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# SOVEREIGNTY AND DEVELOPMENT

## LAW AND THE POLITICS OF TRADITIONAL KNOWLEDGE IN KENYA

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### Abstract

This article investigates the justifications for Kenya's pioneering 2016 legislation to protect the interests of communities in their traditional knowledge. Drawing on parliamentary, governmental and media sources, it argues that law reform was underpinned by political concerns about the exploitation of valuable resources by foreign concerns. This problematization of traditional knowledge in terms of national sovereignty and development defines the scope of the legislation and leads to a number of important shortcomings and contradictions. It puts the nation state at the heart of the legal regime, limiting enforcement to the national territory and giving authorities ultimate the power to override community decisions. While the legislation should be adjusted to address these issues, we also suggest that communities should pursue non-legal alternatives, including the encouragement of ethical commercial conduct through media campaigns and licensing agreements.

Key Words: Traditional Knowledge – Culture – Kenya – Law – Politics – Intellectual Property – Indigenous Peoples

### 1 Introduction

In 2016, Kenya passed legislation to give local communities the power to control their traditional knowledge and cultural expressions and to claim a share of benefits from third party use of these resources. Though inspired by debates in international fora, the law was crucially shaped at national level by political concerns over the loss of valuable resources. These concerns define the ambitions and limits of the legislation, as well as the practical contradictions which beset it. The political stakes of law reform in this area can be clarified through the lens of 'problematization' theory, which rests on the insight that government is done in the first instance through the definition of problems. The latter are not found 'out there', as it were, but are rather produced in law and policy through a combination of moral and expert discourses. An object of regulation like traditional knowledge and cultural expressions (hereafter 'traditional knowledge'), thus, comes to life through a description of needs, threats

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and deficiencies centred upon it. Certain types of individuals, groups or institutions ('governance subjects') are made responsible for addressing the problem in its various dimensions. Certain legal, bureaucratic or economic tools ('governance technologies') are allocated to the task. Producing each of these elements is a work of representation, involving description and justification. The political nature of regulation then – what is covered and what is ignored, who is engaged and who is excluded - depends on the content of these representations.

The Traditional Knowledge and Cultural Expressions Act 2016 grants communities in Kenya a novel and specific (*sui generis*) type of intellectual property (IP) right over their traditional knowledge. The commonly understood aim of this legal innovation, as with more conventional property rights such as patent and copyright, is to allow communities to exclude others from taking or using valuable indigenous resources at will. This mechanism is amplified in the Traditional Knowledge Act by a requirement that the community's prior informed consent to any such appropriation must be obtained on pain of criminal and civil sanctions. The combination of these interventions aims to assist communities to bargain for a share of the profits made on the products created or marketed using traditional knowledge where they choose to license it to outsiders.

The impetus for extending IP rights to traditional knowledge, and the expectations on which they rest, can be traced to processes within international institutions, most notably the World Intellectual Property Organization (WIPO) and, before that, within the World Trade Organization (WTO), which will be discussed below. The ambition to agree a treaty for the protection of traditional knowledge in those fora has been frustrated for some years now, however. In response several countries in the global south have taken the initiative themselves, introducing domestic legislation similar to protect community interests. In that context we would expect the problems associated with traditional knowledge, and the legal solutions proposed in response, to be defined in distinctly national terms. In the present paper, we test this insight with reference to developments in Kenya. Our discussion is based on a close reading of selected interventions in the lead-up to and during the passage of the 2016 Traditional Knowledge Act, including official documents, parliamentary debates and media commentary, as well as a detailed study of the provisions of the legislation itself, and engagement with subsequent academic discussion of its import.

Our selective review suggests that the regime created by the Act is sustained normatively by two main problematizations of traditional knowledge. On the one hand, traditional knowledge is represented as being stolen or misappropriated by external forces, posing a threat to knowledge-makers' sovereignty. On the other hand, it is characterized as an underused engine of development, understood here in a specifically neo-liberal sense, as achievable through the fuller and more successful entry of Kenya into the capitalist world economy, wherein sovereignty is redeployed or captured for generating profit. In the present context, that would mean commercial production and profitable sales based on the licensing of Kenyan traditional knowledge to domestic and foreign concerns. These are the problems to which the Traditional Knowledge Act is addressed. As we will see, what is most notable in this set of representations is that the sovereignty under threat is in fact *national sovereignty*, and the development opportunities being lost are those of the *national economy*. Equally it is the apparatus of the nation state which is called forth as the central 'governance subject', and state law which is to be deployed as the main 'governance technology' in addressing the

problem.<sup>4</sup> There is an inconsistency, then, if not a contradiction, between the community-focussed promise of the legislation, as manifested in some of its provisions, and the nation-centric problematizations on which it rests and which inform many of the Act's key terms.

In the following sections, we set out our theoretical framework, elaborating on the specifics and potential of problematization analysis. We then consider the international legal context, before examining in detail relevant provisions of Kenya's 2016 Act and the manner in which it establishes novel IP rights as a governance technology to be deployed in response to the problematization of traditional knowledge. Thereafter we explore some tensions that result from the over- and under-inclusiveness of the problematizations on which the Traditional Knowledge Act rests. These shortcomings manifest in three ways. First, though the threat to traditional knowledge is widely and vividly portrayed as coming from abroad, the jurisdictional reach of the Act is limited to Kenya: neo-colonial exploitation of traditional knowledge abroad cannot be addressed by it. Quite apart from this territorial limitation, several of the most notorious cases of misappropriation had no factual basis or an exaggerated impact. Second, the sovereignty problematization makes national authorities the key agents of protection and enforcement. However, community interests may be opposed to those of the state or at least insufficiently represented by it, due to histories of exploitation and marginalization, as well as the fact that many groups straddle international frontiers. We note the efforts of the Maasai people to assert what might be understood as a parallel, sub-state sovereignty, outflanking the nation state with the aid of support networks outside Kenya. Third, the development problematization and the legislation perpetuates an understanding of traditional knowledge as discrete, ownable and tradeable, and assumes that there are simple frameworks for identifying and empowering decisionmakers within communities, both of which are at odds with a more messy and negotiated reality. We conclude by considering possible changes to the Act and its regulations, as well as additional mechanisms that might also need to be implemented alongside it to ensure communities benefit equitably from use of their traditional knowledge.

