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (2013 Edward Edgar Publishing) 546.

year. It is therefore not suitable for crop farming.¹⁷⁶ The study is based on the lives of several women who make Maasai traditional handicraft as their primary means of livelihood.

2.1.2. Why the Women as Respondents?

Discussions with local elders of the community revealed that women do most of the work in the homestead including household chores, building the family home, taking care of the family livestock and engaging in income generation activities. Land is the main resource in the in the community. The community practices pastoralism with ‘open-access to common grazing fields. The society is highly patrilineal and consequently land is owned by men and is passed from one generation to another through the male heirs. The women do not own any major resource. This provided the perfect set up to obtain the data required from a human rights perspective. The situation remains as described in one report:¹⁷⁷‘the right of women whether wives or daughters, to share in the inheritance are either very limited or non-existence.’¹⁷⁸ In addition, even where both women and men can own property, women have not been supported sufficiently through the creation of sound financial and credit facilities to acquire property. The denial of human rights impacts more on women than men because men are themselves instrumental in negating women’s human rights.¹⁷⁹

Indeed, it has been observed that the practices of patriarchal cultures are with regard to the treatment of women, necessarily contrary to the modern human rights doctrine.¹⁸⁰ Many of the practices defended in the name of culture that impinge on human rights are gender specific, they promote the preservation of patriarchy at the expense of women’s rights. These include Female Genital Mutilation (FGM), forced marriages, child betrothal, the dowry system and allowing the husband control over all

¹⁷⁶ See H.W.O. Okoth-Ogendo, ‘Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa’, in Nathalie J. Chalifour et al, eds., *Land Use for Sustainable Development*, (Cambridge University Press, 2007) 60.

¹⁷⁷ Government of Kenya, *Report of the Commission on the Law of Succession*, (Government Printer, 1968).

¹⁷⁸ Mary A Ang’awa, *Procedure in the Law of Succession*, (LawAfrica Publishing, 2011) 4.

¹⁷⁹ Kivutha Kibwana, *Law and the Status of Women in Kenya*, (Claripress, 1996) 10.

¹⁸⁰ Frances Raday, ‘Culture, Religion and Gender; An Overview’ in Meena Shivdas and Sarah Coleman (eds) *Without Prejudice: CEDAW and the Determination of Women’s Rights in a Legal and Cultural Context*, Commonwealth Secretariat (2010) 20.

resources.¹⁸¹ In the community under study, the threat of FGM is real. The effects of FGM such as increased risk of life-threatening bleeding, significant childbirth complications and greater risk of newborn baby deaths¹⁸² are evident.

2.1.3. Interview Technique

The choice of women as interviewees was made because it is women who are primarily responsible for the making of Maasai handicrafts. They are therefore better placed to provide information relevant to traditional knowledge. In addition, among the Maasai, it is women who take charge of the daily running of the homestead, they are therefore well placed to provide information about their homesteads.

2.1.4. Research Population

The Respondent women were selected from a non-proportional sample of the Maasai community in Kajiado County. The writer observed the Woman making of traditional handcraft and interviewed four of them; Respondent 1, Respondent 2, Respondent 3 and Respondent 4. through the help of a translator. They make handicrafts for sale.

The women were taken from a sample drawn using a non-probability design. This nonprobability sampling design was found appropriate to this study for two reasons. First, although Maasai women were primarily involved in handicraft making, not every woman in the community is involved. The specific number of women involved in the trade is not readily known, thus making it impossible to generate a random sample. The unknown number of women makes irrelevant the issue of whether or not the sample is big enough and representative. A non-probability sample design allowed the inclusion of any eligible, identified, and cooperative women.

¹⁸¹ Ibid, 24.

¹⁸² Claudia Carr, *Unlocking Medical Law and Ethics*, (Hodder Education, 2012) 195.

Second, a non-probability design was appropriate because the interviews were a search for interpretation of the findings from library and online research. This approach ensured that interviews focused only on providing in-depth information. This flexible approach enabled the emergence of new issues that the study did not, on the onset, seek to explore. The purpose of interviews and focus group discussions was therefore to juxtapose their views with those already identified in written works.

The goal was to observe women who were directly involved in the handcraft making. This goal was achieved through the use of purposeful sampling..

2.1.5. Choice of an Interpreter

Since the Respondents only spoke the Maa language which the researcher did not understand, an interpreter, helped to bridge the communication gap. The interpreter is a not a native Maasai but she has lived in the area since 1993. She is a fluent speaker of Maa as well as English and Kiswahili. She runs a business at a Trading Center along the Nairobi-Namanga Highway.

. She helped out with the language barriers as well as with cultural interpretation thus enabling me to be sensitive to the respondent's culture. She was selected as the translator and field guide due to her business interactions with the local community seem to have created a good rapport with members of the community. Her presence reassured the interviewees as they recognized her as a trustworthy person. She also gave validity to the process because although she is from a different ethnic community, she spoke the Maa language and understood the Maasai culture.

2.1.6. Observation of the Respondents as a Method of Data Collection

The research is based on a field study conducted on the Maasai in Kajiado County. The community was studied through the lens of a human rights approach. The writer observed various phenomena to support the ethnographical accounts. During observation, the author observed the standards of living,

the material conditions of life, the status of the women and so on. The library and online research considered articles and books on Folklore as well as the Constitution of Kenya, Acts of Parliament, government policies and International legal instruments.

The four respondents are members of the Purko clan. The researcher first observed them as they engaged in laborious task of making various kinds of beaded handicrafts. The handicrafts made are bracelets, arm bands, necklaces, headbands, belts, and bead adorned dresses. The handicrafts are their main source of livelihood. They sell them to brokers who visit the area and who in turn market their handicrafts in the towns and cities. One of the Respondents is a widow while the others are married women. The first three respondents take care of their respective family's goats and cows alongside making handicrafts for sale. The fourth respondent runs a green grocery stand the local Trading Center and in between customers uses her time to make handicraft.

2.2.Secondary Data

The basic methodology of this study was a review of published ethnographies detailing Folklore. In order to focus on the research questions posed in this study, the focus is on ethnographic literature that recognizes Foklore as 'property' or 'intangible property'.

2.3.The ethical considerations taken into account in the course of this research include:

1. Upholding values such as respect and honesty

This was achieved through a combination of methods. First it involved advising the people involved of the purpose, goals, and timeframe of the research, the data-gathering techniques, the positive and negative implications, and impacts of the research. Secondly, it also involved learning about their culture such as the way women have to bow before older men and let the man touch their head as a form of greeting. This ensured that that the observance of such practices was upheld.

2. Obtaining informed consent

To conduct the research and at the higher level, I applied for a research permit from the National Commission for Science, Technology and Innovation. At the local level, I sought the consent of the Chief of Ngoile location where the research was conducted. To speak to the women, participating in the study, the researcher obtained the consent of the village elders. Finally, the researcher obtained the consent of the individual women who were to be interviewed. The consent of the women was also sought and obtained before their participation in the in the focus group discussion.

3. Guarantee confidentiality of surveys and sensitive material

To guarantee confidentiality and protect the identity of the participants, all the names of the interviewees and focus group discussants have been changed. The exact geographical location of the field study was also changed to protect the identity of the participants.

4. Incentive to participate

All the Respondents participated voluntarily and provided information willingly. There was no incentive whatsoever for them to participate in the study. The interpreter agreed to assist in the interpretation for a fee of Kshs. 500. However, at the end of the interview, the interpreter declined to receive her pay unless the respondents were paid too. She explained that they had all left their domestic chores and economic activities unattended. In the end, I ended up paying each respondent Kshs. 300 and the interpreter Kshs. 500.

