‘In My Own Village’: Chronotopes, Governmentality and the Changing Regulation of Traditional Medicine in Kenya

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Abstract

Traditional medicine in Kenya has been the focus of increasing official attention over the past decade. Legislation has been proposed, and in some cases passed, to regulate the practice of traditional healers, to control the supply of medical materials and to protect the interests of local communities in their medical knowledge. This paper explores the discourses through which these initiatives have been framed and (partly) achieved. It draws on governmentality theory to suggest that each proceeds on the basis of ‘problematizing’ aspects of traditional medical knowledge and practice. Such problematizations are effective in law and policy to the extent that they are considered natural or plausible. In studying problematization thus as rhetoric I suggest that we need to attend to style and form in addition to substantive content, arguing in particular that vivid spatio-temporal images (or ‘chronotopes’) have encapsulated the diverse threats to and promise of traditional medicine in contemporary Kenya. I seek to show the purchase of this framework by reviewing in some detail campaign materials, legislative debates, national and international policy literature, and academic interventions. These sources are supplemented by a series of interviews which I conducted with key stakeholders in the different reform processes. I identify a number of key, and in some cases rival, chronotopes which anchor different doctrinal and policy positions. Figures such as the village, the community, the nation and the globe, familiar from debates on traditional medicine elsewhere in Africa, are given a distinct inflection with reference to Kenyan history and contemporary contexts.

Introduction

Traditional medicine in Kenya has been the focus of increasing official attention over the past decade. Legislation has been proposed, and in some cases passed, to regulate the practice of traditional healers, to control the supply of medical materials and to protect the interests of local communities in their medical knowledge. Long neglected, marginalized and disparaged,

it is now targeted by diverse national bodies and international agencies with influence in Kenya. The 'quest for governance', identified by Kibet Ng'etich (2008), is at last making progress. This paper explores the discourses through which these initiatives have been framed and (partly) achieved. After briefly sketching the most important developments, I draw on governmentality theory to suggest that each proceeds on the basis of 'problematizing' aspects of traditional medical knowledge and practice. Such problematizations are inherently discursive and have an important rhetorical dimension. They are effective in law and policy to the extent that they are considered natural or plausible. In considering the plausibility of problematizations, I suggest that we need to attend to style and form in addition to substantive content, arguing in particular that vivid spatio-temporal images (or 'chronotopes') have encapsulated the diverse threats to and promise of traditional medicine in contemporary Kenya. In the rest of the paper I seek to show the purchase of this framework by reviewing in more detail campaign materials, legislative debates, national and international policy literature, and academic interventions. These sources are supplemented by a series of interviews which I conducted with government officials and researchers, the leaders of healers' associations, and activists. On the basis of this material I identify a number of key, and in some cases rival chronotopes which anchor different doctrinal and policy positions. Figures such as the village, the community, the nation and the globe, familiar from debates on traditional medicine elsewhere in Africa, are given a distinct inflection with reference to Kenyan history and contemporary contexts.

Traditional Medicine in Kenya: Practice and Reform

It is estimated that over 70% of the Kenyan population relies on traditional medicine as its primary source of health care, while more than 90% have used medicinal plants at one time or another (IEA, 2011: 11). Although the great bulk of state health care resources is allocated to the delivery of biomedical services, traditional healers are considerably more accessible to ordinary Kenyans. While the doctor-patient ratio is approximately 1:33,000, that for traditional healers is 1:950.[1] Most are herbalists, though that is often combined with work as traditional birth attendants, bone setters and spiritualists or faith healers (Lambert and Leonard 2011: 20). Their patients tend to have lower incomes and be less educated than the average Kenyan (Lambert and Leonard, 2011:19). In rural areas and the poorer city districts

[1] Africa Health Workforce Observatory - Human Resources for Health Country Profile: Kenya - March2009, quoted in Lambert and Leonard (2011: 29).

healers partly make good persistent deficits in access to health care, owing to lack of physical facilities and hospital stock outs for example.[2] They are known by reputation, collecting and processing raw materials themselves (Prince and Geissler, 2001). In more affluent urban areas, by contrast, healers supplement biomedicine, operating commercial clinics with their own staff, production systems and internet presence (Ng'etich, 2008: 28). Formal training in traditional medicine is not available in Kenya and the subject is largely absent from medical school curricula. Becoming a healer often involves acknowledging a special vocation and carrying on family traditions after a period of apprenticeship (Prince and Geissler, 2001). It is important to note that traditional medicine is not monopolized by practitioners: self-care with well-known plants is widespread (TICAH, 2010: 7).

Recent reform initiatives have focussed on regulating the practice of traditional medicine (by legal and non-legal means), and the expansion of intellectual property law to protect traditional medical knowledge. Practice has been the target of measures such as the Kenya Medicinal and Aromatic Plants project supported by the Japanese Development Agency to train healers in record keeping and hygiene, the selective mapping of healers and their practices by World Bank-funded consultants, and the revision of regulations for the production and storage of herbal medicines laid down by the Pharmacy and Poisons Board.[3] A series of legislative proposals have attempted to create a system of licensing and discipline, though none of these has been passed due to considerable resistance from within the medical profession and endemic divisions between healers themselves.[4] Most recently a Traditional Medicine Practitioners Bill introduced in 2014, which has yet to pass both houses of parliament, would make some form of educational qualification a prerequisite for the inclusion of a healer on a comprehensive national register, itself a requirement of lawful practice.[5]

Kenyan concerns at the misappropriation of valuable genetic resources and traditional knowledge[6] have chimed with international agreements, most importantly the Convention on Biological Diversity (1992) and with policies and model laws emanating from the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional

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[2] Traditional Healer, Kakamega County, Interview 31st June 2013
[3] See respectively KWG-MAPS (2011); Lambert and Leonard (2011); and Pharmacy and Poisons Board (2010).
[4] Senior Pharmacist, Ministry of Health, Interview 19th February 2013; Former Patent Inspector, Kenya Industrial Property Institute, Interview 11th July 2013
[5] Copy of the Bill on file with author.
[6] See IEA (2009: 6-7).