## 2 Problematization, Law and the State

Problematization is a technique of government which functions, first by labelling behaviours and phenomena as threats to specified social goals and, then, by proposing measures to reshape conduct toward attaining these goals. This process is informed by scientific, medical and other theories, and is normatively oriented to collective values (Bletsas 2012: 41). To take a familiar example, people's lack of access to credit may be problematized as the cause of their poverty, drawing on micro-economic theories, themselves guided by household data surveys. This problematization implies that the conduct of commercial banks, state lenders, and borrowers themselves should be guided by technical norms and a greater moral imperative aimed at widening the availability of loans. Problematization analysis developed

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<sup>4</sup> This theoretical register draws on the work of Michel Foucault and followers. In particular we use 'governance subject' here to suggest that various institutions and individuals promote regulatory goals through the exercise of their own agency, rather than simply as the mere instrument of external forces. For an introduction, Dean (2010: 175ff, 228ff).

out of Michel Foucault's theory of 'governmentality' (1991).<sup>5</sup> Taken literally, this proposes that the study of government is a matter of attending to the changing content of 'mentalities' or rationalities in specific regulatory contexts (Walters 2012: 62). Importantly, the sources of these rationalities are not to be found exclusively within traditional state institutions. Rather, as Foucault emphasizes, ruling involves the elaboration of norms and expertise at various locations, for example by professional bodies or academics, at least as much as the issuing of direct commands by a single, centralized powerholder. The state adopts and often depends on these externally generated standards in governing (Death 2016: 57). Its own distinct contribution is to provide a normative 'horizon' lending coherence to diverse problematizations. This horizon may be derived from fundamental constitutional duties and objectives, as well as historical narratives about the origins and purpose of the state (Harrington 2018; Walters 2012: 26). Thus, to return to our example, the 'point' of harnessing academic theories of credit to official lending policy is the state's acknowledged duty to eliminate poverty.<sup>6</sup>

In looking for more specific guidance on how to 'do' problematization analysis in a context like traditional knowledge in Kenya, we turn to the work of Carol Bacchi. She affirms that 'policy is not the government's best effort to solve "problems"; rather, policies produce "problems" with particular meanings that affect what gets done or not done, and how people live their lives' (Bacchi 2012a: 21). This insight has *methodological consequences* in so far as it suggests that problematizations are not above or prior to policy documents, legal texts and so on, but are rather to be found in the diagnoses laid out within them. These materials are not simply sets of instructions to be implemented mechanically by state agents and citizens. Rather they need to be carefully interpreted as exercises in the construction of meaning which draw on and contribute to specific 'govern-mentalities', oriented to broader horizons including national histories and fundamental values (Goodwin 2012: 27). Bacchi's summary also has *evaluative consequences*, in so far as it recognizes that problematizations are not merely descriptive. They can exert a real influence on the self-understandings and capacity for action of individuals and groups in a given society, empowering and 'responsabilizing' some while marginalizing others (Goodwin 2012: 33). Moreover, problematizations are necessarily selective. They are marked by silences, gaps and exclusions as much as by positive content. As a result, certain issues are made more visible while others are neglected and obscured.

This paper takes up Bacchi's challenge of asking 'what's the problem represented to be?'<sup>7</sup> in relation to traditional knowledge in Kenya, through an examination of selected policy statements, parliamentary debates, commentary and the text of the 2016 legislation itself. We follow her in recognizing that any given field of regulation is in fact likely to be the object of multiple problematizations, which can be articulated together, but which cannot be

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<sup>5</sup> See also Rose and Miller (1992) and Lemke (2007).

<sup>6</sup> It is important here to recognize that governmentality theory, and thus problematization analysis, emerged out of an engagement with the domestic history of European states (Joseph 2010). Concerns about its utility elsewhere have been convincingly met by Carl Death, who argues that governmentality theory is well placed to account for the multiple sources of norms and practices (e.g. international organizations, foreign donors, private concerns, as well as national legislatures) through which, for instance, contemporary African societies and states are governed (Death 2016: 58).

<sup>7</sup> For a concise introduction to this approach locating it with reference to governmentality theory, see Bacchi (2012b).

reduced to one another.<sup>8</sup> While noting the important role played by foreign and non-state expertise in the definition of problems, we hold to the insight that the state retains a crucial role here. It establishes governance technologies and subjects through specific legal forms such as intellectual property rights (Lemke 2007). It also provides a horizon for problematizations of traditional knowledge through formal constitutional values and more broadly as the inheritor of anti-colonial struggles and the custodian of national futures. Consistent with Bacchi's critical strategy we look to the gaps and silences in problematizations of traditional knowledge. We pay attention to who and what is neglected by the legislative regime, noting points at which it has been contested and outflanked. Problematization is a process. It is never finished and never wholly successful, and it is in these constructions, limitations and contestations that we will find the ongoing politics of traditional knowledge in Kenya (Bletsas 2012).

### 3 International Debates on Traditional Knowledge

The problematization of traditional knowledge in domestic jurisdictions like Kenya has been shaped by its position within international negotiations concerning trade and intellectual property (IP). Given the growing importance of IP in trade policy since the 1990s, debates over how intangible knowledge assets should be shared across borders or protected from exploitation provide a useful case study for understanding the broader politics of sovereignty and development within the global south. From the late 19<sup>th</sup> century a series of international IP agreements, such as the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property, established a system for recognizing conventional rights such as patents, copyright and trademarks in signatory countries. That regime was intensified and linked to the world trade regime in 1994 with the entry into force of the WTO's Agreement on Trade Related Aspects of Intellectual Property (TRIPS) which raised the level of IP protection required of states and made their obligations ultimately enforceable by permitted trade sanctions (Drahos and Braithwaite 2004).

TRIPS allowed states some leeway about how they implemented their obligations. While developed countries and their corporations pressed for minimal use of these 'flexibilities', least developed and developing countries sought broader freedom to use techniques such as parallel importation and compulsory licensing to override drug patents and allow access to essential medicines during the ongoing AIDS pandemic. More generally, flexibilities would enable technology transfer and improve access to technologies beneficial for development (Lee 2015). This contest has followed a to-and-fro process over the last two decades, with gains for the global south, most notably the Doha Declaration of 2001, being recouped by developed states through strategies like 'forum shifting', where an issue is moved out the remit of an unfavourable institution and into one which is more compliant (Drahos 2007).<sup>9</sup> Similar tensions, between strong IP rights and allowing developing countries more affordable access to technologies, are also evident in international debates about facilitation and finance

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<sup>8</sup> For an insightful analysis of copyright law in terms of multiple problematizations, see Dent (2009).

<sup>9</sup> It should be noted that at the level of implementation, the picture is complex, however, because many developing countries have implemented strong IP protection under TRIPS for various reasons, including lack of knowledge, and pressure from developed nations, see Correa (2001).

of technology transfer in climate negotiations under the United Nations Framework Convention on Climate Change (Latif et al 2011).

