

# INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS IN TANZANIA: REGULATING AND PROTECTING TRADITIONAL KNOWLEDGE

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## **Abstract**

Traditional knowledge and Cultural Expressions of a community are essential elements not only in heritage and identity of that community but also a valuable asset to the community and nation as a whole. When carefully tapped, such traditional knowledge and cultural expressions can further the economy of a given society. Therefore, when these knowledge and expressions are not promoted a society loses a great deal. Similarly, if such knowledge and expressions are not protected, a society is robbed of a great wealth and value. The use of such knowledge and expressions by an individual, a group or a country without acknowledgement and approved appropriation, tend to harm the owner of the valued Traditional Knowledge and Cultural Expressions. This amounts to misappropriation and infringement of the same. Protection of such infringements necessitates proper measures and laws to be put in place for safeguarding the said knowledge and expressions. To achieve safeguarded knowledge and expressions of a society, there needs to be appropriate legal framework that is comprehensive and functioning as protection and promotion tools for Traditional Knowledge and Cultural Expressions.

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**Key words:** Traditional Knowledge, Cultural Expressions, Intellectual Property, Protection, Misappropriation, Rights.

## 1. INTRODUCTION

Traditional Knowledge and Cultural Expressions (TKCE) carry an important role in the lives of people of any society. Ever since ancestral times, traditional knowledge has been applied in various aspects of life including telling time, manipulating weather, entertainment, environmental management, education, food and healthcare.

The value of TKCE goes beyond anthropological and social benefits to the issue of economy of a given society or country. When such knowledge and expressions are not promoted, a society or a country may (takes) to a considerable extent lose economically. Similarly, if the same is not protected a society is robbed of a great wealth and value. The use of such knowledge and expressions by an individual, a group or a country without acknowledgement and approved appropriation, tend to harm the owner of the valued knowledge and expressions. This amounts to misappropriation and infringement of one's TKCE. Protection against such infringements needs proper measures and laws to be put in place to safeguard the same. The role of the legal protection however, can be extended beyond promotion and protection; it can be a catalyst of enhancement of various aspects of the welfare of a society and in particular, for the interest of this article (paper), economic welfare. Thus this article (paper), highlights the importance of rendering legal protection to TKCE and how such protection can enhance economic welfare of a society.

It is the argument of the author of this article that rendering protection of TKCE will contribute to the enhancement of the economy of Tanzania. It is further highlighted in this study that laws and legal agreements play a major role in such protection. This study examines the legal status in Tanzania and at international level and points out gaps that can be addressed to render said protection.

In order to understand the subject matter under this discussion, it is necessary to understand the concept of TKCE. The World Intellectual Property Organization (WIPO) is currently defining TKCE to be the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the knowhow, skills, innovations, practices and learning which form part of traditional knowledge systems and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.<sup>1</sup> This definition is not limited to any specific technical field. In fact, it is also argued that the most wide ranging definitions of traditional knowledge use 'holistic concepts of knowledge and knowledge transmission and they encompass everything from artistic, literary and oral cultural expressions to signs and symbols to traditional medicines, plants, agricultural knowledge and knowledge about biodiversity and the environment.'<sup>2</sup>

The term Traditional Knowledge has been used by WIPO 'in a general sense (traditional knowledge *latosensu*) and in a narrow

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<sup>1</sup> WIPO, Documentation of Traditional Knowledge and Traditional Cultural Expressions Background Brief - No. 9, 2016.

<sup>2</sup> Antons Christoph, Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Rights: Approaches in the Asia Pacific Region, p. 39.

sense (traditional knowledge *strictosensu*)'.<sup>3</sup> While in a narrow sense the term refers to traditional knowledge of a technical nature in its general sense it includes the manner in which it is transmitted.<sup>4</sup>

The term Traditional Knowledge (TK) is also used to refer to 'the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles as well as "indigenous and traditional technologies".<sup>5</sup> Indeed, TKCE can vary from songs, plants, clothes and so on. A good example is the Maasai Blanket in Tanzania, Makonde carving, Gogo musical instruments and the like.

As these are intellectual activities, the end product is intellectual property or service. They need to be protected. IP is a property and it can be protected by using different branches including copyright, patent and utilities. However, IP (it) needs specific laws for its protection.

