

INTELLECTUAL PROPERTY PROTECTION OF AFRICAN TRADITIONAL MEDICINE WITHIN THE LEGAL FRAMEWORK OF THE RIGHT TO DEVELOPMENT

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Abstract

In this article, we examine the prospect of securing intellectual property protection of African traditional medicine within the legal framework of the right to development in Africa. We do so with the aim to advance the right to development as an imperative to improving living standards for the peoples of Africa. Our analysis involves determining to what extent adequate protection could be secured to the benefit of the communities that engage in the practice of traditional medicine for livelihood. Despite the imposition of western medicine, which has dominated traditional medicine since from the colonial era, the latter has survived and as we argue, deserves protection for gainful purpose as part of the common heritage, which the peoples of Africa are entitled by law to benefit from. With the renewed impetus directed towards re-establishing African value systems against the iniquities of imperial domination, our central focus in this article is to demonstrate that the practice of traditional medicine is deeply rooted in African culture, which under the African human rights system is granted as a human right. In essence, the advancement of African culture constitutes an integral aspect of the right to socio-economic and cultural development enshrined in the African Charter. Unlike other intellectual property regimes, which we argue are not sufficiently protective, we posit that the right development provides a *sui generis* framework within which intellectual property protection of African traditional medicine could effectively be claimed as a measure to secure redistributive justice, which the peoples of Africa have been deprived of over the decades.

Keywords

African traditional medicine, intellectual property protection, African culture, right to development, human rights and development, socio-economic and cultural development

1. INTRODUCTION

Prior to the introduction of modern medicine, traditional medicinal practices characterised by indigenous methods of healing dominated the medical and public health system, which rural and urban communities in Africa relied on in dealing with various diseases that threatened their existence and survival.¹ With the advent of colonialism, the public health system witnessed a dramatic change with the imposition of Western medicine as the only formally accepted public health standard in the whole of colonial Africa.² African traditional medicinal practices were downrightly condemned as witchcraft or sorcery, systematically ostracised and banned from use.³ However, because of its correlation with the cultural value systems of the African peoples, the practice of traditional medicine survived many odds and today, it is estimated that about seven per cent of household health budgets are spent on traditional medicines.⁴

Despite western influences and attempts to exterminate the practice, the survival of traditional medicine can be explained not only by the fact that the peoples of Africa are largely unable to afford pharmaceutical or conventional medicine, but importantly because the use of traditional medicine constitutes an inseparable part of African culture that has existed from time immemorial. The World Health Organisation (WHO) defines traditional medicine as

the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention, diagnosis, improvement or treatment of physical and mental illnesses.⁵

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¹ A. A. Abdullahi, 'Trends and Challenges of Traditional Medicine in Africa', 8 (5) *African Journal of Traditional, Complementary and Alternative Medicines* (2011): 115–123.

² *Ibid.*

³ O. M. J. Kasilo, *et al.*, 'An Overview of the Traditional Medicine Situation in the African Region', 14 *African Health Monitor* (2010).

⁴ A. M. Agbor & S. Naidoo, 'Knowledge and Practice of Traditional Healers in Oral Health in the Bui Division, Cameroon', 7 (6) *Journal of Ethnobiology and Ethnomedicine* (2011): 1.

⁵ World Health Organisation, *General Guidelines for Methodologies on Research and Evaluation of Traditional Medicine*. Geneva: World Health Organisation (2000).

Drawing from this definition, African traditional medicine is explained to refer to the system of health care based on customary belief systems that have been accepted and practised over the centuries within African communities for the health needs of the local populations. Traditional healers and other practitioners of the art of traditional medicine generally charged little or no monetary reward or remuneration for the services they rendered. In most cases, they only received gifts from their patients in the form of food items such as tubers of yam, bush meat, and palm oil among others.⁶

In Cameroon for example, the advent of the economic crisis in late 1980 created a shift towards increased consumption of medicinal plants as an increasing practice in herbal medicine.⁷ The sustained use of or reliance on traditional medicine has become one of Africa's revered heritage and customs, which to say the least, was undermined and considered primitive practice during the colonial era. Unlike conventional medical practitioners who are expected to restore their patients' physical health only, African traditional medicinal practices are designed to re-establish social and emotional equilibrium based on traditional value systems as well as community rules and relationships.⁸

Primary health care, especially within the framework of conventional medicine is essentially based on practical, scientifically sound and socially acceptable methods and technology, which generally are made accessible to communities to ensure their full participation and at a cost that is affordable.⁹ Given that traditional medicine embodies the knowledge, skills, and practices that are informed by the belief systems that are indigenous to different cultures; our analysis in this article involves determining to what extent adequate protection could be secured to the benefit of the communities that engage in the practice of traditional medicine for livelihood.

⁶ P. Omonzejele, 'Current Ethical and other Problems in the Practice of African Traditional Medicine', 22 *Medicine & Law* (2003): 29.

⁷ C. N. Fokunang, *et al.*, 'Traditional Medicine: Past, Present and Future Research and Development Prospects and Integration in the National Health System of Cameroon', 8 (3) *African Journal of Traditional, Complementary and Alternative Medicines* (2011): 284–295.

⁸ E. K. A. Sackey, & O. M. J. Kasilo, 'Intellectual Property Approaches to the Protection of Traditional Knowledge in the African Region', 14 *African Health Monitor* (2010) 89-94.

⁹ Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

With the renewed impetus directed towards re-establishing African value systems against the iniquities of imperial domination, our central focus in this article is to demonstrate that the practice of traditional medicine is deeply rooted in African culture, which under the African human rights system is granted as a human right. In essence, the advancement of African culture and by implication African traditional medicine constitutes an integral aspect of the right to socio-economic and cultural development enshrined in the African Charter. Of interest in this regard is the question of securing intellectual property rights over African traditional medicine, which we posit, is achievable within the legal framework of the right to development in Africa.

Making this determination requires as we explain in section 2, an analysis of the impact of cultural imperialism on traditional medicine in Africa. In accordance, we explain why it is of essence to ensure that the practice of traditional medicine acquires intellectual property protection as integral to the enjoyment of the common heritage of mankind, which the peoples of Africa are entitled to by law. We proceed in section 3 to explain the relevance of situating intellectual property protection of African traditional medicine as an essential component of the right to development. We posit that unlike other intellectual property regimes, which we argue are not sufficiently protective, the right development provides a *sui generis* framework within which intellectual property protection of African traditional medicine could be claimed as a means to secure redistributive justice. In conclusion, we reiterate the fact that states parties have an obligation under the African Charter to ensure the realisation of the right to development at domestic level as a guarantee that traditional medicinal practices can effectively be protected.