It is in this context that the concept of IP rights over traditional knowledge was introduced into the WTO discussions around TRIPS in the late 1990s by NGOs and developing country lobbies, partly as a bargaining chip to justify the TRIPS flexibilities which they sought (Dutfield 2012). Developing countries are net exporters of weakly protected traditional knowledge and related genetic resources (GRs), whereas they are usually net importers of other, strongly protected forms of IP, like patents and copyrights, covering pharmaceuticals, software and industrial processes, for example. As a result, these states often call for stronger protection for GRs and traditional knowledge, while supporting weaker controls in other areas of IP (Oguamanam 2012). By contrast the United States and the European Union have resisted recognition of rights over traditional knowledge that would be enforceable through the WTO system. In order to preserve the gains which they made through linking trade with IP protection for their own products through TRIPS, they 'forum shifted' the potentially disruptive issue of traditional knowledge protection out of the WTO and into World Intellectual Property Organization.

WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in the early 2000s to pursue law reform and its deliberations have continued to date. Progress has been slow however, with no prospect in sight of a treaty to anchor the recognition and enforcement of rights over traditional knowledge as was done for conventional IP rights with agreements such as the Berne Convention and TRIPS. Western countries continue to argue that the costs of such protection for traditional knowledge are unacceptably high given the allegedly vague nature of what traditional knowledge is and who its owners might be. Notwithstanding this failure to create 'hard' international law on traditional knowledge, the WIPO IGC has been influential as a source of 'soft' norms, for example, model laws for the creation of *sui generis* rights. The deadlock at international level has led to some states passing their own legislation based on these models and the IGC has also served as a forum for debating the issues. Developing country groups have articulated the need for formal protection through problematizing traditional knowledge in the manner we have been suggesting. This often involves advancing a strong moral claim to redress enduring wrongs of colonialism. traditional knowledge from the global south is accordingly said to have been 'misappropriated', 'misused', extracted or 'culturally appropriated' for commercial gain by the global North before and since formal decolonization (Antons 2013).

#### 4 Legislating to Protect Traditional Knowledge in Kenya

The Kenya Traditional Knowledge Act of 2016 creates a *sui generis* IP regime in relation to traditional knowledge. This law is one of the most wide-ranging legal frameworks for protecting rights over traditional knowledge globally. Other African countries besides Kenya have introduced national legislation that also protects traditional knowledge to a certain

degree, some taking a more formal approach than others.<sup>10</sup> Of these, the legislation from South Africa and Zambia is most comprehensive and comparable to the Kenyan Act.<sup>11</sup> The latter was influenced by the debates at WIPO about the protection of traditional knowledge that we discussed in the previous section. It was also informed at a continental level by the Swakopmund Protocol of the Africa Regional Intellectual Property Organization (ARIPO) which came into force in 2015.<sup>12</sup> Developed to align ARIPO initiatives with the discussions taking place at WIPO's IGC (ARIPO 2012), the Protocol embodies the position of a substantial group of African states in that forum. It aims to protect traditional knowledge holders against infringements of their rights and the misappropriation, misuse, and unlawful exploitation of expressions of folklore beyond their traditional context. In substance, the Kenyan Traditional Knowledge Act draws on several key provisions of the Swakopmund Protocol, for example, the definition of traditional knowledge as transmitted in an intergenerational manner, associated with a 'traditional community', and integral to its cultural identity.<sup>13</sup>

The Traditional Knowledge Act provides penalties for the unauthorised use of cultural resources such as crafts and music or local medical knowledge outside of the 'traditional' context. It gives cultural practitioners the right to benefit from exploitation of such resources that they agree to, for example by earning royalties from drug and nutrition companies. The legislation provides mechanisms for both defensive and positive protection for traditional knowledge, allowing communities to stop others claiming IP rights over it, and enabling them to do this themselves. Several scholars have reviewed the provisions in the Act in greater detail.<sup>14</sup> Therefore, in this paper we will confine ourselves to a number of key points about its substantive provisions.

First, the Act defines a wide range of subject matter as traditional knowledge whether or not it is 'reduced to a material form' or documented (section 2), as long as it is 'generated, preserved and transmitted' over generations in a community with which they are 'distinctively associated' and 'integral to [its] cultural identity' (sections 6 and 14). It is important to note that the Traditional Knowledge Act does not regulate the appropriation of genetic resources *per se* in Kenya. This is subject to a distinct regime established under a different statute, the Environmental Management and Control Act, 1999.<sup>15</sup> In many cases, of course, valuable genetic resources may also be the subject of traditional knowledge and are accessed, by bio-prospectors for example, through engaging with knowledgeable community members. In such cases the Traditional Knowledge Act will be applicable. But this is not always the case.

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<sup>10</sup> At the time of writing these include Benin, Burundi, Cape Verde, Chad, Congo, Cote d' Ivoire, DR Congo, Djibouti, Egypt, Ethiopia, Ghana, Lesotho, Liberia, Namibia, South Africa, Tanzania and Zambia, see <https://wipolex.wipo.int/en/main/legislation>

<sup>11</sup> For a detailed comparative legal analysis, see Naidoo (2019).

<sup>12</sup> At the time of writing it had eight contracting states: Botswana, Malawi, Namibia, Rwanda, The Gambia, Liberia, Zambia and Zimbabwe. It should be noted that that, though a member of ARIPO, Kenya has not yet ratified the Protocol.

<sup>13</sup> Article 4, Swakopmund Protocol. The criteria vary, but only slightly, in the case of expressions of folklore, see Article 16, Swakopmund Protocol.

<sup>14</sup> See for example Deacon (2017) on transboundary provisions, Otieno (2018) on questions of consent and benefit sharing, and Kariuki (2019) on community ownership of IP rights relating to traditional knowledge.

<sup>15</sup> This regime is established under the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.



Second, the Act grants ‘owner’ or ‘holder’ communities wide-ranging rights to control exploitation of their communally owned traditional knowledge and to authorize outsiders to use it in return for a share of benefits. Rights over traditional knowledge cannot be transferred to others outside the community. This approach is made explicit in the Act’s provisions on moral rights, which prevent the adaptation or misuse of traditional knowledge in a manner inconsistent with tradition.<sup>16</sup> As a result, a grant of authorization to outsiders to use the traditional knowledge is effectively no more than a licence, an approach consistent with the Swakopmund Protocol. No formalities are required for this protection to arise.<sup>17</sup> This mirrors the Swakopmund Protocol,<sup>18</sup> but differs from equivalent legislation in South Africa, which makes protection conditional on registration.<sup>19</sup> As a way of recording ownership claims, the Kenyan Act does provide for the creation of a national register in which communities can document their traditional knowledge, but this is not required.