## **2. UNPROTECTED ASSETS AND UNAUTHORIZED USE OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSION (TKCE)**

If not protected, TKCE of a country can easily be exploited by outsiders. Consequently, the social, cultural and economic benefits of the TKCE is denied to the owning community. Subsequently, the owners of such knowledge and expressions

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<sup>3</sup> World Intellectual Property Organization, Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore a Guide for Countries In Transition, 2003 p.4.

<sup>4</sup> *Ibid.*

<sup>5</sup> Convention on Biological Diversity, Articles 8(j) and 18(4).

may end up paying for their own exploited products or services. This is detrimental not only to the community but also to the nation as whole.

There is evidence indicating that such exploitation is possible, regardless of whether it is intentional or accidental. Whereas the misuse and misappropriation of one's tradition and culture may not be intentional, the fact remains that one's tradition and culture is exploited, and even distorted in some instances, without the owners' knowledge or consent. More often misappropriation benefits the one responsible for misappropriation and is detrimental to the tradition and culture owner. Moreover, it is detrimental to the whole country as such knowledge and expressions could be used to further economic growth. The majority of victims of these infringements are developing and middle income countries including Tanzania although developed nations are not spared.

The question in point is TKCE and any of such value which can be easily exploited by others due to lack of protection tend to tempt others to exploit it. Some countries, such as India, have made attempts to respond to such intellectual mistreatment. A good instance of this is the case of India's efforts on revocation of patent on wound healing properties of turmeric at the US Patenting Office and the patent granted by the European Patent Office (EPO) on the antifungal properties of Neem; both being traditional knowledge used for many years in India.<sup>6</sup> Yet, many

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<sup>6</sup> Saipriya Balasubramanian, Mondaq India: Traditional Knowledge and Patent Issues: An Overview Of Turmeric, Basmati, Neem Cases., 18 April 2017, available at <<http://www.mondaq.com/india/x/586384/Patent/Traditional+Knowledge+And+Patent+Issues+An+Overview+Of+Turmeric+Basmati+Neem+Cases> >

other countries, including Tanzania, have remained silent while its rights and the rights of its community are infringed.

The following examples give a clear picture of such infringements towards Tanzania and other countries.

### **African *Artemisia judaica***

This is one of many Africa nations' traditional medicines, one notable origin being Libya. It was reported that a patent (US patent number 6,350,478) on an 'Artemisia judaica fractionation method' was granted to UK Company Phytotech Ltd (a subsidiary of Phytopharm Plc).<sup>7</sup> Granting of this patent was controversial since as argued, *Artemisia judaica* was used in Libya and other neighbouring North African and Middle Eastern countries as a traditional medicine. The patent granted also revealed this as part of the description of the patent stated 'Artemis judaica is used in Libyan traditional medicine as an infusion for the treatment of "wasting disease", almost certainly diabetes mellitus.<sup>8</sup>

### **Mali Blight-Resistant Rice**

It is revealed that in the 1970s a specimen of *Oryzalongistaminata* from Maliwas transferred to a rice research program in India where its resistance to bacterial rice blight was identified.<sup>9</sup> The rice specimen resistant to blight was then transferred to the International Rice Research Institute (IRRI) in the Philippines, where it was determined that the resistance was due to a genenamedXa21.<sup>10</sup> Afterwards, one of the researchers

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<sup>7</sup> Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates*, p.59.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* 66.

<sup>10</sup> *Ibid.*

from IRRI, cloned gene Xa21 and obtained a patent over it (US Patent 5,859,339).<sup>11</sup>

A concern to note from this case is the fact that the TKCE owners in Mali did not see a value to the importance of such knowledge. Scholars noted that the value of the rice was known by the people in Mali but they did not consider it to be a worthwhile subject of further research because the rice was generally considered by farmers to be a weed. Apparently, only the Bela and Fula people were dependent on the wild rice for subsistence and for use in some rituals and ceremonies.<sup>12</sup>

### ***Basotho Blanket***

In 2017, a well-known American designer, Louis Vuitton, reproduced a Basotho blanket adopting all the characteristics of the blanket in his designer shirts turning it into the latest fashion trend for men.<sup>13</sup> Whereas the original Basotho Blanket costs 65 USD, the designer's shirts sell up to 2000 USD<sup>14</sup> not only in the US but also in African countries including South Africa. The pattern is currently known worldwide as Louis Vuitton's design and is protected under intellectual property rights.