2.4.Data Analysis and Interpretation

Although the women have not been exposed to the economic connotations of their traditional knowledge at the national, regional and international levels, they were however, very conversant with all the relevant issues at the local level. They were all very conversant either with traditions of their community and with the traditional knowledge protection at the local level. They were involved in handicraft making as a source of livelihood. They were also involved in the promotion of traditional

knowledge through teaching younger women how to make handicrafts. The primary handicraft made by all the women consists of various ornaments decorated with beads.

CHAPTER THREE

FOLKLORE IN THE CONTEXT OF INTELLECTUAL PROPERTY LAW

3.0.Introduction

Folklore is now appreciated outside its epistemic and geographic confines.¹⁸³ It has even been accorded IPRs protection. This protection is two-fold: defensive protection and positive protection.¹⁸⁴

Whereas the latter involves the creation of positive rights which empower the holder to protect it, the former involves the adoption of legal or regulatory measures to ensure that the rights are not acquired by unauthorized persons or organizations.¹⁸⁵

There are a number of positive outcomes from the use of IPRs law to protect Folklore. To begin with, it means that Folklore is protected within a wider area of the national boundaries instead of the limited jurisdictional confines of the Maasai customary law. Secondly, the criminal system supplants the role of norms and sanctions with stronger deterrence than customary law. Thirdly, the Maasai gain greater control over the use of their Folklore with a possibility of obtaining civil law remedies such as damages and injunctions against commercial exploiters.

However, challenges abound in the attempt to protect Folklore under IPRs law. Some of these challenges include the challenge of appropriate categorization, the problems encountered in conceptualizing Folklore within the common constructs of IPRs law including individual ownership, originality, limited duration of protection, need for fixation to protect, inventiveness and uniqueness.

3.1.Folklore and the Constitution

Under the Constitution of Kenya, IPRs are regulated by the national government.¹⁸⁶ The Constitution is full of provisions which if put into practice would adequately protect Folklore.¹⁸⁷ To begin with, it

¹⁸³ Oguamanam (n 61) 5.

¹⁸⁴ William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th edn, Sweet & Maxwell 2007) 32.

¹⁸⁵ Graham Dutfield, 'Legal and Economic Aspects of Traditional Knowledge' in Keith E. Maskus and Jerome H. Reichman, (eds) *International Public Goods and Transfer of Technology*, (CUP 2005) 495.

¹⁸⁶ Constitution of Kenya, FOURTH SCHEDULE.

elevates IP to the same level as property in land and affords them similar treatment. The basis for property ownership is article 40(1) which provides that ‘...every person has the right, either individually or in association with others, to acquire and own property (a) of any description and (b) in any part of Kenya.’ In addition, the Constitution enjoins the state to support, promote and protect the IPRs of the people of Kenya.¹⁸⁸

The Constitution requires Parliament to enact legislation ensuring that investments in property benefit local communities. The Constitution ‘... recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.’ Accordingly, the state is enjoined to:- ‘(a) Promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) Recognize the role of science and indigenous technologies in the development of the nation; and (c) Promote the intellectual property rights of the people of Kenya.’¹⁸⁹

Article 44 further provides that ‘every person has the right to use the language, and to participate in the cultural life, of the person’s choice. In addition, ‘a person belonging to a cultural or linguistic community has the right, with other members of that community- (a) to enjoy the person’s culture and use the person’s language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. In the same breath, Parliament is required to enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage.’¹⁹⁰

¹⁸⁷ The Constitution further guarantees that every person shall be equal before the law and shall have the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Everyone is also granted the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The state is prohibited from directly or indirectly discriminating against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In addition, to give full effect to the realization of these rights, the state is required to take legislative and other measures such as affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

¹⁸⁸ Constitution of Kenya, 2010, art 40(5).

¹⁸⁹ Constitution of Kenya, 2010, art 66(2).

¹⁹⁰ Ibid.

Article 69(1) enjoins the state to ‘(a) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b)... ; and (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.’¹⁹¹ Despite the elaborate provisions outlined above, the description of Folklore in the Constitution suffers from a definitional deficiency. For instance, there is uncertainty on to the size of the social grouping required to confer Folklore status on a work. This problem arises because tribes, clans, families and lineages groups lack clear-cut boundaries and so some Folklore may be shared by several groups from a certain region. There is also need to elaborate on how widespread a cultural practice must be to constitute Folklore. There need for clarity on whether modifications to a pre-existing cultural practice could be regarded as a new work, thereby providing the persons responsible for the modifications with IPRs.

3.2.Folklore and Patent Law

A patent is a legal certificate that gives an inventor exclusive rights to prevent others from producing, using, selling, or importing the invention for a fixed period.¹⁹² Patents can be bought, sold, hired, or licensed.¹⁹³ To qualify for patent protection, an invention must be useful¹⁹⁴, novel¹⁹⁵ and non-obvious¹⁹⁶.

To obtain the patent, indigenous peoples would have to prove novelty by convincing the patent examiners that they are the only people with the knowledge. In addition, indigenous peoples can also rely on defensive registration where they file an application not because they intend to make use of the patent but so as to ensure that no one else can obtain one. To do this they only need to make a

¹⁹¹ Ibid.

¹⁹² See, Industrial Property Act, No. 3of 2001.

¹⁹³ Ibid, s 54.

¹⁹⁴ Ibid, s 25. It must have industrial application; ideas, theories, and scientific formulas are not sufficiently useful to be patentable.

¹⁹⁵ Ibid, s 23. The invention should be recent and original, but perhaps most importantly it should not already be known (in the public domain).

¹⁹⁶ Ibid, s 24. It must not obvious to a person skilled in the technology and more inventive than mere discovery of what already exists in nature (such as a gene with no known function).

‘defensive publication’ through publication of a thorough description of how to practice the invention. The downside of all this is that proving novelty may be either too difficult or incompatible with the indigenous peoples’ practice of sharing knowledge openly. In addition, indigenous peoples must also acquire legal personality through incorporation or apply for patenting as individual persons. Another major challenge for indigenous peoples is that the process of acquiring a patent, which includes drafting the patent, payments for filing, filing the application, examination of the patent, and the grant of the patent, is expensive and time-consuming.¹⁹⁷

A critical review shows that it is not possible to protect TK under patent law. The ‘new’, ‘inventive step’ and ‘capable of industrial application’ requirements are deemed to be synonymous with the terms ‘non-obvious’ and ‘useful’ respectively. Folklore fails the test for patentability on the ‘new’ and the ‘inventive step’ standards. On the ‘new’ standard, they will fail because by its very nature Folklore has existed for a long period of time among the Maasai people although it may be new to the rest of the world. In addition, patent law requires that ‘a patent applicant discloses sufficient and clear information regarding the invention to allow another person ‘skilled in the art’ to reproduce it. However, this also renders patent law inappropriate to protect traditional cultural expressions because it would erode the rights of the Maasai people because it would make the Maasai handicrafts easily available to commercial entities.

Finally, corporations can also obtain patents based on Folklore. In such a case, it may be difficult for indigenous peoples to discover such a registration. Even where they find out, instituting legal action can be very expensive. Unlike corporations which have patent lawyers and sufficient financial muscle to mount an effective legal challenge, indigenous peoples have neither resources nor legal representation. Even if the people were to find the wherewithal to go to court, the corporation would

¹⁹⁷ See generally on the subject matter of patents, Martin Adelman et al, *Global Issues in Patent Law*, (Thompson Reuters, 2011) 39.

still be able to distinguish before court that its product, use or process is sufficiently different from the original to constitute an invention.

In other cases the since patent applications are publicized, the risk of the indigenous people challenging a patent application may cause corporations to compensate indigenous peoples in advance so as to avoid an expensive legal processes, negative publicity or rejection of their application.