2. CULTURAL IMPERIALISM AND ITS IMPACT ON TRADITIONAL MEDICINE

A. The civilisation mission

The civilisation mission, otherwise known as *mission civilatrice*, provided the basis, albeit maliciously, for the European invasion of the African continent, which they shredded into pieces of colonies in the 1880s, supposedly to fulfil a divine appointment to bring civilisation or enlightenment to the African peoples. Civilisation according to Wolf is explained to mean an evolutionary process marked by a systematic shift from ancient practices towards contemporary

societies.¹⁰ Understood literally, the civilisation mission carried the connotation of a well-intentioned moral obligation to elevate the African continent and its peoples to acceptable standards of modernisation established by the western world.

However, because ‘[p]erceptions influence attitudes which also influence behaviour, choices and actions’,¹¹ the colonisation of Africa was actually premised on western narratives. These narratives are driven by ethno-centric beliefs and a constructed imagery of Africa as a dark and backward continent, inhabited by barbaric and uncivilised people accustomed to primitive practices, which ought to be de-emphasised and rooted out.¹² Contrary to the understanding of civilisation as a progressive phenomenon anticipated to ameliorate a prevailing situation, the colonisation crusade perpetrated through brutal conquests and abusive exploitation could not disguise the underlying motives behind European imperialism, which aimed at decimating the African identity.

For the over three quarters of a century that colonialism lasted, the civilisation mission not only failed to achieve its make-belief purpose, it brought about, as Tracey puts it, ‘deep-seated structural distortions’ in the lives of the African peoples.¹³ Apart from a few notable development gains recorded during the colonial period, the colonised peoples of Africa experienced a severe deterioration in living standards.¹⁴ Owing to the deep-seated motives that informed the colonial enterprise, the so-called civilisation mission, became more of an imperial machinery to deconstruct African cultural value systems and customary modes of production.¹⁵

European imperial interest was kindled by hunger for the continent’s wealth and resources, which led to the massive expropriation of native lands and the violation of indigenous property

¹⁰ S. Wolf, ‘Global Civilisation and Local Cultures: A Crude Look at the Whole’, 16 *International Sociology* (2001): 319.

¹¹ A. R. Byaruhanga, ‘Poverty and Human Rights in Africa: Historical Dynamics and the Case for Economic, Social and Cultural Rights’, 14 *The International Journal of Human Rights* (2010): 33.

¹² I. Y. Kabiru, ‘Impact of Globalisation on the Traditional African Cultures’, 15 *International Letters of Social and Humanistic Sciences* (2014): 8.

¹³ T. Jamison, ‘Lay My Burden Down: How the Concept of White Man’s Burden affected the Sociocultural and Political Economic growth of African Americans in the Mid Twentieth Century’, *Academia.Edu*, (d.n.a): 15.

¹⁴ L. Heldring, & J. A. Robinson, ‘Colonialism and Economic Development in Africa’, *National Bureau of Economic Research - Working Paper 18566* (2012): 10-12; P. de Zwart, ‘South African Living Standards in Global Perspective 1835-1910’, *Economic History of Developing Regions* (2011): 26.

¹⁵ E. Iwara Iwara, ‘Cultural Hegemony and Africa’s Development Process’, 9 *African Journal of Political Science and International Relations* (2015): 130.

rights.¹⁶ The colonisation project was designed in a manner to ensure that corporate interests; characterised by profit maximisation and the accumulation of wealth, took precedence over human interests and the well-being of the African peoples.¹⁷ This caused the African peoples to lose track of their ‘traditional or cultural trajectories of development’.¹⁸ While the African peoples were made to see the practice of traditional medicine as superstitious, the colonisers commoditised and tagged the resources used for traditional diagnostics and healing as public goods with a market value. This placed the local populations at a disadvantage in terms of bargaining capacity.

History holds empirical evidence of the fact that great civilisations existed across Africa before the European invasion.¹⁹ Talking of great African civilisations, we refer to the socio-economic and cultural achievements within the various communities that made up the African continent, which Yankuzo notes, were advancing self-sufficiently in every aspect, including in the area of public health.²⁰ Academic literature, illustrates that a functional health care system dominated by the use of traditional medicine and indigenous healing practices that responded adequately to the health needs of the local populations existed preceding the advent of colonialism and the introduction of western medicine.²¹

A central aspect of the pre-existing African civilisation includes, as we argue, the uncelebrated discoveries in the medicinal properties of local plants and herbs for which intellectual property right is lawfully supposed to be attributed to the African peoples. However, instead of capitalising on these discoveries for the advancement of African societies, colonialism, with its inherently paternalistic drive rather became a constraining factor to the science of traditional medicine. The practice of traditional medicine prior to colonialism might have been rudimentary but of course, did not for any reason, necessitate its substitution with western medicine. The WHO definition referred to earlier, indeed makes it clear that traditional medicine is acceptably culture-bound and driven by indigenous beliefs and spirituality.

¹⁶ Heldring, *supra* note 14, 13.

¹⁷ C. C. Ngang, ‘Indigenous Peoples’ Right to Sustainable Development and the Green Economy Agenda’, (2015) 44 (4) *Africa Insight* 46.

¹⁸ Iwara, *supra* note 15, 124.

¹⁹ Mist Nationals, ‘Kingdoms of Africa’, (2016) available at: http://www.pbs.org/wonders/fr_wb.htm (accessed 24 August 2017).

²⁰ K.I. Yankuzo, ‘Impact of globalisation on the traditional African cultures’, 15 (1) *International Letters of Social and Humanistic Sciences* (2014): 3-6.

²¹ Yankuzo, *supra* note 20, 5; Abdullahi, *supra* note 1, 115.

With evidence that development in Africa has not been stagnant, it is irrefutable that without colonialism, African traditional medicine, just like traditional medicine from South East Asia (China and India to be precise), would ultimately have advanced into the mainstream of contemporary health care systems. Medicinal plants used in traditional diagnostics and therapeutics in Africa are known to have provided the working knowledge and ingredients for scientific breakthroughs in pharmaceutical medicine for which patent has often wrongfully been hijacked by foreign stakeholders.²² Even more problematic is the essentially biased purpose that motivated the imposition of western medicine in the colonies. This was driven by the capitalist interest to expand the frontiers of the European market economy through profiteering rather than a genuine concern for the health and survival needs of the African populations.

