

The Protection of Traditional Cultural Expressions in Africa

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How does a modern-based sui generis model protect traditional cultural goods? How does an individual-oriented intellectual property system protect community-produced expressions? While *Enyinna Nwauche's latest book, The Protection of Traditional Cultural Expressions in Africa*, answers that sui generis and intellectual property have an effect on the protection of traditional cultural expressions (TCEs) and intangible cultural heritage in Africa, it also shows that a peoples' and human rights framework is the way to advance the two protection models.

TCEs are basically regarded as the same as folklore, intangible cultural heritage, and indigenous cultural heritage.¹ Definition controversies reflect TCEs' complex nature from the traditional environment and contradict the modern legal regime. From 1967, many draft laws have been formulated by UNESCO and WIPO regarding different aspects of the protection of TCEs, such as the subject-matter of protection, beneficiaries, and the legal and policy options.² Three years before the publication of Nwauche's book, WIPO released *The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2 in 2014*, which was developed on the basis of *The Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore* made in 2010. But the draft has not passed until now. Owing to Enyinna Nwauche's working experience as the director of the Nigerian Copyright Commission, the book sheds light on the intersection of intangible cultural heritage, human rights and the ever-changing intellectual property system in Africa. It is timely as the protection for TCEs has been developed for several decades, but many thorny issues remain controversial.

On the basis of analysing the nature and characteristics of TCEs and the critical issues and challenges of protecting TCEs in Africa, the book explores four protection approaches: sui generis (negative protection); intellectual property (positive protection); tangible heritage law; and peoples' and human rights. In order to evaluate each approach, the book analyses the effect of TCE-related laws, such as the copyright and heritage laws of many African countries, from a comparative perspective. It flags numerous examples of countries such as Kenya, South Africa, Nigeria and Ghana.

A specific contribution of the book is that it fills a literature gap on the assessment of African laws protecting TCEs. As Nwauche traces main documents on this issue from UNESCO and WIPO with detailed indexes, the book will be a reliable and superb reference for further elaboration. For example, Nwauche carefully analyses the Swakopmund Protocol, whose highlight is endowing indigenous

¹ Janet Blake, *Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration* (Paris: Unesco, 2001).

² WIPO, *"The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis"* Geneva: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2018).

communities with rights over TCEs (p.70). A similar full evaluation is seen in South Africa's IPLAA 2013, as it divides TCEs into different categories and reintegrates each category into an existing type of intellectual property right, entitled "traditional" or "indigenous", such as "traditional work" or "indigenous designs" (p.113). From the analysis, Nwauche suggests that the primary obstacle to protection is that many African states own and control TCEs, and customary norms are underestimated, which stops communities with a strong desire to protect their creations in a negative model and prevents TCEs from registering as intellectual property rights in a positive model.

This obstacle affects both sui generis and intellectual property protection, and is related to the lower participation of communities. This book emphasises the vital role of communities, which crops up in some places in the text. Unlike other studies that typically define communities as indigenous or local communities, this book distinguishes communities as unethnic communities (e.g. religious communities and linguistic communities) and ethnic communities that are regarded as indigenous communities, and only their creations are qualified as TCEs (p.28). Most concentrated is the section entitled "Communities in African States and Expressions of Folklore", which provides an analysis of the relationship between communities with individuals and states. These discussions are a great help in considering which communities are eligible TCE owners.

Related to this, the author aptly points out that underestimating customary laws can also invalidate negative and positive models (p.6). Customary laws can define TCEs and resolve disputes involving TCEs (p.71). The specific legal provisions presented in Ch.6 may reverse readers' understanding of African customary laws, which are treated equally with statutory laws in many countries, such as Kenya and South Africa (p.176). This fact may motivate countries in other regions to protect TCEs and communities by recognising customary laws. However, the premise of applying customary laws is to confirm them, which is a difficult problem. Community connections may be loose, and different groups may have different understandings of customary laws.

Also, what may strike readers as noteworthy is that Ch.4 of the book provides a way to protect TCEs through tangible cultural heritage laws, while for a long time the protection of TCEs, as intangible objects, had been considered separately from tangible cultural heritage. Also, the fact that intangible cultural heritage is embedded in tangible cultural heritage has been ignored. This approach has been given a new introduction in this book. As proven by a few examples, the protection of TCEs can be achieved indirectly by restricting access to tangible heritage (p.86). The obstacles in this path are interpreted by Nwauche as tangible cultural heritage being controlled by states (p.80). There are other reasons, such as that the heritage law cannot force TCE holders to control the reproduction and dissemination of their productions, but the book provides a reasonable explanation for this.

Another novel point is that the book suggests a peoples' and human rights framework as a "means" to achieve negative and positive protection of TCEs by gaining community entitlements and implementing customary laws, while other research only thinks of human rights as the "ends" to protect indigenous people and communities. Nwauche proposes an ideal system for protecting TCEs here, which not only eliminates the barriers of communities being right holders under various protection modes, but also preserves the possibility of using multiple models to protect TCEs. This will be a significant contribution to the research area.

The book is not without some minor flaws. Some community-related issues within the scope of the book have been mentioned, but not further developed. For instance, the exploration of community is not exhaustive. It is therefore questionable how the community is categorised, in addition to the types mentioned by the author. This question is understandably missing in studies of this sort because it is not a special folklore study. But, not surprisingly, readers may wonder which kinds of communities' creations can be considered as TCEs. Some countries have rich akin TCEs which are not developed by ethnic communities. If only the expressions from ethnic communities are qualified, many expressions will be denied as TCEs, although their essence is TCE. Moreover, one of the essential characteristics of TCEs is that they are integral to community identity. Therefore, the classification of communities poses a possible threat to the pre-existing definitions of TCEs. Also, while the reconciliation between communities and states has been thoroughly discussed, the nexus between communities and individuals, including community members and outsiders, still seems to be unclear. The community is the centre of the book's compass for navigating the sea of the protection of TCEs, which ideally own rights of TCEs in sui generis and intellectual property protection. Thus, later editions of the book might benefit from adding meticulous consideration of a taxonomy for communities and its relationship with the qualification of TCEs. Despite such ambiguities, the book paves the way for protecting TCEs by communities.

Although the monograph focuses only on Africa, it is highly instructive with regard to the formulation of laws in other regions. One of the issues is the impact of geographical factors on TCEs. African communities can straddle two or more countries, and "indigenous communities" have entirely different meanings from the same term on other continents, owing to their colonial history (p.29). Where appropriate, the features of communities in every unique region can be discussed in the research targeted at specific regions.

Where does the book leave us? Nwauche explores four protection models with a meticulously detailed but accessible writing style. His conclusion on the vital role of communities is compelling, as is his meticulous commentary on legal documents from African countries. This book is meant to be read by those researchers focusing on TCEs, cultural heritage, indigenous property and related law issues. It

will also be of the greatest value to those involved in law-making for TCEs and indigenous culture. It would not be very useful for the lawyers and staff of local cultural industries as it is too academic and cannot be used immediately in practice.

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