3.3. Folklore and Copyright Law

Copyright are governed by the Copyright Act.¹⁹⁸ Copyright gives authors legal protection for the following types of work: literary works, dramatic and musical works; artistic works and works of applied art such as paintings, ceramics, carvings; photographic works; motion pictures and sound recordings as well as computer programs and databases.¹⁹⁹

The key provision in the Copyright Act with regard to Folklores is Section 49(d). The section provides that the Minister may make regulations to ‘authorise and prescribe the terms and conditions governing any specified use of folklore, except by a national public entity for non-commercial purposes, or the importation of any work made abroad which embodies folklore.’ The import of this provision is that any person who wishes to use Folklore for commercial purposes requires permission from the Attorney General.

Indigenous peoples can use copyrights to protect traditional paintings, sculptures and designs as artistic works, dances as dramatic works, folktales as literary works and folk songs as musical works. This can be justified on account of the similarities between Folklore and the categories of works protected under copyright law.

However, even the use of copyrights to protect Folklore faces challenges. First copyrights are assigned to individuals or companies and not to amorphous groups such as indigenous peoples.

¹⁹⁸ The Copyright Act, No. 12 of 2001.

¹⁹⁹ Ibid, s 23.

Secondly, whereas the law of copyright does not protect ideas but the expression of ideas indigenous groups, a lot of Folklore is not fixated in any form but is passed on orally from generation to generation. This makes it ineligible for copyright protection.²⁰⁰

3.4. Folklore and Trademark Law

A trademark is a distinctive design, word, or series of words, used as a marketing tool that to support a one's claim that their products are 'authentic' or 'distinctive' from those of other traders.²⁰¹

Handicrafts and artworks can be protected using trademarks. This might encourage people to buy goods bearing such trademarks, perhaps at higher prices because of their authenticity. The use of trademarks may also deter imitators due to the risk of legal action. In addition, the sale of reproductions passed off as genuine indigenous peoples handicrafts would be actionable for passing off.²⁰² Trademarks can help indigenous peoples to commercialize their Folklore and also support claims based on 'unfair competition'.²⁰³

However, they would still be inappropriate²⁰⁴. Indigenous peoples are increasingly grappling with third-party use of marks bearing whole or partial indigenous names, terms, signs, symbols or other insignia in relation to such third-party's products or services. Such third-party practices raise issues of ownership, authorization, attribution and exploitation. In such cases, indigenous peoples are often uncertain of their rights and entitlements especially in relation to concepts such as free prior and informed consent, benefit-sharing or the availability of legal remedies. In some cases, the indigenous

²⁰⁰ See generally, Lionel Bently, et al, *Copyright and Piracy: An Interdisciplinary Critique*, (Cambridge University Press, 2010).

²⁰¹ See, Trade Marks Act Chapter 506, Laws of Kenya.

²⁰² Thomas Letangule, *An Analysis of Indigenous People's Rights under Kenyan Law*, (University of Nairobi, Unpublished LLM Dissertation 2012).

²⁰³ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583; 828 U.N.T.S. 303.

²⁰⁴ See generally on trademarks, John Cross et al, *Global Issues in Intellectual Property Law*, (Thompson Reuters 2010) 162.

peoples may even be oblivious to the use and registration by third parties of trademarks bearing their traditional terms and insignia.²⁰⁵

The major problem arises because trademark registration is granted on a first-to-register basis. Additionally, trademark laws do not prohibit registration of indigenous names or symbols as trademarks and neither do they require applicants for registration to submit proof of the prior informed consent of the indigenous peoples groups involved. Upon registration, there is no requirement for benefit-sharing between the third-party right holder and the source indigenous peoples. Accordingly, the third parties obtain the rights at the expense and to the detriment of the indigenous peoples. Indigenous peoples are only concerned about how best to use their Folklore as differentiation tools in the marketplace, how to prevent misappropriation and misuse as well as how to preserve and safeguard their Folklore.

3.5.Folklore and Industrial Designs Law

Industrial designs are defined as the ornamental or aesthetic aspect of a useful article. An industrial design may consist of the shape, pattern, or colour of the article such as a pattern on an article of clothing or pottery.²⁰⁶ The designs must be original and reproducible by industrial means.²⁰⁷ Like trademarks, registering a design is cheaper and less time-consuming than applying for a patent. It also gives owners the right to take legal action against infringers.

3.6.Folklore and Geographic Indications Law

²⁰⁵ See M Torsen and J Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO, 2010), <<http://www.wipo.int/tk/en/publications/1023.pdf>> accessed 29 October 2014.

²⁰⁶ Industrial Property Act, 2001, s 84.

²⁰⁷ Ibid, s 85.

Geographic indications identify a product as originating in a region or locality where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.²⁰⁸

One type of geographical indication is the appellation of origin.²⁰⁹

Geographical indications can be used to protect Folklore. This would require that indigenous peoples set up their own appellations of origin or certification-issuing entities.

3.7.Folklore and International instruments

Kenya is a party to several international and regional treaties, conventions and protocols that protect IPR such as patents, copyrights, trademarks, industrial designs, utility models, geographical indications, trade secrets, plant breeders' rights and TK. This section examines some of the instruments that have a bearing on the protection of TK in Kenya.

a. The Paris Convention for the Protection of Industrial Property (1883)

The Paris Convention was the first major treaty designed for the international protection of intellectual creations in the form of industrial property rights, including inventions (patents), trademarks, industrial designs, geographical indications and certification marks. Under the Paris Convention it is envisaged that protection can be granted to collectively owned marks as collective marks. To qualify for protection, the Maasai would have to form groups and apply for protection as groups. This can be facilitated the by the registration of Folklore as trademarks, utility models, industrial designs, service marks and indicators of source or appellations of origin.

b. UN Declaration of the Rights of Indigenous Peoples (2007)

This declaration emphasises the rights of indigenous peoples in relation to the maintenance and strengthening of their own institutions, cultures and traditions, and their rights to pursue their development in keeping with their own needs and aspirations, including through documentation systems.

²⁰⁸ William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property; Patents, Copyrights, TradeMarks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 740.

²⁰⁹ Ibid.

c. **Convention Concerning Indigenous and Tribal Peoples in Independent Countries**
(Convention 169 of 1989)

The International Labour Organization (ILO) was arguably the first United Nations organization to address TK. As far back as in 1957, the ILO adopted the Convention Concerning the Protection and Integration of Indigenous Peoples and other Tribal and Semi-Tribal Populations in Independent Countries (Convention 107).²¹⁰ In 1989, Convention 107 was revised into Convention 169. The Convention obligates state parties to develop measures of promoting full realization of the social, economic and cultural rights of indigenous peoples. The provisions of the Convention have been interpreted as providing protection of TK.

d. **Earth Summit**²¹¹

In 1992, one of the principles of the Rio Declaration on the Environment and Development which emerged from the United Nations Conference on the Environment and Development (Earth Summit) in Rio de Janeiro provided for the strengthening of the institutions of indigenous peoples. However, it did not explicitly address the question of intellectual property protection of TK. Agenda 21, which was adopted by over 160 states at the summit, dedicates an entire chapter to indigenous peoples and makes a raft of recommendations on the protection of their rights.

²¹⁰ Convention Concerning the Protection and Integration of Indigenous Peoples and other Tribal and Semi-Tribal Populations in Independent Countries (Convention 107), 28 UNTS 247.

²¹¹ United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992.

CHAPTER FOUR

COMPARATIVE JURISPRUDENCE ON THE PROTECTION OF FOLKLORE

4.0. Introduction

In Chapter three, I have already highlighted the inadequacies of IPRs law in the protection of Folklore. The purpose of the analysis in this chapter is to identify the best practices from around the world and their applicability in Kenya. The application of best practice must however be done within the context of the human rights framework.

Since, many of the emerging issues cut across different areas of law, the need for comprehensive protection cannot be met by one piece of legislation or other one-size fits all solution. However, any solution must be both accessible to the indigenous peoples and appropriate to the context. This section therefore looks at various ways used around the world in the protection of Folklore and proposes on the most appropriate protection mechanism.