In fact, the model of western medicine that colonialism brought to Africa, which as indicated above, is fuelled by capitalist interests, contrasted sharply with the pre-colonial customary health care system. The practice of traditional medicine operates within the context of communal ownership where medicinal plants are revered as divine gifts to be used to the benefit of the entire community and not necessarily for personal gains. Not only did colonialism seek to destroy these value systems, colonial laws were also used to criminalise traditional forms of diagnostics and therapeutics.²³ In apartheid South Africa for instances, traditional medicine was branded as witchcraft, declared unconstitutional and banned from being practiced.²⁴

Although Lock is right in stating that colonialism never succeeded in completely eradicating indigenous health care practices, the latter is still largely dominated by western medicine with the attendant adverse consequences to the peoples of Africa.²⁵ By alienating traditional medicine for decades, colonialism created unacceptable levels of inequalities, which have to this day, disadvantaged the majority of African people who are not only unable to afford pharmaceutical brands but to say the least, are grossly deprived of the opportunity for socio-economic and cultural development.

²² S. Ragavan 'Protection of Traditional Knowledge', 2 *Minnesota Intellectual Property Review* (2001): 60.

²³ T. Helen, 'History of Medicine: Medicine, Empires, and Ethics in Colonial Africa', 18 *Ama Journal of Ethics* (2016): 753.

²⁴ Abdullahi, *supra* note 1, 116.

²⁵ M. Lock, 'Globalisation and Cultures of Biomedicine: Japan and North America' in H. Selin, (ed) *Medicine Across Cultures: History and Practice of Medicine in Non Western Cultures* (2003), p. 155.

The crusade for self-determination in Africa evolved from the background of the abusive exploitation and dispossession of the ownership rights over the abundance of natural resources, which constitutes an enormous potential for advancing among others, the industry of traditional medicine. In the aftermath of colonialism, the processes for transformation in Africa have progressively been driven by radical concepts among which we highlight the right to development initiated in the late 60s by Senegalese Foreign Minister, Doudou Thiam and anti-imperialist Archbishop Etienne Duval.²⁶ For these proponents, proclaiming the right to development as a substitute model for countries of the ‘third world’, as they posited, entails denouncing the pre-existing colonial paradigms that perpetuate subjugation.²⁷

Conceived to advance socio-economic and cultural self-determination against imperial injustices, the recognition of the right to development in the African Charter²⁸ as a collective entitlement provides assurance of a legal regime that can appropriately redress the challenges relating to the protection of property rights for discoveries, product branding and standardisation of traditional medicine in Africa. As Abdullahi correctly asserts, it is appropriate to do so within a regulatory legal framework.²⁹ Although there are existing (mostly international) legal frameworks for the protection of intellectual property rights, we emphasise on the right to development in Africa on the basis that as a more contextualised regime, it imposes a duty on states parties to adopt appropriate domestic legislation and policies to regulate the often uncontrollable actions of foreign conglomerates.

The monopoly powers granted under existing intellectual property regimes allow multinational corporations to dominate domestic markets, thus reducing viable competition and inhibiting the conservation of medicinal plant varieties at local levels.³⁰ Before proceeding to look at the right to development framework more closely as a legal regime for the protection of traditional medicine in Africa, it is important to first of all highlight the irregularities involved in the practice and by so doing, provide justification for its protection.

²⁶ O. C. Okafor, ‘A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights’, in UN *Human Rights Realizing the Right to Development*, Geneva: United Nations (2013), p. 374.

²⁷ F. Ougergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Netherlands: Martinus Nijhoff Publishers (2003), p. 298.

²⁸ African Charter on Human and Peoples’ Rights adopted in Nairobi on 27 June 27 1981, art 22.

²⁹ Abdullahi, *supra* note 1, 120.

³⁰ R. Ramcharan, *International Intellectual Property Law and Human Security*, The Hague: Asser Press (2013), pp. 81-93.

B. Rationale for Protecting African Traditional Medicine

African traditional medicinal practice, also known as ethnomedicine, folk medicine, native healing, or complementary and alternative medicine, is the oldest form of health care system that has stood the test of time on the continent. It is an ancient and culture-bound method of healing that Africans have used to cope and deal with various diseases that have threatened their existence and survival.³¹ The pre-colonial period between 1840 and 1860 marked a significant and rapid innovation in tropical medicine, particularly the invention of quinine to stem the scourge of malaria in the most endemic regions of the world. The institutionalisation of the modern health care system is seen as one of the many ‘legacies’ of western encroachment in Africa.³² The introduction of western medicine gave rise to property protection rights over biological resources, including folklore medicinal practices, which had hitherto created an unequal power relation that practically undermined the traditional health care system in Africa because of the over-riding power of western medicine.³³

African traditional medicinal practice remains that knowledge which has been developed over time, dating back to the pre-history of the communities but it is often not possible to trace its actual origins. Petra Ebermann points out that the practice of African traditional medicine has survived due mainly to the fact that it has been passed on orally from generation to generation.³⁴ Consequently, in terms of intellectual property protection, contrary to the western standards for protection provided for within the framework of the World Trade Organisation Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPs), we make the argument that only a regional framework can be established to recognise, protect and promote the ‘inalienable rights’ of the African peoples to gainfully practice traditional medicine on the continent.³⁵

Although we can, to a greater extent agree that western science and technology has drastically changed human health care system globally, this revolution has not been able to

³¹ Abdullahi, *supra* note 1, 115–123.

³² P. D. Curtin, *Disease and Empire: The Health of European Troops in the Conquest of Africa*, London: Cambridge University Press (1998).

³³ K. Konadu, ‘Medicine and Anthropology in Twentieth Century Africa: Akan Medicine and Encounters with (Medical) Anthropology’, 10 (2/3) *African Studies Quarterly* (2008).

³⁴ P. Ebermann, ‘Patent as Protection of Traditional Medical Knowledge? A Law and Economics Analysis’, 15 *Intersentia Cambridge – Antwerp – Portland*, (2012): ch. 1.

³⁵ G. Bodeker, ‘Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing’, 11 *Cardozo Journal of International & Comparative Law* (2004): 785.

completely replace the practice of traditional medicine in providing quality health care to local populations. In spite of the development of resistant strains of micro-organisms, mortality rates associated with common infectious diseases have declined significantly with an attendant increase in life expectancy. The eradication of smallpox globally is further evidence of the efficacy of orthodox medicine. However, according to WHO, over thirty three per cent of the world's population has no regular access to the most essential western medicines, especially in the poorest countries in Africa and Asia where more than fifty per cent of the population lacks access to major health care services.³⁶

To this end, we hold the view that the institutionalisation of practical measures for the recognition of African traditional medicine as a means to eradicating infectious diseases that are discovered through epistemological actions is important. A significant feature that demonstrates the predominance of traditional medicine is the fact that its practitioners outnumber western-trained medical doctors. In Ghana and Zambia for example, the ratio of medical doctors to the population is 1 to 20,000 while the corresponding figures of traditional practitioners to the total population is 1 to 200. Unlike in south-east Asia, African traditional medicine is not adequately integrated into the health care systems despite the policy directions that have been provided through the adoption of various resolutions and declarations by WHO governing bodies.³⁷

More recognition ought to be given to the ability to develop drugs in non-western cultures in Africa. Nonetheless, the uncertainties are rather more related to the protection of traditional medicine by aspects of intellectual property law at the national or regional levels in Africa. This is compounded by the divisions in epistemologies of western and traditional knowledge systems. Incompatibility of the patent system with traditional medicinal knowledge is in the epistemic schism rather than in the purported areas of antiquity, openness, and stagnation of traditional medical knowledge.³⁸ The issues relating to intellectual property protection of Africa traditional medicine is that the subject matters for protection are often too abstract and not bound to a particular source. The knowledge of one person about the healing properties of a plant, for example, does not affect the use of the same by another person provided that the plant is

³⁶ WHO, *supra* note 5.

