

**REVITALIZING INTELLECTUAL PROPERTY RIGHT  
PROTECTION FOR TRADITIONAL KNOWLEDGE AND  
CULTURAL EXPRESSION IN ETHIOPIA: A LESSON FROM  
KENYA**

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**ABSTRACT**

*Ethiopia, being a country with multi-ethnic population is endowed with plenty of traditional knowledge (TK) and traditional cultural expressions (TCE). Nevertheless, the arrival of globalization has created fertile ground for commercial exploitation and distortion of the TK and TCE of the country by alien without any economic or moral incentive to their custodians or preservers. Recently, efforts are being made to adopt sui-generis form of intellectual property (IP) law to preserve, protect, and promote TK and TCE at international, regional and national levels yet Ethiopia has no effective IP law on TK and TCE. Hence, inspired by the inadequacy of the existing Ethiopian IP laws in protecting, promoting, and commercializing TK and TCE, this article proposes key forward to revitalize legal protection of TK and TCE in the country. To this end, it utilized doctrinal and comparative research that drawn lesson from a revolutionary experience of Kenya in this regards. The paper advocates for enactment of a sui-generis law that rectify deficiency of the existing IP law and adequately protect, preserve, promote, and commercialize the TK and TCE. In so doing, it is suggested to follow the Kenya's footsteps, ratify the Swakopmund protocol and adopt the sui-generis law from Kenyan TK and TCE Act in line with relevant Model laws.*

**Keywords:** *Traditional Cultural Expression (TCE), Traditional Knowledge (TK), Ethiopia, Kenya, Intellectual Property (IP)*

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## 1. INTRODUCTION

It is truism that Ethiopia is homeland of diverse Nations, Nationalities and Peoples that are gifted with diverse IK and TCE. Traditional knowledge and TCE are the integral part of the cultural heritage of a country and thus are an essential means of social identity of each Nations, Nationalities and People in the country. The cultural heritage of the country include but not limited to: traditional literature, arts, music, visual arts, ceremonies, traditional medicines and medical practices, traditional dispute settlement and system of self-governance, agriculture, forest management and conservation and sustainable use of biological diversity.<sup>1</sup> These TK and TCE are a body of knowledge vital to the day to day life of local communities derived through generations of living in close contact with nature. TK and TCE have also contributed significantly to the present body of knowledge possessed by scientists, such as ethno botanists, ethno pharmacologists, and by agriculturists, foresters, and food technologists.<sup>2</sup> They may also contribute to the welfare, sustainable development and cultural vitality of those communities.

However, with the arrival of globalization, there has been an increase in the commercial exploitation or appropriation of TK and TCE in Ethiopia by entrepreneurs without any benefit and prior informed consent of the communities to which the cultural expression/knowledge belong.<sup>3</sup> For instance, it has been reported that “a researcher in Tennessee (US) has obtained a US patent on four medicinal plants (known in Amharic Damascisa, Tena Adam, Kosso and Birbira)<sup>4</sup> those have been used by Ethiopians for centuries.”<sup>5</sup> Similarly, the Dutch company obtained EU patent on the Ethiopian teff though later challenged and invalidated by court in

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<sup>1</sup>OSSREA, Indigenous Knowledge Systems in Ethiopia: Report of Ethiopia National Workshop, available at : <<https://www.africaportal.org/documents/5270/ethiopia-2002.pdf>>

<sup>2</sup> World Intellectual Property Office 2013, ‘Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries in Transition’

<sup>3</sup>Sable Mulat, Property Rights Approach Towards Traditional Cultural Expressions in Ethiopia: Challenges and Prospects (LL.M Thesis, Addis Ababa University,2015)

<sup>4</sup> The US Patent 6,811.795 issued on 2 Nov 2004.

<sup>5</sup>Jay Mcgown, Out of Africa: Mysteries of Access and Benefit Sharing, 2006, P7, available at: [https://www.google.com/url?q=https://acbio.org.za/wp-content/uploads/2015/02/ACB\\_Out\\_of\\_Africa\\_Mysteries\\_of\\_access\\_and\\_benefit\\_sharing.pdf&sa=U&ved=2ahUKEwjCvIPq1I7uAhXTasAKHQOTDNqQFjAFegQIAxAB&usq=AOvVaw2qYuk2oVqTGMK9tur7aGMW](https://www.google.com/url?q=https://acbio.org.za/wp-content/uploads/2015/02/ACB_Out_of_Africa_Mysteries_of_access_and_benefit_sharing.pdf&sa=U&ved=2ahUKEwjCvIPq1I7uAhXTasAKHQOTDNqQFjAFegQIAxAB&usq=AOvVaw2qYuk2oVqTGMK9tur7aGMW)< last accessed January 2, 2021>.

Netherland.<sup>6</sup>What is more, the Oromo's Gadaa<sup>7</sup> system can also be considered as the origin of democracy<sup>8</sup>yet the ancient Greek is often being celebrated as the first creator of the system. That way, the indigenous communities who were the custodians or preservers of their TK and TCE left without enjoying the economic or moral benefit of their creation or share returns from such unauthorized exploitation by person alien to the community.<sup>9</sup>

Recently, the international attention has turned to IP laws to preserve, protect, promote, and safeguards TK and TCE so as to enable the concerned indigenous community to reap the expected benefit of their TK and TCE, and prevent the distortion of the same.<sup>10</sup> The IP rights confer protection to intangible creation of the human mind, namely, inventions, artistic and literary works, and trademarks among others. The IP laws play an important role to revitalize TK and TCE by providing legal protection for the custodian and preservers. This is because legal protection enables, encourage and protect tradition-based creation and innovation, prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of TK and TCE, and achieve the fair and equitable sharing of benefits arising from the use of their TK and TCE.<sup>11</sup> It also incentivizes the indigenous communities and

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<sup>6</sup> Dagnachew Mellese, Bio-piracy: International Perspective and the Case of Ethiopia (Legal and Institutional Regime, LL.M Thesis, Addis Ababa University, July, 2013). P.59. See also Kluwer Patent blogger, Teff Patent Declared Invalid, Great News for Ethiopia, available at <<http://patentblog.kluweriplaw.com/2019/02/12/teff-patents-declared-invalid-great-news-for-ethiopia/>>

<sup>7</sup> Gadaa System is traditional democratic system of governance created and used by the Oromo people in Ethiopia and Kenya, and developed from knowledge gained by community experience over generation.

<sup>8</sup> Zelalem Tesfaye, *Old Wine in New Bottles: Bridging the Peripheral Gadaa Rule to the Mainstream Constitutional Order of the 21st C. Ethiopia*, Oromia Law Journal (2015) , Vol.4, No.1

<sup>9</sup> Jay Mcgown, *supra* note 5

<sup>10</sup> Anurag Dwivedi and Monika Saroha, *Copyright Law as a Means of Extending Protection to Expression of Folklore*, Journal of Intellectual Property Law (2005), Vol.10, P311.

<sup>11</sup> See WIPOThe Protection of Traditional Knowledge: Draft Articles', Rev. 2 (August 31, 2018) (hereinafter the WIPO Draft Articles on Traditional Knowledge), Preamble & Art. 2, and WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators' Rev. 2 (June 15, 2017) (Hereinafter WIPO Draft article on Traditional Cultural Expression), preamble & Art 1

their members to protect, develop, promote, safeguard, and commercialize their traditional creations.<sup>12</sup>

Against this backdrop, number of African countries have already legislated, or are on the ways of legislating effective IP laws for TK and TCE.<sup>13</sup> In this regards, Kenya exemplifies a regional leader and introduced the ‘Protection of Traditional Knowledge and Cultural Expressions Act’<sup>14</sup> in 2016. In Ethiopia, there is no separate IP law that protects TK and TCE, and it is also subject of scrutiny as to whether the existing IP regime could extend direct/indirect protection to TK and TCE. The absence of effective in IP law that accommodates and confers IP right to communities has opened doors for theft, misuse and bio-piracy of TK and TCE in the Country.<sup>15</sup>

This article appraised adequacy of the existing Ethiopian IP laws in preserving, protecting, promoting, and commercializing TK and TCE and proposed a key forward to revitalize legal protection of TK and TCE in the country. In so doing, it employed a comparative and doctrinal research approach that utilized both primary and secondary sources to draw lesson from the experience of Kenya. Kenya is selected as model for she has taken revolutionary steps in adopting the most celebrated *sui generis* law that learns from existing international and African frameworks, and better accommodates the special needs of TK and TCE, and that other African nations including Ethiopia could learn from this exemplary experience of Kenya. Besides, the selection is justified taking into account the fact that both Ethiopian and Kenyan community share relatively similar traditional view as African and neighboring countries.

The paper is organized as follows. Following this introductory section, section two provides a basic conceptual frameworks and justification for protection of TK and TCE in general. Section three reviews the international

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<sup>12</sup>*Ibid.*

<sup>13</sup>Expressions/Traditional Knowledge/Kenyan Reform on Traditional Knowledge and Traditional Cultural Expressions: Two Year on, available at <http://ipkitten.blogspot.com/2019/02/kenyan-reform-on-traditional-knowledge.html?m>

<sup>14</sup>The Republic of Kenya, Protection of Traditional Knowledge and Cultural Expressions Act, NO. 33 of 2016 Revised Edition 2018 [2016] ( Kenyan Traditional Knowledge and Cultural Expressions Act)

<sup>15</sup>Abiy Hailu, Ethiopia: Absence of Special IP System Resulting in Indigenous Knowledge Exploitation(2017); accessed from <https://allafrica.com/stories/201707240816.html>

and regional effort toward the protection of TK and TCE. Section four appraises the adequacy of the existing Ethiopian IP laws in protecting TK and TCE whereas section five proposes holistic *sui generis* law that learns from the experience of Kenya to revitalize legal protection for the TK and TCE in Ethiopia. Lastly, the paper ends with concluding remarks.