The Basotho Blanket, a well-known traditional pattern in Lesotho has more value than a piece of cloth. For the Basotho, the blanket

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> See 'Louis Vuitton's latest Basotho Blanket Inspired Range' July, 2017, available at <<https://lesotho-blanketwrap.com/2017/lesotho-clothing-and-fashion/louis-vuittons-latest-basotho-blanket-inspired-range/>>

<sup>14</sup> eNca, 'Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items' 14 July 2017 available at <<https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>>.

signifies a sacred ritual.<sup>15</sup> The design of the blanket has special characters such as the yellow stripes which traditionally signify the direction in which the Basotho blanket is to be worn.<sup>16</sup>

### ***Hoodia Plant***

South Africa lost on the bitter hoodia plant used over many centuries by the San as a hunger suppressant.<sup>17</sup> In 1996, scientists from the Council for Scientific and Industrial Research (CSIR) isolated a chemical known as P57 as the hunger suppressing chemical from this plant and later patented it. CSIR later licensed a UK-based firm, Phytopharm, to further develop and commercialize the P57 component. Phytopharm then licensed Pfizer to develop and commercialize P57. This has been a source of conflict between the South African San Council and the CSIR.<sup>18</sup>

### **Tanzania's Case**

Examples of such activities affecting Tanzania include the Disney Swahili phrase '*Hakuna Matata*' adopted in the Lion King and trademarked as Disney's through US trademark vide registration number 27006605.<sup>19</sup>

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<sup>15</sup> eNca, 'Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items' 14 July 2017 available at <<https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>>

<sup>16</sup> eNca, 'Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items' 14 July 2017 available at <<https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>>.

<sup>17</sup> Daniel F. Robinson, above n.7, p.61.

<sup>18</sup> SikoyoM. George et al, Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda, 2006, p. 4:

<sup>19</sup> Cathy Mputhia, Personal Finance, '*Trademarking 'hakuna matata' a wake up call*' 25 November 2018, available at <<https://www.businessdailyafrica.com/lifestyle/pfinance/Trademarking-hakuna-matata-a-wake-up-call/4258410-4867976-wyiem7z/index.html>>

Another Tanzania knowledge is the Maasai Tire Sandals which have been used and Intellectual Property protected by a shoe company in Switzerland, now trading all over the world. The owners of the company have protected the Maasai Curved Sole whose mechanism activate muscle use as well as reduce shock forces to the entire skeletal system. The company even trades by the name MBT (Maasai Barefoot Technology).<sup>20</sup> Furthermore, before Louis Vuitton misappropriated the Basotho blanket, he had misappropriated the Maasai's blanket popularly known as *shuka* for his Maasai Fashion Collections to which he also procured intellectual property.<sup>21</sup>

Other known incidences include the Movie Black Panther having several African culture appropriation which have acquired protection for the Movie writers and Company<sup>22</sup> and the use of Tanzanite as brand and trademark protected word to other nationals outside Tanzania.

Such misappropriation of culture and traditional knowledge and expression has been subjected to significant criticism and reactions. The aforesaid misappropriation has been recognized as a problem which has been addressed at the international level through dialogue and legal agreements. Much as there has been reaction at the International level, little has been done at the

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<sup>20</sup> See <<https://www.backinaction.co.uk/mbt>>; <<https://www.backinaction.co.uk/mbt-info>>; *Signature MBT patented rocker sole with Sensor Technology™*. Available at <<https://au.mbt.com/women-s-baridi.html>>

<sup>21</sup> David Piling, 'Warrior tribe enlists lawyers in battle for Maasai 'brand' 'Investors chronicle (Online), 19 January 2018 available at <<https://www.ft.com/content/999ad344-fcff-11e7-9b32-d7d59aace167>>

<sup>22</sup> Hari Ziyad, AFROPUNK, 'He Controversy Around Black Panther's Supposed "Appropriation" Shows The Necessity of Pan-Africanism' available at <<https://afropunk.com/2018/02/controversy-around-black-panthers-supposed-appropriation-shows-necessity-pan-africanism/>>

national level. In particular, Tanzania is lacking measures to protect and promote its TKCE against such misappropriation. Moreover, there are no encouraging efforts from the country in engaging on the ongoing International dialogue among nations which aim at addressing these challenges and arriving at solutions agreeable for all nations.

