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PROTECTION OF TRADITIONAL KNOWLEDGE AND ITS RELEVANCE TO NATIONAL ECONOMIC GROWTH AND DEVELOPMENT IN NIGERIA

Nneka Chioma Ezedum*

Abstract

Nigeria is a country that is richly blessed with abundance of natural resources, good vegetation and fertile soil for cultivation. The country also has diverse ethnic groups, culture and customs. This way of life of the people can be perceived in the activities, traditions and customs that have been handed down to them by their forefathers. Overtime, communities expanded and there was influx of people to the different communities in the country. These people become exposed to this way of life and they benefit from it individually and collectively. This information or knowledge acquired is generally utilized by others without the local or indigenous communities benefitting in any form from their cultural heritage. It is general knowledge that intellectual property protects the activities of the intellect or mental faculty. Could this traditional knowledge (TK) of the people require protection under intellectual property? Would it not be appropriate that these people are recognized as the custodians of the TK? Their consent sought before usage, and benefits arising thereof be given to them on prior agreed terms. This will further strengthen the economic system of the society. Doctrinal research method was used in this work, and reliance was placed on both primary and secondary source of information as the work discussed the need for protection of traditional knowledge (TK), the progress made so far and the challenges to providing proper legal and institutional framework for protection of TK.

Keywords: Traditional knowledge, intellectual property, indigenous peoples, culture and custom, public domain

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1. Introduction

Traditional knowledge (TK) is the cultural identity of a people. It is their culture and heritage by which the people are known. It is usually as old as the people because it is handed over to them by their forefathers and they proudly pass it down to each generation. The transition to each generation could be done orally and is traced back to the people. TK is a living body of knowledge that is developed, sustained and passed down to generations, it comes in diverse forms and can be seen in the way the people utilize it for agriculture, to handle their health needs, to preserve the environment and generally as a way of life

It could be said that TK is generally owned by a community or a people and not the property of an individual. It is different from the general concept of intellectual property (IP), which is to protect and reward the original work, product or innovation of a person or company for a limited period. How then can these communities benefit from their cultural heritage being used by others?

The general view is that traditional practices are in the public domain, free and available for anyone to make use of. This view however generalizes the traditional customs and practices of indigenous peoples. It gives unrestricted access and encourages misappropriation and misuse of their cultural heritage. This misuse and misappropriation is what enables a cosmetic or pharmaceutical company use traditional remedy and thereby apply for the patent without recognizing the custodians of such traditional remedy or allowing them the economic benefits of such use. This misappropriation could also be seen when a traditional dance step or folk song is copyrighted without as much as acknowledging the indigenous people who own the song or allowing them benefit from the economic exploitation of the traditional right.

TK is unique and its practices are not generally accommodated under the conventional IP administration. However the fact remains that indigenous people ought to have their rights protected and should benefit from the exploitation of their cultural practices. This work examines the importance of TK, the benefits of its commercialization, the progress made in creating its protection and concludes by providing recommendations and stating the challenges envisaged in providing a legal framework for protection of TK.

To achieve the aim of this work, aside from the introductory part, the paper is further categorized into four sections. The second section is

on the concept of TK. Here a definition of TK is attempted, its examples provided and the rationale for TK protection stated. . The section further discusses the relationship between TK and information in the public domain, the possibility of ownership of TK and the basis for the protection of indigenous peoples right. The third section examines the existing legal protection for TK and the human right perspective to TK protection. Section four discusses what is obtainable in India and the progress the country has made in providing adequate protection for its TK. while the lasts section suggests recommendations for effective protection of TK in Nigeria, and thereafter the conclusion.

2. Concept of Traditional Knowledge

2.1 Meaning of TK

TK is the knowledge and practices of a particular society which form part of their cultural identity and passed down from the forefathers to their progeny. The World Intellectual Property Organization (WIPO)¹ defines TK as ‘Knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.’ The concept has been described as knowledge systems and innovations which have evolved in a traditional context, usually among particular tribes or group of people sharing similar boundaries, culture and beliefs, which systems have been transmitted from generation to generation.² It has played, and still plays, a vital role in the daily lives of vast majority of people. It is essential to food security and health of millions of people in the world, particularly the developing world.³

TK generally includes cultural heritage, practices and knowledge systems of indigenous peoples and local communities.⁴ In its strict sense and in the traditional sense, it can be referred to as the knowledge

¹WIPO ‘Traditional Knowledge’< <https://www.wipo.int/tk/en/tk> > accessed 2 February 2021.

² Adegoke O Oyewunmi *Nigerian law of Intellectual Property* (1st edn, Lagos, University of Lagos Press and Bookshop Ltd, 2015) 249.