## 2. BASIC CONCEPTUAL FRAMEWORKS AND JUSTIFICATION FOR PROTECTION OF INDIGENOUS KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION

The term traditional knowledge (TK) refers to ‘knowledge that is created, maintained, and developed by indigenous [peoples], local communities, [other beneficiaries], and that is linked with, or is an integral part of the national or social identity and/or cultural heritage of indigenous [peoples], local communities; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.’<sup>16</sup> TCE on the other hand refers to ‘any form of artistic and literary expression, tangible and/or intangible, or a combination there of, in which traditional culture and knowledge are embodied or which are indicative of traditional culture and knowledge and pass from generation to generation and between generations including, but not limited to: phonetic or verbal expressions, expressions by action, tangible expressions, adaptations of the expressions referred to in the above categories.’<sup>17</sup>

As can be inferred from these definitions, TK and TCE has certain common characteristics. They are collectively held by a community, handed down from generation to generation, either by verbal transmission or by imitation; continuously utilized, circulated, evolved and developed within the community for many years; reflect a community's cultural and social identity; made by ‘author unknown’ or by communities or by individuals within their communities, and often made for noncommercial purpose.<sup>18</sup>

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<sup>16</sup> See WIPO Draft Articles on Traditional Knowledge, Art.1

<sup>17</sup> WIPO Draft Article on TCE, Art.2

<sup>18</sup>WIPO, Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore (WIPO Background paper No.1, 2003), P26.

The legal protection of TK and TCE has ample justifications. The main justifications include: recognition of value, empowering communities, supporting customary practice of the community, safeguarding traditional cultures, encouraging community innovation and creativity, contributing to cultural diversity, precluding unauthorized IP rights, enhancing certainty, transparency and mutual confidence etc.<sup>19</sup> Accordingly, the legal IP right protection of IK and TCE is justified by protection and preservation of cultural integrity, prohibition of unjust enrichment, prevention of economic and moral harm to the community. Hence, given her diverse Nations, Nationalities and Peoples that are gifted with enormous TK and TCE, and the government's endeavor to promote, protect preserve, and commercialize this cultural diversity for economic development and technological advancement; it is also rationale to provide efficient IP protection regime for TK and TCE in Ethiopia.

Such legal IP protection sought to incorporate in different legislative framework could be of two types: defensive and positive protection. Defensive protection is a mechanism that prevents the acquisition of IP rights.<sup>20</sup> Positive protection on the other hand enforces the rights of indigenous communities over their TK or TCE by granting and recognizing these rights legitimately.<sup>21</sup> This enables them to control their knowledge and further reap the benefits of their commercial exploitation. In furtherance of this, indigenous groups are seeking protection for their IK and TCE and their responses have affected legislation at national and international levels.

### **3. SELECTED INTERNATIONAL AND REGIONAL EFFORT TO PROTECT INDIGENOUS KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION**

#### **3.1.INTERNATIONAL EFFORTS**

At international level, various legal frameworks relevant for protection of TK and TCE have been adopted under the auspicious of WIPO, UNESCO, WTO and UN system. UNESCO adopted two conventions with respect to

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<sup>19</sup> The WIPO Draft Article on TCE, Preamble & Art 1 and The WIPO Draft Article on TK, Preamble & Art 2

<sup>20</sup>Lillian Makanga, *Biopiracy and Case for Traditional Medicine in Kenya* (L.L.B, Strathmore University, 2017)

<sup>21</sup>*Id*, P20

TCE, namely the Convention for the Safeguarding of the Intangible Cultural Heritage (CICH) and Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) but none of them addresses IP right over cultural expression.<sup>22</sup> There event international legal frameworks adopted under the auspicious of the WIPO include: Berne convention, Paris convention, Rome convention and WIPO Performances and Phonograms Treaty 1996. The WIPO-UNESCO “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions was also developed by joint effort of UNESCO and WIPO. Under WTO system, trade related intellectual property system (TRIPS) is relevant for protection of TK and TCE. Though mainly of the biodiversity law than being IP law, the convention on biodiversity and its protocol can also be considered relevant for protection of TK associated with biodiversity and genetic resources under the UN system. These instruments provide certain protection for TK and/TCE under copy right, performer’s right, patent right and sui-generis laws.

### 3.1.1. PROTECTION UNDER COPYRIGHT SYSTEM

Berne Convention<sup>23</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>24</sup> are relevant international frameworks that accord legal protection to TCE under copyright. Copyright protection is available for “literary and artistic works” as referred to in the Berne Convention for the Protection of Literary and Artistic Works.<sup>25</sup> The Convention makes it clear that all productions in the literary, scientific and artistic domains are covered, and no limitation by reason of the mode or form of their expression is permitted. The Convention also provides an illustrative list of the works protected. Accordingly, a numbers of TCE for which protection is desired are productions in the literary, scientific and artistic domain and therefore, in principle, constitute the actual or potential subject matter of copyright protection.

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<sup>22</sup>WIPO, *supra* note 18,P38

<sup>23</sup>Berne Convention for the Protection of Literary and Artistic Works ,1979 (hereinafter Berne convention)

<sup>24</sup>Agreement on Trade Related Aspects of Intellectual Property (TRIPs), 1994 (hereinafter TRIPS)

<sup>25</sup>The Berne Convention,Art 2.

Art 2 15(4) of the Berne Convention included works of folklore in the enumeration of ‘literary and artistic works. The provision states that “in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”<sup>26</sup> Hence, the inclusion of this article in the convention implies the possibility of granting protection for TCE. Furthermore, the provision of Berne convention is also expressly accepted under Art 9 of TRIPs which states that all members shall comply with Arts 1 through 21 of the Berne Convention (1971) and the Appendix thereto.<sup>27</sup>The issue of TCE was also explicitly included in the agenda of the TRIPS Council at Doha Conference 2001.<sup>28</sup> However, the protection of TCE under copyright system has its own limitation as some requirements of copyright protection like originality and fixation are difficult to satisfy for the bulk of the TCE.

### 3.1.2.INDIRECT PROTECTION UNDER PERFORMER’S RIGHT

The protection of performer’s right is regulated under Rome Convention<sup>29</sup>, WIPO Performances and Phonograms Treaty (WPPT)<sup>30</sup> and TRIPS agreement. Performers’ rights, as recognized in the WPPT protect performances of ‘literary and artistic works or expressions of folklore’.<sup>31</sup> Article 2 of the WPPT provides that for the purpose of the treaty, ‘performers’ are defined as ‘actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or *expressions of folklore*’<sup>32</sup> Thus, it can be submitted that WPPT expressly recognizes the protection of performers of

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<sup>26</sup> The Berne Convention, Art 15.4(a)

<sup>27</sup> The TRIPs Agreement, Art 9

<sup>28</sup> WTO website:<[https://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm)>

<sup>29</sup>Rome, Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organization, done at Rome on October 26,1961(hereinafter, Rome Convention )

<sup>30</sup>WIPO Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of October 29, 1971

<sup>31</sup>WIPO Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of October 29, 1971 (WPPT).

<sup>32</sup>The WPPT, Art.2.

the folklore which has an indirect<sup>33</sup> relevance to protection of TCE that is performed by certain performer.

Under TRIPs, though no definition is given to the term performer, article 14(1) of the TRIPs agreement which provides protection for performers in respect of their performance on a phonogram, can be construed as wide enough to cover performers of TCE and therefore capable of protecting TCE indirectly. Whereas under Rome Convention, the word ‘performers’ is defined as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic work.<sup>34</sup> Here, it can be argued that the protection for performances of literary and artistic works which is provided by the Rome Convention and the TRIPS Agreement is not limited to works protected by copyright and include TCE. However, the problem with the protection of TCEs through performers’ right benefits only those who perform TCEs and not the indigenous people that created it unless the indigenous people themselves or members thereof perform or seek protection over the works as performers.

### 3.1.3. THE PROTECTION UNDER PATENT RIGHT

Paris Convention<sup>35</sup> and the TRIPS are some of the international instrument that may provide IP protection to TK. The Paris Convention is an international legally binding agreement concerning property rights in patents, utility models, industrial designs, service marks, indications of source or appellations of origin and trademarks. Hence, it is possible for innovations of the community to be protected under trademark, utility models, industrial designs, service marks, and indications of source or appellations of origin provisions of the Paris Convention. This Convention does not, however, contain provisions for granting patents to TK per se, or any other kind of knowledge for that matter, although it recognizes and would protect modern industrial products and services generated from that knowledge. The TRIPS agreement sets minimum standards for countries to follow in protecting

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<sup>33</sup>The protection accorded to the performed TCE at this juncture is merely indirect as the performance rights are primarily intended to protect the interest of the performer itself than that the owner of the performed TCE.

<sup>34</sup>The Rome Convention, Art 3(a)

<sup>35</sup>Paris Convention for the Protection of Industrial Property, 1883(Hereinafter' Paris Convention)

intellectual property. Article 1 of the TRIPS Agreement (on the nature and scope of the obligations) provides some flexibility in the implementation of the provisions of the Agreement. Hence, the parties to the TRIPS Agreement can invoke this provision to enact legislation for protecting traditional knowledge.