On its part Tanzania has a stake at TKCE that needs to be protected. This study looks at what has been done and what can be done in the quest to promote and protect TKCE and enhance their value in the country.

In so doing, the measures to enhance innovation through TKCE will be recommended. It is expected that if the recommendations are implemented they will enhance national economy through TKCE benefits from commercialization and culture promotion. Such measures may lead towards industrialization of the patented and trademarked TKCE products.

### **3. AVAILABLE LEGAL PROTECTION MEASURES FOR TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS**

It is evident from the discussion above that promotion and protection of TKCE is essential for any nation. Clearly, such protection cannot be realized without clear laws and legal measures both at national and international levels. As IP laws and many other, have the aspect of being territorial, national laws alone cannot comprehensively render the protection needed. The initiatives at international level are very crucial in realizing full protection. The discussion in this part examines the legal measures available both at national and international levels and

points out the gaps which Tanzania needs to address in order to achieve effective protection of TKCE which may lead to economic development.

### **3.1 Legal Protection in Tanzania**

Tanzania has several laws addressing the area of intellectual property. It has similarly entered into several international agreements in the area. However, one notable fact is that it lacks specific laws regulating TKCE. When one examines the provisions of IP framework in the country, they will find isolated provisions which may have elements of TKCE. But as noted, these provisions are isolated and do not have the effect which a legal statute on the area would be expected to have.

The most relevant provisions close to the subject can be found from the Traditional and Alternative Medicine Act (No. 23 of 2002). This Act was enacted with the aim of 'promotion, control and regulation of traditional and alternative medicines practice, to establish the Traditional and Alternative Health Practice Council and to provide for related matters.'<sup>23</sup> Among the functions provided in the Act is to monitor, regulate, promote, support the development of traditional medicine and regulate and control the practice of traditional and alternative health practitioner.

The Act establishes a regulatory body whose functions are:

to supervise and control the practice of traditional and alternative health practitioners; to publish newly registered practitioners and other necessary issues; to promote the practice of traditional and

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<sup>23</sup> Preamble of the Act.

alternative health practitioners; to hold inquiries; to coordinate the efforts to develop traditional and alternative health science; to register and enroll traditional practitioners; to register and regulate the traditional and alternative health delivery facilities; to regulate and set standards for traditional and alternative health material remedies and practices; to control abuse, disseminate information and so forth.<sup>24</sup>

An important note here is the task given to the special Council to provide for the protection of Tanzanian medicinal plants, and other natural resources of medicinal value, such as animals, minerals, aquatic and marine products<sup>25</sup>. This provision is quite relevant to the questions raised in this study. However, the highlighted provision cannot adequately address all issues arising in that scope. How is the protection provided? Against who? And for the benefit of who? What are the consequences? So many other questions are left with no clear answers.

It is pertinent to note here that the Act gives the responsible Minister to the sector crucial powers to control the alternative medicines and its practice in Tanzania.<sup>26</sup> Among others, the Minister is empowered to make regulations with regard to establishing or strengthening the national medicinal plants databank or compendiums; prepare the national approved list of medicinal plants; and provide for matters related to patenting of traditional medicine inventions.<sup>27</sup> The recognition of intellectual

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<sup>24</sup> Section 6 of the Act.

<sup>25</sup> Section 6(1)(n)

<sup>26</sup> Section 55(2)

<sup>27</sup> Section 55(l).

property in terms of patent here is very essential. However, it is important to note that the Ministers' power are limited as they are subject to the provisions of the Patents Act, 1987 and the patenting principles.<sup>28</sup>

When one revisits the prerequisite of granting a patent, it becomes clear that regulations alone are not sufficient to address protection of TKCE. Patenting rules and procedures such as first to file, inventive steps and novelty are not favorable to the TKCE which entails not only passing down knowledge from generation to generation but also intended for the benefit of the community and not individuals.