³⁷ World Health Organisation, 'Alma-Ata Primary Health Care: Report of the International Conference on Primary Health Care. Alma-Ata', USSR, Geneva, (Health for All Series, No 1) (1978).

³⁸ J. Whittingham, 'GMO – The Piracy of Indigenous Knowledge', (2014) available at: <http://www.badgeronline.co.uk/gmo-piracy-indigenous-knowledge/> (accessed: 26 October 2017).

available to all, which supports the fact that once this knowledge has been disclosed, the user cannot control or prevent others without an artificially created protective system.³⁹

Research shows that thousands of applications have been filed for the patenting of African plants. These plants include: brazzein, a protein that is 500 times sweeter than sugar from a plant in Gabon, which has been used by traditional communities for centuries; teff, the grain used in Ethiopia's flat 'injera' bread has been used by the people of Ethiopia and Eritrea from as far back as 4000BCE; thaumatin, a natural sweet protein extracted from the katemfe plant in West Africa; the African soapberry and the Kunde Zulu cowpea; genetic material from the West African cocoa plant as well as *Prunus Africana* known as the native of Cameroon.⁴⁰ Interestingly, the property rights for inventions on the above plants are unfortunately not awarded to Africa traditional medical practitioners but to foreign multinational corporations.

Owing to the fact that existing contemporary property right regimes do not sufficiently guarantee protection to the practice of African traditional medicine or property rights to traditional medical practitioners to reap equal benefits, it gives us the opportunity to explore alternative measures. We stand for a proprietary system of benefit sharing or a form of multilateral negotiation framework in which governments support global protection that equally promotes the practice of Africa traditional medicine as a cultural right to development.⁴¹ This is guaranteed to ensure that the value of African traditional medicine is brought to the limelight on issues of protection to ensure that practitioners are compensated for their contribution to the development of commercially traded medicinal products.⁴²

So far, a few countries such as Eritrea, South Africa, Uganda and Zimbabwe, have developed or reviewed their legislation to include the safeguard measures provided for in the TRIPs Agreement in an attempt to provide protection to the practice of African traditional medicine. In addition, Cameroon and Ghana have developed a national framework for intellectual property rights in 2007 and 2008 respectively whereas; Nigeria and South Africa

³⁹ Ebermann, *supra* note 34, 37.

⁴⁰ K. Hearn, 'Biopirates Walk the Plank: Is the Crackdown on Biopiracy Protecting the Rights of Indigenous People or Putting the Freeze on Beneficial Science?' *Alternet* (14 June 2006) available at: http://www.alternet.org/story/37470/biopirates_walk_the_plank (accessed: 16 June 2017).

⁴¹ Ebermann, *supra* note 34.

⁴² Y. Daya, & N. Vink, 'Protecting Traditional Ethno-Botanical Knowledge in South Africa through the Intellectual Property Regime', 45 (3) *Agrekon* (2006): 319-338.

have developed a Traditional Knowledge Bill. Between 2005 and 2007, Mali held a series of training workshops on intellectual property rights and published two books on indigenous veterinary medicine and on African traditional medicine.⁴³ These domestic measures have greatly benefited traditional health care practitioners.

A traditional health practitioner as defined by WHO is a person recognised by the community in which he or she lives as having the competence to carry out diagnoses with local socio-cultural methods and contributes to the physical, mental, social, and spiritual well-being of the members of their communities. Practitioners of African traditional medicine have various specialisations such as traditional therapy, traditional midwifery, herbalism, psychiatry, paediatrics and spiritualism. As highlighted earlier, the practitioners in these disciplines of traditional medicine far out-number conventional medical practitioners in many African countries and they provide health care to about eighty per cent of the population within the different countries.⁴⁴

The discussion on intellectual property protection of African traditional medicine is thus, motivated by the following interrelated facts: Apart from it being incentive-oriented to provide private monopoly, it is also an inestimable trigger to economic growth, job creation and an important guarantee in enhancing the quality and enjoyment of a better standard of life. Thus, from a very comprehensive point of view, it is logical that intellectual property protection is extended to the reach of traditional medical practitioners in Africa. It is more so because, practitioners of African traditional medicine experience difficulties due to the insufficiencies in protecting their knowledge rights through the existing intellectual property systems. However, the lapses have rather been blamed on the inadequacy of traditional knowledge to satisfy the requirements for intellectual property protection.

In cases where it is possible, the prohibitive costs of registering and defending patents and other intellectual property rights may curtail effective protection.⁴⁵ Application for a patent on Africa traditional medical knowledge and practices cannot be obtained for medicines that are

⁴³ K. Busia & O. M. J Kasilo, 'Overview of Traditional Medicine in ECOWAS Member States', 14 *The African Health Monitor* (2010): 17.

⁴⁴ Sakey & Kasilo, *supra* note 8, 95.

⁴⁵ Sakey & Kasilo, *supra* note 8, 94.

already widely used before the advent of such patent rights.⁴⁶ Within the framework of the TRIPs Agreement, certain minimum requirements must be attained to qualify for intellectual property protection. According to Article 27 of the TRIPs Agreement, ‘...patents shall be available for any inventions, whether products or process, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’.

This condition of protection under the TRIPs Agreement is negative to African traditional medicine, given the fact that the practice of traditional medicine, which is a culture-based knowledge system, cannot be regarded as novel. The more important question of how to protect African traditional medicine as a practical measure for the realisation of the right to development cannot be answered by patent law.⁴⁷ For Lewinski, it is appropriate to promote the development of African traditional medicine by means of contractual agreements that would allow the transfer of a share of the benefits to the traditional knowledge innovation systems and provide incentives to the younger generations to sustain the practice.⁴⁸ Besides ensuring a sustainable practice of traditional medicine, the idea of profit sharing hinges on the important aspect of the right to development relating to the equitable sharing of development gains, which is discussed later.