Though not IP regime in itself, the Convention on Biological Diversity (CBD),<sup>36</sup> also advocates for IP protection of TK on the assumption that recognition of IP right in TK could generate incentives for indigenous peoples to conserve the environment and manage biodiversity. Article 8(j) of the Convention states “ the contracting party shall as far as possible and as appropriate, subject to its national legislation respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity and promote the wider application with the approval and involvement of the holders of such knowledge and encourage the equitable sharing of benefits arising from utilization of such knowledge, innovations and practices”. The CBD also requires member states to facilitate access to genetic resources and associated TK and encourage equitable sharing of the benefit arising out of its utilization.<sup>37</sup>

To facilitate the implementation of these issues, the ‘Nagoya Protocol<sup>38</sup> was adopted in 2011. The protocol calls for the equitable sharing of benefits arising from the utilization of genetic resources and associated TK.<sup>39</sup> The overall structure of the Protocol recognizes to communal nature of TK and enshrines the need for fair access regime, prior informed consent, and mutually agreed terms and fair and equitable sharing of benefit arising from access to genetic resources and associated TK. In harmony with CBD, the

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<sup>36</sup>Convention on Biological Diversity, done at Brazil, Reo de Jenero on June 5, 1992 (hereinafter The CBD)

<sup>37</sup>The CBD, Art.15

<sup>38</sup>Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, decision X/III of COP- 10,(UN Doc. UNEP/CBD/COP/10/L.43/Rev.1 Annex I (here in after Nagoya Protocol).

<sup>39</sup> Nagoya Protocol, Art.4(4).

International Treaty on Plant Genetic Resources for Food and Agriculture<sup>40</sup> also recognizes the enormous contributions of farmers to the diversity of crop that feeds the world, and entitled them with a right to protection of TK relevant to plant genetic resources for food and agriculture; the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and the right to participate in making decisions, on matters related to conservation and sustainable use of plant genetic resources for food and agriculture.<sup>41</sup> Yet, like CBD this instrument being a biodiversity agreement is more concerned with conservation of biological resources than the IP rights.

### 3.2. EFFORTS TOWARD *SUI-GENERIS* LAWS

A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue.<sup>42</sup> In context of TK and TCE, a *sui generis* approach implies a system that modifies some of the features of existing IP rights so as to accommodate the requirements of the IK and TCE. A number of legislative models exist around the world that has incorporated a *sui generis* model in the form of ‘collective/communal IP rights’ that is intended to specifically govern TK and TCE. This includes WIPO-UNESCO ‘Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions and the two Draft articles prepared by the WIPO Intergovernmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge, and Folklore, i.e, WIPO draft article on protection of TCE<sup>43</sup> and WIPO draft article on protection of TK.<sup>44</sup>

UNESCO-WIPO model Provisions protects TCE from illicit exploitation and other prejudicial actions and requires acknowledgement of source when TCE

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<sup>40</sup>International Treaty on Plant Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations, 2009 (hereinafter International Treaty on Plant Genetic Resources for Food and Agriculture).

<sup>41</sup>International Treaty on Plant Genetic Resources for Food and Agriculture, Art.9

<sup>42</sup>Anselm Kamperman Sanders, *Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications*, The Journal of World Intellectual Property (2010), Vol. 13, No. 2, P20.

<sup>43</sup> WIPO Draft Article on Protection of TCE, *supra* note 11

<sup>44</sup> WIPO Draft Article on Protection of TK, *supra* note 11

is used.<sup>45</sup> It provided for rights that are adequate to protect the communities. This influential document recommends a *sui generis* protection of expressions of folklore and, amongst others, provides for: principles of protection; the scope of subject matter; the manner of obtaining authorization; the exceptions to and limitations on authorization; the moral rights attached to copyright; civil and criminal sanctions; the designation of the competent authority to administer copyright; and the protection of expressions of folklore of foreign countries.

The two recent draft articles by WIPO on protection of TK and TCE also aimed to adopt a multilateral convention that affords *sui generis* protection for TK and TCE respectively. Under the preamble and objective provision, both instruments incorporated policy objectives, general guiding principles, specific substantive principles and justification for recognizing TK and TCE as cultural intellectual creative assets of communities.<sup>46</sup> Both Draft articles provide a detail provisions that relates to definitions for technical terms, subject matter of protection, the beneficiaries of protection, and scope and conditions of protection.<sup>47</sup> Finally, both draft articles provides for provisions dealing with sanctions, remedies and exercise of rights, application, administration of rights and interests, exceptions and limitations, and terms and formalities of protection, in their respective areas of protection.<sup>48</sup> In these Draft articles, WIPO has identified highlighted issues such as creation of appropriate system to access TK or TCE, ensuring fair and equitable benefit-sharing, promoting the development of indigenous peoples and local communities; promotion, respect, preservation, wider application and development of TK or TCE, provide a mechanism for the enforcement of rights of TK/TCE holders as key objectives that would guide policy formulation and eventual legislation of a *sui generis* form of IP rights for TK or TCE. The two articles are yet to be adopted as convention but could still serve as a guide for adopting *sui generis* laws on TK and TCE but national level.

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<sup>45</sup> WIPO-UNESCO Model Convention, sections 4-5

<sup>46</sup>See the WIPO Draft Article on TCE , Preamble & Art 1; WIPO Draft Article on TK, Preamble and Article 2

<sup>47</sup>The WIPO Draft Article on TCE, Arts 2 -5; WIPO Draft Article on TK, Arts. 1, 3-5.

<sup>48</sup> The WIPO Draft Article on TCE, Arts 6 -10; WIPO Draft Article on TK, Arts 6-11.

### 3.1. AFRICAN REGIONAL FRAMEWORKS

At regional level, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore<sup>49</sup> intended to provide a framework to provide *sui generis* protection for TK and expression of folklore Africa. The Protocol is an initiative of member states of the ARIPO adopted on 9 August 2010.<sup>50</sup> In its preamble, the protocol recognizes the intrinsic value of TK, traditional cultures and folklore, and the urgent need for legal protection tailored to the specific characteristics of TK and expressions of folklore. The primary purpose of the Protocol is to protect TK holders against any infringement of their rights and to prevent misappropriation, misuse and unlawful exploitation beyond their traditional context.<sup>51</sup> The Protocol grants exclusive rights to communities to authorize the exploitation of their TK, and to prevent exploitation without their prior informed consent. The protocol resembles the Draft WIPO articles and contains detailed provisions on criteria of protection, formality for protection, the beneficiaries of protection, right conferred, assignment and licensing of the right, equitable benefit-sharing, recognition of right holders, exceptions and limitations, compulsory license, duration of protection, and administration and enforcement of protection for both traditional knowledge and expression of folklore.<sup>52</sup> It requires the setting up of a National Competent Authority responsible for implementing it.<sup>53</sup> Moreover, “the Contracting States shall ensure that accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies are available where there is a breach of the provisions relating to the protection of traditional knowledge and expressions of folklore”.<sup>54</sup>

Besides, there is African Model Legislation for Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access

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<sup>49</sup>Swakopmund Protocol on Protection of Traditional Knowledge and Expressions of Folklore within Framework of African Regional Intellectual Property Organization (ARIPO), adopted on 9 August 2010 (Swakopmund Protocol)

<sup>50</sup>*Ibid.*

<sup>51</sup> The Swakopmund Protocol, Section 1.

<sup>52</sup> The Swakopmund Protocol, Sections 4-23.

<sup>53</sup> The Swakopmund Protocol, Section 3.

<sup>54</sup>The Swakopmund Protocol, Section 23.

to Biological Resources<sup>55</sup> that is intended to serve as a basis for national legislation on protections of TK associated with biological resources, and plant and animal varieties. The Model Legislation recognizes communities' rights over their biological resources and TK, and the right to collectively benefit from the utilization thereof.<sup>56</sup> It states that any access to a biological resource, innovation, practice, knowledge or technology shall be subject to the prior informed consent of the concerned community; shares benefits with concerned community and recognition of IP rights of the community.<sup>57</sup> As regard farmer's right, the model law entitled the farmers to the protection of their TK relevant to plant and animal genetic resources and to obtain an equitable share of benefits arising from the use of plant and animal genetic resources.<sup>58</sup> Nevertheless, this model law is more of bio-diversity legislation and that do not fully accommodate the IP right over TK.

The Swakopmund Protocol along with aforementioned international and regional *sui-generis* model laws has been used as basis for national policy and legislative initiatives. Accordingly, some African countries like Egypt, Botswana, Ghana, Malawi, Mozambique, Namibia, Uganda and Zambia<sup>59</sup> adopted legislation with some components of the Swakopmund protocol and the other model laws yet to date; Kenya remains the only country in Africa with a specific policy and laws on TK and TCE adopted from the protocol and these model laws.

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<sup>55</sup>African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Genetic Resources adopted by OAU, 2000(here in after Africa Model Law)

<sup>56</sup>The Africa Model Law, Art 16 (1).

<sup>57</sup> The Africa Model Law, Arts 18, 21, 22.

<sup>58</sup> The Africa Model Law, Art 26

<sup>59</sup> Paul K. Sena, Challenges in the African Region to Protecting Traditional Knowledge, Genetic Resources and Folklore, available at <<https://communitylegalresources.files.wordpress.com/2014/04/challenges-in-the-african-region-to-protecting-traditional-knowledge.pdf>>

#### 4. REAPPRAISING THE ADEQUACY OF THE EXISTING ETHIOPIAN INTELLECTUAL PROPERTY LAWS IN PROTECTING TK AND TCE

##### 4.1. PROTECTION UNDER THE COPYRIGHT AND NEIGHBORING RIGHTS

In Ethiopia, Copyright and neighboring right are governed by Copyright and Neighboring Right Proclamation No.410/2004<sup>60</sup> and copyright and neighboring right proclamation (amendment) proclamation No. 872/2014.<sup>61</sup>As can be inferred from its Preamble, the copy right Proclamation is inspired by the assumption that protection of literary, artistic and similar creative works has a major role to the cultural, social, economic, scientific and technological development of a country. Art. 2(8) of the proclamation defined copyright as “an economic right subsisting in a work and in appropriate case moral right to an author”. Art 2(30) of proclamation defined work as ‘production in literary, scientific and artistic fields’ and provides illustrative list of what constitutes literary, artistic or scientific works that are subject of copy right protection. Accordingly, copyright protection is available for production in literary, artistic and scientific work without any distinction as to mode or form of their expression. Hence, as many of TCE are literary, artistic or scientific production, they, in principle, constitutes literary, artistic or scientific work that is potential subject matter of copyright protection. Besides, the amendment proclamation added one lists dealing with ‘applied arts’ under art 2(30) (J). According to the draft notes/explanation of the amendment proclamation, such inclusion of work of applied arts under illustrative list of works protected by copyright was arguably intended to cover TCE as copyrightable work.<sup>62</sup>