³ F Addor and A Grazioli ‘Geographical Indications beyond Wines and Spirits: A Roadmap for Better Protection for Geographical Indications in the WTO TRIPS Agreement’ 2002, <https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=geographical=+indictio ns+beyond+wines,+and+spirits&btnG=#> accessed 31 May 2022

⁴ Intellectual Property, *Traditional Knowledge and Traditional Cultural Expressions/ Folklore: A Guide for Countries in Transition* (Geneva: WIPO Publication 2013).

resulting from activities of the intellect which includes the know-how, practices, innovations and skills of an indigenous people.

TK can also be defined as a form of knowledge which is passed from one generation to another generation. This happens within a particular community, it is used to identify a community's customs and spiritual life. For many communities, TK forms part of a holistic world-view, and is inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems.⁵ TK often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also have symbolic value for the community. Many sculptures, paints, and crafts are created according to strict rituals and traditions because of their profound symbolic or religious meaning.⁶

2.2 Examples of TK and the Rationale for Protection

TK which is an indigenous peoples' way of life, their customs and cultural practices include:

- (a) Knowledge with respect to agricultural practices and science; for example local irrigation system.
- (b) Medical knowledge (pharmacognosy) with respect to traditional medicine and use of plants and herbs to treat disease and infection; for example, the use of Neem plant (dogoyaro) and Bitter Leaf (Onugbu) to treat malaria and typhoid fever.
- (c) Traditional hunting and fishing techniques for example, the San people use the *hoodia* plant to stave off hunger while out hunting.
- (d) Traditional industrial/technical knowledge that indigenous people use in making fabric. Examples include the tie and dye system, Aso-oke of Ogun State, Nigeria, the *Akwette* of Anambra State, Nigeria.
- (e) TK with respect to folk lore, masquerades and cultural dance of indigenous people; for example, the Atiliogun dance of Anambra people.

⁵ Finley Y. Kargar, *The Interplay Between Traditional Knowledge and Geographical Indications: A Case Study of Liberia*, Master of Laws in Intellectual Property, WIPO University of Turin, Collection of Research Papers, (Geneva: WIPO Publication No 797 E/10 WIPO 2010).

⁶ Kamil Idris, *Intellectual Property - A Power Tool for Economic Growth* (Geneva: WIPO) 238.

TK is used to meet the needs of the community but concerns arise in instances where resources of communities are used by multinational companies for commercial use. TK is valuable, that is why modern industries and agriculture maximize it. The evidence is in many plant based medicines, health products and cosmetics that are derived from TK. It could also be seen in non-wood forest products as well as handicraft. The examples are limitless, they include the use of traditional remedy or local plant used by a pharmaceutical company and the resultant product could be patented by that company. According to the African Centre for Bio-Safety:

International businesses, institutions and other players have created profitable private monopolies over African patrimony by staking out patent claims on Africa's genes, plants and related traditional knowledge. The patent claims are not only economically unjust, but are a moral affront to the many generations of Africans who have cared for and created the continent's rich genetic and cultural diversity.⁷

There is economic benefit in the protection of TK. The government can help achieve the alleviation of the poverty of the indigenous people by ensuring protection of their cultural heritage by way of TK and ensuring that this knowledge is used for the development and growth of the economy of the custodians of such knowledge. It can form a basis for growth of culture-related enterprises and industries in that community thereby reducing poverty and total dependence on others.

Misappropriation of their TK has become a matter of great concerns to indigenous communities. There could be a complete take over by big companies who would not attribute the source of their products to the custodian of the knowledge nor provide economic benefits to them. Companies can visit any indigenous community and be exposed to their indigenous knowledge, with the changing times and the movement into the digital age, easily acquire same.....and any process may be easily documented and scientifically practiced⁸. This brings to mind the case where India forced the United States Patent and Trademark

⁷ See African Centre for Biosafety, *Pirating African Heritage: The Pillaging Continues*, (Briefing Paper 2009) 3 cited in Adegoke Oyewunmi, "Nigerian Law of Intellectual Property" (n3)

⁸ Kasim Musa Waziri and Awolowo Omotayo Folasade, 'Protection of Traditional Knowledge in Nigeria: Breaking the Barriers' (2014) 29 *Journal of Law, Policy and Globalization*, 176 – 184.

Office (USPTO) to revoke the patent granted to University of Mississippi Medical Centre for the use of turmeric to heal wounds.⁹ This was done upon discovering that turmeric was widely used in India as a medicine, a food ingredient and a dye.¹⁰ This is a commendable act of the protection of TK.