Knowledge and Folklore of the World Intellectual Property Organization (WIPO).[7] Since 2006 the National Environmental Management Agency has maintained an inventory of Kenyan biodiversity, as well as a system of conditional permits for accessing such material and for sharing benefits arising from its use.[8] More recently the Protection of Traditional Knowledge and Cultural Expressions Act (2016) has created a new class of intellectual property rights enabling communities to prevent the use of local herbal remedies, for example, without their consent or to license this for a fee or a percentage of any profits. This is intended to fill the gap created by patent law rules which allow traditional knowledge to be appropriated without compensation and then converted into products and processes subject to monopoly control.

Governing Through Problematization

In studying the processes by which reform of traditional medical practice and knowledge transmission is pursued, we are called by Dwijen Rangnekar to attend to the 'domestic political economy of law-making' (Rangnekar 2014: 359). The strategic and discursive dimensions of these processes are visible in what governmentality theorists, building on the work of Michel Foucault, have termed 'problematization', ie. a mode of government which 'poses the obligations of rulers in terms of problems they seek to address' (Rose and Miller, 1992: 181).[9] This is an active process. Problems aren't simply found out there. Rather, they are produced through a combination of discourses and practical routines (Bacchi, 2012). They are defined by expert knowledges and official standards as objects in need of regulation. They have three significant dimensions (Rose and Miller, 1992: 178-179).

1) Moral: setting out tasks and goals and prescribing fundamental values.

2) Epistemic: grounded upon knowledge about the nature of the problem and the target of regulation.

3) Linguistic: articulated in a distinctive language which renders the field thinkable.

Any activity is likely to be the object of not one, but multiple problematizations (Dent, 2009). Traditional medicine in Kenya is problematized in terms of threats to safety, health, resource

[7] For an overview, see Nnadozie (2012) and Dutfield (2012).

[8] *Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations* 2006; see further IEA (2009).

[9] See also Foucault (1991). For a fuller discussion of problematization in the present context, see Harrington (2018).

sovereignty and national development.[10] Thus, an imperative to protect patients against unsafe treatment is defined by public health expertise, underpinned by an entrenched right to health,[11] and articulated in terms of hygienic practice. The state's task of defending resources against foreign 'pillaging' is expressed as a constitutional obligation 'to protect the intellectual property rights of the people'[12] and elaborated in the detail of statute law. Policies respond to this problematization by mobilizing 'technologies' (eg. 'best practice' for record keeping and cleanliness; permit and consent mechanisms for accessing traditional knowledge) and calling new 'subjects' into being as vehicles of self-regulation (eg. healers' associations; national research institutes).[13] This 'government at a distance', is steered by official agencies, (eg. the Ministry of Health; the Kenya Copyright Board), but also expert groups (eg. university ethnobotany departments) and civil society organizations (eg. medical professional associations) (Rose, O'Malley and Valverde, 2006). Given the dependence of countries in the global south on conditional aid, foreign and inter-state bodies also contribute to shaping problematizations through standard setting, training and legal obligations. I have already noted the influence of the WIPO Intergovernmental Conference on traditional knowledge legislation. The WHO Africa Office, for example, has developed tool kits which set out detailed processes for the formulation of national polices on traditional medicine, as well as model laws and codes of ethics (WHO, 2004). Such external interventions are not merely passively received by existing national institutions. They also serve to reconstruct states by calling for the creation new of ministries and agencies, and the development of expert groupings. Each of these bodies may be linked to external mentors and funders as much as to the rest of the national government apparatus, a process aptly described as the 'transnationalization' of the state by Sousa Santos (2013: 785).

It is clear from the foregoing that problematization is significantly achieved in and through discourse. While the role of coercion, corruption and open force in governance must not be neglected, the latter also has a pervasively rhetorical dimension. Implementation of diagnoses and recommendations, as well as the creation of new governance subjects depends on their plausibility to electors, policy makers, judges, legislators and so on. This in turn depends on their ethical appeal (moral), the authority of experts promoting them (epistemic) and the form

[10] For an application of this framework to Vietnamese traditional medicine, see Wahlberg (2006).
[11] Article 43(1) *Constitution of Kenya*.
[12] Article 11(2)(b) *Constitution of Kenya*.
[13] See generally Rose and Miller (1992: 813ff).

in which they are communicated (linguistic).[14] In each case we are concerned with strategic speech, whose effectiveness depends on its ability to move specific audiences in concrete situations. Tools of cultural criticism can be used to elucidate the purchase of different problematizations through examining their aesthetic properties and wider historical resonances. In the next section, I argue, using literary and socio-legal approaches, that a range of spatio-temporal images encapsulate and give force to the different problematizations of traditional medicine.