As regard, derivative work, translation, adaptations, arrangements and other, transformations or modifications of works; collection of works such as encyclopedia or anthologies or databases whether in machine readable or

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<sup>60</sup> Copyright and Neighboring Rights Protection, Proclamation No. 410/2004, 10<sup>th</sup> Year No. 55, Addis Ababa, 19<sup>th</sup> July, 2004(hereinafter Copy Right and Neighboring Right Proclamation)

<sup>61</sup>Copyright and Neighboring Rights Protection (Amendment), Proclamation No. 872/2014, 21<sup>st</sup> Year No. 20 Addis Ababa, 14<sup>th</sup> January,, 2015

<sup>62</sup> Biruk Haile, Lecture on Advanced Intellectual Property Law Course (Unpublished), Haramaya University,2017,taken from the lecture note that I have written down during his lecture class.

other form provided that such collections are original by reason of the selection or arrangement of their contents are protected work<sup>63</sup>, and hence, if certain TCE has got protection as a work of applied art, sculpture, engravings or other oral works illustrated under Article 2 (30) of the proclamation, its derivatives have also a potential to be protected as derivative works. Furthermore, the provisions of the proclamation governing neighboring right have a potential of indirectly protecting TCE. Accordingly, the performer of TCE is entitled to performance right over his performance, and this will accord indirect protection for TCE but if the performance in itself constitutes independent TCE, the performer's right directly protects the TCE.

#### **4.1.1. Limitation of the Copyright System to Accommodate TCE**

As has been discussed above, the existing Ethiopian copyright system attempted to accord certain legal protection to TCE by considering TCE as a literary, artistic or scientific work through the inclusion of the work of applied arts or more generally by taking note of illustrative nature of the list under Art 2(30). But, it is questionable as to whether copyright regimes are adequate to protect TCE because of different reasons. As can be understood from the overall reading of the proclamation, being qualified as artistic, literary or scientific work is not by itself sufficient to attract protection under copyright law and there are other necessary requirements that must be fulfilled for the work to be protected as copy right. Besides, there are also a number of provisions of the proclamation relating to copyright that are not appropriate to the special nature of TCE and Ethiopia's reality with respect to TCE. Below, I will briefly explain the limitation and inadequacy of the current Ethiopian copyright system in protecting TCE.

##### **A) Requirement of Originality**

Art 6 of the copyright and neighboring right proclamation imposes the requirement of originality for the work to be protected under copyright. Accordingly, a literary or artistic work which is an object of copyright and which is created by a subject of copyright is not copyrightable if it lacks originality. However, even if requirement of originality for purpose of copy right is relative than being novelty, it is still difficult to satisfy in the bulk of

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<sup>63</sup>The Copyright and Neighboring Right Proclamation, Art.4

TCE. It is known that, most of the TCE are created in ancient time and drawn largely upon pre-existing tradition, custom and belief which have evolved over the passage of time.<sup>64</sup> As it passed from generation to generation orally and reached the current generation through a gradual and incremental process, it is difficult to know even the time when they are created let alone assessing its originality. In such cases, even the next generations can add new improvements or knowledge during the incremental process, their creativity was limited at least in respect of the pre-existing knowledge and their role mainly imitate and recreation of what has been handed over to them by the preexisting generation. Hence, it can be argued that even if there is possibility that certain TCE to satisfy the originality requirement, it is difficult for most of pre-existing TCE to qualify as original work of subsequent generations as far as there are no improvements and new creations added by the later.

### **B) Requirement of Fixation**

The Ethiopian copyright system imposes the requirement of fixation for the literary, artistic or scientific work to attract legal protection as copyrightable work.<sup>65</sup> The proclamation defined 'fixation' as the embodiment of works or images or sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device prepared for the purpose.<sup>66</sup> It means that for the works to enjoy copyright protection, they have to be reduced to a tangible medium or expressed in some external form such as a manuscript, drawing, film, or mechanical recording or it can be expressed in the form of speech. However, this requirement of fixation under the proclamation is very difficult to satisfy for TCE. It is obvious that Ethiopian people have no habit of reducing their cultural expression in written form that their traditional expression is transferred from generation to generation by oral means. As a result, the bulk of traditional expressions of

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<sup>64</sup>Kuek Chee Ying, *Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?*, Journal of Malaysian and Comparative Law(2005), Vol.2

<sup>65</sup>Art 6 of the proclamation states that the author of work shall, irrespective of the quality of the work and the purpose for which the work may have been created, be entitled to protection, for his work without any formality and upon creation where it is a) Original; and b) Fixed

<sup>66</sup> The Copyright and Neighboring Right Proclamation, Art.2(11)

indigenous people in Ethiopia were not reduced in writing or other tangible form that they rarely satisfy the requirement of fixation.<sup>67</sup>

### **C) Identifiable Author's Requirement**

Under Ethiopian legal system, the protection of copyright presupposes the existence of identifiable author of the work be it is single or several authors. This could be understood from the provisions of the proclamation that defined copyright as economic right and whenever appropriate the moral right of an author.<sup>68</sup> The same idea could be understood from article 6 of the proclamation which states irrespective of the quality of the work, the author of the work is entitled to legal protection in his work provided that the work is original and fixed.<sup>69</sup> The proclamation defined author as a person who intellectually created the work, and recognize the possibility of collective author and joint author.<sup>70</sup> In general the copy right is all about the right accorded to the author that protection of the work as copyrightable is unimaginable in absence of identifiable creator of the work. However, for the most of TCE in Ethiopia, it is difficult to identify and trace their creators as they are communally created and held and/or because the creators are simply unknown.<sup>71</sup> Therefore, due to this identifiable author requirement<sup>72</sup> that is difficult to satisfy for bulk of the TCE, the Ethiopian copyright law is not appropriate for TCE.

### **D) Different Conception of Ownership**

The other limitation of Ethiopian copyright system in protecting TCE relates to the conception of ownership which gives emphasis to individual ownership right. The proclamation states that “owner of copyright” is the author where the economic rights are vested in the author, where the economic rights are originally vested in a natural person other than the

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<sup>67</sup>In this regard, Art 2.2 of the Berne Convention provides requirement of fixation is optional and thaw there was an opportunity for Ethiopia to exclude fixation as a requirement of copyright protection.

<sup>68</sup>The Copyright and Neighboring Right Proclamation, Art.2(8)

<sup>69</sup>The Copyright and Neighboring Right Proclamation, Art.6

<sup>70</sup>The Copyright and Neighboring Right Proclamation, Art.2(2)

<sup>71</sup> WIPO, *Supra* note.18, p.38

<sup>72</sup>At this juncture, unidentifiable /unknown author shall be distinguished from anonymous author indicated as indicated under art 20(5) of the proclamation. The author of anonymous author is known and identified but the author preferred it to be published anonymously upon his choice.

author or in a legal entity, that person or entity, where the ownership of the economic rights has been transferred to a natural person or legal entity, that person or entity; and provide the brief rules on ownership.<sup>73</sup> However, the proclamation emphasizes the notion of individual ownership, but this form of ownership is incompatible with indigenous customs and traditions that emphasize communal ownership. Hence, the notion of ownership advocated by the proclamation is not suitable for TCE. As has been said, it is difficult to trace individual author of TCE as they are communally created and held, or owned by the past and present generations of that community. But, as the provisions of the proclamation dealing with ownership emphasize on the private ownership be it is individual, collective or joint ownership<sup>74</sup>; it lacks sufficient room to accommodate room for communal ownership by indigenous community.

Furthermore, even in situation where there possibility of communal ownership, there is no detail rules on various issues<sup>75</sup> like: how to identify owning community? Which community own which creation? How shared knowledge among various communities will be dealt with? What institution will represent that community? How exploitation of such TCE be made? There is also no rules that guides the use of proceed of exploitation, whether it is to be invested for communal interest like research and promotion of community culture or divisible among individual member of the community.<sup>76</sup>In short, the rule of ownership provided under Ethiopian copy right system is not only inappropriate but also inadequate to accommodate the needs of TCE.

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<sup>73</sup>The Copyright and Neighboring Right Proclamation, Arts.2 (16) &21.

<sup>74</sup>Note that the notion of communal ownership on the TCE should be distinguished from the notion of collective ownership and joint ownership that allows two or more persons to be the owner of a given work as envisaged under Art 2(5) and 2(29) of the proclamation . In communal ownership, the owner is the community at large including the past and present generation of that community and that they are not individually identified but in joint or collective ownership, all individual members exist and/or individually identified.

<sup>75</sup>Even if some of these issues are addressed under the Ethiopian Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006; the scope of proclamation is limited to TK associated with genetic resources, and that it has no applicability to the TCE and the independent TK.

<sup>76</sup>The Copyright and Neighboring Right Proclamation, Arts.2(16) &21

### E) Limited Duration of Copyright

Under Ethiopian copyright system, duration of copyright is limited to life of the author plus fifty years.<sup>77</sup> However, the limited duration of copyright will lead to problematic question with regard to TCE. Firstly, the community has perpetual existence that their cultural expression needs the perpetual protection.<sup>78</sup> As the duration of copyright is limited to certain time to be counted from the death of the author, this will be awkward for TCE as community never dies. On the other hand, if we are referring to ancient generation of the community that have been claimed to create a TCE many centuries ago, it could be claimed that the term of protection would have long expired.<sup>79</sup> Hence, concept of fixed duration of copyright does not meet the need of the traditional communities who desire perpetual protection for TCE.

