

**PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF
INDIGENOUS KNOWLEDGE SYSTEMS BILL, 2014**

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COMMENTS

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Joint Submission by

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Introduction

This document is submitted by a group of experts and scholars working in various areas of intellectual property and indigenous knowledge systems (hereinafter “IKS”). It does not purport to speak for all experts working on these issues, nor does it reflect the positions of our respective institutions. All contributors are committed to the appropriate protection, promotion, development and management of indigenous knowledge and the self-determination of indigenous peoples.

Our approach is to engage with the Protection, Promotion, Development, and Management of Indigenous Knowledge Systems Bill (hereinafter “IKS Bill”) in a sympathetic and constructive yet critical manner. This submission is structured as an outline document – it comments on a few provisions in the IKS Bill that are of particular importance and concern to indigenous communities. We do not attempt an exhaustive review of the IKS Bill at this time, but rather aim to highlight certain areas of concern. We hope this will generate a broader discussion into the contours of the IKS Bill as a whole. We also add some of our own recommendations. In addition, we are available to attend any consultations to elaborate on these issues in the finalisation of the IKS Bill.

General Comments

At the outset, we wish to state that the intention of the IKS Bill is laudable. Its aim to establish a *sui generis* approach for the protection of indigenous knowledge is commendable. This is a positive change from alternative protections given to indigenous knowledge systems through the somewhat unfitting framework of intellectual property rights as evidenced by the most recent Intellectual Property Law Amendment Act 2013 (IP Amendment Act). With both the IKS Bill and the IP Amendment Act, South Africa admirably recognises the need for multiple strategies for protecting and promoting IKS.

This mixed system of IKS protection would provide indigenous communities with different strategies for protecting IKS. It would allow them to decide for themselves whether to protect and manage their IKS through a *sui generis* or intellectual property approach. Indigenous communities can protect and manage their IKS by making formal claims as intellectual property holders through the IP Amendment Act. Alternatively, with the inception of the IKS Bill, they could protect and manage IKS outside the ownership structures of intellectual property through the modes provided for in the IKS Bill (e.g., prior informed consent, benefit sharing agreements, mandatory origin disclosures, and government enforcement).

This mixed approach is not without its limitations however. It may create tensions among and within indigenous communities between those that desire to seek protection under the IP Amendment Act versus the IKS Bill. Nevertheless, this mixed approach provides indigenous communities with a broader terrain of protective strategies from which to choose. Indigenous communities are dynamic, changing, resilient, and responding to very different historical, political, economic, and legal conditions that shape their experiences and lives. In other words, not all indigenous communities (or their members) are the same, and thus, their strategies for IKS protection will also likely differ. The IKS Bill provides for the heterogeneity of indigenous communities by providing them with alternative, multiple modes for protection and management.

We do raise some cautions though with certain provisions of the IKS Bill. Suggestions are made on how to make the IKS Bill speak more explicitly to the concerns of some of the most vulnerable indigenous communities of South Africa. In particular, we write with an interest in supporting those who self-identify as members of San and Khoi communities of Southern Africa (San, Griqua, Nama, Koranna, and the Cape Khoi). San and Khoi consider themselves dynamic and resilient indigenous peoples who have claims against the historical appropriation of their land, culture, and heritage prior to and after colonisation. Khoi and San align with global networks of indigenous peoples to make claims for protection and recognition of IKS, but also as a form of redress for past colonial and apartheid rule and continued violence against them.

Lastly, lawmakers should generally be mindful that adding additional layers of intellectual property (IP) or IP-like protection to hitherto unprotected subject matter also creates societal costs through further reducing a crucial and freely available knowledge resource – the public domain. As a vital engine for innovation, entrepreneurship and development in every country, the public domain is deserving of special protection. That being said, we are aware that indigenous knowledge has been historically characterised as in the public domain in order to appropriate such knowledge. Given such histories, the IKS Bill raises concerns and over how to meet the interests of indigenous communities and attend to the interests of third parties to access such knowledge. One way to address these tensions this is to put emphasis on developing a robust set of exceptions and limitations as will be discussed below.

Comments – Relevant Sections

Preamble

The Preamble rightly frames the protection and promotion of IKS through several different registers. One is to challenge centuries of racially discriminatory colonial rule. Another is to safeguard constitutionally protected rights of human dignity and equality. A third is to assert nation-state sovereignty to protect indigenous knowledge and promote the well being of its people. These are important histories and principles to consider when interpreting this Bill.