Chronotopes: Literary, Social, Legal

Chronotopes in literature include the threshold and the quest, giving expression to the 'intrinsic connectedness of temporal and spatial relationships' (Bakhtin, 1996: 84). The hybrid nature of the concept marks the fact that time is inevitably represented in space (eg. the crossing of the physical threshold as the passage from one phase of life to another) and space is produced through time (eg. the movement of the voyaging hero away from home) (Peeren, 2006: 28). Chronotopes contribute to aesthetic appeal and moral force of literary texts, identifying them with specific genres. Paul Gilroy identifies the recurrent image of the 'slave ship' as a unifying figure in the work of many African American writers (1993: 4). 'Storyscapes' of childhood focus the diasporic consciousness and authorial nostalgia of African fiction authors such as Chimamanda Ngozi Adichie (2003).[15] Social practices too can be grasped as chronotopes whose moral significance depends on their aesthetic form. The queue outside a polling station moving slowly in space and time, may be understood alternatively as an emblem of democratic transformation or chronic maladministration.[16] Chronotopes are not simply products of imagination, but emerge from an iterative reaction of cultural ideals on physical forms and vice versa. For example, state borders, identified on maps and achieved through fences 'on the ground' may be valued for allowing the nation to develop in its own time, or challenged as an alien imposition (Klinke, 2012: 674).

Legal doctrine, policy arguments and law's institutional manifestations, as well as the representations of law in popular culture, are also filtered through spatio-temporal imagery

[14] On these dimensions of rhetoric in law, see further Harrington (2017: c.3).
[15] See Ouma (2014).
[16] See further, Harrington (2020).

(Valverde, 2015). For instance, the chronotope of the 'single-family detached' – childrearing parents living in their own home – has been at the heart of family and residential law in many countries, (Valverde, 2015: 169ff). Its racialized nature can be grasped through juxtaposition with a rival chronotope: the separation of urban labourers from their rural families under colonial and apartheid laws. The peace and order of the country house, disturbed by a murder and restored by an intrepid detective, provides a legitimating image of British criminal justice.[17] Mariana Valverde suggests that a distinction needs to be made between legal and social chronotopes (2015: 21). The former, I would suggest, are immanent in particular doctrines, for example the time-space 'envelope' created by a standard lease over defined property for a fixed term (Abbott, 2013). The latter originate outside the law, but often inform it, for example, the 'single-family detached' mentioned above. Both have important rhetorical effects, forming part of arguments about the application of detailed rules and proposals for law reform respectively (Harrington, 2017). Both add to and draw on a mutable body of common sense about the 'natural' time and space for specific legal interventions.

Law's chronotopes have an important affective dimension associated with the 'governance moods' which each calls forth (Valverde, 2015: 78). For example, while the country house mystery is tightly narrated in the confident expectation of a resolution, law and policy on cross-border bioterrorism is suffused with dread (Stern, 2002). Corresponding to the production of feeling, or 'pathos', in classical rhetoric, governance moods add to the persuasiveness of the problematization and the technologies proposed. In the case of bioterrorism an atmosphere of dread will support rapid, dramatic interventions such as travel restrictions. According to Valverde each chronotope also supports a distinct claim for jurisdiction (2015: 83). Thus, epidemiological modelling of smoking as an epidemic, spreading over time from developed to developing countries, characterizes tobacco control as a transnational matter, responsibility for which properly rests with the World Health Organization (Reubi, 2017). In the rest of this chapter I will pick out a number of chronotopes which have informed and structured the recent problematizations of traditional medicine in Kenya mentioned above. For each one I will attend to its mutually reinforcing spatial and temporal dimensions, the mood evoked and the specific jurisdictional claim raised. My discussion is framed by an understanding of the strategic, agonistic and situated nature of these interventions. Law reform here is marked by rival moods, competing bids for authority

[17] On chronotopes in detective fiction, see Valverde (2015: 165).

and the quest for wider historical and cultural resonance. Accepting this state of contest, I note the hegemonic effects of certain chronotopes, their capacity to marginalize or obscure certain perspectives and interests.

The Tribe and the Globe

The British authorities expressed their understanding of traditional medicine in the Kenyan *Medical Practitioners and Dentists Ordinance* of 1910 which permitted

> the practice of systems of therapeutics according to Native ... methods by persons recognised by the community to which they belong to be duly trained in such practice; provided that nothing in this section shall be construed to authorise any person to practice native ... systems of therapeutics except amongst the community to which he belongs ...[18]

This provision effectively meant that local healers would not be allowed to integrate western techniques, instruments or medicines into their practice, thus bolstering the monopoly position of registered doctors. Like its counterparts across Eastern and Southern Africa, the Ordinance ascribes an inherently static and local character to traditional medicine (Osseo-Asare, 2014: 14). This chronotope of the 'tribe' played a key role in the wider system of 'indirect rule' across British colonial Africa. In effect, the 'tribe' was closed to the outside world save through the obligation to render tribute to the colonial power through a tribal leader who exercised authoritarian powers (Mamdani, 1994).