### F) Idea-Expression Dichotomy

The idea-expression dichotomy is a legal doctrine that limits scope of copyright protection to only expressions of ideas and not ideas.<sup>80</sup> Ideally, the idea/expression dichotomy ought to regulate the public domain by seeking to ensure that ideas are available for use by potential creators.<sup>81</sup> The Ethiopian Copyright right system protects the expression but not the underlying idea or original thought of the author. This is clearly provided under art 5 of the proclamation as “any idea, procedures, system, method of operation, concept, formula, numerical tables and forms of general use, principle, discovery or mere date, even if expressed, described, explained, illustrated or embodied in a work.”<sup>82</sup> However, there could be situation certain style and methods of creating TCE may be vulnerable to imitation.<sup>83</sup> For instance, person alien to the community in question may imitate such style and methods of creating TCE for creating something for his own benefit.<sup>84</sup> In

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<sup>77</sup>The Copyright and Neighboring Right Proclamation, Art 20

<sup>78</sup>Anurag Dwivedi and Monika, *supra* note 10, P312.

<sup>79</sup>*Ibid.*

<sup>80</sup>Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, University of Miami Law Review (1993), Vol.47(5) 1221, P1224

<sup>81</sup>*Ibid.*

<sup>82</sup>The Copyright and Neighboring Right Proclamation, Art .5

<sup>83</sup>Kuek Chee Ying , *Supra* note 64

<sup>84</sup>*Ibid*

such a situation, copyright protection might not be available since it involves idea that is style or method, but not expression of the idea.

### **G) Failure to Provide Defensive Protection**

In context of TCE, the defensive protection includes all mechanisms by which access to the TCE is restricted, including access which may result in the TCE becoming the IP rights of a third party.<sup>85</sup> It also encompasses mechanisms that enable the recognition of the interests of the communities that produce the TCE.<sup>86</sup> The existing Ethiopian copyright not only fails to provide a positive protection to TCE but also to some extent incapacitate the indigenous community from preventing unauthorized exploitation of their TCE in different ways. As bulk of the TCE are traditionally considered a common heritage of mankind that falls into the public domain, copyright system indirectly enables non indigenous people to acquire copyright over new TCE or on those TCE incorporated in derivative works.<sup>87</sup> There are enormous exceptions/limitations<sup>88</sup> in which the author cannot prevent exploitation of his work; however, such exceptions in ordinary copyright system may be excessive in respect of TCE as exploitation of TCE under guise of such exceptions may cause intolerable harm to community.

#### **4.1.2. Limitation of the Neighboring Right System to Accommodate TCE**

As has been mentioned earlier, TCE could be accorded indirect protection under the performer's rights. It is also claimed that the provisions of Ethiopian copyright and neighboring right proclamation dealing with right of performer could extend indirect protection to TCE. Art 2(14) of the Proclamation that defines neighboring rights as the rights performers, producers of sound recordings, broadcasting organizations have over their works.<sup>89</sup> However, Ethiopian neighboring right system is inadequate to provide indirect protection to TCE for the following key reasons.

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<sup>85</sup>Enyinna S. Nwauche, *The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa* (PhD Dissertation, North-West University, 2016), P 53.

<sup>86</sup>*Ibid.*

<sup>87</sup> WIPO, *Supra* note 18, p.42

<sup>88</sup> Copyright and Neighbouring Right Proclamation, Arts 9-19.

<sup>89</sup>The Copy Right and Neighboring Right Proclamation, Art.2(14)

### **A) The Limited Definition of Performer**

Under Ethiopian neighboring right system, ‘Performer’ is defined as actor, singer, musician, dancer, and other person who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works.<sup>90</sup> As can be inferred from this definition, for a person to be regarded as a performer, he should perform literary, artistic and scientific work that it is not expressly addressed whether TCE is a work that can be performed in furtherance acquiring neighboring right over it. In this regard, art 2(a) of WPPT defined performers” as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore thereby explicitly recognizing expression of folklore /TCE as a type of work that can be performed by performer.<sup>91</sup> To the contrary, Ethiopian neighboring right system does not expressly included TCE as subject matter of performance, and hence, it frustrates indirect protection of TCE under right of the performer.

### **B) No Direct Benefit to the Concerned Community**

The other limitation of Ethiopian neighboring right system in according indirect protection to TCE is that there is no economic benefit that will be given to the developers and custodian of the TCE upon which performance right is available. It is obvious that the right of performance provided under the copyright and neighboring right proclamation is accorded to the performer himself and not to the community that are original developer and preservers of the underlying TCE performed by the performer. Of course in some situation, the performer of the TCE may belongs to same community that is the holder of that cultural expression, and in such cases, it can be argued that a benefit of protection accorded to the performer who is the member the community in question can be considered as a benefit for that community. However, in situation where the performer is alien to that community that are holder of the performed cultural expression, there is no any benefits that will accrue to the relevant community.

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<sup>90</sup>The Copright and Neighboring Right Proclamation, Art.2(19)

<sup>91</sup>The WPPT, Art.2(a)

## 4.2. THE PROTECTION UNDER PATENT PROCLAMATION

In Ethiopia, patent and related right are regulated by the Proclamation on 'Inventions, Minor Inventions and Industrial Designs'.<sup>92</sup> Article 2(5) of the proclamation defined patent as the title granted to protect inventions, and invention is defined to mean an. idea of an inventor which permits in practice the solution to specific problem in the filed of technology. Article 3 of the same states an invention is patentable if it is new, involves an inventive step and is industrially applicable. Hence, though there is rare possibility, TK satisfying these requirements could potentially patentable. However, the bulk of the TK as such cannot be patented and effectively protected under the proclamation because of the following main challenges.

### A) Identifiable Inventor Requirement

The proclamation requires a single individual to be identified as an inventor.<sup>93</sup> However, TK is developed inter-generationally, where in most cases it is difficult to trace the initial time of the first invention and inventors. Hence, it is difficult to identify single individual as inventor of TK, and that one cannot claim patent right over TK. Even more, to claim joint ownership of patent, the law requires one or more persons to jointly involve in the invention and to the same goal.<sup>94</sup> However, the bulk of TK are created by the past generation and the current generation could only make changes to and develops the previous knowledge to adapt to the new environmental and socio-economic changes, and in such situations, it is difficult to claim for patent right over the TK unless it was claimed in respect of the new improvements only.

### B) Novelty

Novelty is assessed with reference to prior art or state of the art. Prior art in the context of the patent proclamation implies the complete body of knowledge which is available to the public before a patent application.<sup>95</sup> This is because article 3(2) of the proclamation requires absolute novelty of an

<sup>92</sup>Inventions, Minor Inventions and Industrial Designs Proclamation, Proclamation No. 123/1995 (here in after Patent Proclamation).

<sup>93</sup> The Patent Proclamation , Arts 2(3) & 8

<sup>94</sup> The Patent Proclamation, Art 7(2)

<sup>95</sup> The Patent Proclamation, Art.3

invention in which every disclosure irrespective of its form and place accounts prior art. Any invention which is made public before application is filed would be considered prior art, and hence this requirement of novelty is difficult to satisfy for bulk of the TK.

### C) Inventive Steps

This standard requires that the claimed invention be non-obvious for a person with ordinary skills in a given technical field, and this is known through a comparison of the claimed invention and the prior art.<sup>96</sup> Though there might be certain TK that may involve some sort of inventive steps as in the case of traditional herbal medicine, the bulk of the TKs are usually crude materials that are processed simply and do not involve sophisticated know-how. Hence, for most of TK, it is widely recognized that the difference between the prior art and the claims at issue is difficult, and hence, rarely satisfy this requirement of inventive step.

### D) Limited Duration of Patents

Patents are made public on registration, but grant the owner an exclusive monopoly over the invention for twenty years. In this regards, Art 16 of the patent proclamation states “A patent shall be granted for an initial period of fifteen years commencing from filling date of the application for protection. Upon expiration of the duration, the invention becomes freely available to use. Indigenous people, however, seek to hold rights in their TK in perpetuity unless they are fairly compensated; and this makes the patent registration unsuitable for TK protection.

## 4.3. PROTECTION UNDER THE BIO-DIVERSITY AND ABS REGIME

In addition to the limited protections accorded to it under patent laws as discussed above, certain categories of TK associated with biodiversity and genetic resources can be protected under biodiversity laws of Ethiopia yet this regimes have no place for TCE. The relevant biodiversity legislations of

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<sup>96</sup> Xuan Li, *Novelty and Inventive Step: Obstacles to Traditional Knowledge Protection under Patent Regimes: A Case Study in China*, European Intellectual Property Review (2007), Vol. 29, No(4) 134, P135.

the country in this regard include Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation<sup>97</sup> and Plant Breeders' Right Proclamation.<sup>98</sup> These legislations are primary bio-diversity legislations dedicated to ensure access to and sustainable utilization, protection, conservation and exploitation of biodiversity and genetic resources but they are not IP regime for protection of TK and TCE. Even if certain protections are accorded to TK associated with biodiversity and genetic resources during access to these resources, these legislations have no relevancy for protection of other TK that are independent of biodiversity and genetic resources, and hence, are not full-fledged regime for TK.