Interestingly, however, the Preamble makes little to no mention of indigenous communities. It recognises indigenous knowledge, encourages its use, and accepts it as innovative. The focus is placed on protecting and promoting IKS but without emphasising the very indigenous communities that produce such knowledge. Therefore, we suggest adding language that emphasises the connection between protecting IKS and associated indigenous communities. Such language might include the following:

“Recognising that indigenous communities are not discrete, static and/or traditional, but rather dynamic, changing, resilient, and diverse communities whose self-determination is contingent upon the protection and promotion of their indigenous knowledge and indigenous knowledge systems.”

We also suggest that the Preamble more strongly mention the importance of the IKS Bill in facilitating redress of indigenous communities in the rights and benefits of which they have been deprived without recognition or benefit. The self-determination of indigenous communities is contingent upon the protection of IKS as compensation and redress for histories and continued legacies of colonial and apartheid rule as well as contemporary forms of discrimination against them.

Similar language is explicitly included within the Functions and Duties of NIKSO (Section 6(1)) and we suggest including the following in the Preamble:

“Recognising the importance of facilitating redress of indigenous communities in the rights and benefits of which they have been deprived without recognition or benefit due to histories and continued legacies of colonial and apartheid rule as well as contemporary forms of discrimination against them.”

Definition of Commercial Utilisation

The IKS Bill generally seeks to protect IKS from commercial utilisation. We therefore recommend a more comprehensive definition of commercial utilisation. The current definition restricts commercial utilisation to when a product or process related to IKS is “made available for sale on the open market.” Emphasising only the moment of sale, however, fails to account for numerous stages of the commercialisation process that occur before a product or process is made available for sale. We suggest defining commercialisation to more closely align with the following definition of commercialisation as set forth in the Bioprospecting, Access and Benefit Sharing Regulations of 2008:

Commercialisation includes the following activities in relation to indigenous biological resources:

- (a) the filing of any complete intellectual property application, whether in South Africa or elsewhere;
- (b) obtaining or transferring any intellectual property rights or other rights;
- (c) commencing clinical trials and product development, including the conducting of market research and seeking pre-market approval for the sale of resulting products; or
- (d) the multiplication of indigenous biological resources through cultivation, propagation, cloning or other means to develop and produce products, such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours and extracts;

Definition of Indigenous Community

The IKS Bill makes an attempt to define “indigenous community” very broadly to include a “recognizable community... who identify themselves and are recognized by other groups as distinct” collectives originated in or historically settled within the borders of the Republic as of 2013. This definition of indigenous community is broad enough to include any and all distinct communities within South Africa. This enables protection and promotion of a wide range of indigenous knowledge systems attached to indigenous communities.

We express concern, however, that this meaning of “indigenous community” will not adequately protect indigenous communities such as San and Khoi peoples. Histories of colonial and apartheid rule have left Khoi and San communities scattered and displaced across South Africa. Furthermore, their interests are not represented within the National House of Traditional Leaders. This means it will be difficult for Khoi and San to demonstrate themselves as distinctly recognised indigenous communities eligible for protection under the IKS Bill. We should also note that our concerns apply equally to the IP Amendment Act, which contains the identical definition of indigenous community.

Moreover, we suggest instead of considering defining both ‘indigenous’ and ‘communities’ to rather develop the notion of indigenous communities along the characteristics as outlined by the African Commission on Human and Peoples’ Rights, Working Group on Indigenous Populations/Communities in Africa.

On a more general note, we believe the Bill should better take into account and perhaps even reference existing instruments and discussions in this context to avoid siloed approaches or solutions. For instance, the IKS Bill could reference the laws already dealing with the notion of customary communities such as the TLFA and NTAB (even though we are aware of the problems in South Africa around this issue). Natural Justice, together with UK-based York University, has also developed a ‘restorative approach’ to the identification of Khoi and San communities, which may further refine these approaches (‘A review of the National Traditional Affairs Bill’ (2014), available at http://naturaljustice.org/wp-content/uploads/pdf/NTAB_2013_Review.pdf). In addition, consideration should be given

to the approach of the African Commission's Working Group on Indigenous Populations/Communities in Africa. A short note summarising the Working Group's approach is attached to this document as Appendix A.

Application of the Act (Section 3)

According to Section 3, the IKS Bill applies to all indigenous knowledge resources that existed before the commencement of the IKS Bill or were created on or after its commencement. We applaud the IKS Bill for its willingness to apply to IKS created before and after commencement of the IKS Bill.