Colonial governance of traditional medicine was filtered through two further related chronotopes. First was that of Africa as a store of unknown and untapped remedies which properly belong to all of humankind, available for appropriation by those in a position to unlock their benefits. While western techniques were designated off-limits to African healers, colonial scientists were encouraged and facilitated in their quest for new medical resources. As Osseo-Asare notes, the Berlin Conference of 1884-85 guaranteed safe passage for scientific parties along the Congo and Niger Rivers to just this end (2014: 109). The second chronotope of western medicine as a universally valid and progressively improving science In combination these chronotopes provided the epistemic basis for the creation of a unified profession in European countries . Thus, the restricting of traditional healing to a static

[18] See further Iliffe (1998: 28-29).

locality, as evidenced by the Kenyan Ordinance quoted above, enabled 'progressive' western medicine to exploit Africa as a store of untapped remedies in the interest of capitalist imperialism from the mid-19th Century period of colonial conquest (Lawrence, 1994).. Their normative effect was to marginalize local knowledge holders and subject Africa's biodiversity to the jurisdiction of colonial scientists and doctors.

Such essentializing moves do not fully accord with the reality of traditional medical practice then or in the present day. Historically many healers have travelled from their home area to learn their craft from more experienced practitioners belonging to another ethnic group (Rekdal, 1999). Equally, healers from beyond the locality, often far beyond, were and still are seen as being especially effective. For example, Tanzanian healers or those from, say, the coastal region of Kenya working in Nairobi advertise their specific origins prominently. Moreover, in the multi-ethnic slums of Kenya's growing cities, healers seek to build their reputations among people of all backgrounds (Iliffe, 1998: 191). Patients themselves are commonly unconstrained by 'tribal' categories or by the barrier between 'Western' and 'African' medicine in their pluralistic selection and combination of therapies.[19] However, the 'tribe' still figures in general political discourse, furnishing a still potent means for Kenyan leaders to define and rally their supporters.[20] It also continues to appear in official discourse about traditional medicine in Kenya. The National Assembly debates on the Protection of Traditional Knowledge and Cultural Expressions Bill, for example, were marked by frequent reference to ethnically denominated medical practices such as Kamba treatments for blood pressure,[21] the Luhya group's use of the neem tree,[22] and traditional surgeons among the Kisii.[23] As we will see later, critics also claim that the operation of the Act as passed risks rehabilitating competitive ethnicity over valuable resources.

The Village and the Matatu

The spatio-temporal figure of 'village' provides an important anchor for the problematization of traditional medicine as vulnerable and in need of legislative protection and modernization. It figures frequently as a point of departure in healers' own biographies. Thus, the proprietor

[19] Founder of NGO for the promotion of traditional healing, interview 30th January 2013.
[20] On the entrenchment of 'tribalism' in independent Kenya, see Atieno-Odhiambo (1987).
[21] Mr Mulu MP, Kenya National Assembly Debates (Hansard), 12th November 2015, p.24.
[22] Ms Wakhungu MP, *Kenya National Assembly Debates (Hansard)*, 12th November 2015, p.9-11. Neem, known in Kiswahili as Mwarobaini, is used across Kenya and indeed in many other countries.
[23] Mr Tong'i MP, *Kenya National Assembly Debates (Hansard)*, 12th November 2015, p.29.

of a large commercial herbal medicine business noted that on discovering his vocation he left his job as a pharmacist, visiting his native village in Central Province for extended training with a local 'medicine man' before returning to the city.[24] The village is here a chronotope of origin guaranteeing the authenticity of traditional medicine by virtue of its distance from the urban in time and space. As the leader of a nationwide healers' association put it, 'the genuine practitioners are those people out there … those people up country'.[25] MPs too have drawn on this image to identify what is at stake in legislative proposals to regulate practice. One remembered

> with a lot of sorrow that in my own village, there was an old woman … who used to attract very many couples to her home and they used to go for herbal concoctions…. It is a pity that [she] has since died with this knowledge with nobody to follow it.[26]

Another called forth a more generic village with mythic temporality.

> In the olden days when there was tragedy in the village, people would visit the forest, rivers and lakes to seek intervention from the gods... Herbal medicine is a practice that goes on and has been going on since ancient days. [27]

These reflections conjure up an idyllic rural setting, embodying the past in its spatial dimensions.[28] The literary pastoral is often narrated by a speaker who has been removed from the locale, in our case urban-based healers and politicians. The associated mood of nostalgia gives it a political edge, since the idyll is represented as being threatened by outsiders. In the case of the village, and the authentic healing practices which it warrants, this threat is two-fold.

The first threat comes from 'fake healers', who feature in newspaper headlines and parliamentary interventions, but also in the more reflective comments of health officials. Such quacks and street vendors are said to be only interested in 'making a quick buck'.[29] This purely commercial ethos contrasts with that of 'genuine healers who are doing it for purposes of restoring health'.[30] It is also reflected in the newspaper advertisements and notices pinned to lampposts which list the products and promised remedies of entrepreneurial healers.

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[24] Herbal Medicines Proprietor, interview 29th January 2013.
[25] Herbalist Association Leader, interview 31st January 2013.
[26] Dr Khalwale MP *Kenya National Assembly Debates (Hansard)* 9th December 2009 p.4442.
[27] Dr Khalwale MP, *Kenya National Assembly Debates (Hansard)*, 9th December 2009 p.4442.
[28] For a useful summary, see Klinck (1994: 26-29).
[29] Mr Wamalwa MP, *Kenya National Assembly Debates (Hansard)*, 9th December 2009 p.4438.
[30] Senior Government Researcher on Traditional Medicine, interview 21st May 2013.