As can be understood from its objective provision, the Genetic Resources and Community Knowledge, and Community Rights Proclamation primary aimed at ensuring that the country and its communities obtain fair and equitable share from the benefits arising out of the use of genetic resources so as to promote the conservation and sustainable utilization of the country's biodiversity resources.<sup>99</sup> However, as has been reflected under the preamble and its substantive provisions, the proclamation also accords legal protection and recognition for TK associated with the genetic resources.<sup>100</sup> Hence, being inline with the CBD and the African model law, the proclamation regulates access to genetic resources and related community knowledge, and ensures protection of community right on the genetic resources and community knowledge<sup>101</sup>in these courses. Accordingly, the proclamation vested the ownership of community knowledge in the concerned local community.<sup>102</sup>As per Art 6 of the proclamation, local communities are entitled with (1) the right to regulate access to their community knowledge;

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<sup>97</sup>Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006, Federal *Negarit Gazeta* 13th Year No. 13 ADDIS ABABA-27th February, 2006 (Hereinafter Access to Genetic Resources and Community Knowledge Proclamation)

<sup>98</sup> Plant Breeders' Right Proclamation No. 481/2006, 12th Year No. 12 ADDIS ABABA – 27th February, 2006 (Hereinafter The Plant Breeders' Right Proclamation)

<sup>99</sup> Access to Genetic Resources and Community Knowledge Proclamation, Art.3

<sup>100</sup> Access to Genetic Resources and Community Knowledge Proclamation, Preamble, Para. 5-7

<sup>101</sup>Community knowledge means knowledge, practices, innovations or technologies created or developed over generations by local communities on the conservation and use of genetic resources. See Art 2(14) of Access to Genetic Resources and Community Knowledge Proclamation

<sup>102</sup> Access to Genetic Resources and Community Knowledge Proclamation, Art.5.

(2) right to use their community knowledge; (3) the right to share from the benefit arising out of the utilization of community knowledge<sup>103</sup> and norms of the concerned communities. What is more, the proclamation subjected access to TK to the prior informed consent of the concerned local community.<sup>104</sup> Under Article 10(1), it further mentions the protection of community right over their TK as they are enshrined in the customary practices. However, the main limitation of this proclamation to protect TK is that it failed to cover that are not associated with genetic resources. There are enormous TK that have no relation with genetic resources but the scope of TK covered by the proclamation is not wide enough to address all TK in the country. Even for those TK covered under the proclamation, it failed to incorporate moral rights such as right of attribution and paternity that could have been granted via IP regimes.

The plant breeder's proclamation too is not primarily intended to grant the IP right to the farmer but intended to consolidate the plant breeder's rights over the new plant variety created by him/her and put certain privileges given to farmers in relation to the use of the plant variety as an exception to the breeder's rights.<sup>105</sup> In respect of protected variety, farmer is entitled to use protected varieties including material obtained from gene banks or plant genetic resource centers to develop farmers' varieties; and to save, use, multiply, exchange and sell farm-saved seed or propagating material of protected varieties. However, it would constitute infringement if the farmers sell the farm-saved seed or propagating material of a protected variety in the seed industry as a certified seed. Even in respect of the farmer's variety which constitute a community knowledge, farmers are granted a few right limited to use, save, exchange and sell farm-saved seed or propagating material of that farmers' varieties<sup>106</sup> but not a full-fledged communal IP rights

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<sup>103</sup> Access to Genetic Resources and Community Knowledge Proclamation, Art.6.

<sup>104</sup> Access to Genetic Resources and Community Knowledge Proclamation, Art.12 (2).

<sup>105</sup> It is highlighted in the preamble of the proclamation that granting certain privileges in respect of the plant breeder's right will ensure that the farming and pastoral communities of Ethiopia, who have been conserving and continue to do so in the future the agro-biodiversity resource used to develop new plant varieties, continue to their centuries old customary practice of use and exchange of seed.

<sup>106</sup> Farmer's variety means a plant variety having specific attributes and which has been *discovered, breeds, developed or nurtured* by Ethiopian farming communities or a wild relative of variety about which the Ethiopian farming communities have common knowledge. see Art 2(9) of the plant variety proclamation

as that of the plant breeder's rights. Overall, these limited privileges/rights mainly relate with right to use, save and exchange or sell have been reserved for the farmers as a reward for the enormous contributions that they have made and will continue to make in the conservation and sustainable use of plant genetic resources but not as IP right for their creativity.<sup>107</sup> For this reasons, the plant breeder's proclamation is short of providing sufficient IP protection for TK.

## **5. TOWARD *SUI GENERIS* LAW FOR TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSION IN ETHIOPIA: DRAWING A LESSON FROM KENYA**

### **5.1. A *SUI GENERIS* PROTECTION OF TK AND TCE IN KENYA**

Like Ethiopia, Kenya is rich in TK and TCE. A popular example of TK and TCE in Kenya includes the barefoot technology of the Maasai people which spurred a successful shoe brand, the kikoi (woven cloth), the lessa (decorative cloth or sash) and the akala (tyre sandals).<sup>108</sup> Kenya has approximately forty-two communities with unique languages, cultures, experiences and ways of life making it easy to comprehend the rich expressions of folklore and TK in that country.<sup>109</sup> The Maasai community of Kenya in particular has for centuries captivated the world with their distinctive way of life, dances, dress, ornaments, and traditional medicines. However, over the last two decades, there has been widespread exploitation of Maasai culture by non-Maasai, in Kenya and Tanzania and abroad, often without the consent of the Maasai peoples.<sup>110</sup> As a result, the Maasai have fought against the exploitation of their culture and the harms that occur through improper cultural exploitation from the tourism sector.<sup>111</sup> As a response to this pressing need to protect TK and TCE from the Maasai and other community, the government of Kenya issued the National Policy on

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<sup>107</sup>See Art 27 of the plant breeders proclamation

<sup>108</sup>*supra* note 13

<sup>109</sup>Enyinna S. Nwauche, *supra* note 85, P88

<sup>110</sup>Naomi L. Leleto, *Maasai Resistance to Cultural Appropriation in Tourism*, The Indigenous Peoples' Journal of Law, Culture & Resistance (2019), Vol.5 No.1, P22

<sup>111</sup>*Ibid.*

Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions in 2009.<sup>112</sup>

The policy intended to provide a national framework for recognition, preservation, protection and promotion of sustainable use of TK, TCE and genetic resources. It also outlines policy statement which requires the government in collaboration with other stakeholders to create awareness on the importance and the value of TK and Folklore, Document for preservation and protection, Promote Research and Development in TK and Folklore, and protect the various rights of holders of TK and Folklore.<sup>113</sup> Moreover, the policy recognizes inadequacy of the existing IP right regimes and the increasing demand for *sui generis* systems to enhance, protect and honor TK and TCE.<sup>114</sup> The policy clearly suggests a reform process with a *sui generis* legislation being implemented concurrently with other relevant laws, building institutional capacity, and participation in decision making and its implementation.<sup>115</sup> The reform of Kenyan law was motivated by an edict of Kenya's Constitution<sup>116</sup>, which required the state to promote culture and cultural heritage and to enact legislation in this regard.<sup>117</sup> That reform process has been kick-started by issuing of the Draft Bill on Protection of TK and TCE in 2013. The bill was put accessible for the public participation and consultation<sup>118</sup> for more than three years to solicit important comments and suggestion and finally adopted as Knowledge and Traditional Cultural Act in 2016, and its revised version is released in 2018.

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<sup>112</sup> National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, Government of Kenya, July 2009 (The Kenyan Policy)

<sup>113</sup> The Kenyan Policy, Policy 4.4

<sup>114</sup> The Kenyan Policy, Policy 4.5

<sup>115</sup> The Kenyan Policy, Policy 5

<sup>116</sup> The Constitution of Kenya, 2010

<sup>117</sup> Article 11 (1) of Kenyan Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, and requires the parliament shall enact legislation to (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

<sup>118</sup> A meaningful participatory process was followed throughout the lawmaking process of the Kenyan traditional knowledge and cultural expression law in light of Art 196 (1) of the Kenyan Constitution which states that “ a county assembly shall conduct its business in an open manner, and hold its sittings and those of its committees, in public; and (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

The New Act is intended to provide a frame work for the protection and promotion of TK and TCE and to give effect to Articles 11, 40 and 69(1) (c) of the Kenyan Constitution which generally restates the government's duty to ensure community's property right over their cultural heritage. The structure of the act heavily drawn from and closely follows structure of the Swakopmund protocol<sup>119</sup> and the Draft WIPO articles, and organized in 8 parts. Part I provides for preliminary issues such as Interpretation of relevant terms/phrases, guiding principles and responsibility of county and national governments of Kenya towards protection of TK and TCE. Under this part, the act provided interpretive definition for traditional knowledge<sup>120</sup> and cultural Expression<sup>121</sup>, and set out values and principles set out in the Kenyan Constitution as guiding principles. Part II and III of the Act provide separate rules for TK and TCE respectively addressing *inter alia* issues relating to criteria of protection, formality for protection, right of protection, right conferred, and duration of protection. The remaining parts of the Act provide for detailed rules that is commonly applicable for both TCE and TK including the content of right to protection along with its exceptions and limitations, moral right of the community, right of assignment and licensing and additional rights, right to equitable benefit sharing rights, and

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<sup>119</sup>Kenya is original member of ARIPO, and signatory of Swakopmund protocol

<sup>120</sup> Art 2 of the Act defined "traditional knowledge" as any knowledge (a) originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or (b) contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biodiversity, and know-how of traditional architecture, construction technologies, designs, marks and indications

<sup>121</sup>The act defined "cultural expressions" as "any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise of the following forms of expressions or combinations thereof— (a) verbal expressions including stories, epics, legends, poetry, riddles; other narratives; words, signs, names, and symbols; (b) musical expressions including songs and instrumental music; (c) expressions by movement, including dances, plays, rituals or other performances, whether or not reduced to a material form; (d) tangible expressions, including productions of art, drawings, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments, maps, plans, diagrams architectural buildings, architectural models; and architectural forms"

management of rights, issues of public consultation, authorized user agreements, and sanctions and remedies.