TK is a great asset; it is a source of food and provides traditional healthcare/medication to indigenous communities. According to World Health Organization (WHO), up to 80 per cent of the world's population depends upon traditional medicine for its primary health needs.¹¹ There are over 1300 medicinal plants used in Europe, of which 90% are harvested from wild resources; in the United States, about 118 of the top 150 prescription drugs are based on natural sources.¹² Pharmaceutical industries use natural compounds from plants for drug production. Natural therapies for weight loss are derived from herbs and plants, Cosmetics and personal care industries use extracts from traditional plants species for their beauty products. For instance, Ayurveda is a traditional Indian beauty treatment. It is said to be the oldest holistic approach to health and well-being having been around for about 5,000 years.¹³

In March 1999, the Body Shop introduced a line of Ayurvedic-inspired products (such as a pillow spray of kaphas), and in October 1999 a three-woman team, including model Christian Turlington, launched the upscale skin-care regimen Sundari. Both lines use essential oils and herbs cultivated predominantly in India. Says Sundari co-founder Ayla Hussein, who grew up in Pakistan and attended Harvard Business School: "We take ideas that are thousands of years old and use modern technology to maximize its efficacy." Lindsey Oliver, manager of an Ayurvedic spa called Rag in Fairfield, Iowa, says that

⁹ KS Jayaraman, 'US Patent Office withdraws Patent on Indian Herb' <<https://www.nature.com/articles/37838>> accessed 18 April 2022.

¹⁰ G Krishna Tulasi & B. Subba Rao, 'A Detailed Study of Patent System for Protection of Inventions' Indian Journal of Pharmaceutical Sciences. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3038276/>> accessed 31 May 2022

¹¹ Idris (n 6) 238.

¹² Chinese Medicine, 'Conservation and Sustainable Use of Medicinal Plants: Problems, Progress, and Prospects' <<https://cmjournal.biomedcentral.com/articles>> accessed 13 April 2021.

¹³ Idris (n 6) 247.

when the resort opened seven years ago, she couldn't get magazines interested. Now she reports, "Vogue calls us".¹⁴

From the above, it can be deciphered that the companies that utilize the traditional plants commercialize them and are economically empowered. How do the communities, the custodians of these TK benefit from this commercialization?

The livelihoods of indigenous peoples worldwide depend on the preservation and protection of TK. Indigenous peoples and rural communities have developed an intimate knowledge of the use and functioning of biological and natural resources over centuries of total dependence on these resources.¹⁵ Therefore to ensure that indigenous communities benefit and also have some form of control over the use of their TK by persons or companies, there should be protection of this knowledge.

Protection of TK is also a means of attracting national and foreign investment, simply because these foreign companies and developed countries need the TK for R&D(research and development) and without the ease of bio-piracy, they are compelled to enter into legitimate partnerships with either the government or the people.¹⁶ This legitimate partnership ensures that the economic benefits of such a partnership returns to the custodians of the TK, thereby enhancing the economy of the country.

¹⁴ Ibid.

¹⁵ Kasim Musa Waziri and Awolowo Omotayo Folasade, ' Ibid (n 8)

¹⁶ Ibid. Biopiracy is the unethical or unlawful appropriation or commercial exploitation of biological materials(such as medicinal plant extracts) that are native to particular country or territory without providing fair financial compensation to the people or government of that country or territory. <<https://www.merriam-webster.com>> Examples of biopiracy include Patenting of *Azadirachta indica*- Neem: Indians shared their knowledge in this regard. In 1994, US Department of Agriculture and an American company- WR Grace received a European patent that included various methods that are used for controlling fungal infections in plants by using a composition extracted from neem. Biopiracy of African super-sweet berries: the plant, *Pentadiplandra brazzein* found South Africa is a vital source of protein and utilized because it is a low-calorie sweetener, much sweeter than sugar. Recent developments involve isolation of the gene encoding brazzein that has been sequenced and patented in the USA. What is Biopiracy <<https://byjus.com>> accessed 18 April 2022.

2.3 Traditional Knowledge and the Public Domain

The public domain consists of knowledge and information available to the general public to use freely without restriction. There is no internationally accepted standard for the public domain, that is to say countries are free to classify what amounts to public domain in consideration of their national values and priorities.

Notably, the monopoly and incentives awarded those who have made creative and innovative processes are just for a period with respect to the specific duration for the different areas of IP. At the expiration of the monopoly, it is expected that such innovations will be in the public domain and available to the general public for use without fear of infringement, and especially for use in creating more innovative works.

TK does not *strictu sensu* have duration of use, but it is not also in the public domain because it is not the right of individuals or companies. It is the heritage of a people, a form of their culture, tradition and their pride. There has been notable progress in the discussions concerning the proprietary rights of custodians of TK, however to insinuate that TK is merely an extension of the public domain would be totally out of place. Thus, according to Okodiji:

The treatment of traditional knowledge as merely an extension of the public domain has significant implications for the welfare and economic developments opportunities of indigenous groups. This view undermines treaties that already acknowledge or require protection for the rights of indigenous groups and traditional knowledge holders, and it also violates central tenets of the international IP framework, such as non-discrimination and protection for non-economic interest (ie) moral rights) associated with certain cultural goods.¹⁷