Particular modes of using therapeutic resources are also taken to be a sign of quackery. This may involve heterogeneous mixing:

> There are some that have already borrowed from western medicine and they are injecting [but] the traditional healer in the village is not even aware of the injectables, because they are not a part of their culture.[31]

Or by contrast an oversimplistic approach to therapy:

> The ones in Nairobi, if you go to a chemist - they may give you a mix of one plant and say it is herbal medicine, for a million diseases. But those women out there [in rural areas], they know the right herbs.[32]

As both quotes show, the problematization of traditional medicine in terms of safety is achieved by contrasting urban markets with the pastoral world of rural healing. Mobility of healers, vendors and medicines is the hallmark of the city. Thus, an investigative journalist opened her report on the reform initiatives being discussed here with the following vignette:

> Peter quickly launches into his sales pitch for the various natural remedies he is selling: oil for skin conditions, pills that will clean out the stomach, a liquid remedy which helps with digestion, a product that will purify blood.... Peter has carefully chosen his route, the majority of the passengers will alight at the hospital and clearly health concerns are on their mind. Several of them part with a few hundred shillings to try one of his products (Gemson 2013).

The minibus taxi (or matatu) functions here as a further chronotope: a mobile, encapsulated space, populated by a rapidly changing and ethnically heterogeneous population of travelers, which is itself emblematic of urban entrepreneurialism in Kenya. The jurisdictional implications are clear. Quacks escape the spatio-temporal fixity and customary rules of tribe and village, and are free to operate in the 'unregulated chaos'[33] of the city. They are in need of 'being visited properly by the law' according to a former health minister.[34]

The Community and the Patent

The chronotope of the village also functions as a synecdoche for Africa itself. Traditional medicine is routinely designated as 'African medicine'. The logo for a major commercial herbalist in Nairobi, for example, depicts a healer, seated under a palm tree, set against the map of Africa, with the phrase 'Back to the Roots'.[35] As we have seen this alignment points

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[31] Senior Government Researcher on Traditional Medicine, interview 21st May 2013.
[32] Herbalist Association Leader, interview 31st January 2013.
[33] Ng'etich (2011).
[34] Professor Anyang Nyong'o, *Kenya National Assembly Debates (Hansard)* 13th August 2008 p.2594.
[35] 'Dr Maina's Herbals Advertising Sheet', copy on file with author.

the potential customer back in time, serving as a guarantee of authenticity. But it also focusses and extends the colonial chronotope of the continent as an untapped source of remedies. As one MP put it, the knowledge of healers is

> unprotected and condemned in the open [and] the developed West will take advantage of it... Africa is the only natural resource left.[36]

The mood here is one of defensiveness and anxiety regarding a 'new form of colonial pillaging'.[37] In this vein, the threat of unregulated bioprospecting was a key focus of the 2009 National Policy for Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions.[38] It has been made vivid by narratives of unwitting village healers disclosing valuable knowledge about the sources and uses of local medicines to ethno-botanists working for foreign companies seeking the impetus for new drug development and other commercial products. The most widely circulated of these concerns the 'discovery' of rosy periwinkle in Madagascar as a source of treatments for childhood leukaemia and Hodgkins disease, which have earned immense profits for the Eli Lilly corporation (McClelland, 2004).[39] In 2011 the Institute of Economic Affairs' review of law and policy documented two similar cases of appropriation in Kenya.[40] The German company Bayer had filed a patent on a process for the biosynthesis of acarbose, used for treatment of type II diabetes in 1995. It was later confirmed that the process involved a type of bacteria (Actinoplanes sp.) originally taken from Lake Ruiru in Kenya (IEA, 2011: 6). In 2002-3 US biotech company Genencor reported to shareholders that it had licensed enzymes capable of fading denim jeans to Proctor and Gamble. The report included the image of a box of the detergent powder 'Tide' above a caption saying: 'See what

[36] Mr Maina MP, Kenya National Assembly Debates (Hansard), 9th December 2009 p.4452.
[37] IEA (2009: 3).
[38] See Government of Kenya (2009).
[39] As Osseo-Asare notes, this narrative retains its potency, notwithstanding evidence that Eli Lilly was able to source the flower in other countries and that it is a common weed rather than a rare plant (2014: 33).
[40] Unlike the rosy periwinkle case, these Kenyan accounts have not been challenged.

we see in the soda lakes of Kenya'.[41] The enzymes had been discovered in a microbe, removed without authorization, from Lake Bogoria in the Rift Valley (IEA, 2011: 7).

Though the genetic resources in the two Kenyan cases had been acquired without the assistance of local healers, the ease with which they were extracted was a matter of concern to officials concerned with traditional medicine and to practitioners themselves.[42] The cases were referenced in the National Assembly debates during the passage of the Protection of Traditional Knowledge and Cultural Expressions Act 2016, which meets a timetabled constitutional obligation on the state to ensure that communities are compensated for use of their culture.[43] The minister introducing the legislation stated that it was intended to address a lacuna in Kenya's intellectual property law which had

> resulted in the widespread unfair exploitation of the traditional knowledge and cultural heritage for commercial and business interests and the continuous loss of important elements of traditional knowledge and traditional cultural expression.[44]

One of only two such statues in Africa to date,[45] the Act's provisions create an elaborate governance 'technology' in response to this problematization. At its core is a new or *sui generis* type of intellectual property right held by communities over traditional knowledge, including medical knowledge.