4.1. Problematising the International Dimensions of Maasai Folklore

Around the world, the Maasai peoples are one of the worlds' most recognized indigenous peoples' groups. Their handicrafts make the Maasai image iconic. This can be illustrated by one author's description of a Maasai moran:

He is wearing almost no clothes –just a short loincloth – but lots of jewelry. On his forehead is a large mother-of-pearl button with lots of little bright pearls, the whole thing is glittering. His long red hair has been plaited into thin braids, and his face is painted with symbols that extend right down onto his chest beneath two long necklaces of coloured pearls. On each wrist he wears several bracelets.²¹²

Many of the Maasai's distinct cultural elements can regarded as part of their intellectual property. As a result, the Maasai name and image are used by for commercial gain by hundreds of companies. The

²¹² Corinne Hoffman, *The White Masai* (Peter Millar, tr Arcardia Books, 2005) 2.

downside of this is that it takes a shorter period of time for commercial entities to make Maasai look alike handicraft which are sold at prices that dwarf the prices of authentic Maasai handicraft.

In addition, the Maasai name is also appropriated for commercial gain to market goods and services that have no relation to the Maasai. For instance, Land Rover created the Land Rover Maasai Mara limited edition,²¹³ Omega Automotive Limited created a range of accessories and parts named Masai for the Land Rover Defender, and registered it as a trade mark. The accessories and parts include windows, roof racks, lights, spare wheel carriers, seat covers, steps, lamp guards, mirrors, tree sliders, bumpers among others.²¹⁴

Masai Canada Limited pioneered the Masai Barefoot Technology (MBT) which comprises of a range of trainers. .²¹⁵ They have Patents and trademarks registered on the MBT.²¹⁶ MBT was inspired by the walking posture of Maasai morans. High-end fashion house Louis Vuitton has an entire line called the Masai collection which includes stoles, scarves, rugs, beach towels, hats, shoes, belts, handbags and duffle bags.²¹⁷ Calvin Klein, another high-end fashion house has hundreds of products ranging from shoes to bedding, jewelry, and entire men's clothing lines under the name Maasai or Masai. Italian pen maker Delta introduced a Masai pen as part of its 'indigenous people, luxury line.'²¹⁸ Jean Pierre Levine also produced a pen named Masai.²¹⁹

In using the Maasai name, they ride on the association with the Maasai culture without the express permission from the Maasai people. The real Maasai receive no income from the use of their name

²¹³ Available at <<http://www.landrover-center.com/news/Freelander-L314/14386>> accessed 5th August 2014.

²¹⁴ Available at <<http://www.masai-land-rover.com/>> accessed 5th August 2014.

²¹⁵ Available at <<http://ca.mbt.com/Home/Benefits.aspx>> accessed 5th August 2014.

²¹⁶ The Patented products bear common Swahili names registered in the United States under Section 287(a) of Title 35 of the United States Code. These include *Ajabu, Asante, Chakula, Elea, Faraja, Imani, Karibu, Kesho, Kisiwa, Kisumu, Kizingo, Mahiri, Malaika, Nafasi, Nafakai, Pamoja, Pata, Pendo, Saba, Tamu, Tatu, Ubora, Uzuri, Vizuri, and Yakini*. Available at <<http://ca.mbt.com/Assets/Patents.aspx>> accessed 5th August 2014.

²¹⁷ Available at <<http://us.louisvuitton.com/eng-us/search/masai>> accessed 5th August 2014.

²¹⁸ Available at <<http://www.yafa.com/maasai.shtml>> accessed 5th August 2014.

²¹⁹ Available at <<http://www.lepineatelier.com/nos-produits/>> accessed 5th August 2014.

and cultural association.²²⁰ There is therefore need for the Maasai to regain control over their iconic brand, to ensure greater respect is accorded to their culture, able to grant permission for culturally acceptable commercial use and to return sustainable income to the Maasai people.²²¹ Another important goal is to empower the Maasai community with resources to teach the culture to new generations and exercise long-term management of the cultural brand. The Maasai deserve to receive licensing revenue, just as western companies would legally require licensing revenue associated with licensing the use of their brand. As is well documented, the intangible brand value of a retail product in developed country markets is often worth more than the physical value of a product.

4.2.Certification and Labeling

In Australia, indigenous peoples use certification marks or labels on their products.²²² However, the Australian certification system failed for a number of reasons including difficulties in defining ‘authenticity’ and insufficient funding of the system’s administration.²²³

In New Zealand, the ‘*toi iho*’ is a Maori trademark designed to promote and sell authentic Maori arts and crafts.²²⁴ Labelling is done by the indigenous peoples themselves to show authenticity of products. On the other hand, certification requires authentication by an independent organization. Both certification and labelling can help buyers distinguish between counterfeit and genuine indigenous products. They can also form the basis of legal action by indigenous peoples against

²²⁰ Daniel Chow, ‘The Role of Intellectual Property in Promoting International Trade and Foreign Direct Investment’ in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Praeger Publishers 2007) 191.

²²¹ Keith E. Maskus, ‘The Economics of Global Intellectual Property and Economic Development: A Survey’ in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Praeger Publishers 2007) 161.

²²² See Susy Frankel & Megan Richardson, Cultural Property and ‘the Public Domain’: Case Studies from New Zealand and Australia, in *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Christoph Antons ed., 2009) 280-83.

²²³ Christoph B. Graber and Jessica C. Lai, ‘Indigenous Cultural Heritage and Fair Trade: Voluntary Certification Standards in the Light of WIPO and WTO Law and Policy-Making’. in Peter Drahos and Susy Frankel eds, *Indigenous Peoples Innovation: Intellectual Property Pathways to Development* (2012) 101.

²²⁴ See About Us, Toi Iho Maori Made, <http://www.toiho.com/Aboutus/tabid/249/Default.aspx> <accessed 30 August 2014>.

imitators. They require buyers to be enlightened about specific marks and labels as indicators of originality and authenticity.

However, even labelling and certification marks have disadvantages. First, they require infrastructure and administration to be effective. This can be fairly expensive and in the case of the Maasai, the cost can be a barrier to the adoption of marks and labels. Secondly, certification and labeling cannot stop counterfeiting. They only enable customers to differentiate between products. Thirdly, as some indigenous women in Indonesia found out, it is not appropriate in every circumstance. In their case, labeling had been promoted as a way of protecting their crafts. They created large identifiable labels into their works but this significantly altered its aesthetic appeal and their works became unmarketable.

4.3.Moral rights

Moral rights are recognized in civil law jurisdictions in addition to copyright rights.²²⁵ They derive from the French *droits d'auteur* or rights of the author.²²⁶ They include the right of attribution, the right to have one's work published anonymously and the right to the integrity of one's work (not to have the work altered, distorted or mutilated). They are inalienable and cannot be transferred except through an agreement.

Distinct from any kind of economic right, moral rights directly address the relationship between the creators and their work. They have been suggestions as an effective means for protecting indigenous peoples' rights in works that utilize or derive from Folklore. This would address indigenous peoples concern about limited acknowledgement or attribution to works originating from TK. This addresses concerns such as where sacred images are transferred onto fabrics in ways that distort and denigrate their significance to indigenous people.

²²⁵ This is consistent with Article 14 bis (2) of the Berne Convention WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

²²⁶ Chidi Oguamanam, 'Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy' (2009) 9 *Wake Forest IP L J*,

Unfortunately, for moral rights would be difficult to enforce in the case of Folklore because they suffer from the same limitations as other forms of IPRs law. First, moral rights only protect the rights of individuals not of communities or collectives. Secondly, they are ineffective unless an indigenous work is recognized as legitimate copyright subject matter. Thirdly, sound recordings are excluded from moral rights protection. This is poses a challenge because with oral cultural transmission and low literacy levels, significant amounts of Folklore have been recorded and exist as sound recordings. Fourthly, moral rights are granted for a defined period of time and become subject to termination after expiration of the definite period. As a result, under a moral rights regime, it would be difficult to establish a claim of community harm in connection with the unauthorized use of Folklore that has been handed down from one generation to another.