Moreover, the protection of traditional knowledge may fall into more than one aspect of intellectual property; not only patent. Addressing traditional knowledge and cultural expression in its totality is pertinent. The benefits of protection are reflected in the aspect of profit and protection; rendering benefits to the owners of such knowledge and expression while at the same time repel others from the rewarding fruits without the agreement of the owner.

The avenue which one may see sensible to take is to protect TKCE through the intellectual property laws. In Tanzania IP is regulated through several laws. While some of the laws are directly related to Intellectual Property others are indirectly related to Intellectual Property rights but still relevant to the field. The presence of these laws creates a false hope that TKCE rights are protected. However, a close look at these documents shows a different reality. The Patents (Registration) Act (1995) provides for

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<sup>28</sup> *Ibid.*

the regulation and registration of patents in the country. Regulation of patents is also provided under the Patents Regulations GN. 190 of 1994. The Act is important as it plays a major role in facilitating research, creativity, invention and innovation through its provisions which render promotion and protection of such activities. However, the Act sets principles and rules as to what can and cannot be protected under its provisions. In order for a patent to be granted in Tanzania, the subject matter must be innovative, hence satisfying the novelty requirement. The innovation presented must be inventive, that is it must have steps that are not obvious to a person. The subject matter must also be useful, that is whether it has utility capabilities and the subject matter must not have prior use.

TKCE cannot be new with no prior use and hence cannot effectively be address by principles of patent protection. It should be noted that although one cannot protect TKCE through patent laws, one can turn a TKCE to be a subject matter of patent protection. In this, the patent holder has to convent and exploit the knowledge into inventive steps, which have not been used before and which are useful. The patent obtained will confer exclusive rights to the patent holder only, against the rest of the community.

The same is the case in Copyright protection. In Tanzania in order to be eligible to copyright protection a work must bear originality, independent creation, novelty and fixation. These conditions render similar hindrance to the protection of TKCE. Cultural expressions include stories, songs and other expressions that existed through generations. Such cultural expressions are inherited from ancestors. Similarly, copyright grants exclusive rights to a copyright holder.

Moreover, the same is the case with protection rendered in other IP provisions from the IP protection law including the Trade and Service Marks Act, 1986, Merchandise Marks Act, 1963 (Act No. 20 of 1963) and The Plant Breeders' Rights Act, 2012. These Acts directly promote and protect different branches of IP including Trade and Service Marks, Copyright, Designs, Biotechnology and Plant Breeding. However, there are no relevant provisions offering comprehensive protection of TKCE.

It is evident that pre-existing IPR regimes are deficient and generally inappropriate in terms of addressing the claims of Indigenous peoples for greater legal protection of their TKCE.

It is pertinent that Tanzania ought to engage in discussions and enact appropriate laws to govern, promote and regulate TKCE. There is also a need to engage in external dialogue and initiatives on the same so as to further cooperation with others in the area. This will enable the country to answer several questions including approaches and measures to be taken. For instance, there are countries which have adopted two approaches, defensive and protective, in addressing TKCE. Which approach may benefit Tanzania? Is there a need to document the country's TKCE or doing so will make the country vulnerable to exploitation? How can the country protect documented TKCE without comprehensive protective laws? All these questions need to be settled in order for the country to enjoy its TKCE and tap it towards economic growth.

It is evident that existing IPR regimes are deficient and generally inappropriate in terms of addressing claims of TKCE for greater legal protection of communities owning such TKCE.

### **3.2 Legal Protection at the International level**

Protection of TKCE is not straight forward. There have been ongoing debates regarding protection of this area, including appropriate measures to address. The international community has realized and appreciated the contribution of traditional knowledge. This recognition is featured on ongoing dialogues and measures taken by way of Conventions, Agreements and Declarations.

There are several initiatives at international level which address TKCE. There is a Convention on Biological Diversity, 1992. The Convention is relevant to protection of TKCE as it urges countries 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 and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices<sup>29</sup>

Relevant to the Convention is the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair

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<sup>29</sup> Convention on Biological Diversity, 1992 article is 8(j).

and equitable way. It entered into force on 12 October 2014, 90 days after the date of deposit of the fiftieth instrument of ratification.

Further to that, there is the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, which was adopted in 2003 and entered into force in 2006. This Convention addresses 'Intangible cultural heritage' and defines the same to mean 'practices, representations, expressions, knowledge, and skills that communities recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.'<sup>30</sup> By such definition, traditions and expressions of communities are recognized.