Third, the Act imposes criminal penalties where traditional knowledge is subjected to unauthorized use outside of its ‘traditional context’ and without free, prior and informed consent from owners or holders (sections 19, 20(3) and 24). In such cases, the community may also pursue civil remedies which include obtaining an injunction on unconsented use, the payment of damages, and restitution of any profits made in this way. Inclusion on the national register can provide the basis for certain third-party IP rights applications (such as patents) to be denied, and enable future cases of misappropriation to be clearly identified.

Finally, the Act also provides for ‘compulsory licensing’ of specific traditional knowledge where it is ‘not being sufficiently exploited by the owner or rights holder’ (section 12). This empowers state authorities to permit commercial interests to use traditional knowledge on payment of royalties, regardless of whether the community has given consent or not. Such provisions are familiar from Kenyan and other national IP law, on patents and copyright, for example. Compulsory licenses are also permitted by the WTO’s TRIPS agreement, by way of exception to states’ obligations to provide for and enforce the rights of IP holders. That exception was invoked by global south states by issuing compulsory licences to ensure access to anti-retroviral medicines during the HIV/AIDS pandemic overriding corporate monopolies (Aginam et al 2013). In the context of Kenyan traditional knowledge, however, the purpose of compulsory licensing is less clearly one of meeting a national emergency. Rather, as the term ‘sufficiently exploited’ suggests, what is at stake here is the contribution that traditional knowledge is making (or not) to economic development, defined as participation in global markets. Though cast as an exception to the general principle of community control, the compulsory licensing provision in the Traditional Knowledge Act, appears to provide a mechanism for promoting the aggregate interests of the nation, as defined by state authorities, rather than those of smaller groups.

## 5. The Politics of the Act: Problematizing Traditional Knowledge

During the process of approving the Act, the main expectations for the legislation expressed in Parliament and the media were that it would: 1) help re-assert control over cultural assets

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<sup>16</sup> Section 21(4) of the Act.

<sup>17</sup> Section 7(1) of the Act.

<sup>18</sup> Article 5.2 of the Swakopmund Protocol.

<sup>19</sup> Section 28B of the South Africa Intellectual Property Laws Amendment Act, 2013.

and thereby promote national identity and economic development; and 2) help harness local community control over cultural assets in the service of its own identity and economic welfare. As we will see, for many legislators, the latter was the subordinate theme, with important provision for residual state control over traditional knowledge being included in the Act.

In the preparation of the Act, frequent reference was made in the media and by political commentators to a number of exemplary cases, which made vivid the threat posed by foreign appropriation of African - and specifically Kenyan - traditional knowledge, effectively problematizing the current lack of regulation. Thus, the Kenyan Institute of Economic Affairs, in an influential report of 2011, recalled the well-known case of the rosy periwinkle, identified by Eli Lilly and Company, a pharmaceutical corporation as a source of treatment for diabetes with the unwitting and uncompensated help of traditional healers in Madagascar in the 1960s. It noted that similar instances of alleged biopiracy have been documented in Kenya in recent decades. The German company Bayer filed a patent on a process for the biosynthesis of acarbose, used for treatment of type II diabetes. The process involved bacteria originally taken from Lake Ruiru (IEA 2011: 6). US biotech company Genencor accessed enzymes in Lake Bogoria, again without the consent of the local community or the Kenyan authorities, and licensed them to Proctor and Gamble for use as a fading agent in washing powder (IEA 2011: 7). It is worth recalling that these cases of (mis)appropriation of genetic resources would not be covered by the Traditional Knowledge Act, as access had been achieved directly through foreign researchers, rather than being facilitated by local knowledge holders. Nonetheless both have been deployed rhetorically to demonstrate Kenya's general vulnerability to exploitation.

Cases of alleged misappropriation of Kenyan cultural expressions were also reported prominently in the local media during this period. These included misuse of Maasai traditions (which will be discussed further below), the patenting in Japan of *kiondo* basket weaving, associated with the Kikuyu and Kamba groups in Kenya, and the attempted registration of a 'KIKOY' trademark for *kikoi* woven textiles in the UK (Saulo 2007; Kimani 2010). It was argued that a lack of domestic IP protection, coupled with the availability of such protection to the foreign company in its own jurisdiction, effectively locked Kenyan hand weavers and traders out of these lucrative markets (Sange 2009; 2010).

Concerns about foreign misappropriation were also presented as justifications for the Traditional Knowledge Act during parliamentary debates on its passage in 2015 and 2016. The minister introducing the legislation, thus, referred to 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 (Mr Katoo MP, Hansard, 12 Nov 2015: 3).

Frequent references were made to the importance of the Act in bolstering cultural pride, with one MP citing the Kiswahili proverb '*Mwacha mila ni mtumwa*', meaning that somebody who leaves his culture is a slave to anything (Mr Wanyoni MP, Hansard, 12 Nov 2015: 34). MPs expressed a defensive concern with 'westernization' and the decline in respect for traditional

cultural practices in Kenyan society. They articulated a correlative moral obligation on citizens and legislators to preserve and transmit 'our good values to the next generations' (Ms Seneta MP, Hansard, 12 Nov 2015: 15).

In justifying the Act, MPs thus reproduced a normative account of loss and theft, and the need to restore integrity, self-respect and dignity by reclaiming culture and lost income. As examples of theft, they referenced the Bayer and Genencor cases discussed above,<sup>20</sup> as well as the misappropriation of designs and crafts:

If I can give an example of kiondo or the locally made baskets, it is unfortunate that today, it is something that has been branded and owned by the Japanese... Unfortunately, the international rights to kiondo are no longer with Kenyans but with another country out there. This is very sad. (Mr Aden MP, Hansard, 12 Nov 2015: 7)

If you dress and walk on the streets of London or New York dressed like a Maasai, somebody will point out that you must be a Kenyan. Why are we not earning royalties and rights over this beautiful tradition as a country? (Mr Aden MP, Hansard, 12 Nov 2015: 7).