4.4. Confidential information and Trade Secrets

The law of trade secrets can be applied to Folklore with special spiritual significance and which is only been revealed to a few select members of the community. This is illustrated by two Australian cases relating to the publication of the book *Nomads of the Desert* by Charles Mountford.²²⁷ The book contained secret ceremonial information of the *Pitjantjatjara* people. In the first case, the Court granted an injunction in favour of the *Pitjantjatjara*, *Yankuntjatjara* and *Ngaanyatjara* peoples.²²⁸ The Court also held that disclosure of the information had serious and potentially dangerous consequences for community social structures.²²⁹ The second case related more specifically to the viewing and selling of Mountford's slides. The Court granted property in, and ownership of the slides to the peoples.

Confidential information or trade secrets hold important possibilities for the protection of Folklore. This is especially the case for sacred information. To qualify for trade secret protection, information

²²⁷ See Charles Mountford, *Nomads of the Desert*, (Rigby, 1976).

²²⁸ Antons, Christoph, *Foster v Mountford: Cultural Confidentiality in a Changing Australia' in Landmarks in Australian Intellectual Property Law* (Cambridge University Press 2009) 110-125.

²²⁹ *Foster v Mountford* 14 Australian L R, (Butterworths, Sydney, NSW, 1977.)

must have commercial value, provide competitive advantage, be known to a few people only and there should be efforts such as confidentiality agreements to prevent disclosure. Under the law it is illegal to take such information without consent but there is no obligation in the case of independent discovery by proper means, accidental or actual disclosure, or by reverse engineering. Some Folklore can be protected as trade secrets.

The disadvantage is that any knowledge that is already shared to all members of a community would not qualify for protection as a trade secret. Most Folklore would therefore not qualify unless they are held exclusively by a limited number of people. Secondly, there may be difficulties in satisfying the key elements that constitute a breach of confidence claim (especially the conditions set out in the TRIPS agreement). To constitute misappropriation of trade secrets in this context, it must be shown that the particular piece of Folklore is a trade secret and that the exploiter knew or had reason to know it was transferred improperly. In such a case, if the Folklore is sold openly, it would be difficult to prove the necessary state of mind of the exploiter.

4.5. Protocols

Protocols have been adopted and are increasingly found across all areas involving negotiations around TK.²³⁰ Protocols are codes of conduct, guidelines or sets of manners that explain how people should behave in certain circumstances. Over the course of the past decade there has been a steady increase in the development of protocols to deal with issues of access, control and ownership of TK. Protocols can be developed to address specific problems. Protocols are not necessarily dependent upon bureaucracies or governments. They can be developed locally and changed flexibly over time as practices change too. Protocols are prescriptive and come in handy where indigenous people do not intend to engage with formal legal mechanisms but need means for articulating customary law or local laws specific to the context. The downside is that protocols are not always legally binding.

²³⁰ Harry Jonas, Kabir Bavikatte and Holly Shrumm, Community Protocols and Access and Benefit Sharing (2010) 12 Asian Biotechnology and Development Rev 49-76.

However, since they are negotiated with specific regard to practical detail within community contexts, they are a source and form of private law and may therefore have legal standing.

4.6. Knowledge registries and databases

The most comprehensive database is India's Traditional Knowledge Digital Library (TKDL). It holds 36,000 formulations utilized in Ayurvedic medicinal practice. The TKDL categorizes the knowledge in ways that allow it to be linked to international patent classification systems. The information is available in English, French, German, Spanish and Japanese for ease when searching.

TK databases have been initiated by libraries, archives, anthropologists working or by indigenous peoples themselves in the form of documentaries. This defensive intellectual property strategy has a number of demerits. First, Folklore databases can provide greater access to outside parties seeking to appropriate TK. Databases, registries and libraries can facilitate access to TK without users ever having to deal or negotiate directly with an indigenous community. Secondly, the question of ownership also arises not only who owns the database (as a whole), but who is recorded as the legal owners of the documented knowledge, how long the material will be protected and how to handle inter-community disputes over who the rightful owners or custodians are. Thirdly, there remains the further problem of decontextualizing TK from the context that actually makes it meaningful. Through this process, salient dimensions of TK may be lost. Fourthly, there are other questions such as where the databases will be located and whether indigenous peoples will have easy access.

4.7. Licenses and licensing

Indigenous peoples may have specific rules governing access to and use of knowledge within communities and between families, clans and individuals. The downside is that first the development of TK specific licenses will take time and attention to detail to cater for linguistic differences and literacy needs. Secondly, indigenous peoples have little or no access to legal services for instance on how to negotiate and use a license with an outside party if and when the need arises.

4.8. Customary law

In general, customary laws are unwritten. In some countries, such as Australia and Canada, the idea of codification of customary law has been mooted. However, it may not be beneficial to codify customary laws. Doing so could freeze them in time and prevent them from evolving. On the other hand, integrating them into the national legal system requires in-depth understanding and analyses that can only be achieved through codification. A quick way of incorporating customary laws of access and control of TK is through agreements or protocols.

Indigenous peoples contend that for their TK to be respected and protected regard must be had to customary laws and governing structures that have historically been regulating the use of TK. Such laws need to be treated as legitimate and given appropriate authority, rather than being supplanted with Western laws. The advantage with customary laws is that they are localized and contextual. The disadvantage with customary laws is that they often fail the test of harmonization or standardization of laws across a country.²³¹

4.9. Sui generis legislation

Sui generis legislation for the protection of Folklore has been developed in countries such as Peru and Panama. Sui generis legislation is a unique law complete unto itself and often created when current and existing laws are inadequate. The benefit of sui generis legislation is that it does not have to resemble any current law, including IPR law. The development of sui generis law offers an opportunity for indigenous peoples to participate in developing frameworks that deal with knowledge control, use and sharing. A sui-generis regime can therefore establish a bridge between customary law and national legal systems in order to secure the effective recognition and protection of TK.

²³¹ Brendan M. Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights', 9/2 Law, Environment and Development Journal (2013), p. 142, available at <http://www.lead-journal.org/content/13142.pdf> accessed 29 October 2014.

CHAPTER FIVE

THE WAY FORWARD IN THE PROTECTION OF FOLKLORE KENYA: A SUGGESTED REGIME

5.0.Introduction

The preceding chapter has made a case for alternative forms of protection of Folklores. It has shown that among the different alternative protection methods, sui generis protection remains the most appropriate. This calls for domestic sui generis legislation. Due to globalization, we also need protection that also goes beyond the boundaries of Kenya. This is the place of treaties.

5.1.Domestic Sui Generis Legislation

The Maasai have the most recognizable cultural identity within and outside Kenya.²³² This is reason enough for a comprehensive protective mechanism. A sui generis law regime should be put in place based on the various best practices from around the world. Sui generis models include the United Nations Educational, Scientific and Cultural Organisation (Unesco); WIPO's Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010) developed by Member States of the African Regional Intellectual Property Organisation (ARIPO).

Article 11 of the Protocol limits the rights of access and exchange of TK to the TK's holders within the traditional context. Article 8 of the Protocol allows TK holders to generally conclude licensing agreements for use of their TK, provided the agreements are in writing and approved by the competent national authority. In addition, the Protocol obliges contracting states to ensure that appropriate enforcement and dispute resolution mechanisms, sanctions and remedies are available where there is breach of provisions relating to the protection of TK.

²³² George Odhiambo Kabongah and Otieno Ombok, 'Rift Valley', in Phoebe Akinyi-Dar Nyawalo, *The Invisible Violence in Kenya: A Case Study of Rift Valley and Western Regions*, (Konrad Adenauer Stiftung 2011) 124.