There is also the Indigenous and Tribal Peoples Convention, 1989 of the International Labour Organization (ILO). The Convention is relevant as it protects rights of the tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated by their own customs or traditions or by special laws or regulations. Consequently, the culture, customs and TKCE of these people are protected.

Apart from these, there are several Conventions, Treaties, Agreements and international laws under intellectual property protection system. These include the Agreement on Trade-

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<sup>30</sup> UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003.

Related Aspects of Intellectual Property Rights, the Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“the Rome Convention”), the WIPO Copyright Treaty (WCT), the Patent Cooperation Treaty (PCT), the Madrid Agreement Concerning the International Registration of Marks, the Trademark Law Treaty (TLT) and the Patent Law Treaty (PLT). However, an important thing to highlight is that these conventions, agreements and regulations address all aspects of intellectual property including patents, utility models, copyright, trade and service marks, industrial designs, geographical indications and plant breeders rights. Application of these intellectual property protections to traditional knowledge and cultural expressions is not straight forward as pointed out in the discussion of national laws above.

Similar to the national laws, international initiatives are limited. For instance when dealing with patent protection patent systems reward the inventor enjoyment of the fruits of his/her invention against others. The license granted entitles the inventor to exclusive rights. Moreover, patent requires an invention, which is novel with defined inventive step and clarity. This is the opposite of TKCE which have existed since the days of ancestors and inherited from generation to generation and hence cannot claim novelty. Moreover, TKCE have communal ownership and are tied with custom, beliefs and social aspects of a specific community.

Similarly, when engaging Geographic Indications (GI) for addressing TKCE several concerns arise. It is the principle in

addressing GI that products have to conform to a specific geographic location. Hence, characteristics of a product, its quality and reputation must originate from a certain region.<sup>31</sup> Therefore protection of TKCE through GI may be limited, due to the nature of TKCE which among other things may not be located in one geographical area. It has been argued that GI can be used to protect only certain kinds of TKCE. For instance GI applies to goods and therefore this would exclude all intangible forms of TKCE 'such as methods of medical treatment, techniques for dyeing cloth, folk music, and dances'.<sup>32</sup> Moreover, GI requires goods to enjoy a commercial reputation as GI signifies the source of the good, and if the source is not important to the consumer, protection by means of a GI is irrelevant.<sup>33</sup>

An international initiative of a particular interest to this discussion is a Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization (ARIPO). The Protocol was adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010 (herein referred to as Swakopmund Protocol). The aim of the Protocol is to protect traditional knowledge holders against any infringement of their rights as recognized by the Protocol and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context. Swakopmund Protocol serves as a foundation for member states to enact TKCE protection law in their member countries. The Swakopmund Protocol grants exclusive rights to communities on

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<sup>31</sup> Article 22(1) TRIPS Agreement.

<sup>32</sup> Shivani Singhal, Geographical Indications and Traditional Knowledge, *Journal of Intellectual Property Law & Practice*, Vol.3(11), 2008, p 733.

<sup>33</sup> *Ibid.*

TKCE and confers them power to authorize the exploitation of these TKCE.

The Protocol addresses issues such as protection criteria for traditional knowledge, formalities relating to protection of traditional knowledge, beneficiaries of protection of traditional knowledge, rights conferred to holders of traditional knowledge, assignment and licensing equitable benefit-sharing, recognition of knowledge holders and protection criteria. Even though the Protocol is amongst the notable instruments rendering protection of TKCE, it is not without criticism. Among these is the view that it grants ownership of TKCE to individuals which is contrary to the practices of indigenous communities.<sup>34</sup>

It is evident that relying on the international initiatives addressing intellectual property protection alone does neither safeguard the interests of TKCE nor promote the welfare of owners of the said culture and traditions. Countries need to have in place specific laws that address specific concerns relating to TKCE.