There is controversy and argument by scientists and researchers that TK comprises of what they use for the progress of science and research innovations. That this knowledge is the ‘common heritage of mankind’¹⁸ and should be freely exploited in the furtherance of science

¹⁷ Ruth L Okediji, ‘Traditional Knowledge and the Public Domain’ (Centre for International Governance Innovation (CIGI) Papers No 176, June 2018, 10) <https://www.cigionline.org/publications/traditional-knowledge-and-public-domain/> accessed 01 February 2022

¹⁸ This phrase was first introduced in the Preamble to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Its application

and the benefit of mankind. However, can this argument stand the aim of IP in the protection of rights? There is no confusion as to what a good administration of IP Law seeks to do, it protects the innovation of individuals from undue exploitation and ensure that the economic benefits thereof accrue to these innovators. Intellectual property rights are first of all property rights. Secondly, they are property rights in something intangible. And finally, they protect innovations and creations and reward innovations and creative activity¹⁹

Patents give temporary protection to technological inventions and design rights to the appearance of mass produced goods; copyright gives longer lasting rights in.....literary, artistic and musical creations: trademarks are protected against imitations so long at least as they continue to be employed in trade...this is a branch of the law which protects some of the finer manifestations of human achievements.²⁰

This protection should be extended to indigenous people, as a form of preservation of their cultural heritage and most importantly to prevent others from claiming IP rights in TK.

2.4 Possibility of Ownership of TK

It may be asserted that TK is communally owned and belong to a particular people. However in a situation where an individual who is part of a particular community has carved a niche for himself with his people's TK by creating a work that is somewhat original, how can such a person benefit from his additional input to the TK?²¹ Would such a person be permitted some form of exclusivity in the right? On the other hand, where a company that has used the TK of a people and developed it to such an extent as to amount to an inventive activity or an original

placed certain geographical areas, such as the seabed and ocean floor, off-limits from claims of ownership See art 136 of the United Nations Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994).

¹⁹ P Torremans and J Holyoak, *Holyoak and Torresmans Intellectual Property Law* (2nd edn, Butterworth 1998) 12.

²⁰ W Cornish and D Llewellyn, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights*(5th edn, London, Sweet & Maxwell, 2003) 3.

²¹ For instance a patent in the yellow yam in Nigeria which is known to aid in the treatment of diabetes, was granted to one Dr Maurice Iwu by the United States Patent Office. Cited in Kasim Musa Waziri and Awolowo Omotayo Folasade, *Ibid* (n 8). Could this be said to be an inventive activity. What about the people in his community that have been using the same knowledge, and who possibly shared that knowledge with him.

work, what is the fate of the company considering the scope of IP protective in relation to the particular area of IP.

It is recognized that there is great benefit in the commercialization of TK, it is said to play an important role in the global economy, with the market value of plant-based medicines sold in developed countries estimated to be worth billions²². Restricting the use of TK to only the local community would be depriving the society at large the benefits the exploitation would birth, because the custodians of the TK might not have the technical know of maximizing the potentials of the TK. Furthermore, the local community might be constrained financially and would not be able to explore the various areas that the TK could be used and the products that can be derived thereof. However, if protection of TK is provided for under the IP regime, ownership, licensing and duration could be factored in and made applicable the same way it is obtainable in the different areas that IP cover. For instance, under patent, because of the importance of patented inventions to the society the duration is limited to 20 years and within this period only the patentee has the right to grant license of an invention and exclude others from making, using or selling an invention in the country wherein it was obtained without the consent or permission of the owner of the invention.²³ With respect to copyright, the duration differs from 50 to 70 years depending on whether the work is a literary, artistic, sound recording, etc; while for trademark protection is for 15 years in Nigeria. Within the duration of protection, the owner of the relevant IP is compensated and enjoys remuneration exclusively pending when the IP enters the public domain for general and free use.

Because of the peculiarity of TK as being owned and used communally, its transition to the public domain is not foreseeable. However, the same way other right owners of the various areas of IP enjoy the economic benefits which result from the commercialization and exploitation of IP, custodians of TK should equally enjoy the commensurate benefits that come from the exploitation and

²² Graham Dutfield, 'TRIPS-Related Aspects of Traditional Knowledge' CASE W. RES.J. INT'L, Spring 2001. Pp.233, 243 & 244. Cited in Fasogbon Adeniyi, 'Protecting Traditional knowledge Through *Sui Generis* System in Nigeria Prospects and Challenges' https://scholar.google.com/scholar?hl=en&as_sdt=%2C5&q=protecting+knowlege+throug+ui+generis+system+nigeria&btnG= accessed 31 May 2022

²³ Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria (LFN) 2004, s 6.

commercialization of their TK. This could be achieved, and in this way individual and companies can have access to TK, acknowledge the custodians of the TK and upon agreed terms be able to use the TK. Culture is known as a people's way of life, communities should not be deprived from laying claim on their cultural practices without due compensation. This would be a win-win situation.