We would like to make it known though that the IKS Bill seems to conflict with the IP Amendment Act in this respect. For instance, under the IP Amendment Act indigenous works are only eligible for copyright protection if they were created "on or after" the date of commencement of the IP Amendment Act. There is no language in the IP Amendment Act extending copyright protection to indigenous works existing before commencement of the IP Amendment Act. The IKS Bill thus seems to provide the only protection for IKS existing before creation of the IP Amendment Act in 2013.

Lastly, it is worth stressing that the IKS Bill only applies to persons in South Africa. Thus, in the absence of international lawmaking in this area, persons in South Africa may be prevented from using indigenous knowledge while access to such knowledge of persons living abroad remains unimpeded. This may be seen as a competitive advantage for persons living outside South Africa over their South African counterparts.

Objectives (Section 4) & Functions and Duties of NIKSO (Section 6)

The IKS Bill sets forth several important objectives in protecting and promoting IKS in Section 4. These objectives should be similar to the functions and duties outlined for NIKSO in Section 6. In particular, the duty of NIKSO to facilitate redress is not emphasised within Section 4. We therefore suggest bringing Section 4 and Section 6 into alignment.

To do so, we recommended adding the following language to each:

Section 4: “(g) to facilitate redress of indigenous communities in the rights and benefits of which they have been deprived without recognition or benefit.”

Section 6: “(a) to carry out the objectives of the Act as specified in Section 4 above.”

Furthermore, we applaud the IKS Bill for establishing NIKSO as an entity to carry out the objectives of the Act. If the formation of NIKSO is anything like the establishment of the National Intellectual Property Management Office (“NIPMO”) this level of government involvement adds a welcome layer of support for indigenous communities and IKS. We want to caution though that NIKSO must be afforded adequate staff and resources in order to carry out its functions. If NIKSO is inadequately funded and supported it may create an added layer of bureaucracy that actually hinders the efforts of indigenous communities to protect their IKS.

We also stress that NIKSO should work in collaboration with indigenous communities. Although their intentions are worthy, government agencies sometimes have difficulty addressing and understanding the needs of indigenous communities as defined by the communities themselves. Indigenous communities are increasingly establishing their own forms of governance and community protocols for protecting IKS. NIKSO should work in collaboration with the customary law, governance systems, and practices of indigenous communities. We therefore suggest adding the following language to Section 6(1):

“seek to understand and work in collaboration with the customary laws, governance systems, and practices of indigenous communities.”

Eligibility Criteria for Protection (Section 11)

The IKS Bill sets forth broad and more suitable requirements for eligibility of protection. For instance, it laudably does not require IKS to be written down or expressed in a material form or capable of substantiation such as specified in the IP Amendment Act for copyright protection.

Section 11 (a) of the IKS Bill however states that IKS must be “passed on from generation to generation and between generations in indigenous communities.” We express concern that this provision seems to assume that indigenous knowledge is a stable and unchanging thing that can be identifiable across generations. The reality though is that when indigenous communities pass on knowledge about their local plants, animals, and environments the contours of that knowledge likely changes overtime. Indigenous knowledge about a plant from one generation might look different when passed along to the next generation. Indigenous communities are continually experimenting and adapting their indigenous knowledge systems to the changing environmental, social, and political conditions around them. The concern then is that if expressions of IKS change from one generation to the next they won’t be eligible for protection under the IKS Bill. It is unclear if Section 11 (a) as currently drafted attends to the dynamic and changing nature of IKS.

Scope of Protection (Section 12)

We want to commend the IKS Bill for setting out a broad set of protections for indigenous communities. In particular, we applaud the rights set forth in Section 12(1)(b) that afford beneficiaries the right to “authorise or deny access to and use of their indigenous knowledge...” It is important to recognise this right of refusal for indigenous communities. Conditions of colonialism, apartheid, and discrimination have denied many indigenous communities (some more than others) the right to refuse and deny access to their knowledge and resources. Granting indigenous communities the right to authorise but also deny access to their knowledge goes a long way towards empowering and strengthening indigenous communities.

Term of Protection (Section 13)

We have noted that the protection of indigenous knowledge under the Bill can be perpetual.

Beneficiaries of rights (Section 14)

We also want to commend the IKS Bill for specifying that a beneficiary of rights under the IKS Bill will be determined “in accordance with the customary law and practices of that indigenous community or indigenous communities.” We recognise the difficulty in deciding who is and is not entrusted with the custody and protection of indigenous knowledge. Indigenous communities are quite heterogeneous and struggle with these decisions themselves. We stress that the IKS Bill must maintain this respect for indigenous communities to decide for themselves who is and is not a beneficiary. Discussions regarding the difficulty of determining beneficiaries can sometimes take away and deny the agency and governance of indigenous communities to make these decisions on their own. It is important to keep this focus on indigenous communities as defining beneficiaries of rights. This said, if IKS is held collectively tensions may arise between individual interests and the interests of the cultural community. Such conflicts should be anticipated and addressed.