#### **4 THE RELEVANCE OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS (TKCE) IN ENHANCING ECONOMIC DEVELOPMENT AND THE NEED FOR PROTECTION**

The importance of TKCE in economic development cannot be overemphasized. The two are closely related and the welfare of the economy of any society carries a degree of reliance on the

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<sup>34</sup> Rochelle C. Dreyfuss and Justine Pila, the Oxford Handbook of Intellectual Property Law, Oxford University Press, p. 52

culture of that society.<sup>35</sup> Moreover, the rights to cultural expressions are considered to be human rights.<sup>36</sup> Hence it is essential to acknowledge Traditional Knowledge and find means to preserve it for generations to come. It is argued that Africa loses a library when an old man dies.<sup>37</sup> The importance of TKCE is multifaceted. It recognizes individuals as humans, provides them an opportunity of preserving the same and passing it through generations, enhances the economy of a particular society and safeguards the welfare of members of that society. Exploiting traditional knowledge in healthcare, for instance, is beneficial in preserving life. Similarly, exploiting cultural expressions in education can further the society in question. It is imperative to note that in order to realize these achievements a society must roll out efforts to protect such Traditional Knowledge and Cultural Expressions.

It is the argument of the author of this article that protection of Traditional Knowledge and Cultural Expressions will enhance the economy of Tanzania. Studies suggest that increase in intellectual property protection generates research and development activity sufficient to promote financial capacity.<sup>38</sup> It is further highlighted that laws and legal agreements play major role in such protection. In absence of such legal protection, the option that has been used over generations was making such knowledge a secret and known only to a small group of overseers to that TKCE that will prevent others from exploiting it without consent from owners.

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<sup>35</sup> Dragana Rusalic, *Making the Tangible Intangible*, (Belgrade, 2009) p. 17.

<sup>36</sup> *Ibid* p.20.

<sup>37</sup> *Ibid* p.20.

<sup>38</sup> <http://documents.worldbank.org/curated/en/663011468739527882/pdf/multi-page.pdf>

Most of TKCE are in danger of being exploited as they are no longer a secret knowledge, but rather are projected in public domain. Some of these TKCE are explored by the local scientists and are published without any measures as to their protection or exploitation for the welfare of the community. It has been a strong point of IP principle that 'once knowledge is transferred from private, secret or community, knowledge remains into the public domain, it undergoes a transformation whereby formal regulations, such as intellectual property rules, can then be applied to them.'<sup>39</sup> It is only where there is effective IP laws and regulations that such exposed TKCE can continue to be protected as 'Once in the public domain, local communities lose their traditional forms of control over the knowledge, plants and other biological resources.'<sup>40</sup> In order to address this, the appropriate authorities need to advocate for 'Protection before Projection' which will sensitize and inform all those who explore TKCE in the country to take necessary measures to protect TKCE before they project it to the public. But most importantly, there must be effective and comprehensive protection system in place to ensure that TKCE is protected from misappropriation. Equally there should be put in place effective and comprehensive commercialization measures to ensure that the society gains and enjoys the fruits of their TKCE.

TKCE can be used to promote a country's economy. However, there is a need of legal framework that will facilitate enhancement of economy by exploiting TKCE. These laws need to ensure that they set down rules of operation in all aspects of TKCE, from protection to collaboration with external partners to effective

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<sup>39</sup> Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates*, Earthscan Publications Ltd., 2010 p.109.

<sup>40</sup> *Ibid.*

commercialization and use of such TKCE. The laws need to regulate commercialization in terms of making TKCE commercial products while at the same time safeguarding the interest of the nation. Issues such as benefit sharing, community gain both financially and through the available resources of TKCE being commercialized; ownership of TKCE need to be constantly and comprehensively regulated.

There is a need of having legal regulations in place that will address issues of conservation of TKCE in all aspects including social, cultural, economic and environmental aspects. Moreover, laws need to ensure that human rights and respect of dignity of the TKCE owner is maintained and not affected in any manner.

Among things to take into account in future is the regional recognition of TKCE. It is important to so recognize because most communities in these regions were one, and were only separated by the national borders drawn by colonial masters. The countries in these regions have traditions and cultures which are similar. Taking an example of the Masaai who are in both Kenya, Uganda and Tanzania, these communities would be sharing similar knowledge and expressions. The African politics and culture were porous and interchanging before colonialism, hence communities such as Baganda in Uganda and Bahaya in Tanzania, or Wamakonde in Tanzania and Mozambique have the same or similar traditions.