2.5 Protection of the Rights of Indigenous Peoples and TK

Colonization caused a great injustice to indigenous people. Apart from their land being taken over by their colonial masters, their resources were equally taken. This includes their TK. This resulted in indigenous people not being able to use their resources in ways that are peculiar and particular to them. Their culture and customs which were their heritage from their forefathers were looked down on and termed as inferior. The quality of their cultural values and customs diminished to pave way for what was seen as modern. Certain customs and practices, which are adverse to natural law, were abolished, so it is not in doubt that modernization has its advantages. However, these advantages should not negate the importance of TK to indigenous peoples. This guided the decision of the United Nations to recognize that people can be different and there is diversity in culture, and diversity and cultural richness contribute to the common heritage of mankind.²⁴ Thus, the UN acknowledges that indigenous peoples ought to be respected in line with their cultural heritage and should not be discriminated on rather they deserve respect and equality as attributed to mankind: 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.²⁵

There were concerns raised by Nigeria and some African countries with respect to this declaration in relation to the absence of the definition of the term 'indigenous peoples'. It was stated that 'A clear and

²⁴ United Nations Declaration on the Rights of Indigenous Peoples, Res 61/295 adopted on 13 September 2007.

²⁵ Ibid art 31.

unambiguous definition will delimit the term and avoid its misuse especially in countries where all the ethnic groups are indigenous.²⁶ The apprehension was against the different indigenous tribes in Nigeria agitating for exclusivity from the nation/state 'Nigeria' if a clear definition of the term was not provided in the Declaration. This concern is based on the fact that Nigeria has 371 indigenous tribes and the country as an entity gained political independence in 1960 but the different ethnic groups could leverage on the Declaration to try and break out as separate States.

In view of the current trend in IP and discussions going on with respect to the protection of TK, the author believes these concerns are unfounded. The intention of the UN is not to create chaos of some sort but rather to protect the interest of people generally and avoid discrimination and ensure that the customs and cultural practices of all indigenous peoples are protected and given free expression.

3. Legal Protection of Traditional Knowledge

3.1 Sui Generis Approach to Protection of TK

The fact still remains that TK is unwritten and regulated by customary law that is basically not codified. This could be challenging in trying to make it fit into the already established IP system. IP is structured to protect original works whereas TK is an established and existing custom or culture of a people. TK is owned by a community or a people, and transmitted from generation to generation unlike regular IP which its monopoly is for a provided duration.

Protection of TK under the current IP system can be challenging because of the uniqueness of TK. For instance protecting TK under the copyright system would have been ideal because some of the works eligible for protection therein which are literary, musical, artistic works are also the areas in which TK is expressed. For any work to be eligible for protection in the copyright system, sufficient effort must have been put into giving the work an original character and the works must have been fixed in a definite medium.²⁷ TK is basically expressed and passed down orally by the custodians and the criteria of fixation would be

²⁶ Unrepresented Nations and Peoples Organization (UNPO) 'Ogoni: Nigeria Opposes Indigenous Rights Declaration' (28 May 2007) <<https://unpo.org/article/6763>> accessed 13 April 2022.

²⁷ Copyright Act, Cap C28, Laws of the Federation of Nigeria (LFN) 2004, s1.

difficult to meet. In addition, the duration for copyright protection is 70 years following the death of the author for literary, musical and artistic works, whereas TK has no time limit. Patent law has been the most discussed IP rights in relation to TK because the knowledge embedded in TK is often of a technical nature, thus resembling what patents are meant to protect.²⁸ TK not being documented also poses a challenge in this regard, patent law requires that for an invention to be patentable it must be new, results from an inventive activity and must be capable of industrial application.²⁹ These criteria make protecting TK difficult. Another area to be looked at is protecting TK as a trade secret but the nature of TK requires express communication within the particular community.

Considering a defensive protection approach would be effective in stopping third parties from acquiring intellectual property rights over TK. This could be better achieved where there is a comprehensive database of TK. This way a quick reference could be made to such a database by appropriate authority when considering applications for the grant of patents. This will help eliminate the grant of patents to third parties for TK. In terms of positive protection, there is a need to equip the host communities and custodians of TK and enable them to control the use of their TK, promote its use and benefit from the commercial exploitation of its use. One suggestion is a community rights regime where ownership rights over TK are vested in the indigenous peoples instead of being focused on single owners.³⁰

Sui-generis is used to describe something different, unique and in a class of its own. A *sui-generis* approach could be a combination of some IP protections with some other forms of protection. The government may choose to extend protections to genetic resources and/or knowledge to a community in the form of patents, trade secrets, copyright, farmers and breeder's rights or another creative form not currently established in the IP regime.³¹ A *sui-generis* system could ensure that a data base of the TK of its people is maintained, and any

²⁸ Kamrul Hossain and Rosa Ballardini, 'Protecting Indigenous Traditional Knowledge through a Holistic Principle-Based Approach' *Nordic Journal of Human Rights* <<https://www.tandfonline.com>> accessed 18 April 2021.

