

## LEGAL APPRAISAL OF TRADITIONAL KNOWLEDGE AS ASPECTS OF INTELLECTUAL PROPERTY REGIME IN NIGERIA

Nwachukwu, Nkeiruka Tasie<sup>1</sup>

### Abstract

*Nigeria is a country that is indigenous in nature and a bio-diverse nation. Indigenous communities possess extensive knowledge passed on from generation to generation, and much of that knowledge is traditional in nature. This knowledge is a reflection of their cultural and religious traditions and practices which have existed for a long time and have been evolving from time to time. Traditional knowledge which is an aspect of intellectual property rights have been in existence prior to the evolution of formalised intellectual property system which evolved under the territorial, international and global era. This article seeks to analyse the effectiveness of legal platform like the formalised intellectual property system, customary law and biodiversity strategy policies at play when it comes to traditional knowledge. This article will address issues as to whether the new copyright framework have helped to guarantee protection for the indigenous communities over their creations. The article concluded that the indigenous communities despite the existence of legal frameworks are still deprived of absolute control over their biological resources and the benefits accruing thereof. This article recommended the need for a robust sui generis traditional knowledge system that will take cognisance of customary law of the indigenous communities and a biodiversity policy that will ensure fair and equitable sharing of benefit for the indigenous communities.*

### 1.0 Introduction

Prior to the evolution of formalised intellectual property system, traditional knowledge which is a body of knowledge developed, sustained and passed on from generation to generation was already in existence in the communities. Formalised intellectual property system evolved under three eras. The eras were the territorial, international and the global era. Territorial era saw the application of the laws within the territories. The International era birthed two may instruments namely the Paris Convention for Industrial Property 1883 and the Berne Convention for the protection of Literary and Artistic Works 1886. Global era saw the evolution of TRIPS.

The evolution of formalised intellectual property regime in Nigeria is rooted in colonialism. As can be seen in the extension of the English Copyright Act of 1911 to the territories like Nigeria through Order in Council No 912 of 1912, the extension of the English Trademark Act as Ordinance to the territory as Trademark Promulgation 1900 and the extension of the English Patent Act first to Southern Nigeria followed by to Lagos and later to other territories. As Nigeria began to develop their own formalised system using the Paris Convention on Industrial Properties 1883, Berne Convention on Literary and Artistic Work 1886 (both established under international era) and the TRIPS Agreement (under global era) as yardsticks, traditional knowledge became relegated to the background. Relegating traditional

<sup>1</sup>LL.B (IMSU), BL (ABUJA), LL.M (RSU), PhD (in view), Associate Counsel at Atejimah & Steve Port Harcourt Nigeria. Tel: 08038693822, Email: nkudums@yahoo.com.

knowledge to the background in the absence of a strong structural foundation exposed it to exploitation. It became a free for all without any form of recognition for prior informed consent and fair and equitable sharing benefit. Over the years, Nigeria has taken bold steps to enact legislations aimed at protecting traditional knowledge. How well those bold steps have yielded result will be explored below.

## 2.0 Appraisal of Traditional Knowledge under Conventional Intellectual Property Regime

Traditional knowledge protection under conventional intellectual property regime is possible. The question of the effective protection of traditional knowledge by this system has been plagued by obstacles that have continued to hinder the interest of the indigenous communities who are the rightful owners. The fact remains that the effect intellectual property has on economic development are measured through the yardstick of its availability and the strength of its protection in face of infringement of intellectual property rights. For instance, a higher level of intellectual property protection for a creation or innovation will encourage more creations and innovations. After all no greater joy exists than knowing that an individual or community can reap the outcome of their labour. Traditional knowledge constitutes an intricate part of prior art and its effective identification and protection under the intellectual property regime of a country can go a long way to boost the value creation of that country. This underscores the use of traditional knowledge in relation to copyright, trademark and patent.

### 2.1 Traditional Knowledge and Copyright

Copyright law can be used to protect tradition cultural expressions such as folklore which is an embodiment of folk drama, poems, riddles, songs and play.<sup>2</sup> The New Copyright Act which repealed the Copyright Act of 2004 has as its objectives the need to protect the rights of authors and ensure just rewards and recognition for their intellectual effort.<sup>3</sup> A fact which can easily be attributed to the indigenous communities who are the owners of folklore. Unlike the Copyright Act 2004 which was silent about the indigenous communities, the New Copyright Act of 2022 stipulates that with respect to commercial use, permission ought to be obtained from the relevant indigenous community concerned and/or the Nigerian Copyright Commission.<sup>4</sup> This is a point in favour for the indigenous communities as it gives them a semblance of recognition even if it is not a complete one. The only difficulty encountered is when the said work in this case TK/TCE is subjected to requirement which goes against its nature.