Contractual agreements can provide practical measures for the protection intellectual property rights on Africa traditional medicine and traditional knowledge by promoting its integration into public health systems with evidence on safety, efficacy and quality through partnership-building between conventional and traditional health care systems.⁴⁹ The actual issues with regard to guaranteeing intellectual property protection of African traditional medicine relate to the fact that a large amount of traditional knowledge is undocumented and that relevant literature or databases are either not sufficiently available or researchable.⁵⁰

This creates the assumption among western pharmaceutical industries that the knowledge relating to African traditional medicine is free information, while western medicine is not and that no one has exclusive right to this information, especially because of the lengthy process of

⁴⁶ Ebermann, *supra* note 34, 141.

⁴⁷ S. V. Lewinski, ‘Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore’, 3 *Kluwer Law International CN The Hague, Netherlands* (2004): 65.

⁴⁸ Lewinski, *supra* note 47, 66.

⁴⁹ K. Busia, & O. M. J. Kasilo, ‘Collaboration between Traditional Health Practitioners and Conventional Health Practitioners: Some Country Experiences’, 14 *The African Health Monitor* (2010): 14.

⁵⁰ Lewinski, *supra* note 47, 60.

development involved to make traditional medicine patentable. Considering the huge profits generated by western medicine, African states have an obligation, in accordance with the African Charter to establish an appropriate legal framework to protect the practice of traditional medicine such that the benefits may be shared equitably with the communities where such traditional is generated.⁵¹ In doing so, assurance is given that the right to development guaranteed to all the peoples of Africa is achievable. A challenging question that arises in the discourse on intellectual property protection of traditional medicine is whether patent right belongs to the state or to the community-based custodians of such knowledge?

This issue has not been resolved internationally, although, under the intellectual property frameworks of many African countries, it is the state that holds ultimate patent right over traditional medicine – a situation that is by no means acceptable to indigenous groups and other communities that practice traditional medicine.⁵² This is justified by the upsurge of charlatan practitioners, many of whom, like the sophists of the ancient times, make huge sums of money from the trade. Some of the purported practitioners of African traditional medicine, often without adequate knowledge of the trade, move from rural to urban areas, probably as a result of poverty with the sole purpose of enriching themselves.⁵³ This can be resolved through a legislative framework not intended to replace conventional medical practices but to provide directives on how to avoid unorthodox practices that undermine African traditional medicine.

As indicated earlier, African traditional medicine must not be understood in the sense of being an ancient or static practice merely because of the use of the word ‘traditional’.⁵⁴ It is indeed a cultural practice with the potential for innovation and more so, a cultural right that needs legal protection as Chisala posits.⁵⁵ As an integral component of the right to (cultural) development, African traditional medicine is guaranteed protection under the African Charter on Human and Peoples’ Rights and also under the African Charter for Cultural Renaissance. The latter instrument recommends, on account of ‘[t]he experience of previous decades [...] an in-

⁵¹ E. M. Lee, ‘Patenting Traditional Medicine’, 89 (1) *Journal of the Patent and Trademark Office Society* (2007): 45-90.

⁵² G. Bodeker, ‘Intellectual property rights’ in G. Bodeker *et al.* (eds) *Traditional, Complementary And Alternative Medicine: Policy And Public Health Perspectives* (2006) London: Imperial College Press, p. 472.

⁵³ Omonzejele, *supra* note 6, 30.

⁵⁴ Ebermann, *supra* note 34, 37.

⁵⁵ S. E. Chisala, ‘Protecting Traditional Healing Practices In Malawi: Are There Lessons to be Learnt from South Africa?’, LLM Dissertation, University of Ghana (2005); J. D. Winthrop, *The White Man’s Burden: Historical Origins of Racism in the United States*, New York: Oxford University Press, (1974).

depth renewal of national and regional approaches in terms of cultural policy' to protect the factors relating to the 'productions of peoples, grassroots communities, artists and intellectuals'.⁵⁶ The Charter enjoins states parties to take 'appropriate measures for the protection of intellectual property rights related to the expression of cultural diversity',⁵⁷ which we argue is embodied in the formulation of the right to development in the African Charter.

Reaffirming that the practice of traditional medicine is an inalienable human right, we posit that it is crucial to explore the opportunity in asserting such a right broadly within the context of the right to development, which provides not only entitlement to socio-economic and cultural development but also, the right to the 'equal enjoyment of the common heritage of mankind'. The common heritage factor, which relates to the protection of natural wealth originates from the fact, as the African Commission explained in the *SERAC* case that Africa's resources have since the colonial era, been abusively exploited to the benefit of foreign stakeholders, leaving the African peoples disadvantaged and vulnerable to continuous exploitation.⁵⁸

Understandably, the right to development aims ultimately at the highest attainable standard of living, which includes among others the right to adequate health care and the right to equitable benefit from the development process. On this affirmative note, we move on to determine how the benefits of intellectual property rights could be secured within the right to development framework for the millions of African peoples who depend on the practice of traditional medicine for livelihood and survival.

3. *SUI GENERIS* RIGHT TO DEVELOPMENT FRAMEWORK

A. Guarantee of protection under the right to development regime

Our perception of the right to development in Africa as a *sui generis* regime for intellectual property rights protection for practitioners of traditional medicine is explained by the views held by the African Commission in the *Endorois* case. The Commission held that 'normatively, the African Charter is an innovative and unique human rights document compared to other [...]

⁵⁶ African Charter for Cultural Renaissance adopted in Khartoum on 24 January 2006, art 8.

⁵⁷ African Charter for Cultural Renaissance, *supra* note 56, art 22(e).

⁵⁸ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* Comm 155/96(2001) AHRLR 60 (ACHPR 2001), para 56.

instruments, in placing special emphasis on the rights of ‘peoples’.⁵⁹ It noted further that the Charter significantly departs from other human rights instruments by ‘weaving a tapestry which includes the three “generations” of rights: civil and political rights, economic, social and cultural rights; and group and peoples’ rights’.⁶⁰ Unique in this regard is the fact that the Charter enshrines the right to development, which summarily embodies these generations of rights.

Although the right to development is recognised and protected in the African Charter as a legally binding entitlement, there is some level of misapprehension as to what it means in concrete terms. This misunderstanding stems from the ambiguous formulation of the concept of the right to development in the 1986 United Nations Declaration and the controversy generated by some scholars who argue against its legal basis.⁶¹ The Declaration for instance, repeatedly emphasises the need for developed countries to assist developing countries, which we argue, defeats the purpose for which the right to development originated Africa with the claim to achieve self-sustainability.