In Kenya, the National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009, proposes a sui generis system. The policy recognizes Kenya's rich TK and Folklore from different communities most of which is undocumented. It also recognizes that there has been an ad hoc approach towards research, documentation, protection and development in this area mainly due to an absence of formal institutionalized rules and processes. This has resulted in a non-integrated approach, despite the existence of legislation guiding access, benefit sharing, transfer procedures and Intellectual property rights.

It also outlines the following policy statement regarding what the government shall do in collaboration with other stakeholders:

1. Create awareness on the importance and the value of TK and Folklore for, education, conflict resolution, posterity and socio-economic development.
2. Document for preservation and protection (include extinct, endangered and threatened languages).
3. Promote Research & Development in TK and Folklore.
4. Protect the various rights of holders of TK and Folklore.

Policy 4.5 thereof provides for IPRs and access. Policy 4.5.1 recognizes that a great deal of TK cannot be traced to a specific individual, community or geographical area and is ineligible for patent protection. This justifies the need for a sui generis system to enhance, protect TK. Policy 4.5.2 provides that the existing IPRs regime are inadequate and do not address all the issues involved in the protection of TK and Folklore.

In a further policy statement the Government endeavours:

1. Through a sui generis system, protect, integrate, enhance and validate TK know-how and practices while ensuring that the owners of the TK directly benefit on an equitable basis and on

mutually agreed terms from any commercial exploitation of it or from any technological development derived from it and its derivatives.

2. Protect TK systems from unauthorized intellectual property claims based on traditional artistic, literary and cultural works.
3. Ensure mandatory disclosure of source of origin of genetic resource and TK in intellectual property applications.
4. Develop mechanisms for certification, labeling, trademark, geographical indication, tracing or an appellation of origin authorized by the communities' concerned.
5. Protect the economic rights of performers in their unfixed performance⁴.

According to policy statement 5.1.1, the Government shall endeavour to put in place a comprehensive enabling legislation on TK, genetic resources and Folklore with the legislation being implemented concurrently with relevant laws.

Proposed key provisions for the sui generis legislation include:

1. Competent authority

According to the model provisions, certain uses of expressions of folklore are subject to prior authorization by a competent authority or the community itself if they are made both with gainful intent and outside their traditional or customary context and would therefore constitute illicit exploitation if used without this authorization.²³³ In some cases, becoming a juridical person may not only be beneficial but even necessary for negotiations and signing contracts. According to law, unincorporated associations have no legal capacity and therefore cannot contract, sue or be sued in their own name.²³⁴ For example, income may have to be received and administered by a juridical person representing the local people. Also, legal tenure may require that documents are held by a legally recognized entity.

²³³ Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, s 3.

²³⁴ Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract*, (29th edn, OUP) 231.

These legal structures would likely involve communities in certain administrative procedures with which they may be unfamiliar, such as filing annual statements and recording minutes of meetings. Local people may prefer the entity representing them to have a structure and to follow procedures that conform to traditional community structures and customs but find that national law regarding juridical persons does not easily accommodate this desire. An alternative to becoming a juridical person is to set up an independent trust fund to help ensure that local people are not exploited by organizations that they choose to deal with.

Maasai IP initiative²³⁵ proposes to create a General Assembly of Maasai elders, trained in IP, who would act as a legal body specifically on this issue, negotiating with companies via a licensing agent, on a case-by-case basis. According to them, IPRs law is designed for new businesses and people creating innovations and it's not really well-suited to TK.²³⁶

To solve the problem of TK ownership, indigenous peoples such as the Maasai should be encouraged to form Trusts as the competent authority. The Trust would allow the indigenous peoples to manage TK and any related products.²³⁷ It would also facilitate the free sharing of TK at the local level, while at the same time ensuring (through imposing specific usage requirements) that any third party users of TK comply with the norms and values of the community and also that the community benefits from any commercial exploitation of its TK. The trust would also enable them surmount the problem of identifying the holders of TK and how to share out benefits equitably. The structure of the trust would also provide a reliable mechanism to implement mechanisms such as 'access and benefit-sharing' and 'prior informed consent'. Negotiating prior informed consent would be via the trustee whose fiduciary obligations would ensure that the best decision is made for the beneficiaries. The Trust would also allow easier management of the TK as the trust's property and also facilitate the equitable sharing of benefits and enforcing the rights against infringement.

²³⁵See, <http://maasaiip.org/> accessed 5th August 2014.

²³⁶ Ibid.

²³⁷ See generally J E Penner, *The Law of Trusts*, (8th edn, 2012 OUP).

2. Rights Protected

The rights contained in the model provisions are adequate to protect the communities. They also offer the following advantages:

- a. They protect both fixed and unfixed works of Folklore.
- b. The period of protection is indefinite.
- c. The protection includes rights similar to the moral rights that exist in some copyright.
- d. The provisions recognize the need to balance protection from abuses of Folklore against freedom and encouragement of its further development and dissemination.
- e. It recognizes the right to self-determination and human rights.

3. Criminal Sanctions

Four other types of prejudicial action are proposed to be subjected to criminal sanctions.²³⁸ These include:

- a. Failure to indicate the ethnic and geographic source of an expression of folklore in printed publications and other communications to the public;
- b. Unauthorized use of an expression of folklore where authorization is required;
- c. Deliberately deceiving the public about the ethnic source of a production;
- d. Any kind of public use that distorts the production in a manner prejudicial to the cultural interests of the community.

4. Marketing of Folklore

The sui generis laws should also promote the direct marketing and sale of Folklore by the indigenous peoples themselves by elimination of middlemen. It has been noted that local markets are a temporary destination for traditional handicrafts. Each time handicrafts are sold and the further they are taken from their source, they become more expensive. Therefore, the producers of

²³⁸ Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, s 6.

handicrafts selling locally receive a small proportion of the price obtained by the seller of the finished article, especially when they are bought and sold many times during their journey from source to final purchaser. Gift shop owners buy handicrafts or textiles from local markets very cheaply to sell them, often at inflated prices, in specialist shops in other countries.

Secondly tourism should be explored as a source of additional income for indigenous peoples. The sale of traditional cultural expressions such as handicrafts can have a profound effect on their economic fortunes. Unfortunately, the demand for traditional Maasai handicrafts has led to their mass production with a corresponding deterioration in quality as well as to the production of imitations by outsiders who pass off the imitations as genuine Maasai handicrafts. Just the same way, tourists are treated to Maasai traditional art performances such as songs and dances, the process of making traditional handicrafts can be packaged as a form of entertainment for tourists. This would especially be of direct benefit to the Maasai women. The Maasai community should also be given more control over tourists attracted to their culture and traditional knowledge. Such control would give them an upper hand in the management of the proceeds of tourism.

The community can also earn money from filming and photography. For this to occur, there must be mandatory requirements that photographers and film crews must seek the consent of the community before taking their images and that they must also pay some fee for this. Museums, art galleries and private collectors can also serve as a source of income for the Maasai people. The ethnic art market is a highly lucrative sector, with private collectors paying huge sums of money for individual items valued for the skill and artistry of the manufacturer, their antiquity, or their perceived exotic and 'primitive characteristics. Museums may display items manufactured by present-day peoples, including sacred and secret objects. Art galleries display works of art and crafts. It has also been proposed that displaying cultural property abroad has an ambassadorial

function of making the countries richer by exposing its citizens to the other cultures and in exchange, the source country benefit from increased tourism inspired by the cultural items.²³⁹

5. Equity

The sui generis legislation should have provisions to address the root causes of the social and economic forms of differentiation. There should be deliberate attempts to promote equity and inclusiveness and to eliminate all inequalities including those rooted in local social customs and beliefs.²⁴⁰ This can be done by ensuring that proceeds from the sale of traditional knowledge are used in development projects. This may entail a wide range of activities, such as building of roads and bridges, construction of health centers, resettlement of landless people, construction of dams, provision of piped water, building of schools, establishment of bursary schemes and many similar projects.