To qualify for copyright protection, the work in question must be original.<sup>5</sup> Originality as a condition for copyright simply stipulates there ought to be an authorial personality to whom a work may be traced in order for it to be protected. Unfortunately, this can prejudice future innovations arising from traditional knowledge taking into consideration that the original inventor or creator have long passed away. This exposes a huge gap in the current Copyright Right Act and the need for further reformed in

---

<sup>2</sup> Copyright Act 2022, s 74(1) (a-c).

<sup>3</sup> *Ibid*, s 1.

<sup>4</sup> Copyright Act (n2) s 76.

<sup>5</sup> Copyright Act (n2) s 2(2)(a).

ways that will recognise the cumulative nature of most innovators while as the time not hindering further innovations.<sup>6</sup>

One of the most important component of right to property is the ability of the owner to control and have power over his property or creations. Unfortunately, the right to authorise acts pertaining to folklore referred to in the Copyright Act is vested in the Nigerian Copyright Commission.<sup>7</sup> This power invested in the commission enables it to takes actions against any infringement. This was the case in *Nigerian Copyright Commission v Oba Okechukwu*,<sup>8</sup> where the accused persons were charged with selling and possession of local and foreign musical and cinematography films which is contrary to section 20(2) (a) and (c) of the Nigerian Copyright Act. The Federal High Court Abuja sentenced the accused to three (3) months imprisonment and a fine of N12,600 and the infringing copy handed over to the NCC. This means that an infringement in the use of folklore in a manner not permitted by section 74 is in breach of statutory duty and liability arising thereof in the form of damages, injunction or any other remedies as the court may deem fit shall be paid to the commission.<sup>9</sup> Even though the new Copyright Act also recognised the need to obtain permission from the indigenous community concerned, vesting of right on the Copyright commission amounts to an aberration of the right to property which guarantees power to control and to take action in the event of an infringement. No entity ought to be paid compensation if not the owner of the property.

The works enjoying copyright protection under the Copyright Act are as a result of a creative process infused with individual personality which is in contrast of those felt by indigenous communities when it comes to their creations. This means that the concept of creativity as it pertains to individualist approach contrast with another concept of creativity encompassed by indigenous people's culture which belongs to the whole community. In other words, copyright is an individualist right in terms of authorship and the ultimate protection is for the one that fixed the work. For indigenous works, the notion of individual authorship is relatively unknown. Copyright Act confers monopoly of exploitation on the person originating the work. Copyright is an exclusive right of which the author is the first owner while with folklore, this position is difficult to reconcile because of the nature of folklore.

Conventional copyright is characterised by limitation. The terms of protection for the various works were stipulated in the Copyright Act to be 50 years for cinematography sound, recording sound and broadcasting while literary, artistic and musical work is 70 years.<sup>10</sup> Folklore being a prior act ought not to be limited by duration or time.

Once copyright works are accorded protection, the works face little or no danger when placed in the public domain. The whole essence of the protection is to guarantee prevention of infringement even though it necessarily does not guarantee absolute protection. The same cannot be said for TK/TCE whose existence in the public domain exposes it to expropriation of a culture that has been handed down

---

<sup>6</sup> G Dutfield and U Suthersanem, 'The Innovation Dilemma: The Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 4 *IPQ*, 380.

<sup>7</sup> Copyright Act (n2) s 75.

<sup>8</sup> (2012) 55 NIPJD (FHC).

<sup>9</sup> Copyright Act (n 2).

<sup>10</sup> Copyright Act (n2) s 19(a-e).

from generation to generation. Copyright protection promote new creativity, while that of folklore is the preservation and safeguarding of works that has been in existence since the ages.

Taking into account the issue enumerated, it's obvious that protection of TK/TCE under the existing conventional Copyright Act in Nigeria is not appropriate. The analysis of the Nigeria Copyright protection shows how the national copyright law with its strong copyright tradition is unsuitable to protect indigenous people's folklore. The originality and fixation prerequisite protect individual author and not indigenous community. There is no doubt that a more comprehensive intellectual property system should be established to accommodate TK/TCE. When it comes to the evaluation of the requirement of originality, a better option will be to assert the originality from the underlying values which folklore represents for many indigenous communities. The exception to copyright infringement bordering on "fair dealing" as stipulated by the Copyright Act has its foundation on the notion of individualist authorship.