The Act provides the criteria of protection that sufficiently accommodates the unique nature of TK and TCE by setting aside the criteria of protection under the conventional IP system. As regard criteria for protection of TK, art 6 of the act provides;

Protection shall be extended to traditional knowledge as long as it is (a) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes; (b) individually or collectively generated; (c) distinctively associated with or belongs to a community; and (d) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

As regard criteria for protection of traditional cultural expression, Art 14 of the act states that;

The protection of cultural expressions under this Act shall relate to cultural expressions, of whatever mode or form, which are- (a) the products of creative and cumulative intellectual activity, including collective creativity or individual creativity where the identity of the individual is unknown; (b) characteristic of a community's cultural identity and cultural heritage and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community; (c) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes; (d) individually or collectively generated; (e) distinctively associated with or belongs to a community; and (f) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

As regard, formalities, the Act states Protection of TK and TCE shall not be subject to any formality<sup>122</sup> as long as the aforementioned criteria for protection are satisfied. What is more, the act extends the duration of protection of both TK and TCE to be perpetual so long as their respective criteria for protection provided in the Act are intact.<sup>123</sup>

The Act protects communities from exploitation and allows them to control the use of culturally significant and economically valuable knowledge and expression by creating a new form of IP right held by the community itself. It provides the defensive and protective protection necessary for providing a robust legal regime that protects TK and TCEs. The defensive protection prevents people outside a traditional community from acquiring IP rights over TK and TCEs requiring the government to establish a repository for the documentation of such knowledge and maintain registers of TK and TCEs that are collected and registered.<sup>124</sup> In terms of positive protection, the Act grants the rights that empower communities to promote their TK and TCEs, control their uses and benefit from their commercial exploitation.

Accordingly, the community of TK or TCE owners shall have the right to protection of that knowledge or cultural expression, which may include the exclusive right to authorize exploitation of the TK and TCE, and prevent any person from exploiting it without their prior informed consent, right to recognition as owner of the TK and TCE, right to institute legal proceedings and get remedies against violation of these right.<sup>125</sup> Art 18 of the Act further states that ‘a person shall not, in any way, misappropriate, misuse, abuse, unfairly, inequitably or unlawfully access and exploit traditional knowledge and cultural expressions, and use the knowledge or expression without the prior and informed consent of the owners, be used for reproduction, publication, broadcasting, translation, derivation work , for sale...’ Art 19 of the Act; however, provides for exceptions and limitations in like normal usage, development, exchange, dissemination and transmission of TK and TCE or use for non-commercial purpose, or other exceptions as may be necessary subject to a prior informed consent of the owner and in manner

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<sup>122</sup> The Kenyan Traditional Knowledge and Cultural Expressions Act , See Arts 7 & 15

<sup>123</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act , Arts 13 &17

<sup>124</sup> The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 8

<sup>125</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 10, 11,

compatible with fair practice, relevant community's customary laws and practices, acknowledging the community as source, and in ways that is not offensive to the community.

Besides, the Act provides for moral rights that the owning community shall have toward their TK and TCE. In this regard, Art 21 of the Act states that ‘the owners shall be holders of the moral rights in the traditional knowledge or cultural expressions which include:

- (a) right of attribution of ownership or paternity in relation to their traditional knowledge and cultural expressions; (b) right not to have ownership of traditional knowledge or cultural expressions falsely attributed to them; and (c) right not to have their traditional knowledge and cultural expressions subject to derogatory treatment including any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or cultural expressions that is prejudicial to the honor or reputation of the traditional owners, or the integrity of the traditional knowledge or cultural expressions; and (d) right to protection from false and misleading claims to authenticity and origin

It is noted that these moral rights of traditional owners in their TK and TCE shall exist perpetually, and independently of their cultural rights.<sup>126</sup> Moreover, the Act recognizes additional right such as the cultural rights to maintain, control, protect and develop cultural heritage, TK and TCE as well their manifestations, and these cultural rights shall be in addition to any rights that may subsist under the existing IP laws.<sup>127</sup> The owners of TK and TCE rights shall have also the right to assign and conclude licensing agreements in relation to their TK or TCE <sup>128</sup> and the right to fair and equitable sharing of benefits arising from commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties.<sup>129</sup>

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<sup>126</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 21 (3) & (4).

<sup>127</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 23.

<sup>128</sup> The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 22.

<sup>129</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act ,Art 24.

What is more, the Act provides for provisions regarding participatory management of the community right as well as remedies and sanctions for violation of any of the rights. In this regard, Art 25 of the Act states that the owners of TK or TCE may grant authorization for the exploitation and use of their TK or TCE themselves; or after necessary consultations, authorize the national government, county government or any other person to exploit their TK or TCE, on their behalf. The owners of TCE or TK shall, before entering into an authorized user agreement, consult the members of the community on the proposed terms and conditions of the agreement. The authorized user agreement shall provide for, in its terms and conditions on matters of (a) the benefit sharing; compensation, fees, royalties or other payments for the use; whether the use will be exclusive or non-exclusive; duration of the use and rights of renewal; disclosure requirements ; possible sharing by the owners of any IP rights arising from the use of the TCE or TK ; access arrangements; applicable controls on publication; assignment of rights, where appropriate; dispute resolution ; confidentiality and disclosure in relation to secret TK and TCEs; and respect for moral rights of the owners.<sup>130</sup>

Finally, the Act sets up a system to ensure that the rights are effectively protected and criminalize any misuse of TK and TCEs.<sup>131</sup> Communities further have the power to stop misuse of their TK and TCEs by obtaining civil remedies such as court injunctions and forcing companies to pay for royalties for any commercialization of TK and TCEs that has not been agreed to in advance.<sup>132</sup> Overall, the Kenya's Act represents a bold and forward-thinking effort to improve and protect the TK and TCE in Kenya, and this can be taken as model for other African countries wishing to protect the TK and TCE.

## **5.2. WHAT KEY MESSAGE FOR ETHIOPIA?**

Unlike Kenya, Ethiopia, as of yet, has no an enforceable, effective, and binding protection regime for TK and TCE. The country does not have

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<sup>130</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 34

<sup>131</sup>The Kenyan Traditional Knowledge and Cultural Expressions Act, Art 37

<sup>132</sup> The Kenyan Traditional Knowledge and Cultural Expressions Act , Art 39

effective *sui generis* form<sup>133</sup> of IP right system for TK and TCE, and the existing IP laws of the country are also not adequate to protect TK and TCE. As has been revealed under section 4 of this paper, the existing IP laws of the country including the copyrights and neighboring right proclamation, and the patent law are tainted by various limitations and are not adequate to protect, preserve and promote TK and TCE in the country. Moreover, even if the existing bio-diversity and ABS regimes of the country including the have tried to accord certain protection for TK associated with biodiversity and genetic resources during access to these resources; these legislations have no relevancy for protection of TCE and TK that are independent of biodiversity and genetic resources.<sup>134</sup> Hence, both TCE and TK are not effectively protected under the existing IP and biodiversity laws.

Nevertheless, the existing constitutional frameworks, and place given to relevant international instruments ratified<sup>135</sup> by the country could potentially be harnessed for an optimal TK and TCE protection. In this regard, Article 39(2) of the FDRE Constitution entitled Every Nation, Nationality and People in Ethiopia a right to express, to develop and to promote its culture; and to preserve its history. Art 41(9) of the same imposes on the state the responsibility to protect and preserve historical and cultural legacies, and to contribute to the promotion of the arts and sports, and this could potentially extend to a duty to protect and promote TK and TCE.<sup>136</sup> Moreover, the Constitution recognized right to property and private property is defined in Art.40 (2) of the Constitution to include any intangible product having

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<sup>133</sup>Even though there is the ongoing steps by Ethiopian intellectual Property Office to prepare laws of community knowledge, the efforts had not reached the legislative stage at the time of writing this paper

<sup>134</sup>See the discussion under section 4.3 above

<sup>135</sup> For instance, Ethiopia ratified various human right instruments that recognized right to culture and IP rights over TCE and TK, specific WIPO treaties like the Berne Convention, and the CBD and related instruments. The country is also on the ways of acceding to WTO and assumes the obligations incorporated under the TRIPS agreement.

<sup>136</sup>The same duty is stipulated under Art 91 of the constitution dealing with cultural objective of the country imposes government duty to support the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution, and to support the development of the arts, science and technology.

value<sup>137</sup>, and this could potentially include communal IP rights in the areas of TK and TCE.

From now, given these constitutional frameworks that led foundation for cultural rights of the community and the related duty of the Ethiopian government to ensure fulfillments of the cultural right of the community and promote, preserve and protect cultural heritage of the country, it is overdue to ratify the Swakopmund protocol and legislate effective *sui generis* laws that learns from the experience of Kenya as recapped in the preceding subsection. The *Sui generis* legislation is a unique law complete unto itself and often created when current and existing laws are inadequate. The development of *sui generis* law offers an opportunity for indigenous peoples to participate in developing frameworks that deal with knowledge control, use and sharing, establish a bridge between customary law and national legal systems in order to secure effective recognition and protection of TK and TCE.<sup>138</sup> As has been stated earlier, Kenya adopted effective *sui generis* law that learns from the relevant international and regional framework, putting Kenya at the forefront of states in the global south protecting national resources and interests of local communities. It is recalled that being determined to implement the constitutional duty that requires the Kenyan government to enact law to ensure promotion, preservation and protection of community's TK and TCE with meaningful participation of the public and concerned stakeholders, the Kenyan parliament adopted new Act that sufficiently accommodate the nature and needs of TK and TCE. Consequently, this will send important message to Ethiopian government already in task to have law on TK and TCE from perspective of three key points; a determination to enact law to protect, preserve, promote, and commercialize TK and TCE in the interest of community, adopt participatory approach in course of making this law, and driving content of the law itself from the Kenyan TK and TCE Act.