Self-sustainability means that the peoples of Africa ought as a matter of right, be able to self-reliantly manage their resources for developmental purposes and consequently reap the benefits of doing so. It is within this understanding of the right to development as it is conceptualised by the Africa Charter that we situate and explain how the practice of traditional medicine could be guaranteed protection. The Charter provides that:

- 1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

⁵⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009), para 149.

⁶⁰ *Endorois case*, *supra* note 59, para 149.

⁶¹ J. Whyte, ‘Book review: Development as a human right edited by Bard A Andreassen and Stephen P Marks Harvard University Press, London, England, 2006’, 1 (1) *Electronic Journal of Sustainable Development* (2007): 1-3; A. Rosas, ‘The Right to Development’ in A. Eide, C. Krausus, & A. Rosas, (eds) *Economic Social and Cultural Rights* Dordrecht: Nijhoff Publishers (2001) p. 251; E. Bello, ‘Article 22 of the African Charter on Human and Peoples’ Rights’ in E. Bello, & B. Ajibola, (eds) *Essays in Honour of Judge Taslim Olawale Elias* Dordrecht: Nijhoff Publishers (1992) p. 462; I.G. Shivji, *The Concept of Human Rights in Africa* London: African Books Collective (1989) 82; Y. Ghai, ‘Whose human right to development?’ (1989) *Commonwealth Secretariat Occasional Papers*; R. Rich, ‘The right to development: A Right of Peoples?’ in J. Crawford, (ed) *The Rights of Peoples* Oxford: Oxford University Press (1988) 17-38; J. Donnelly, ‘The right to development: How not to Link Human Rights and Development’ in C. E. Welch, & R. I. Meltzer, (eds) *Human Rights and Development in Africa* New York: SUNY Press (1984) p. 261.

- 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.⁶²

Originating from the legacy of colonial injustices bequeathed to the peoples of Africa, the right to development was conceived and therefore, is to be understood within the context of decolonisation and the right to self-determination. This is explained in the preamble to the Charter, which highlights the need to liberate Africa from all forms of colonialism and by extension, preserve and promote the virtues of the historical traditions that build into African civilisation. Contrary to the views of some scholars who see the right to development as a solicitation for development assistance,⁶³ we see the right to development rather as an entitlement that allows the opportunity to shape socio-economic and cultural development processes in Africa.

Conceptually, the African Charter ascribes entitlement to exercise the right to development. Unlike under other human rights regimes, the peoples of Africa are empowered with the legal capacity to practically ensure equitable redistribution of their resources to be able to reap the benefits of socio-economic and cultural development. Although the Charter does not explicitly define what would amount to economic, social and cultural development, it recognises the right to culture embodied in traditional values, belief systems, customary practices and an African way of life.⁶⁴ According to Amartya Sen, development represents a process of expanding human freedoms,⁶⁵ which for the peoples of Africa; includes the freedom to practice traditional medicine. In highlighting the idea of ‘freedom and identity’ in exercising the right to development, the Charter recognises that only the peoples of Africa can determine the health care practices that are relevant to their specific circumstances.

⁶² African Charter, *supra* note 28, art 22.

⁶³ K. de Feyter, ‘The Right to Development in Africa’, *Law and Development University of Antwerp* (2013): 17; M. E. Salomon, ‘Legal Cosmopolitanism and the Normative Contribution of the Right to Development’ in S. P. Marks, (ed), *Implementing the Right to Development: The Role of International Law*, Geneva: Friedrich-Ebert-Stiftung (2008), p. 17; Sengupta, A ‘Development cooperation and the right to development’, *Copyright © 2003 Arjun Sengupta* (2003): 20; A. Sengupta, ‘On the theory and practice of the right to development’, 24 (4) *Human Rights Quarterly*, (2002): 880.

⁶⁴ African Charter, *supra* note 28, arts 17(2)&(3); Charter for African Cultural Renaissance, *supra* note 56.

⁶⁵ A Sen *Development as Freedom* (1999) 3.

Indigenous communities for instance, are identified to manifest unique cultural, spiritual and lifestyle characteristics that distinguish them from other communities in society.⁶⁶ It is noted that owing to their unique identities, the cultural lifestyles and spirituality of indigenous peoples are so interconnected with the natural environment that dissociating them from their indigenous practices may amount to denying them the right to life⁶⁷ and of course also the right to development. Although these communities have demonstrated from time immemorial the know-how through indigenous practices, even without the use of modern-day technology they are often not accredited with the property rights for their discoveries and ownership of the resources for which they are entitled to claim custodianship.⁶⁸

The right to development represents the process of equalising opportunities for development, which according to the common heritage standard referred to earlier, sets the standards for achievement in terms of resource ownership as a pre-requisite for advancing the productive capacity of the peoples of Africa.⁶⁹ To acknowledge that the right to development is to be achieved with due regard to a people's freedom and identity, articulates the right to self-determination, which the African Charter recognises in article 20 as an 'unquestionable and inalienable right'. The Declaration on the Right to Development also recognises the right to development as an extension of the right to self-determination, which guarantees entitlement to full sovereignty over all their natural wealth and resources.⁷⁰

The capability to exercise the freedoms envisaged by the Charter is accompanied by the liberty to portray a collective identity, which implies, as we explain later that it is more appropriate to grant intellectual property rights for the practice of traditional medicine to entire communities where such practices are prevalent than to individuals. This is justified by the African construction of collectivism, which situates individual functioning only within the framework of the broader community.⁷¹ It is further emphasised by the fact that the African patrimony is conceived as a 'common heritage' from which the peoples are granted the right to

⁶⁶ International Labour Organisation Convention No 196 1986, Martínez Cobo UN Doc E/CN.4/Sub.2/1986/7 (1987), art 1.

⁶⁷ Ngang, *supra* note 17, 34.

⁶⁸ Ngang, *supra* note 17, 35.

⁶⁹ H. Armiwulan, 'Development and Human Rights', *China Human Rights* (2008): 32.

⁷⁰ Declaration on the Right to Development adopted by the UN General Assembly, Resolution 41/128 on 4 December 1986, art 1(2).

⁷¹ L. R. Carson, "'I am Because We Are": Collectivism as a Foundational Characteristic of African American College Student Identity and Academic Achievement', 12 (3) *Social Psychology Education* (2009): 327.

collectively derive benefits and also by the age-old custom of passing down cultural practices from generation to generation. Unfortunately, this practice has systematically been eroded and for imperialistic reasons, the dominant culture of pharmaceutical medicine is imposed as the universal standard for health care.