The spatio-temporal form of the right created by the 2016 Act can be contrasted with the patent which it is intended to displace or at least limit in the field of traditional knowledge. Patents are sharply defined, being enforceable within the national territory for a term of 20 years from the date on which the application was filed.[46] This legal chronotope is closely based on the social figure of the 'moment of genius',[47] when an individual makes an invention. Viewed thus, new knowledge originates within the person of inventor and exists only from a defined point in time (Osseo-Asare, 2014: 10). This figure is reflected in statutory requirements for patentability, namely that the product or process concerned be

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[41] Intellectual Property Lawyer, Nairobi, interview 1st October 2013.
[42] Former Patent Inspector, Kenyan Industrial Property Institute, interview 1th July 2013; Prominent Healer, interview 22nd April 2013.
[43] Articles 11(3)(a) and 69(1)(c) *Constitution of Kenya* (2010). See also Mr Njuguna, MP, *Kenya National Assembly Debates (Hansard)*, 12th November 2015 p.12
[44] Mr Katoo MP, Kenya National Assembly Debates (Hansard), 12th November 2015 p.3.
[45] Similar legislation was passed in Zambia in 2016.
[46] S.60 Industrial Property Act 2001.
[47] This is well explained in the equivalent context of copyright and traditional music by Seeger (1992: 352).

novel and non-obvious, as well as being capable of industrial application.[48] The 'moment of genius' chronotope is also presumed by theories of intellectual property whether oriented to the rights of inventors or the need to offer clear rewards for research and innovation (Lee, 2015: 33ff).

As the National Policy recognized, the patent form itself enables biopiracy (Government of Kenya, 2009: 9). Its effect is to classify knowledge which is collectively held as part of the timeless common heritage of all mankind and, thus, available for appropriation without permission or compensation. Once the inventor, and the corporation which they work for, have transformed this into patentable knowledge, they are vested with authority to exclude others from using it without payment of a monopoly rent (Timmermans, 2003: 752). The response of the 2016 Act is to call forth a new governance subject, 'the community', whose informed consent must be obtained prior to any use or reproduction of its traditional knowledge.[49] These ownership rights are enforceable by an elaborate system of criminal sanctions and civil remedies,[50] as well as provisions allowing communities to enter 'authorized user agreements' with companies to share in the benefits of commercial exploitation.[51] This extension of intellectual property law has been an important theme in the work of the WIPO Intergovernmental Conference and in an influential report by Kenyan scientists and legal experts (Oguamanam, 2012:158ff; Mutta and Munyi, 2010). The latter showcased the work of existing biodiversity management groups among the Mijikenda people of the coastal region and in Kakamega Forest in the west and their efforts to protect and profit from their intellectual resources, for example by forming partnerships with research institutes.

By contrast with the patent holder, the 'community' which owns traditional knowledge under the 2016 Act is loose in form.[52] It is defined as 'a homogeneous and consciously distinct group' which shares any of the following attributes: common ancestry, similar culture, mode of livelihood or language, shared geographic or ecological space; or community of interest.[53]

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[48] S.22 Industrial Property Act 2001.
[49] S.18(2) Protection of Traditional Knowledge and Cultural Expressions Act 2016.
[50] Ss.37, 38 Protection of Traditional Knowledge and Cultural Expressions Act 2016.
[51] Ss. 25, 34 Protection of Traditional Knowledge and Cultural Expressions Act 2016.
[52] The Constitution provides no comprehensive definition, referring in different places to communities as cultural and linguistic, but also ethnic entities, see Articles 44(2) and 63(1). 'Marginalised communities', whose political participation and social welfare the state is under a duty to promote, are defined in much narrower terms than under the 2016 Act, see Articles 56, 204 and 206.
[53] S.2 Protection of Traditional Knowledge and Cultural Expressions Act 2016.

This eludes sharp spatial limits and is matched by a backward-looking temporality which refuses any clear point of origin for the community and its knowledge. The latter is defined as that which 'is generated, preserved and transmitted from one generation to another … distinctively associated with [the] community and integral to [its] cultural identity.'[54] This new legal chronotope is an important step in 'filling the gaps' left by orthodox intellectual property law.[55] But the complexity of its internal constitution poses new risks. The operation of the Act depends on the community decisions whether or not to enforce their exclusory rights, enter benefit agreements and so on. This will be difficult for some language groups in Kenya which number in the millions or which are spread over urban and a range of rural locations. Admittedly the Act does allocate limited decision-making power to 'individual 'holders' of traditional knowledge 'recognized' according to customary rules. However, holders may not speak for all or even a majority of the community. Indeed, as Forsyth has argued of similar legislation in the Pacific Islands, underlying assumptions about the homogeneity of communities tend to strengthen the powers of stronger members, often older men, at the expense of others who would perhaps resist the marketing of traditional knowledge (2012: 4, 23). Moreover, the imprecise contours of the 'community' may be filled out in practice by the form of the 'tribe' which, as we have seen, has been established as a legal and social chronotope since the colonial period. This poses the further risk of ethnically denominated struggles over the valuable rights in traditional knowledge created by the sui generis regime.[56] Again it is worth emphasizing that the boundaries between communities and their knowledges are blurred.[57] Both also straddle colonially imposed borders, though this difficult jurisdictional issue is not significantly addressed in the 2016 Act (Deacon, 2017).