Accordingly, the first thing that Ethiopian government should learn from Kenya is determination to protect, promote, and preserve TK and TCE itself. The Kenyan government appreciated the values of the cultural heritage of the

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<sup>137</sup> FDRE Constitution, Art.40 (2)

<sup>138</sup>Wanjohi M. Mukuha, Protection of Folklore in Kenya: The Case of Maasai Handicrafts (LL.M Thesis, University of Nairobi, 2013), P.65.

community and pressing need for legislative intervention, and this was clearly reflected in the Kenyan Constitution, Kenyan Policy on TK, TCE, and Genetic resources, and her subsequent accomplishment in ratifying the Swakopmund protocol as original member and adopting the Kenyan TK and TCE Act in conformity with the protocol on top of many African Countries and the world. To the contrary, the Ethiopian government remained reluctant toward the legal protection of TCE and TK in the interest of traditional community. Even if the Ethiopian Intellectual Property Office has recently revitalized the need for the protection of TK and TCE and is undertaking various measures, including drafting laws, this is not seriously considered; and that it seems it is almost ignored as there is no news about its progress even in the ongoing massive legal reform. Hence, Ethiopia should follow the Kenya's footsteps in this regard, accede to the Swakopmund protocol/African Regional intellectual property office (ARIPO) open for all African Union members, and usher the already triggered initiation to adopt law on protection and promotion of TK and TCE in the country.

In meantime, the other key message to Ethiopia from Kenyan experience is that she should stick to public participation<sup>139</sup> and consultation with concerned stakeholders<sup>140</sup> in all level law making process and incorporate public comments and suggestion in the would be draft laws on protection and promotion of TK and TCE. This is because public participation in lawmaking process is an important tool for creating fair policies/laws reflective of real needs of the community; ensuring that new legislation is effective in achieving its goals, ensuring legitimacy of proposed regulation and its compliance; increasing partnership, ownership and responsibility in implementation of adopted legislations; strengthening democracy and human rights and increasing confidence in public institutions.<sup>141</sup> Thus, every important law should undergo genuine and inclusive consultations with

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<sup>139</sup> Participation means a process of dealing with the citizens, civil society organizations (CSOs) and other interested parties to influence the development of policies and laws which affect them so as to reach at a better and acceptable decision; See National Assembly of Kenya, Public participation in Legislative Process: Factsheet No.27.

<sup>140</sup>The Stakeholders are those who will be affected by the draft law under consultation; or will be involved in the implementation of the draft law under consultation; or have a stated interest in the subject matter of the draft law.

<sup>141</sup>The Institute for Social Accountability (TISA), Public participation Framework in County Assembly, Kenya, April.2015

every potentially affected group before it gets adopted, and such consultations should take place at all key stages in the legislative process and not only when there is already a fully drafted legislative text.<sup>142</sup> Different levels of participation in law making process includes (1) access to information, including access to parliamentary information such as bills and reports (2) consultation and (3) active engagement through dialogue and partnership, and empowerment of the public.<sup>143</sup>

Hence, the full and effective participation of indigenous peoples should be ensured in any developments of policies and laws on TK and TCE rights, and such laws should particularly comply with the prior informed consent of the community<sup>144</sup> Yet unlike in Kenya, the practice of legislative process in Ethiopia does not adequately make public participation and consultation, and the fate of the ongoing process to enact laws for TK and TCE may be similar. In this regard, study has confirmed that the lawmaking process in Ethiopia is initiated, formulated and adopted by the executive thereby blocking not only public participation but also a meaningful participation by Member of Parliament.<sup>145</sup> This is because most of the time members of parliaments are abided by their party discipline whether the issue is concerned with policy or not even if they have significant reservations<sup>146</sup>, and hence, they are passive to express the will of the people they represented but the will of executive. Moreover, stakeholder's participation in legislative process is not only weak but also in a diminishing propensity.

Even if the principle of popular sovereignty, and right to access to information and public participation<sup>147</sup> is hinted under the Constitution, the public do not have access to relevant information including to the draft law, and these information are not released on media, website, and kept secret until the law is finally adopted and published on *negaritte gazette* as a law; and this is what we all are witnessing in the course the ongoing massive legal reform. Moreover, unlike in Kenya, there is no procedural guideline that

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<sup>142</sup>Public Consultations on Draft Legislation ,Practical Guidelines for Public Officials who are responsible for organizing public consultations in Ukraine, 2016

<sup>143</sup>The Institute for Social Accountability (TISA),*Supra* note 141, P51

<sup>144</sup> Paul K. Sena, *Supra* note 59, P16

<sup>145</sup>Atsbeha Aregawi, Practice of Policy Making process in Ethiopia: Case of HPR, (MA Thesis, AAU,2012), Pp.70-71

<sup>146</sup>*Ibid.*

<sup>147</sup>FDRE Constitution, Art.8.

enables the public to participate in person; consulted and actively engage in all level of law making process in Ethiopia. Whereas in Kenya, as stated earlier, there is procedure to ensure meaningful public participation and access to information in deed as well as in the constitution and other laws, and even more the country has recently prepared the public participation Bill<sup>148</sup> that consolidates the earlier practices and provide guidelines to ensure effective public participation . Thus, Ethiopia should take this good experience from Kenya in the course of enacting laws, particularly laws on TK and TCE, and put in place a system that will ensure grass root participation and consultation of the public and all concerned stakeholders, made relevant information accessible through media, website and all other possible means, solicit public and stakeholder's views at all level, and incorporate such views in the would-be draft laws.

The last and most importantly, Ethiopia is advised to draw lesson from and adapt content of her would-be *sui-generis* law for protection and promotion of TK and TCE from Kenyan TK and TCE Act, of course ,while incorporating different perspectives of Ethiopian community as can be gathered through their meaningful public participation. This because as has been discussed above, Kenyan TK and TCE Act is celebrated as the most effective *sui-generis* law that is drawn from Swakopmund protocol, the WIPO Draft articles and other relevant international framework and model laws. And hence as both Ethiopian and Kenyan community shares relatively similar traditional view as African and neighboring countries, it goes with the assertion that there is no reason for Ethiopia to reinvent what is already invented as long as transplantation fit to the actual needs of TK and TCE in the country and approved by the community.

Accordingly, the would-be TK and TCE proclamation of Ethiopia should *inter alia* provide clear definition of TK<sup>149</sup> and TCE, and criteria for their protection that can accommodate the unique needs of TK and TCE;

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<sup>148</sup>The Republic of Kenya, Public Participation Bill, 2018, Kenya Gazette Supplement No. 17 (Senate Bills No. 4).

<sup>149</sup> Even if community knowledge is defined under Art 2(14) of the Access to Genetic Resources and Community Knowledge Proclamation, this definition limited scope of TK to those relating to the conservation and use of genetic resources only and hence not broad enough to include all TK.

recognize communal ownership<sup>150</sup>; avoid unnecessary formality for protection; put perpetual duration of protection; elaborate content of economic right to protection along with possible exceptions and limitations, moral right, right of assignment and licensing. It should also contain provisions that impose government's duty to establish a repository for documentation and maintenance registers of TK and TCEs ; provide effective means to ensure participatory management of the community right; ensure the prior informed consent and benefit sharing with concerned community for exploitation; punish and repress all acts of misappropriation and derogatory use or unauthorized use of TK and TCE, and incentivizes the indigenous communities to protect, develop, and commercialize their TK and TCE. Finally, the *sui generis* law should have provisions which recognize and respect cultural rights over TK and TCE as recognized under the relevant human right instruments and the FDRE Constitution, and make express link to right protected under the conventional IP laws in this regards.<sup>151</sup>

## 6.CONCLUDING REMARKS

Ethiopia is gifted with diverse TK and TCE that would have been potentially exploited for sustainable development of the Ethiopian people yet; arrival of globalization has created fertile ground for unjust exploitation and distortion of the TK and TCE of the country. Recently, international attention have been turned toward a *sui-generis* system to accord adequate protection to TK and TCE, and Kenya stand at forefront of the global south in this regard. In Ethiopia, there is no separate *sui-generis* IP law that protects TK and TCE, and it is also confirmed in this paper that the existing IP regimes of the country are inadequate to provide effective protection for TK and TCE. In particular, it is found that the requirement of fixation and originality, expression-idea dichotomy, limited duration of copyright, and absence of defensive protection, and the provisions of the proclamation dealing with

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<sup>150</sup>The communal ownership of TK is recognized under Art 5 of the Access to Genetic Resources and Community Knowledge Proclamation, but has been discussed above, the scope of the proclamation is limited to TK associated with genetic resources and that it has nor for communal ownership over TCE and independent TK

<sup>151</sup> In this regards, Art 23 of the Kenyan TK and TCE Act recognizes additional right such as the cultural rights to maintain, control, protect and develop TK and TCE as well their manifestations, and states that these cultural rights shall be in addition to any rights that may subsist under the existing IP laws.

authorship and ownership made Ethiopian copyright system unsuitable to TCE. The Ethiopian neighboring right system too is not adequate to protect TCE for its limited definition of performer and obviously for its inability to accord any benefits that accrues to concerned community especially when performer is alien. Moreover, it is found that requirement of identifiable inventor, novelty, inventive steps, and limited duration under the patent law blocked/undermined patentability of TK in the country. Even if certain protections that are short of IP rights are accorded to certain categories of TK associated with genetic resources under the bio-diversity and the ABS regimes of the country, these laws too are not broad enough to protect all TCE and TK.

Therefore, it shall be the agenda of time for Ethiopian government to take cognizance of the pressing need to protect TK and TCE in the country and come up with a *sui-generis* law that rectify deficiency of the existing IP law and adequately protect, preserve, promote, and commercialize the TK and TCE. In so doing, it is suggested to follow the Kenya's footsteps, ratify the Swakopmund protocol and adopt the *sui-generis* law from Kenyan TK and TCE Act in line with relevant model laws. The would-be *sui-generis* law shall be drafted and enacted through meaningful public participation, and *inter alia* provide criteria for protection, duration and ownership that accommodate unique needs of TK and TCE; provide means to ensure prior informed consent of concerned community for exploitation and equitably share benefits arising thereof, punish all acts of misappropriation/offensive use/unauthorized use of TK and TCE, and incentivizes the communities to protect, develop, and commercialize the TK and TCE.