The liberty to identify with traditional practices as an acceptable norm in African society, which is embodied in the concept of the right to development, guarantees the collective entitlement to advance traditional medicine without submission to external pressures. According to Kamga, the right to development is an undeniable entitlement that cannot be bargained for less than its inherent value.⁷² The right to development is absolute and cannot be negotiated.⁷³ By virtue of these assurances, envisaging the protection of traditional medicine under the regime of the right to development is of utmost value to the peoples of Africa who are yet to come to terms with the threat posed by conventional paradigms perpetrated through globalisation.⁷⁴

Regardless of its acclaimed virtues, globalisation is bad for Africa. It allows foreign stakeholders to hijack domestic policy making and thus, limits the capacity of African countries in setting development priorities that are relevant and applicable to the realities on the ground.⁷⁵ Alternatively, the right to development represents a policy mechanism with the potential to set the praxis for protecting the practice of African traditional medicine. This is underscored by the fact that the right to development derives from the right to self-determination requiring the peoples of Africa ‘to freely determine their political status and to ‘pursue their economic and social development according to the policy they have freely chosen’.⁷⁶ The Declaration on the

⁷² S. A. Kamga, ‘Human Rights in Africa: Prospects for the Realisation of the Right to Development under the New Partnership for Africa’s Development’, *LLD Thesis University of Pretoria* (2011): 121.

⁷³ A. Sengupta, ‘Development Cooperation and the Right to Development’, *Copyright©2003 Arjun Sengupta* (2003): 20.

⁷⁴ L. Haocai, ‘Remarks at the Opening Ceremony of the Beijing Forum on Human Rights’, *China Human Rights* (2008): 1

⁷⁵ A. Sengupta, ‘On the Theory and Practice of the Right to Development’, 24 *Human Rights Quarterly* (2002): 880.

⁷⁶ A. Anghie, ‘Whose Utopia?: Human Rights, Development and the Third World’, *Qui Parle: Critical Humanities and Social Sciences* (2013): 22; N. J. Udombana, ‘The Third World and the Right to Development: Agenda for the Next Millennium’, 22 (3) *Human Rights Quarterly* (2000): 769-770; African Charter, *supra* note 27, art 20(1).

Right to Development acknowledges that '[s]tates have the right and the duty to formulate appropriate national development policies' for the betterment of the livelihood of their peoples.⁷⁷

It involves the right to choose between policy alternatives, which in this context, requires African countries to prioritise traditional medicine over western pharmaceutical brands. It draws from the obligation imposed on states parties to the African Charter to create the enabling environment for exercising the right to practice traditional medicine as a pragmatic measure for the realisation of the right to development enshrined therein. As a tool for policy making, the right to development guarantees to the peoples of Africa, the opportunity to seek new ways of advancing their productive capabilities, including through the practice of traditional medicine. It envisages both legislative and regulatory measures to protect the African patrimony from the abusive exploitation by foreign stakeholders.

Faced with increasing global competition, Africa remains challenged with regard to establishing a policy framework for the protection of the wealth of resources and knowledge systems in the domain of traditional medicine. In spite of the WHO position on accepting and recognising traditional medicine as an integral part of the cultural heritage of a people, communities in Africa are yet to reap substantial gains in terms of socio-economic and cultural development.⁷⁸ Many international instruments make provision for the protection of cultural heritage in conceptualising a framework for development.⁷⁹ To this end, the African Union Commission envisages an Africa with a 'strong cultural identity, common heritage, shared values and ethics' but fails to highlight the regime of protection of that patrimony.⁸⁰

The absence of a robust policy framework for the protection of the African cultural patrimony of course, exposes the practice of traditional medicine to abuse and exploitation. Although many African countries have signed up to various international treaties on intellectual property rights, we contend that these instruments are generally not protective enough in addressing issues relating to the practice of traditional medicine that is specific to Africa. Consequently, we posit that the right to development enshrined in the African Charter, which has

⁷⁷ Declaration on the Right to Development, *supra* note 70, art 2(3).

⁷⁸ World Health Organisation, 'Traditional Medicine Programmes and Global Programme on AIDS 'Report of the consultation on AIDS and traditional medicine: Prospects for involving traditional health practitioners' Botswana (1990) WHO/TRM/GPA/90.1 3-6.

⁷⁹ Chisala, *supra* note 55, 12.

⁸⁰ African Union Commission 'Agenda 2063: The Africa we want', *African Union* (2015): paras 40-46.

extensively been ratified by all member states of the African Union with the exception of South Sudan and Morocco, provides an appropriate legal framework that needs to be explored for the protection of traditional medicine and the practices associated to that across the continent.

In making this proposition, it is important to reiterate the fact that traditional medicine is associated to culture, which in Africa, cuts across territorial boundaries. As a practical measure, the right to development framework guarantees that communities can reap equitable benefits from the common African heritage, and in accordance, article 22(2) of the African Charter binds states parties with the obligation to collectively create the enabling environment for the peoples of Africa to advance traditional medicine as a legitimate practice. We estimate that such an enabling environment would motivate innovations in the practice of traditional medicine, create opportunities for the commercialisation of traditional medicinal brands and products and therefore also promote socio-economic and cultural development across the continent.

Intellectual property protection is indeed intended, as Masango affirms, to prevent exploitation by appropriation for financial gains by third parties.⁸¹ In accordance, we assert that unlike other intellectual property frameworks, the regime of the right to development in Africa offers the advantage of judicial remedy in the event that the intellectual property rights of practitioners of African traditional medicine are infringed upon. Although there is yet no case that has been adjudicated in this regard, the right to development regime provides avenues for litigation that need to be explored. The *Endorois* case dealt with indigenous ancestral lands, including the natural resources found therein and the cultural practices associated to the indigenous lifestyle,⁸² which we argue does not exclude the practice of traditional medicine.

With regard to the right of ownership of the natural resources that constitute the supply base of traditional medicine, the African Commission has laid down the rule that the resources found on indigenous ancestral lands legitimately belong to the indigenous peoples concerned.⁸³ In accordance with the common heritage standard alluded to earlier; the entitlement to natural resources guarantees protection over the practice of traditional medicine, which if violated, legal action could be instituted to ensure that redistributive justice is achieved.

⁸¹ C. A. Masango, 'Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?', 76 *South African Journal of Library & Information Sciences* (2010): 80.

⁸² See generally *Endorois* case, *supra* note 59.

⁸³ *Endorois* case, *supra* note 59, para 267.

B. Redistributive Justice

It is reported that the practice of traditional medicine has the potential to yield enormous economic benefits to the world market value of over USD60 billion.⁸⁴ Although this huge sum obtains from the marketing of a wide range of pharmaceutical medication such as ‘quinine, salicylic acid, artemisinin’ among others, which are known to originate from traditional knowledge sources, the local or indigenous people and communities who generate and develop such knowledge,⁸⁵ often do not get to reap any benefits from their commercialisation. On the contrary, this has contributed significantly to the economic growth and by extension, the development of western societies that exploit these traditional medicinal resources.