The Nation

The elevation of the 'community' generates a two-fold development of jurisdiction. Customary law and practice delimits the powers of action and duties of consultation among knowledge 'holders' within the community. It also defines knowledge and the context in which it is used as 'traditional'.[58] State law, in the form of the Act itself and the regulations

[54] S.6 Protection of Traditional Knowledge and Cultural Expressions Act 2016.
[55] See further Gervais (2009).
[56] See generally Lynch (2011).
[57] See Antons (2013: 1404).
[58] Ss. 19, 30, 2 Protection of Traditional Knowledge and Cultural Expressions Act 2016.

which have yet to follow, sets out the framework for the community's relations with outsiders, for example foreign bioprospectors. In addition it distributes functions, for example dispute settlement, the keeping of registers of traditional knowledge and the grant of formal approval to user agreements, as between county and national governments, and the Kenya Copyright Board.[59] The state is not simply the recorder and enforcer of the community's will, however. It also exercises residual jurisdiction, where for example no owner for traditional knowledge can be identified or where a dispute as to ownership cannot be resolved.[60] In such cases the national authorities may step in and issue a licence for the exploitation of the traditional knowledge to a private company. Given the blurred boundaries of who belongs to communities and what knowledge they hold, disputes are inevitable, widening the scope for state intervention. This is increased further by section 12 of the Act which allows state authorities to override the will of the community and grant a compulsory licence to a commercial concern, where the knowledge is not being sufficiently exploited. In the rest of this section I argue that these provisions need to be read in terms of recent policy documents and international instruments and suggest that the Kenyan nation state is itselfa legal chronotope.

In order to grasp the dimensions of this chronotope it is worth recalling the changing history of official attitudes to traditional medicine and traditional knowledge more generally. The early decades of independence from 1964 were marked by widespread hostility among medical civil servants and modernizing political leaders. First President Jomo Kenyatta denounced healers as conmen and parasites (Iliffe, 1998:191). African nationalism was pursued in the health sector by removing racial barriers to practising and accessing biomedicine rather than through the promotion of indigenous healing practices (Ombongi, 2011). The late 1970s saw a relaxation of this position under the influence of the WHO's Alma Ata Declaration, which promoted the role of healers in the delivery of primary care.[61] A Traditional Medicines and Drugs Research Centre was established as part of the Kenya Medical Research Institute (KEMRI) in 1984.[62] The new stance was initially more verbal than practical and signaled above all else a symbolic re-appropriation of traditional medicine,

[59] See the brief summary in Deacon (2017).
[60] S.30 Protection of Traditional Knowledge and Cultural Expressions Act 2016.
[61] Declaration of the Alma Ata Conference on Primary Health Care 1978. https://www.who.int/publications/almaata_declaration_en.pdf (Accessed 29 February 2020).
[62] See NCAPD (2005: 1).

as a 'national essence'[63] and something for Kenyans 'to be proud of', in the words of KEMRI's founder, Professor Kihumbu Thairu.[64] But it also marked the beginnings of a new focus on the potential for indigenous knowledge to contribute to economic development. In this regard Kenya was catching up with Tanzania and Ghana which had sought, admittedly with limited success, to create state-owned domestic pharmaceuticals industries based on indigenous knowledge (Langwick, 2010; Owoahene-Acheampong and Vasconi, 2010).

Policy and legislative initiatives, as well as academic commentary concerning traditional medical practice and knowledge over the last twenty years have been articulated in these developmental terms. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, which provided the impetus for the 2016 Act, affirmed that 'no society can achieve its developmental goals if it ignores its rich cultural heritage imbedded [sic] in traditional knowledge' (Government of Kenya, 2009: 6).[65] Commercialization was one of the four key objectives of the 2005 National Policy on Traditional Medicine and Medicinal Plants which addressed obstacles such as: unsustainable harvesting practices; lack of funds for small scale investment; weak supply chains; and poor packaging and labelling (NCAPD, 2005: 9, 20ff). Compared with the 1980s and 90s, there is now less international optimism about the potential for traditional medical knowledge to lead to lucrative new pharmaceuticals (Crook and Clapp, 2002). Attention has instead shifted to the massive market for herbal products and 'nutraceuticals' in Europe and North America. The Natural Products Industry Initiative established under the government's medium term economic strategy Vision 2030 aims to meet this demand.[66] Traditional medicine does not directly serve the goal of self-sufficiency, as was the aim in Ghana and Tanzania after independence. Rather it positions Kenya as a competitor in the neo-liberal market place.[67]

These interventions contribute to the problematization of traditional medicine in terms of its potential contribution to development and the threats to this posed by neo-colonial

[63] This is taken from Xu's study of struggles over traditional Chinese medicine in the 1930s (1997).
[64] Quoted in Ombongi (2011: 364).
[65] This was echoed by MPs debating the Act, see for example, Mr Ali, *Kenya National Assembly Debates (Hansard)*, 12th November 2015 p.36
[66] Interview with senior researcher attached to the Natural Products Industry Initiative, 25th July 2013.
[67] See Langwick (2010: 23-24).