6. Human Rights

The sui generis law should also have provisions that seek to promote the human rights of the indigenous peoples such as the right to self-determination.²⁴¹ This will empower the indigenous peoples to make decisions on the commercialization of the Folklore. This can be grounded on the principles of international law that support rights to self-determination of indigenous communities.²⁴²

In industrial societies, ownership of land, goods, and services can be transferred from one person or corporation to another in exchange for money. Except for personal possessions, property rights (such as IPR) are typically held by legal persons (corporations) rather than individuals. Traditional societies may view such transactions as contrary to their customs and laws.

²³⁹ Molly McIntosh, Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property, 17 *Duke Journal of Comparative & International Law* (2006) 199, 211.

²⁴⁰ Dilys Roe, Fred Nelson and Chris Sandbrook, 'Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions' *International Institute for Environment and Development (IIED)*' (2009) 57.

²⁴¹ See Gamaliel Mgongo Fimbo, *Multipartyism, Constitutions & the Law in Africa*, (LawAfrica Publishing 2013) 12.

²⁴² *Ibid.*

Communal property is the prevailing system used in most traditional societies to control access to basic resources like food and fuel, but rights are multiple in that individuals, elders, women, clans, lineages and others each have ownership rights within a given resource area and over specified resources within them. Such rights may vary in their extent from one group to another, but they are inalienable (others cannot take away or undermine them).

The 2002 New Zealand Trade Marks Act contains specific grounds for the refusal of trademarks incorporating Maori names and signs. Offensive use of Maori text and imagery in trademarks, for example, is proscribed under the Act. The Act also establishes a Maori Trade Marks Advisory Committee.²⁴³ The function of the Committee is to advise the Commissioner of Trademarks on whether ‘the proposed use or registration of a trademark that appears to be, derivative of a Maori sign is, or is likely to be, offensive to the Maori. Many trademark applications examined by the Committee have been withdrawn by the applicants from the registration process based on the Committee’s advice.

5.2. International Sui Generis Treaties

There are proposals for an international treaty in the area of protection of Folklore. Such a treaty could offer an overarching authoritative framework for negotiating equitable relationships in the use of TK. However, questions of jurisdiction, enforceability and constructing fundamental concepts would remain significant challenges. In addition, the highly contested political nature of TK debates is likely to slow the progress of an international treaty. Other difficulties are likely to emerge from questions about consensus, indigenous peoples’ participation in the design, adoption and ratification of a treaty and who the parties to such a treaty would be.

²⁴³ New Zealand Trade Marks Act s of 2002, 177.

CHAPTER SIX

A NEW DAWN IN THE PROTECTION OF FOLKLORE

This paper has investigated the legal protection of expressions of folklore using the Maasai handicrafts as a case study. The paper has demonstrated that the protection of Folklore can only be effective if done within the right legal framework.²⁴⁴ This paper has brought forth the incontrovertible evidence that Folklore is *sui generis* and requires a *sui generis* protection framework. It is now clear that despite several similarities between Folklore and IPRs, the former is created, owned and utilized differently and is not intended to confer economic benefits to individual creators. Instead, it is intended for communal exploitation.

Chapter One introduced the research problem by exploring the thematic areas of property, indigenous peoples, folklore and intellectual property rights. It has argued that indigenous people should also be afforded a fair chance to make profits from their Folklore just like corporations. Chapter Two presented the research methodology whose underlying framework is the human rights theory. In Chapter Three, this paper considers expressions of folklore under the various categories of IPR recognized by Kenyan law. The appropriateness of each of these categories in the protection of expressions of folklore is debated using the legal, socio-cultural, economic and political justifications as well as drawbacks.

In Chapter Four of this study, it has emerged that the IPR regime in its current form is not the ideal framework for the protection of expressions of folklore. While this paper recognizes that IPR laws can facilitate the protection of expressions of folklore, it has demonstrated certain drawbacks which significantly limit the efficiency of these IPR laws. To begin with, the inherent characteristics of expressions of folklore are incompatible with the existing criteria for protection under the IPR regime. For instance, while the IPR regime confers a time-limited monopoly over one's innovation,

²⁴⁴ Pamela Andanda, *Striking a Balance Between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge*, 17 J of IPR (2012) 447.

folklore ought to be protected in perpetuity. If folklore was to be protected under the IPR regime, upon expiry of the IPR protection period the folklore would lose protection forthwith and fall into the public domain. In addition, the subject matter of expressions of folklore appears to be far more complex than the subject recognized by the existing categories of IPR. Accordingly, discussions on the protection of folklore should not in the context of IPR terminology.

As a result of the realization that the IPR regime is inadequate in the preceding chapter, Chapter Five advocates for the development and adoption of a new, sui generis type of protection. The recommended sui generis system is sufficiently close to existing IPR law particularly copyright law. This close association with copyright law means that the sui generis system will benefit as much as is practicable from the general principles of copyright law but remain modified enough to reflect the specific and unique features of folklore.

Chapter Six is the concluding chapter. It wraps up the entire discussion, drawing conclusions from the arguments of the preceding chapters and shows the capacity of this paper to influence the law. This paper has used the human rights approach to show how communal rights in Folklore can be recognized and protected. We do not have to rely on the law of property which only recognizes individual rights for the protection of Folklore. Through a human rights framework, indigenous peoples can benefit fully from the proceeds of the sale of their Folklore. The proceeds should be channeled directly to them without any portion of it being channeled through intermediaries such as Non-Governmental Organizations or even the government. Channeling the proceeds through public bodies exposes indigenous peoples to corruption, mismanagement of funds and further marginalization by other communities.

The sui generis framework proposed herein is in line with the model sui generis framework crafted by WIPO. The model is perhaps a concession by WIPO of the fact that the protection of folklore requires the concerted efforts of all stakeholders across the globe. The model Draft

Provisions/Articles for the Protection of Traditional Cultural Expressions is still under revision. It captures the principle issues arising in the protection of folklore but is still limited in certain respects. This is principally because it is not meant to be legally binding upon WIPO Member States because it comprises optional rules that may be enacted into municipal legislation. It has been demonstrated that for a sui generis system of this nature to be fully operational it is necessary that WIPO Member States either enter into a legally binding Treaty or that they all enact the model law into their municipal legislations.

This paper has also shown that through affirmative action indigenous peoples such as the Maasai can gain full control of their folklore and the products thereof. Such communities should be allowed to decide just like an individual author, whether to keep their knowledge to themselves or to share it with the world and if so when and how to share it and even be compensated whenever their folklore is appropriated unlawfully. In addition, they should be afforded the moral right to fair attribution whenever their folklore TK is used. As demonstrated in this paper, commerce and culture need not be at loggerheads. Indeed, culture can be strategically wedged into sustainable development policies.²⁴⁵

In the case of the Maasai and other indigenous peoples, the government should put adequate safeguards in place to ensure that they continue creating their folklore in their villages without being compelled to migrate to urban areas to work in factories to produce expressions of .