There is a notable elision of national and group interests here. '*Kiondo*' and '*Maasai dress*' are explicitly figured as 'Kenyan' in an international setting rather than as the 'property' of specific ethnic groups. The potential for 'domestic' misappropriation within Kenya was largely absent from the debate, except for a few references to the Maasai. One MP noted the use of ethnically specific imagery to represent Kenya to visitors, without benefit to locals:

Big hotels in this country and even outside use artifacts of Maasai women or morans [ie. warriors] on washroom doors. In real sense, the local communities do not benefit from their cultures and cultural expressions. (Ms Seneta, Hansard, 12 Nov 2015: 15).

For most MPs who spoke, however, it was precisely this commercial pursuit of Kenyan interests that justified the legislation. Protecting traditional knowledge would make it available for processing, commercialization and export, allowing Kenya to compete with knowledge-rich countries in the global market for herbal products, 'ethnic' fabrics and so on. This ambition is widespread among African states.<sup>21</sup> It was adopted as a guiding value in the National Policy on Traditional Knowledge that formed the basis for the 2016 Act. The policy presented traditional knowledge as a collective resource, affirming that 'no society can achieve its developmental goals if it ignores its rich cultural heritage embedded in traditional knowledge' (Government of Kenya 2009: 6).<sup>22</sup>

The imperative of harnessing traditional knowledge to national development through the means of IP protection is enshrined in the text of the 2010 Constitution and in the

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<sup>20</sup> Mr Njuguna MP, Hansard, 12 Nov 2015: 12.

<sup>21</sup> This ambition is widespread among African states, see De Beer, Oguamanam and Schonwetter (2014) and Langwick (2010).

<sup>22</sup> This view was echoed by parliamentarians debating the Act, see for example, Mr Ali MP, Hansard, 12 Nov 2015: 36.

government's medium term economic strategy Vision 2030,<sup>23</sup> which is being implemented in this respect by the Natural Products Industry Initiative sponsored by the Ministry of Culture.<sup>24</sup> Now allocated responsibility for implementing the Traditional Knowledge Act itself by an amendment of 2018, the Ministry is required among its tasks to promote the link between culture and development (Nzomo 2018).<sup>25</sup>

This problematization of traditional knowledge in terms of stolen wealth and lost opportunities for development, permitted by a deficient legal regime, was articulated in resonant terms by Julius Mwangi, Professor of Pharmacognosy at the University of Nairobi and a practicing traditional healer. In a lecture of 2012 he argued that, by allowing plant 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). As we have seen, realizing that ambition is facilitated by the compulsory licensing provisions in the Traditional Knowledge Act, which allow state agencies to override community interests. The justification for the extensive powers of the state in this regard was clearly put by one MP who stated that:

What we are trying to conserve is knowledge on, for instance, medicinal values on our plants. That is a role of the national Government. If, for instance, an international pharmaceutical company comes to this country and takes Mwarubaini [ie. neem] and patents it outside the country and then they come back and sell it to Kenya, the country cannot be told that, that is something to leave with a villager. That is a resource which is as important as gold. (Ms. Odhiambo-Mabona Hansard 15 March 2016: 17).

## 6 Challenging the Problematization of Traditional Knowledge

The problematization of traditional knowledge which informed the Act, and which has been outlined above, can be critiqued in three main ways. First, the focus on ideas of theft over-emphasises legal remedies as a means of addressing the misappropriation of traditional knowledge. The Act may not be appropriate or effective in addressing the identified problem because it is only applicable in the domestic jurisdiction, and traditional knowledge misappropriation is also to a significant extent a cross-border problem as the above examples show. Second, the problematization of traditional knowledge suggests that the nation state can address the problem through a strong assertion of *national* sovereignty and by pursuing *national* development. This focus on the state acting on behalf of communities opens the door to compulsory licensing in the national interest, and overlooks the state's often

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<sup>23</sup> See Government of Kenya (2012).

<sup>24</sup> Under articles 11 and 69 of the Constitution, culture is recognized as the foundation of the nation, and the State is required to promote all forms of national and cultural expressions through among others, cultural heritage and enactment of legislation to protect indigenous knowledge, so that communities may receive compensation for use of their cultures and cultural heritage. On the Natural Products Initiative, see Harrington (2015).

<sup>25</sup> Although the National Culture Bill has not passed through the legislative process, early drafts (2014) indicated the close link observed between culture and development, see Nzomo (2015). The current website of the Ministry uses some of the same language around culture and development as the Bill, see <http://sportsheritage.go.ke/projects/>

antagonistic relation with the marginalised communities recognised as the holders of traditional knowledge. Communities claiming traditional knowledge ownership, such as Maasai, may themselves straddle national borders, which is an added layer of complexity. Third, the underlying conception of traditional knowledge as more or less bounded, capable of exclusive ownership and alienation by a single group, belies the social and hybrid nature of such knowledge. In the remainder of the paper, we discuss these points in more detail. We conclude by suggesting ways in which a more nuanced problematization of traditional knowledge would give communities more effective control over its use by state bodies and by commercial interests, whether in Kenya or elsewhere.

The dominant problematization of traditional knowledge suggested, as we have seen, that Kenya's vulnerable and under-utilized national resources are threatened by misappropriation and that they can be reclaimed by legislating for *sui generis* IP rights. However, closer examination of some of the cases mentioned above shows that the factual basis for many of the claims of misappropriation was weak. More generally, the diagnosed problem (foreign misappropriation) did not match the proposed solution (legislation with national effect).

As early as 2008, IP bloggers argued that prominent claims of misappropriation pertaining to *kiondo* and *kikoi*, outlined above and frequently referenced in arguments justifying traditional knowledge legislation, were not factually correct or legally plausible (Njuguna 2008; Olivier 2008). In the case of *kiondo*, no patent can be registered on the handmaking techniques because they are neither novel nor industrially applicable and so fail to meet the basic requirements for a grant. It might be possible to register a process patent or a utility model over new industrial methods of production or a trademark over the term 'Kiondo'. However, Sange (2009) could find no such applications or registrations regarding *kiondo* registered in Japan. Thus, the commercial use of the term and the technique by Kikuyu and Kamba women in Kenya was never in jeopardy. Makers and traders of *kiondo*, surveyed in 2016, did not have any knowledge of the alleged problem, or its proposed solution. Stephen Musyoka, making covers for *kiondo* baskets at Kariokor market in Nairobi, said 'I do not care if the basket was patented in Japan or not, all I know is that making covers for the basket gives me an income. In fact, I do not understand all this talk about patents or what they are all about' (Waruru 2016).