²⁹ Patents and Designs Act, Cap P2, LFN 2004, s 1.

³⁰ *Ibid* (n 26)

³¹ Balavanchth Kalaskar, 'Traditional Knowledge and Sui-Generis Law' (2012) 3 (7) *International Journal of Science and Engineering Research* 2.

application for patent is checked therein to forestall grant of patent to its local knowledge. If a *sui-generis* approach is sustained, a persons or companies wishing to use the TK of indigenous peoples would need to obtain their prior authorization and consent. This way the terms and conditions for such grant are outlined and the benefits of such relation are noted.

In the *sui-generis* approach, the criteria for protection as stated under the regular IP laws will not be strictly adhered to. Hence, the criteria for novelty and definite monopoly will not be exercised therefore TK does not have to be new, non-obvious and capable of industrial application to be protection, neither should the protection be exercised for a definite period. Also protection of TK will be provided for communities/indigenous people. Since TK is local and indigenous knowledge, the *sui-generis* laws could be laws that are peculiar to that community or society as long as they are not against universally accepted standards or human right laws.

3.2 Existing Protection for TK

Nationally, some countries have laws that protect TK example Kenya, Zambia, Peru, Costa Rica, etc. In 2000 Panama passed a *sui-generis* law known as ‘Panama’s Special System for Registering the Collective Rights and Indigenous Peoples for the Protection and Defence of Their Cultural Identity and Traditional Knowledge and Setting out Other Provisions’.³² Equally some others have come together at the regional level provide some protection for TK. In 2010, member States of the African Regional Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions³³. The scope of protection offered by the Swakopmund Protocol confers on the owners of rights exclusive right to authorize the exploitation of their TK and the right to prevent anyone from exploiting their right without their prior informed consent.³⁴

³² Graham Dutfield, ‘Protecting Traditional Knowledge and Folklore’ A Review of Progress in Diplomacy and Policy Formulation. UNCTAD/eTCTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development October 2002, p-36 cited in Balavanchth Kalaskar, ‘Traditional Knowledge and Sui-Generis Law’) *ibid*

³³Explanatory Guide to the Swakopmund Protocol <https://www.aripo.org/wp-content/uploads/2020/04/Explanatory-Guide-to-the-Swakopmund-Protocol.pdf>

accessed 31 May 2022

³⁴ Swakopmund Protocol, s 7.

India has put legislative mechanisms to protect and enforce the traditional rights of its people. India has not just made protection of TK a domestic affair but has gone ahead to fight for the IP rights of its indigenous people outside in other jurisdictions where their rights are violated or about to be misappropriated.³⁵ As Anderson puts it:

In India, where the awareness of intellectual property law is very low, the momentum towards protection of the indigenous properties increased after the basmati, tumeric and neem disputes. The WTO and its “drug denying obligations” (high prices of drugs on account of product patent regime) served to increase this awareness. As a consequence of this, in December 1998, the First Inter-Ministerial Committee on Protection of Rights of Holders of Indigenous Knowledge was convened. The discussions included protection of traditional knowledge and the possibility of introducing local self-government for administering the communities and their knowledge. The issue of identifying local communities was highlighted in this meeting. Many of the local communities lost their traditional identity (over a period of time). The knowledge of this community has also become generic over a period of time. With this in mind, various bills, including the Protection of Plant Varieties and Farmers Rights Bill, 1999, and the Bio Diversity Bills of 1999 were drafted.³⁶

These laws are limited in the sense that they can only be enforced in the countries they are enacted.

WIPO has always been strategic in making and streamlining IP laws while considering both the interest of the right owner and the general public. Sometime in 2000, WIPO established a committee to look at TK and some other related areas. The aim of the Committee known as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was to develop an international system that would give adequate protection to these areas of

³⁵ John Atoyebi, ‘Securing the Intellectual property Rights of Indigenous Peoples Through Human Rights Guarantees: Prospects and Challenges’ <<https://journals.ezenwaohaetorc.org>> accessed 20 April 2022.