As observed by several writers, globalization has not brought prosperity for all. In fact, income inequality has grown rapidly in some regions leading to a decline in productivity, increase in poverty levels, heightened social instability and even conflict. As shown in this paper, one of the ways of addressing these undesirable outcomes of globalization among indigenous peoples is the use of social justice to address inequalities and ensure that every working man and woman can obtain their fair

²⁴⁵ Peter Onyango, *Cultural Gap & Economic Crisis in Africa: Africa Must Reinvent Herself in Order to Overcome her Economic Crisis- Focus on the Sub-Saharan Region*, (Fastprint Publishing 2010) 54.

share of the wealth they have helped to generate.²⁴⁶ In a developing economy like Kenya, a large part of the workforce is active in the informal economic sector. Some of the measures created to enhance social in the informal sector can be helpful in the case of indigenous peoples.²⁴⁷

Since international trade has been recognized as an engine for economic growth and key aspect of international economic development,²⁴⁸ communities such as the Maasai should be facilitated to access international markets from the comfort of their Manyattas. This can be achieved through the use of Information Communication Technology (ICT) concepts such as digital storefronts similar to eBay and Amazon; telecommuting such that the Maasai produce folklore from the comfort of their Manyattas and crowdsourcing which enables every producer of folklore to make their contribution.²⁴⁹ ICT, the internet and the World Wide Web can be harnessed to enable people conduct e-commerce both locally and internationally in fast, secure, cheap and efficient ways.²⁵⁰ Electronic banking with features such as electronic funds transfers, credit cards and so on can be used to effect payments across geographical borders.²⁵¹ Mobile commerce (m-commerce) where business transactions are conducted electronically using mobile devices such as smartphones can be applied in the case of local trade.²⁵² Communities such as the Maasai can also utilize mobile banking platforms like Safaricom Limited's M-PESA to make seamless payment transactions with their customers and suppliers. Communities should also be facilitated to take advantage of trading regional markets such as the Common Market for Eastern and Southern Africa (COMESA) and the East African

²⁴⁶ International Labour Organisation, *Rules of the Game: A Brief Introduction to International Labour Standards*, (International Labour Organization, 2009) 8.

²⁴⁷ International Labour Organisation, *Rules of the Game: A Brief Introduction to International Labour Standards*, (International Labour Organization, 2009) 12.

²⁴⁸ Shawkat Alam, *Sustainable Development and Free Trade: Institutional Approaches*, (Routledge 2008) 1.

²⁴⁹ See Stephen Haag and Maeve Cummings, *Management Information Systems for the Information Age*, (9th edn, 2013) McGraw-Hill/Irwin, 17.

²⁵⁰ See D.P. Nagpal, *Textbook on Management Information Systems* (2011, S. Chand & Company) 187.

²⁵¹ Adam J. Mambi, *ICT Law Book: A Source Book for Information & Communication Technologies and Cyber Law* (Mkuki na Nyota Publishers 2010) 5.

²⁵² Ralph Stair, George Reynolds and Thomas Chesney, *Fundamentals of Business Information Systems* (2 edn, 2012, Cengage Learning EMEA) 15.

Community (EAC).²⁵³ They can also benefit from dispute resolution mechanism in private international law or through the common market dispute resolution bodies in case of any disputes.²⁵⁴

This paper has also made a contribution to the protection of gender rights. It has shown how women from indigenous communities can benefit when gender issues are addressed under the human rights framework. The gender issues addressed include problems stemming from customary-law distinctions between men and women with respect to inheritance or female genital mutilation. The state can use civil and criminal law to invalidate all such discriminatory customs. The state can also promote transformations in communal attitudes towards gender. Education can play a role by challenging stereotypical gender roles in textbooks and academic instruction.

The government can influence prevailing views for instance by appointing women to public service offices. The civil society can play a role by absorbing women into their activities.²⁵⁵ The women should also take advantage of the rights to equal treatment and opportunities granted by the Constitution in political, economic, social and cultural spheres. These include rights to inheritance, land and other forms of property.²⁵⁶ In the case of the Maasai, such action should be taken in favour of the women who produce folklore to empower them to benefit from the proceeds of their labour and through the ownership of the intellectual property inherent in their work. Researchers have established that women are the most vulnerable and yet most victimized in indigenous societies as a result of cultural values, role-playing and social expectations.²⁵⁷ Among the Maasai, these challenges can be through offering women soft loans repayable over flexible periods to enable them buy more

²⁵³ See, James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes*, (Cambridge University Press 2011) 181.

²⁵⁴ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa*, (Cambridge University Press 2011) 271.

²⁵⁵ Malcom D. Evans, *International Law*, (3rd edn, OUP 2010) 808.

²⁵⁶ John N. Burugu, *The County: Understanding Devolution and Governance in Kenya*, (Centre for Leadership Education and Development, 2010) 79.

²⁵⁷ Tibamanya Mwene Mushanga, 'Women as Victims of Domestic Violence', n Tibamanya Mwene Mushanga, *Essays in Criminology*, (LawAfrica Publishing, 2011) 49.

raw materials. This can also be done through offering scholarships for their children, free healthcare services and other social amenities.

This paper also proposes that the Maasai people can also contribute to the national economy through the formation of businesses vehicles such as social enterprises²⁵⁸ which can contribute through the payment of taxes. The collection of taxes from Maasai small scale traders would help to increase both the tax base as well as the amount of tax collected.²⁵⁹ However, the tax system should be deployed to militate against economic discrimination especially against women²⁶⁰ and also the whole Maasai community. If empowered enough, the Maasai can pay income tax,²⁶¹ Value Added Tax, Customs and Excise Duty and other taxes out of the proceeds of the sale of their traditional cultural expressions. This would in turn benefit the whole country and ensure that the Maasai traders pay taxes just like other traders.²⁶² The Maasai should also be regulated in way that enable them put part of their income as savings in pension schemes for the sake of their future.²⁶³ Regard should be had to the international dimensions of their dealings in handicrafts across international borders.²⁶⁴ The Maasai should be empowered to create their own business vehicles such as companies, partnerships²⁶⁵ or trusts. They should also be educated in managerial skills to enable them manage their folklore businesses effectively.²⁶⁶ Marketing skills would also come in handy to enable them

²⁵⁸ See, Matthew F. Doeringer, 'Fostering Social Enterprise: A Historical and International Analysis,' (2010) 20 *Duke J of Comparative & International Law*, 291.

²⁵⁹ See Edgar Kiser and Audrey Sacks, 'Improving Tax Administration in Contemporary African States: Lessons from History, in Isaac Willaim Martin, Ajay K. Mehrotra and Monica Prasad eds., *The New Fiscal Sociology: Taxation in Comparative and Historical Perspective*, (OUP, 2009) 183.

²⁶⁰ See Ann Mumford, *Tax Policy, Women and the Law: UK and Comparative Perspectives*, (Cambridge University Press, 2010) 1.

²⁶¹ See Reuven S. Avi-Yonah, *Global Perspectives on Income Tax Law* (OUP, 2011)17.

Osambo A. T. Income Tax Law & Practice, Bluechip Copy Services, (2009) 40.

See Gabriel Kitenga, Introduction to Tax Law, (LawAfrica Publishers, 2010) 49.

²⁶² See, Moshe Shekel, *The Timing of Income Recognition in Tax Law and the Time Value of Money*, (Routledge-Cavendish, 2009) 19.

²⁶³ See, Paul Thornton and Donald Fleming, *Good Governance for Pension Schemes*, (Cambridge University Press, 2011).

²⁶⁴ See Peter Harris and David Oliver, *International Commercial Tax*, (Cambridge University Press, 2010).

²⁶⁵ See generally, Sarah Riches and Vida Allen, *Keenan and Riches Business Law*, (10th edn, Pearson education, 2011) 73.

²⁶⁶ See generally Stephen P. Robbins and Mary Coulter, *Management*, 11th edn Pearson Education Limited, 2013.

create competitive advantage for their folklore businesses.²⁶⁷ They should also be empowered with legal representation to enable them enter into complex contracts with third parties with full understanding of their obligations, and the risks involved.²⁶⁸ All these measures would ensure that the Maasai community enjoys sustainable community development.²⁶⁹

²⁶⁷ See generally Phillip Kotler and Gary Armstrong, *Principles of Marketing* 14th edn Pearson Education Limited, 2013.

²⁶⁸ See, Ewan McKendrick, *Contract Law: Text, Cases and Materials* (5th edn, OUP) 7.

²⁶⁹ 'Sustainable Community development is a process in which the community uses and enhances its social, cultural, economic and environmental resources to ensure a better quality of life for everyone, now and for generations to come.' Gitonga B A, *Lobbying and Advocacy*, (Revised edn, Project Support Information(PSI) Consultants, 2013) 184.

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