Equally, it was found that the trademark for KIKOY had not in fact been registered in the UK, as had been alleged in the press. An objection had been raised by Kenyan exporters during a 2006 application for trademark protection by a British company (Sange 2010). The company's failure to respond to the objection meant that the application was effectively cancelled, although some earlier figurative marks<sup>26</sup> containing this word had been registered by the same company.<sup>27</sup> In any case, the word mark<sup>28</sup> KIKOY, if registered, would be unenforceable against traders using the term in Kenya, since 'kikoi' is a descriptive term for the product

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<sup>26</sup> A figurative mark is a type of trademark that consists of just a figure or a figure and words. One of the figurative marks, number EU002831691 was a picture of a torso of a woman wearing a kikoi, with the words 'kikoy.com'

<sup>27</sup> The two trademarks, numbers EU002829992 and EU002831691 expired on 27<sup>th</sup> and 28<sup>th</sup> August 2012 and were not renewed.

<sup>28</sup> A word mark is a type of trademark that consists of words. To prevent confusion among consumers, word marks that should stand out both visually and phonetically. However, in the case at hand, 'KIKOY' is phonetically similar to the term 'kikoi'.

there, and should thus be available for free use by other *kikoi* traders (Njuguna 2008; Sange 2010). This would be unaffected by the fact that the term is at present not widely known in the UK as a description of the product (IPKat 2007).

Thus, the *kiondo* and *kikoi* cases referenced in the Kenyan media and in parliament were not clear cases of misappropriation. No relevant IP rights had been registered abroad, and if registered, would not have affected Kenyan traders in the ways that had raised concerns. This is not to say that the word KIKOY or KIKOI could not be registered as a trade mark abroad, as illustrated by the registration of KIKOI by a company in Italy in 1998 for clothing.<sup>29</sup> However, as noted above, such a registration would not affect the use of the term by traders in Kenya. As the word becomes more well-known it may be considered descriptive for clothing even in places like the EU, and thus rejected for trade mark registration in relation to such goods.

While the misappropriation of Kenyan traditional knowledge was not as extensive as originally claimed in the *kiondo* and *kikoi* cases, the potential for this to happen remains (Nnadozie 2012). But, even then, where IP rights over Kenyan cultural heritage have been acquired by third parties abroad, the *sui generis* IP regime in the 2016 Traditional Knowledge Act offers no remedy. Its scope is purely national and in the absence of international agreements on reciprocal traditional knowledge protection, or indeed provisions on cross-border cooperation, it lacks extraterritorial effect (Deacon 2017). Thus, cases centred on the UK, Japan and other states of the global north (or even other African states, since Kenya has not ratified the Swakopmund Protocol) could not have been remedied by the legislation as passed, contrary to the expectations of MPs. There is thus a mismatch between the problematization of traditional knowledge in relation to foreign misappropriation and the scope of the Traditional Knowledge Act.

Our analysis underlines the importance of ensuring that legal solutions to the asserted problem of misappropriation of traditional knowledge are considered ‘in the round’. Claims of misappropriation need to be adequately researched and documented, and both legal and nonlegal remedies considered and grounded in a broader framework of stakeholder education. The necessity of broader approaches to traditional knowledge protection becomes even more evident when considering the experience of the Maasai community.

## 7 Beyond the Nation-State: The Case of the Maasai

The problematization of traditional knowledge use in neo-colonial terms, and the assumption that community ownership of IP rights to extract benefit from foreign companies will translate into national development, obscures ways in which local communities such as the Maasai are already trying to address problems associated with foreign misappropriation in practice. The Maasai, pastoral people living for centuries in the Rift Valley, now located on both sides of the border between Kenya and Tanzania, maintain most of their traditional lifestyle (Mutta and Munyi 2010). As nomads, they have historically depended on traditional knowledge for survival, shared freely amongst themselves. We have already seen that the community is frequently evoked by Kenyan legislators and media commentators as a metonym for the whole nation. The Maasai are thus exemplary of indigeneity put to

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<sup>29</sup> Trademark registration 0000756637.

productive use through tourism and export, but also signify the vulnerability of national culture and resources to unfair exploitation.

Many trademarks invoking Maasai culture have been registered by third parties in foreign countries. In January 2018, the *Financial Times* estimated that 'more than 1,000 companies have used Maasai imagery or iconography to project their brand' (Pilling 2018). In 2011, Louis Vuitton developed a line of clothes based on the 'red and purple-blue of Maasai blankets' or *shuka* as 'a striking new take on the famous LV Damier check' pattern (Menkes 2011; Young 2017). Other fashion houses including Calvin Klein, Ralph Lauren have also referenced Maasai designs. A company initially named 'Maasai Barefoot Technology' (now MBT), operating out of Singapore in a number of countries, marketed sports shoes 'whose destabilising-sole design is intended to build muscle by emulating the Maasai gait over soft ground', some of which 'resemble those that the Maasai fashion from old tires' (Pilling 2018).

As we have noted, the exclusively national focus of the Traditional Knowledge Act means that it cannot be used to sanction misappropriation by foreign companies in other countries. There are also rather weak provisions in the Act for cases where transboundary communities are holders of traditional knowledge (see Deacon 2017). The latter is common in much of Africa owing to the arbitrariness of the frontiers established during the colonial period which divided historic communities between different jurisdictions. Well before the Traditional Knowledge Act was passed, Maasai groups had taken non-legal steps to deal with both of these issues.<sup>30</sup> In 2009, for example, community representatives received training in the documentation of cultural heritage and the management of IP interests provided by WIPO, in partnership with the American Folklife Center at the Library of Congress and the Center for Documentary Studies at Duke University (WIPO 2009). In 2013 the Maasai Intellectual Property Initiative (MIPI) was established to represent the community in both Kenya and Tanzania in its dealings with domestic and foreign institutions (Hebblethwaite 2013).

MIPI's mission statement commits it to regaining control over the use of Maasai images and designs, securing income from such approved use, and distributing that income to a wide range of community projects. It has put direct pressure on companies outside of East Africa to act 'ethically' by paying license fees for access to their traditional knowledge. MIPI is advised in these commercially focussed initiatives by a range of foreign and international bodies (Otieno 2018). Light Years IP, a Washington-based NGO, negotiated on its behalf to obtain license fees from foreign companies, such as UK-based Koy Clothing, which now reportedly donates 5% of the sales of its Maasai *kikoi* patterned garments to MIPI (Akwei 2018). MIPI's claims against these companies are purely based on moral arguments for redress, because there is as yet no formal legal basis for them. Similar kinds of moral pressure have enabled the Pueblo of Zia community to negotiate voluntary licensing agreements with third party companies in the US for use of their Zia sun symbol, even though the community has no right in law to prevent others using the symbol (Saez 2018). In defending against misappropriation, MIPI claims a greater political role for itself as representative of the community, even drafting a 'Maasai constitution' (Musangi 2016). This assertion of group sovereignty was made explicitly by community member John Ole Tingoi, who stated that

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<sup>30</sup> By 'non-legal' here we mean commercial or moral pressure as an alternative to enforcement based on law.