Failure to address ownership of TKCE makes developing countries lack mandate over their own culture and traditions leaving them susceptible to misappropriation. It is argued here that a number of parties are "squaring off" over the question of who should share the benefits. The squaring is between

developed and developing countries that divide disputants between developed and developing countries; another is between local communities and the dominant socio-economic cultures of the countries within which they are situated.<sup>41</sup> Clearly, benefiting of TKCE should not be unsettled discussion between the developed and the underdeveloped, but the reality is it is. The developing world should be assertive enough that this position should never be doubted. It is suggested that adopting intellectual property laws to protect indigenous and local knowledge could be one of the ways to address this as 'At least in theory, vesting intellectual property rights in indigenous and local communities over their innovations would assist them to stop un-desired use of their knowledge and/or compel compensation when it is used'.<sup>42</sup>

A general view of the IP law is that it is monopolistic, associated with the advancement of commercial concerns and tends to benefit a few. However, it is noted that there is an emerging movement in international law toward positive evaluation and protection of more general forms of knowledge, hence a rise of unconventional movement favouring recognition and protection of more general forms of knowledge.<sup>43</sup> This new form of IP protection applies to a substantive knowledge and knowledge from communities. It is evident that such approach in IP protection renders desired protection to communities that are rich of traditions and culture such as Tanzania. Moreover, among the potential of such protection is that 'it has potential to redress intellectual property law's asymmetrical dispensation of awards

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<sup>41</sup> Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, p.954 < <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/7355599-44.Halewood.pdf> >

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

and incentives to "high-tech" innovators in developed countries'<sup>44</sup> and instead renders protection to developing countries that would ordinarily have mostly low-tech traditional and cultural knowledge; and allow them a 'measure of control over the use and dissemination of their knowledge which they would not have had otherwise'.<sup>45</sup> There is a need of having appropriate legislation in regulation of TKCE to ensure that all aspects of regulation, promotion and protection of traditional knowledge and cultural expressions are addressed. At the same time there is a need of provisions that will strike a balance and ensure that they are not too restrictively individualistic to the extent that it denies the citizens a right to enjoy and exploit their traditional knowledge and cultural expressions. The need to ensure that the promotion and protection of such knowledge and expression does not hinder the very object it tries to save, that is, exploitation from its owners and enhancement of their economy.

The presence of laws and regulations alone will still not effectively bring the desired result. Rather, a comprehensive redress system comprising access to justice, effective enforcement are prerequisites in a successful journey on enhancement of the economy through protection of traditional knowledge and cultural expressions.

It is also very important to acknowledge that addressing the traditional knowledge and cultural expressions through legal measures alone cannot yield the desired results and facilitate enhancement of economy. There need to be economic strategy that will effectively exploit the legal protection and validation of

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

such knowledge and expression. Moreover, social-political strategies are equally important.

## **5. CONCLUSION**

The discussion above describes in what way Intellectual Property obtained through TKCE, and any other IP, can be engaged in various ways to promote an economy of a country. The knowledge protected can be deployed for industrialization, production and commercialization of specific products and/or services. IPs obtained can also be licensed to third parties leading to benefits in terms of royalties and financial gain to the owner. Furthermore, it has been shown above that IPs have capabilities of influencing market power. Owners of IPs, especially companies can expand their market share and prevent competitors from becoming active in other countries simply by registering their IPs against others. Moreover IP can be used as a bargaining tool to negotiate favourable local agreements. Certainly, the benefits of protecting TKCE outweigh the detriments on non-protection. It is also not debatable that countries such as Tanzania stand to lose significantly without such protection.

It is evident from above discussion that TKCE is a source of innovation. It is argued that the growth of innovation leads to growth or productivity and as a result growth in businesses and the economy at large. In addition, it is argued that the world is facing a rise of 'innovation economy' where economic growth increasingly rely on innovations and 'those who cling to old ways of doing business are getting left behind'. As we seek to move towards enhancing the economy of a country through industrialization, it is essential that we exploit such an important but neglected resource.

There are several ways of enhancing and facilitating innovation, however, tapping the same from TKCE is often overlooked. As incidences of biopirating and exploitation of TKCE by outsiders increases it is vital to start harnessing TKCE innovations for the economic growth of the country.