³⁶ D Anderson, ‘Against, Supersession (January 10, 2011). Canadian Journal of Law and Jurisprudence, Vol XXIV, No.1. 2011 cited in John Atoyebi, ‘Securing the Intellectual property Rights of Indigenous Peoples Through Human Rights Guarantees: Prospects and Challenges’ *ibid*.

law and to recommend a formal treaty for countries who would choose to ratify it.³⁷

There is also article 8(j) of the Convention on Biological Diversity (CBD)³⁸ which requires parties, subject to their national laws ‘to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.’ Also the Nagoya Protocol³⁹ to the CBD on Access and Benefit Sharing deals with TK associated with genetic resources, and addresses issues like prior and informed consent, equitable remuneration and maintenance of community laws and procedures as well as customary use and exchange.⁴⁰

Protection afforded under national laws is restricted as it can only be exercised in the country where it is passed, that is why there is a pressing need for a legal instrument that is internationally binding. An internationally binding instrument might require documentation of TK so that a data base of all TK with the requisite custodians of the TK known. The benefit of these is information on who owns what is made public to avoid misappropriation. The flip side of the coin is that when this information is made public and can be accessed on the internet, there is a limit to what people can be prevented from using the information to do, but this can be prohibited by making specific provisions to that effect.

³⁷World Intellectual Property Organization (WIPO), ‘Traditional Knowledge and Intellectual Property –Background Brief’ <www.wipo.int/pressroom/en/briefs/tk-ip.html> accessed 19 April 2022

³⁸Article 8(j)-Traditional Knowledge, Innovation and Practices <https://www.cbd.int/traditional/> accessed 31 May 2022

³⁹The Nagoya Protocol on Access and Benefit Sharing, <https://www.cbd.int/abs/> accessed 31 May 2022

⁴⁰ Dr Marisella Ouma, ‘Traditional Knowledge: The Challenges Facing International Lawmakers’ *WIPO Magazine* February 2017 https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html accessed 02 February 2022. In the late 1990’s and early 2000S India won a number of landmark legal battles to revoke patents relating to the country’s traditional knowledge, including in relation to the use of turmeric (for its antiseptic properties) and neem (for its properties as a pesticide). India has since established a Traditional Knowledge Digital Library which catalogues its wealth of traditional knowledge to guard against its misappropriation.

3.3 Human Right Perspective to TK Protection

The United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) is the most comprehensive international instrument on the rights of indigenous people. Generally, it established a universal framework of minimum standards for the survival, dignity and wellbeing of the indigenous peoples of the world,⁴¹ and has been noted to be the first human rights international document that deals with the rights of indigenous peoples. Article 11(1) of UNDRIP provides that indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as artefacts, designs, ceremonies, technologies and visual and performing arts and literatures. It also provides that the people have a right to practice their culture, their right to participate in matters affecting them directly or through their chosen representatives and their rights to traditional medicine.⁴²

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, TK and traditional cultural expressions, as well as the manifestations of their sciences, technology and culture, 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, TK, and traditional cultural expressions.⁴³ UNDRIP established that indigenous peoples are entitled to the full enjoyment of their human rights without discrimination.

The African Charter on Human and Peoples' Rights (African Charter)⁴⁴ also considered the collective rights of peoples or communities. In its provision it considered the Charter of the Organization of African Unity (now African Union) which stipulates that 'Freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. This it

⁴¹United Nations Declaration on the Rights of Indigenous Peoples <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html#>> accessed 02 February 2022.

⁴² UNDRIP art 24.

⁴³ Ibid art 31(1).

⁴⁴ OAU Doc CAB/LEG/67/3 rev 5, 21 I.L.M 58 (1982), entered into force 21 October 1986.

meant to achieve by ensuring complete eradication of colonialism in a bid to achieve a better life for African people, and to promote international co-operation putting into consideration the Charter of the United Nations and the Universal Declaration of Human Rights. Article 2 of the African Charter provides for freedom from discrimination. This means that all humans are equal and unique, and are entitled to every form of protection as required by Law. It provides for rights of all peoples to equality and rights⁴⁵, right to property.⁴⁶ Property can be tangible and intangible. It also provides for the right to freely dispose their wealth and natural resources.⁴⁷ Wealth and natural resources form part of TK and this articles recognizes the need to prohibit the misappropriation of a peoples TK which will invariable deprive them of their right to dispose of them according to their will. The charter goes further to provide for their right to economic, social and cultural development⁴⁸ and others. Commercialization of TK is one way a community can grow economically and achieve maximum development. Harnessing and utilizing TK is fundamental to achieving economic growth in a community, and the indigenous people have a right to enjoy the benefits of this commercialization which can be achieved by protecting their rights and ensuring access to their TK can be gotten with their consent upon agreed terms. Anything contrary to this will be tantamount to deprivation and misappropriation.

Internationally, there is notable progress in the right of indigenous people over their TK. Discussions are on-going at WIPO with the aim of developing an international legal instrument that will bind all the countries that choose to ratify it.

4. Lessons from India

Aside from developing the Patent Act, Copyright Act and the Trademark Act in India, some recent legislation which protect TK include the Biology Diversity Act, 2002, the Protection of Plant Varieties and Farmer's Rights Act, 2001 and the Geographical Indications of Goods (Registration and Protection) Act, 1999.⁴⁹

⁴⁵ African Charter art 19.