'[t]here has been exploitation of the resources. So, the community feel now it's time for us to control what is ours so that we can determine our future.'<sup>31</sup>

The assertiveness and willingness of Maasai groups to bypass state-sponsored systems of redress may be explained by the long history of exclusion and oppression which their community has suffered at the hands of national authorities, as much as by remote commercial interests. As Joel Ngugi has carefully documented, discrimination against the Maasai, in both the colonial and independence periods, was justified on the basis that they were essentially a pre-modern community, incapable of joining Kenya's modern capitalist economy (2002). Their collective interests in land and resources were thus overridden by colonial settlers and by the new African 'gentry', which the departing British authorities had brought on (Manji 2020). Ironically, it is precisely this view of the Maasai which has allowed them to be fetishized as emblems for tourism, four-wheel drives, and exotic fashions in the manner alluded to in Parliament. This was acknowledged, although only in passing, in the National Assembly debates on the Traditional Knowledge Act:

When talking about the Maasai culture, we do not have to talk about protecting our cultures from outsiders. Everybody has talked about Wazungus [i.e. Europeans], but even the Government is misusing the Maasai culture. The Brand Kenya initiative is using the Maasai brand to advertise Kenya and yet, they are not paying the Maasais. If the Government is using items of the Maasai culture to advertise this country, then the Maasais should be compensated. (Mr Korir MP, Hansard, 12 Nov 2015: 15).

Thus, as we have seen, the Traditional Knowledge Act does not help the Maasai resolve the many cases of foreign misappropriation they have been subjected to, nor does it assist them with the management of ownership claims and benefit sharing negotiations as a transboundary community. By contrast, the actions they have taken on their own initiative have had some success. Otieno (2018) suggests that establishing similar community trusts could assist other indigenous communities in Kenya, not just in negotiating with third parties directly, but also in registering holders and establishing benefit sharing agreements under the Traditional Knowledge Act, as well as exercising moral pressure on companies who are concerned about their public image.

## 8 Beyond Community, Beyond Traditional Knowledge

Our final critique of traditional knowledge Act, and of the set of problematizations on which it rests, focusses on the understandings of community and of traditional knowledge adopted in the legislation. The Act creates a new legal space in which different actors may jostle to exert influence and control over what is 'traditional knowledge', and who should manage or benefit from it.<sup>32</sup> Resolution of these contests is not helped by the terms of the Act, which confers powers on both 'owner' communities and their representatives ('holders') at different

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<sup>31</sup> See WIPO, Transcript of Film 'Digitizing Traditional Culture in Kenya' [http://www.wipo.int/portal/en/transcripts/wipo\\_untv\\_maasai.html](http://www.wipo.int/portal/en/transcripts/wipo_untv_maasai.html)

<sup>32</sup> For research on the functioning of equivalent legislation in Polynesian states, see Forsyth (2012).



points (Kariuki 2019: 96). Disputes within and between communities over consent, benefit sharing and decision-making authority are referred to customary law for resolution, but the sources and effects of these norms are not spelled out in sufficient detail to make them workable. The risk created by definitional uncertainties in the Act is that control over valuable traditional knowledge and, accordingly, the power to monetize it through *sui generis* IP rights, will default to state authorities. This is in fact provided for in the Act in cases where ownership cannot be established, and through the compulsory licensing mechanism discussed above.

A still more profound challenge is presented by the fact that the scheme established by the 2016 Act, like the Swakopmund Protocol, presumes a mutually constitutive relation between traditional knowledge and communities. Thus, 'knowledge' is defined as 'traditional' because it has been handed down within a given community, but equally, the community is identified as such (in part) by its possession of certain forms of traditional knowledge (see sections 2 and 6). The definition of 'community' in the Act (see section 2), which might allow an escape from this circularity, is broad and open-ended. For example, possession of a shared language, shared geographical residence or shared history will be sufficient to constitute a community capable of 'holding' or 'owning' traditional knowledge. In the face of this vagueness, there is more than a possibility that Kenyan courts and implementing agencies will fall back on colonially defined ethnicity as the true meaning of community. Where traditional knowledge is held by more than one community, disputes over control and commercialization may then be conducted as inter-ethnic disputes, mapping on to enduring conflicts over power and resources fostered by colonial and independent governments.

The Traditional Knowledge Act is premised not only on ideas of community and knowledge, but also on the capacity of IP law to protect both. In other words, 'what the problem was represented to be', to use Carol Bacchi's term, included a lack of IP rights and the failure of Kenyan authorities to adopt this legal form as a governance tool in the national interest. But those elements of the problematization can also be challenged. Established IP law tends to create exclusionary property rights over knowledge vested in a single individual, which may include a corporation or some other form of juristic person. While it is true that the *sui generis* regime brought into being by the Traditional Knowledge Act calls forth the 'community' as collective owner, the rights created under it are no less exclusive. As Graham Dutfield has convincingly claimed, this form is entailed by, and enabling of the drive to modernize, and, thus, commercialize traditional knowledge (2017). Like us, he argues that law reform has been introduced with an eye to the monetary, rather than the social, aesthetic or spiritual value of traditional knowledge in its many forms. We would add that an instructive comparison is offered by the drive of donors and the World Bank to encourage individual titling of previously common land across the global south, in order to stimulate agricultural productivity and generate exports. Exclusive rights, it is assumed, protect the weak and allow realization of economic value to the benefit of all.<sup>33</sup> Paradoxically, in order to protect knowledge and culture, (like the land in which they are often deeply embedded) (Drahos 2014), they need to be moved out of the traditional and into the modern.

Even among those challenging misappropriation of traditional knowledge, the idea of two rigidly separate domains remains strong. For such commentators, the modern steals from the traditional in a zero-sum struggle between neo-colonial expropriators and nationalist

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<sup>33</sup> For a brief overview, see Anon (2020).

defenders. Modernity is not to be refused, however, but rather participated in subject to the direction and control of the nation state (see Osseo-Asare 2014). In reality, relations between traditional and modern knowledge have been considerably more complex. Their production, reproduction and use have been entwined on an ongoing basis. That history is certainly marked by inequality, extraction and exploitation, but also by exchange and hybridity. Traditional healers, for example, have long appropriated and adapted biomedical practices and medicines (Harrington 2015). They also borrow from each other, across geographic distances and ethnic divisions. Patients in many parts of the world combine remedies from different 'systems' in more or less licit ways.