Exceptions and limitations (Section 24)

A healthy and robust set of exceptions and limitations is required to meet the interests of indigenous communities and those that desire third-party access to indigenous knowledge. The situation here is, in principle, similar to the other – orthodox – categories of IP protection in which exceptions and limitations serve as an important tool for balancing the conflicting interests of rights owners on the one hand and those wishing to utilise their knowledge on the other. That being said, the balancing of the interests of indigenous communities with those wanting access to their knowledge raises different concerns given that histories of colonialism, apartheid, and discrimination have contributed to the exploitation and taking of indigenous knowledge systems in profoundly different ways.

Section 24 sets out several exceptions that make it clear the IKS Bill primarily serves to protect IKS during commercialisation. We propose that the exceptions and limitations in

section 24 are re-worded and, where necessary, expanded to appropriately permit socially beneficial uses such as research, education, use by libraries and archives, use by persons with disabilities as well as preservation and digital curation in the digital environment. A general-purpose flexible exception in addition to specific exceptions could be useful since it is difficult to predict all the use cases that will be affected by the Bill.

This said, it is of concern to us that some of the practices currently listed as exceptions also historically engage in the appropriation of indigenous knowledge. The line between academic research and commercialisation for example is not always clear. Academic research can often engage in steps towards commercialisation of a product or process related to indigenous knowledge. Reporting news agencies have also been known to appropriate indigenous knowledge. We therefore suggest that by strengthening the definition of commercialisation (as noted above) it would make it clearer that when certain practices such as academic research or reporting news engage in modes of commercialisation they will be subject to the IKS Bill.

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Appendix A:

Untangling Decades Old Myth: Understanding the Concept of ‘Indigenous Peoples’ in Africa (February 2015)

This brief note is prepared by the African Commission’s Working Group on Indigenous Populations/Communities as a handy tool that explains the term indigenous communities as it applies in the African context. It further clarifies concerns that are commonly associated with the application of the concept in Africa. This is a highly abridged version of the 2003 Report of the African Commission on Human and Peoples’ Rights (the Commission), the full version of which is available at <http://www.achpr.org/mechanisms/indigenous-populations/>

What does the term ‘indigenous peoples’ mean in the African context?

A more than two years research led by the Commission conceptualises the term, giving it a human rights-based meaning that takes into account the specificities and realities of the African continent.

According to this research, in post-colonial Africa, the term ‘indigenous peoples’ **does not mean:**

- first habitants in a country or on the continent;
- natives as understood in the Americas or Australia,

It rather refers to those communities in Africa:

- who identify themselves as indigenous;
- whose cultures and ways of life differ considerably from the dominant society, and whose cultures are under threat, in some cases to the point of extinction;
- the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon;

- who suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society;
- who live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially; and
- who are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.

This discrimination, domination and marginalization violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.

Therefore, this human rights-based meaning of the term ‘indigenous peoples’ should not be confused with its etymological or generic one, presented in most dictionaries as meaning ‘*originating from*’, and which comes to the minds of most people in Africa when they hear the word indigenous peoples.

It is crucial that the critical human rights situation of indigenous peoples is addressed and, for this purpose, it is necessary to have a concept by which to highlight and analyse their situation. ‘Indigenous peoples’ is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development, who are perceived negatively by dominant mainstream development paradigms and whose cultures and lives are subject to discrimination and contempt. The linking up to a global movement - by applying the term ‘indigenous peoples’ - is a way for these groups to try to address their situation, analyse the specific forms of inequalities and repression they suffer from, and overcome the human rights violations by also invoking the protection of international law.

It is the modern analytical understanding of the term ‘indigenous peoples’, with its focus on the above-mentioned facts of marginalisation, discrimination, cultural difference and self-identification, that has been adopted by the Commission, which has also been endorsed by the African Union Heads of States and Governments.

Common Misconceptions About the Application of the term in Africa

Are Indigenous Peoples' Demanding Special Rights?

One of the misconceptions regarding indigenous peoples is that to advocate for the protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights. As explained above, the issue is that certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalized groups to call for protection of their rights in order to alleviate this particular form of discrimination.