⁴⁶ Ibid art 14.

⁴⁷ Ibid art 21.

⁴⁸ Ibid art 22.

⁴⁹ Shambhu Chakrabarty and Ravneet Kaur, 'A Primer to Traditional Knowledge Protection in India: The Road Ahead' <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8172557/>> accessed 20 April 2022.

To further solidify their position of combating bio-piracy, India resorted to a significant *sui generis* protection of TK. As at 2011, India was able to cancel or succeed in withdrawing 36 applications to patent traditionally known medical formulations. They were able to do this by developing a Traditional Knowledge Digital Library (TDKL), a data base which contains 34 million pages of formatted information on some 2.260,000 medical formulations in multiple languages.⁵⁰ This ensures that patent offices round the world do not grant patent to applications founded on India's wealth of TK. Initially due to language barrier, because most of their medicinal knowledge existed in their local dialects and when searches were conducted in line with patent applications, this medicinal knowledge did not show up as prior art⁵¹ and they had to spend a lot of money and effort challenging the patent grant. With the coming into effect of the TDKL database, patent examiners can easily identify a patent application that does not satisfy the criteria of novelty.

India went on to make available the TDKL to the patent offices of the countries that have signed the TDKL Access Agreement so they could have easy access to India's data base of knowledge and prior art. One would wonder why a developed country would voluntarily sign such an agreement that would restrict their ability to grant patent that would favour the developed country's economy, but it's a wise decision to take because the penalty and damages that the infringing country would be mandated to pay would be avoided by the non-grant of patent of a prior art.

This development has impacted significantly on protecting the country's TK. There has been a positive drop in bio-piracy cases and frivolous filing of patent applications related to Indian Systems of Medicines (ISM). This success showed by India in protecting TK has inspired countries like China and Finland to follow suit. This is a positive and gives hope to other countries because 'when a seed is removed from

⁵⁰VK Gupta, Protecting India's Traditional Knowledge, www.wipo.int/wipo_magazine/en/2011/03/article accessed 20 April 2022.

⁵¹ Prior art is information that has been made available to the public in any form before a given date that might be relevant to a patent's claim of novelty and inventiveness. Patent would not be granted to invention that has been described as prior art.

its environment, it dies halfway to its destination, and the same could happen to indigenous knowledge'.⁵²

5. Recommendations and Conclusion

Nigeria could borrow a leaf from what has been established in India. A database of the TK of the ethnic groups and different communities that make up Nigeria is highly recommended. The first step to take is to educate and sensitize the people to enable them divulge information regarding their TK. This is because of the marginalization and misuse of the TK by companies who had made promises that they did not fulfil. The communities would be informed of the need for a data base of the nation's TK so that subsequent use of the TK would require permission and consent on agreed terms. Nigerian government would have to set up a system in place to get this TK, there would be need to seek out the chiefs and traditional rulers/ leaders of these communities. As a way of encouraging this idea, there could be a form of compensation put in place for previously exploited TK, which would be done after obtaining and confirming the authenticity of TK claims.

It is also recommended that clarity of the process for the financial benefits of the consented use of TK should be outlined. The benefits accruable to the communities for access to TK and requisite penalty for misappropriation or violation of their rights should be put in perspective. Another area of concern would be in terms of how the economic entitlement be will be accessed by the communities. Would it be by way of structural development of the communities and economic investment in the communities? Would it be by mobilizing and equipping different groups of people or individuals who actually work on the TK. For instance, for the production of Akwette, there are individuals of the community who produce it as a means of livelihood, would these people be economically and financially empowered.

In conclusion, though it is a relief that concerns regarding protection of TK are being raised which gives hope that such concerns will soon be resolved and a favourable solution to the misappropriation of TK will be achieved in the near future. However, there are possibilities that countries who benefit from the commercialization of TK might be impeding the progress of providing protection to TK. For instance, how

⁵² Quote by Piaroa Elder, an Indigenous community of Venezuela cited by Chakrabarty and Kaur (n 49).

the Indian Neem case took about 15 years before the patent granted to WR Grace was revoked on account of the neem tree being used in farming practices and specifically an Indian factory owner explained how he had been producing pesticides based on the neem tree in manners similar to those patented by WRGrace.⁵³ It is true that it is the turmeric and neem cases that gave way to the setting up of TKDL in India. However, let us imagine that the developed countries also faced the challenges associated with misappropriation of TK, would an international legislation for the protection and proper administration of TK not be in place currently?

⁵³Martin Fredriksson, 'Balancing Community Rights and National Interest in International Protection of Traditional Knowledge: A Study of Indian's Traditional Knowledge Digital Library'(2022) 43 (2) *Third World Quarterly* 352 – 370. <https://www.tandfonline.com/doi/full/10.1080/01436597.2021.2019009> accessed 31 May 2022