Exclusivist approaches to IP also fail to distinguish within traditional knowledge between generally held knowledge that is shared, hybridized, and unmoored from any origins - eg. as regards common remedies - and more localized, specialized knowledge within small groups or communities that could feasibly be linked to specific 'holders', and more easily made the subject of IP rights. Protection of traditional knowledge, dictated from the top-down at national level and applied to such a diverse range of subject matter, is likely to inhibit hybridity and exchange in accordance with the wishes and practices of traditional knowledge custodians and users. For Dutfield, 'mutually advantageous collaborations', between communities and outsiders, 'based on respect for local norms regulating access, control and ownership' are possible (2017:144).<sup>34</sup> But national legislation like the Traditional Knowledge Act and binding international agreements, such as the Convention on Biodiversity, which create exclusive rights and are largely oriented to commercialization, are unlikely to achieve this.

## 9 Conclusion

We have framed our study of law and the politics of traditional knowledge in Kenya using Carol Bacchi's theory of problematization. This builds on the insight that 'policies produce "problems" with meanings that affect what gets done or not done, and how people live their lives' (Bacchi 2012a: 21). It pays attention to the idioms in which these problems are cast, their resonance with historical and contemporary common sense. It asks us to consider what is obscured and neglected, who is marginalized or (potentially) harmed, as a result of specific problem descriptions. In this case, what 'got done' was the 2016 legislation vesting rights in communities over their traditional knowledge. The justifications presented for the Act in media reports and parliamentary debates were framed in terms of imminent loss, vulnerability to 'piracy' by foreign companies, and untapped potential for national economic growth. They problematized the state and the system of conventional IP protection in Kenya for not defending national sovereignty and for failing in its role as the agent of development. A new regime of *sui generis* IP rights was proposed as the governance tool which would remedy this set of problems. Communities would be 'responsabilized' to secure the benefits of traditional knowledge for themselves and the nation through the exercise of these rights.

In critiquing this set of problematizations, we drew attention to 'what doesn't get done' across three dimensions. First, the focus on addressing the 'theft' of Kenyan traditional

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<sup>34</sup> See also Mutta and Munyi (2010)

knowledge by the global north over-emphasises legal remedies that cannot govern overseas actors as a means of addressing the misappropriation of traditional knowledge. It overstates the scope of the legislation itself, which remains firmly national and does not address international misappropriation by foreign firms. Second, the problematization of traditional knowledge misrepresents the nation-state as a neutral actor acting on behalf of communities to achieve development goals. Provisions in the Act allowing state control through provisions for compulsory licensing, lack of clarity on questions of community ownership, and the absence of workable provisions on dispute resolution may all increase conflict over the management of benefits from traditional knowledge. Third, the representation of traditional knowledge as a static resource owned by a single group underplays its dynamic reality, and potentially inhibits future hybridity and exchange in accordance with the wishes and practices of traditional knowledge custodians and users. It also overemphasizes the commercial potential of traditional knowledge at a time when the ethical branding of products like cosmetics, with lower returns, is more likely than, for example, the patenting of high value medicines derived from indigenous knowledge (see Laird and Wynberg 2017).

In fact, research conducted since the passage of the Act suggests that it has not had a significant effect on the lives of communities who are holders of traditional knowledge, other than creating a complex bureaucracy for administration of their new rights. Chepchirchir and colleagues (2018) found that there is still little awareness of the Traditional Knowledge Act among most relevant stakeholder groups. It is true, as we have seen, that Maasai groups have taken advantage of the enabling climate established by the Constitution (after 2010) and the Traditional Knowledge Act (after 2016) to reassert their claims to community ownership of their traditional knowledge. However, in order to do this, they have had to go beyond the framework set up by the Act, correcting for its exclusively national focus, and asserting community-level sovereignty.

The problematization of traditional knowledge is borne out of the national and international context within which the Kenyan state finds and positions itself. This context includes the historical legacy of colonial and neo-colonial exploitation, as articulated in parliamentary and policy discourses, and in the wider media. It is arguable that the rhetorical force of these discourses obscured the technical difficulties in addressing North-South misappropriation through extending IP rights to communities at the national level. However, it is worth noting that the regulatory measures proceeding from such problematizations can be amended, even in piecemeal fashion. Thus, for example, ongoing developments at international level offer the potential for addressing cross-border issues neglected in the Traditional Knowledge Act. While a comprehensive treaty at global level through WIPO is unlikely at present, the new African Continental Free Trade Agreement, signed by Kenya, but not yet in force, will have a chapter on enforcement of IP rights beyond the domestic jurisdiction (Ncube 2016).<sup>35</sup> While the Traditional Knowledge Act domesticates some provisions of the Swakopmund Protocol, formal ratification and full implementation by Kenya and its neighbours would ensure more effective mechanisms for the protection of transboundary traditional knowledge (Deacon 2017). Mechanisms set out in the Swakopmund and Nagoya Protocols, as well as the African

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<sup>35</sup> See Annex 9, Annex on Intellectual Property Rights Under Article 27(1) of the SADC-EAC-COMESA Tripartite Free Trade Area Agreement (20.12.2010).

Court on Human Rights and Justice, could also provide models for more effective dispute resolution over the use of traditional knowledge.

Incremental change based on a more nuanced problematization of traditional knowledge is also possible at the national level. As well as improving and clarifying dispute resolution mechanisms, more attention could be paid to supporting community organisations that can exercise their rights (Otieno 2018), and helping them develop community protocols on access (Kariuki 2019) that could regulate both third party access and compulsory licensing by the state. This would build on the example of the Maasai community, which we have discussed. Capacity-building support for communities seeking to protect their traditional knowledge and to benefit from its use should cover additional approaches, aside from legal regulation, including publicising inappropriate practices in the media, registering conventional IP rights such as trademarks or geographical indications to support communities, using certification labels, voluntary licenses or formal contracts, and drafting codes of conduct (Deacon and Smeets 2018). These will be particularly important in marketing environments that focus on the brand implications of using traditional knowledge (including references to social justice) rather than their scientific benefits to a product.

Our critical analysis of the problematization of traditional knowledge in Kenya should not be taken as amounting to a denial of the problems identified or a utopian demand for a fully accurate and holistic description of this field. Problematization as such will always be partial and incomplete, marked by foreshortening and occlusion. It can, however, be adjusted, through the inclusion of previously marginalized perspectives and willingness to challenge prior assumptions

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