'All Africans are Indigenous'

A closely related misconception is that the term 'indigenous' is not applicable in Africa as 'all Africans are indigenous'. There is no question that all Africans are indigenous to Africa in the sense that they were there before the European colonialists arrived and that they were subject to subordination during colonialism. The Commission is in no way questioning the identity of other groups. When some particular marginalized groups use the term 'indigenous' to describe their situation, they are using the modern analytical form of the concept (which does not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination from which they suffer. They do not use the term in order to deny all other Africans their legitimate claim to belong to Africa and identify as such. They are using the present-day broad understanding of the term because it is a term by which they can very adequately analyse the particularities of their sufferings and by which they can seek protection in international human rights law.

Recognizing Indigenous Peoples leads to tribalism and ethnic conflict

Another misunderstanding is that talking about indigenous rights will lead to tribalism and ethnic conflict. This is, however, turning the argument upside down. There exists a rich variety of ethnic groups within basically all African states, and multiculturalism is a living reality. Giving recognition to all groups, respecting their differences and allowing them all to flourish in a truly democratic spirit does not lead to conflict, it rather prevents conflict. What creates conflict is when certain dominant groups force through a sort of "unity" that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives.

Or, put another way: conflicts do not arise because people demand their rights but because their rights are violated. Finding ways to protect the human rights of particularly discriminated groups should not be seen as tribalism and disruption of the unity of African states. On the contrary, it should be welcomed as an interesting and much needed opportunity in the African human rights arena to discuss ways of developing African multicultural democracies based on respect for, and the contributions of, all ethnic groups. It promotes and facilitates all inclusive development and nation-building.

Question of Secession

Many Governments in Africa are reluctant to recognize indigenous peoples within their territories because they fear that it will lead to claims of secession. However, the UN Declaration on the Rights of Indigenous Peoples' categorically states that indigenous peoples right to self-determination does not include secession. This is one major difference between international law protecting minority rights and indigenous peoples' rights. Minority groups right to self-determination upto secession is recognized in international law. Therefore, the international legal framework on indigenous peoples' rights recognizes and respects territorial sovereignty and hence does not pose any threat to the territorial integrity of states.

The Commission recognizes the concern of those who feel that the term 'indigenous peoples' has negative connotations in Africa, as it was used in derogatory ways during European colonialism and has also been misused in chauvinistic ways by some in post-colonial Africa. However, notwithstanding the possible negative connotations of the word itself, it has today become a much wider internationally recognized term by which to understand and analyse certain forms of inequalities and repression, such as those suffered by many pastoralists and hunter-gatherers in Africa today, and by which to address their human rights sufferings.

Indigenous peoples as distinguished from minorities

In debates and discussions on the issue of indigenous peoples in Africa, some argue that "minorities" would be a more appropriate term to describe the groups of people known as "indigenous". It is the Commission's position that it is important to accept the use of the term indigenous peoples all over the world, including in Africa, as the concept of indigenous peoples in its modern form more adequately encapsulates the real situation of the groups and communities concerned. There may certainly be overlaps between groups identified as 'indigenous' and groups identified as 'minorities', and no definition or list of characteristics can eliminate these overlaps. Moreover, cases will continue to arise that defy any simple attempt at classification. The usefulness of a sharp and clear-cut distinction between minorities and

indigenous peoples is therefore limited, which is why it is important to apply a flexible approach based on a concrete analysis of the human rights issues at stake.

The nature of the types of rights ascribed to indigenous peoples and minorities in international law differs considerably and this has major implications. The crucial difference between minority rights and indigenous rights is that minority rights are formulated as individual rights whereas indigenous rights are collective rights. The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture, to practice their own religion, to use their own language, to establish their own associations, to participate in national affairs etc. These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group.

Indigenous rights are collective rights, even though they also recognize the foundation of individual human rights. Some of the most central elements in the indigenous rights regime are the collective rights to land, territory and natural resources. The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities contains no such rights, whereas land and natural resource rights are core elements of ILO Convention 169 (arts 13- 19) and the UN Declaration on the Rights of Indigenous Peoples (arts 25-30). Collective rights to land and natural resources are one of the most crucial demands of indigenous peoples – globally as well as in Africa – as they are so closely related to the capability of these groups to survive as peoples, and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture. The types of human rights protection groups such as the San, Batwa, Ogiek, Maasai, Barabaig, Tuareg, Hadzabe etc. are seeking are, of course, individual human rights protection, just like other individuals the world over. However, it goes beyond this. These groups seek recognition as peoples, and protection of their cultures and particular ways of life. A major issue for these groups is the protection of collective rights and access to their traditional land and the natural resources upon which the upholding of their way of life depends. As the protection of their collective rights, including land rights, is at the core of the matter, many of these groups feel that the indigenous human rights regime is a more relevant platform than the minority rights arena.