The Nagoya Protocol adopted within the framework of the Convention on Biological Diversity makes provision for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources to ensure the conservation and sustainable use of biodiversity.⁸⁶ It is worth stating that local and indigenous peoples have from time immemorial, demonstrated the ability to sustainably manage and maintained ecological balance of nature’s resources.⁸⁷ As an international treaty, the Nagoya Protocol imposes an obligation to the effect that, the local and indigenous custodians of nature’s secret knowledge are entitled to a fair share of the proceeds of exploitation of their natural traditional plant resources. With acknowledgement of the fact that economic growth plays a major role in stimulating and sustaining development, disadvantaging the peoples and communities that drive economic growth at the grassroots level would rightly qualify as a violation of their intellectual property rights.

Besides providing the framework through which claims could be made through litigation as explained above, the regime of the right to development in Africa also creates the opportunity for redistributive justice in the allocation of benefits that may accrue from protecting African traditional medicine. Article 22 of the African Charter neither specifically provides for intellectual property protection over traditional medicine nor defines the substantive benefits that

⁸⁴ A. Mposhi, C. Manyeruke & S. Hamuaswa, ‘The Importance of Patenting Traditional Medicines in Africa: The Case of Zimbabwe’, 3 (2) *International Journal of Humanities and Social Science* (2013): 236.

⁸⁵ Mposhi, Manyeruke & Hamuaswa, *supra* note 84, 236.

⁸⁶ Convention on Biological Diversity 2011, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation adopted in October 2010, Secretariat of the CBD, Montreal.

⁸⁷ Ngang, *supra* note 17, 34.

may be derived from such practice. However, as indicated earlier, the African Charter in conjunction with the Charter on Cultural Renaissance grants entitlement to advance traditional medicine as part of the right to socio-economic and cultural development. This is guaranteed to benefit the peoples of Africa in accordance with the assurance of the equitable sharing of the benefits deriving from the common African heritage of which they are unfairly disadvantaged.

The right to development framework inputs not only a legal but also a deontological duty on states parties to the African Charter to individually and collectively ensure, through appropriate development policies, legislation and other measures that the peoples of Africa can exercise the right to socio-economic and cultural development. It entails among others, guaranteeing intellectual property protection over African traditional medicine as an assurance for the constant improvement of human well-being. In accordance, states parties are required in conjunction with article 1 of the African Charter to undertake all necessary domestic measures for the realisation of the right to development including inter alia, ensuring equality of opportunity, especially for local and indigenous communities in their fair share in the exploitation of traditional medicinal resources.

With regard to ensuring redistributive justice in relation to the practice of traditional medicine, the Nagoya Protocol makes provision for fair and equitable benefit sharing;⁸⁸ requires prior informed consent and the active involvement of indigenous and local communities before the commercialisation of bio-genetic resources,⁸⁹ and that the development of genetic resources associated with traditional knowledge be done on mutually agreed terms with indigenous and local communities.⁹⁰ On account of the fact that the Protocol allows the potential for overlap with other relevant instruments,⁹¹ we make the case for considering the regime of the right to development in Africa as an appropriate framework for intellectual property protection of African traditional medicine on the basis that it has a mutually reinforcing effect.

Following the idea of collectivism and adherence to the common heritage doctrine discussed earlier, we estimate that granting property rights over traditional medicinal plant species to whole

⁸⁸ The 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 29 October 2010 UNTS Registration No A-30619 [Nagoya Protocol] art 5.

⁸⁹ Nagoya Protocol, *supra* note 88, art 6(3).

⁹⁰ Nagoya Protocol, *supra* note 88, art 7.

⁹¹ Nagoya Protocol, *supra* note 88, arts 4(3), 12.

communities where those species are found has the advantage of systematically empowering and uplifting large numbers of people out of poverty. For Blakeney and Mengistie, it guarantees that local communities can reap substantial benefits from their indigenous knowledge and traditional practices.⁹² The mutually reinforcing effect is explained by the fact that the right to development provides the *sui generis* framework within which the practice of African traditional medicine can be guaranteed effective protection and in turn promotes the realisation of the right to economic, social and cultural development.

4. CONCLUSION

African societies have experienced various forms of domination throughout history, including under slave trade, colonialism and neocolonialism. However, their cultural heritage reflected in the practice of traditional medicine survived extinction from the cultural genocide perpetrated through colonialism. Presently, health care systems in Africa are dominated by the use of traditional medicine and indigenous healing practices that respond adequately to the health needs of the local populations. The absence of effective policy and legislative measures or the insufficiency of existing mechanisms to ensure the protection of traditional medicine has meant that illegal exploitation and the commercialisation of medicinal plants by multinational corporations is allowed to prevail, to the disadvantage of the African peoples who are supposed to enjoy intellectual property rights over these resources. The disadvantage with the illegal exploitation and commercialisation of traditional medicine is evident to the fact that Africa has remained the continent with the highest prevalence of various types of diseases.

In advancing the arguments in this article, we portray the practice of traditional medicine as an integral component of the right to development enshrined in article 22 of the African Charter, which we argue provides a unique framework for allocating intellectual property rights to practitioners of the art in Africa. In relation to the standards for the realisation of the right to development in Africa, we reiterate the fact that it is more appropriate to attribute intellectual property rights for the practice of traditional medicine to entire communities where such practices are prevalent, especially with regard to localised medicinal plant species. With regard

⁹² M. Blakeney & G. Mengistie, 'Intellectual Property and Economic Development in Sub-Saharan Africa', 14 (3/4) *Journal of World Intellectual Property* (2011): 238, 240.

to commercialisation, it is worth emphasising that market failures may occur if western standards of intellectual property protection, which cannot easily be deflected, are applied to the practice of traditional medicine. This is explained by the fact that the traditional medicine is susceptible to piracy and unfair copying.

In accordance with the obligations imposed by article 22, read together article 1 of the African Charter, states parties are enjoined as a practical measure, to adopt a domestic right to development legislative and/or policy framework to ensure effective protection of the practice of traditional medicine across the continent. Such a framework should be crafted to impose liabilities for the violation of intellectual property rights pertaining to practitioners of African traditional medicine. We estimate that domestic legislation and/or policy on the right to development should as a matter of necessity, prohibit the abusive exploitation and illegal use of traditional medicinal plant species. It should also, to all intents and purposes, make provision to the effect that the communities where medicinal plant species are found and where knowledge of such plant species is generated and developed should collectively be entitled to the associated intellectual property rights.