exploitation on the one hand and domestic inefficiencies, on the other. Both aspects were well captured by Professor Julius Mwangi, himself a traditional practitioner, in his 2012 inaugural lecture as Chair of Pharmacognosy at the University of Nairobi. By allowing resources simply to be 'shipped out', Kenya was failing to grasp an opportunity to develop the industrial sector and neglecting its 'academic, moral and practical' duty to make full use of its 'green gold' (Mwangi, 2012: 15, 26). Mwangi's imperative is made explicit in the constitution which recognizes 'the role of indigenous technologies in the development of the nation'.[68] The state is the key governance subject within this problematization, the primary duty bearer for fostering development. Understood chronotopically, the state has to lead the territorially defined nation out of underdevelopment.[69] The governance mood is one of optimism, albeit tempered with a sense of vulnerability. Faith in progress, once characteristic of colonial science, has been appropriated by the independent state. The designation of traditional medicine as a resource for national development[70] under the stewardship of the state establishes a hierarchy of jurisdiction supported by international and national law. While Article 8(j) of the Convention on Biological Diversity obliges parties to respect the knowledge and practices of indigenous and local communities, this duty is subordinate to the 'sovereign right' of states to control their own resources recognized in Article 3 (Oguamanam, 2012: 148). Equally, while Kenya's Protection of Traditional Knowledge and Cultural Expressions Act 2016 carves out considerable scope for local and community control, provisions on lack of ownership and compulsory licensing restore state jurisdiction to a certain extent. If, as Chidi Oguamanam has argued, the spread of sui generis regimes betokens the emergence of a post-modern regime for traditional knowledge, that remains nested within a classically Westphalian ordering.[71]

Conclusion

This chapter identified a number of key chronotopes which served as a focus for contemporary and historical problematizations of traditional medicine in Kenya. In each case we saw a connection between spatial and temporal forms, and between these and the

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[68] Article 11(2)(b) *Constitution of Kenya* (2010).
[69] As Branch and Cheeseman indicate, development has been the raison d'etre of Kenya, like most other post-colonial states (2010).
[70] On the appropriation of traditional culture as a national resource for political and economic ends in Senegal, see Mills (1996: 70).
[71] See Oguamanam (2012: 156).

associated governance mood and specific jurisdictional claims which each grounded. The local and the traditional were mutually reinforcing in the pastoral image of the village and they contributed to a sense of vulnerability and a regulatory imperative to defend pure, safe and authentic practice. It was clear throughout that problematizations could be figured through more than one chronotope. Governance for colonial appropriation was realized by an articulation of the temporally static and spatially fixed form of the tribe with the figure of Africa as virgin territory ready to supply the raw material for a dynamic, universal medical science. Our rhetorical perspective suggested that chronotopes may be more or less coherently realized and therefore more or less plausible in supporting specific problematizations and governance technologies. The 'community' called forth by the 2016 Act as the holder of sui generis rights is beset by uncertainty as to its spatial borders and its internal constitution. This complexity suggested potential difficulties in the operation of the new regime and its likely subordination to the nation state in the hierarchy of jurisdiction. The nation's pre-eminence is favoured by its historical role as the agent of development, whether state-led or neo-liberal, as well as its more clearly defined spatio-temporal limits. The latter was also a feature of the legal chronotope of the patent and its subject matter, by comparison with the fluid boundaries of traditional knowledge and the communities which own it.

The strategic value of chronotopes in legal and policy discourses lies in their persuasive appeal. They also have the hegemonic effect of making somethings visible and others invisible at the same time. While an essentialized view of the community would allow the claims of marginalized peoples to be promoted, it may also occlude genuine dissent within them. The view of Africa as a natural cornucopia suppresses the intellectual and practical contribution of individual healers and communities in identifying and utilizing medicinal plants over generations. Chronotopes cannot be grasped in isolation. They qualify and challenge each other in rhetorical struggles. The nation defends its natural resources against claims based on the common heritage of mankind. They define each other dialogically through relations of contradistinction or supersession. Village healing is constituted discursively in opposition to mobile medicine markets in the cities. Village healing is also the as yet unactivated source of the nation's longed-for industrial and commercial modernity.

The range of chronotopes was matched by the different governance subjects presumed by the different problematizations. Responsibility for safety will rest with individual healers, while the management of traditional knowledge is under the direction of a complex of state and

non-state bodies, including communities. The governmentality framework adopted in this review suggests that the role of the state is not exhausted by command and control models. It also attempts to orchestrate without directing the regulatory work of other governance subjects. This effort is not always successful or uncontested as we have seen. It is a commonplace of the globalization literature that the state is challenged from below (locally) and above (internationally), that physical and normative exclaves are carved out from the national order and linked more directly to external sources of power and governance. Nonetheless the state retains a significant discursive role as the repository of popular anti-colonial ambitions and the aspiration to 'build the nation'. This subjectivisation of the state had its international moment too. As Sundhya Pahuja has shown, the post-World War II order operated by the United Nations and the Bretton Woods institutions enjoined newly independent states to achieve economic and political progress (2011). They were governed, then and now, within the frame of another chronotope: the spectrum along which states are arranged and along which they can progress from failed, to underdeveloped to fully developed. Policy makers, scientists and herbalist leaders I interviewed also framed their efforts through this chronotope, making particular reference to Kenya's need to catch up with China as an exemplar of rapid industrialization including the modernization of its traditional medicine practices. These internal and external resources, I would suggest, still uniquely equip the state to provide a certain discursive coordination or 'imaginary unity'[72] to the plurality of problematizations and technologies proposed and deployed in relation to traditional medicine.

[72] See Lemke (2007).

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