## 2.2 Traditional Knowledge and Trademark

Trademark can be utilised by indigenous people in identifying various goods and services.<sup>11</sup> By so doing, the indigenous people can protect their trade interest especially when commercialised. Taking into consideration that Nigeria as a country lack the necessary measures in place to avoid commercialisation, trademark will not act as deterrence to external sources from unfairly appropriating the value of a successful trademark or service mark.

For trademark to be a viable tool for the protection of traditional knowledge, legal requirement for registration must be met.<sup>12</sup> The registration of trademark are limited to marks that include device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination intended for the purposes of trade.<sup>13</sup> This insinuated that an indigenous community in the use of a trademark would be operating as a trader.

Just like the protection of folklore under copyright law, trademark is another alternative for protection of folklore. Unfortunately, the commercial implication of trademark for protection limits it from general protection. The downside to the usage of trademark to protect folklore is the fact that the words are purely descriptive as they were not expressed.

One aspect of conventional trademark protection is the extension of protection to cover everything commercial in nature having been placed in the public domain. Unfortunately, TK/TCE do not promote commercial transactions without the appropriate compliance of prior informed consent. Instances do arise where trademark laws have been used both to protect and undermine indigenous people's claim of protection for their traditional knowledge and cultural property. Third parties have used trademark registration as an avenue to harness indigenous people's culture in pursuit of their commercial purpose. There have been instances where renowned companies used well known cultural or traditional names

---

<sup>11</sup> S Ragavan, 'Protection of Traditional Knowledge' (2001) 2(2) *Intell.Prop.Rev.*, 20.

<sup>12</sup> Trademark Act 1965, Cap T12 LFN 2004.

<sup>13</sup> *Ibid*, s 67.

to represent its products without prior permission gotten from the indigenous community.<sup>14</sup> A typical example is the use by Lego Company of certain Maori names with cultural and religious significance to identify its toy.<sup>15</sup> The Maori indigenous community complained that such use was inappropriate and trivialised Maori culture. Lego Company was unresponsive to the request to cease using the name. After some negotiation, Lego agreed to cease using some of the Maori words.

In contrast, certain categories of indigenous knowledge are unable to be included under commercial qualification due to their symbolic sacred nature which often times forbids disclosure of secrets.<sup>16</sup> A number of substantive requirement for trademark protection that constitute a barrier to indigenous people's rights are:<sup>17</sup>

- a. Limit of protection: Trademark Act recognises the limit of protection relating to use in trade both as a requirement for registration and benefit flowing from exclusive right to be for seven years.<sup>18</sup> Unfortunately, this position works against TK/TCE which is retrospective in nature and ought to enjoy perpetual protection.
- b. A sign maybe registered as trademark if they are capable of distinguishing the goods and services of one undertaking from that of another undertaking.<sup>19</sup> Many signs and symbols of indigenous people's culture although meeting the definition of sign will not meet the requirement of trademark because the sign is not applied to goods and services neither is it uses to distinguish goods and services in a trade context. Using existing trademark registration procedures to protect indigenous people's interest will require squeezing indigenous interest into a system designed for interest in trade and commerce.
- c. Trademark protection is fundamentally about protecting mark, sign or symbol and does not necessarily protect knowledge and values incorporated in the TK/TCE.
- d. Trademark protection requires an identifiable owner unlike TK/TCE which is more communal in nature.

Even though geographical indication is closely related to Trademark. The closeness of the Trademark with respect to geographical indication was with respect to provision for registration of certification marks.<sup>20</sup> This certification marks indicate compliance with standards and characteristics pre-established by the owner of the mark in respect of origin, materials, mode of manufacture, quality, accuracy or other characteristics. If there is one aspect of intellectual property rights that can ensure preservation and positive protection of TK/TCE, it is geographical indication. One advantage of geographical indication which has correlation with TK/TCE is the potential detraction from the public domain of generic words which are free for use by all. Unfortunately, there is no legislation for geographical indication in Nigeria.

---

<sup>14</sup> S Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' (2011) 36 *Victoria University of Wellington Legal Research*, 3.

<sup>15</sup> *Ibid*, 'Third Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard' (2005) (8) *J World Intel Prop*, 83.

<sup>16</sup> R Guest, 'Intellectual Property Rights and Native American Tribes' (1995-96) 20 *Indian L Rev*, 111.

<sup>17</sup> Frankel (n14).

<sup>18</sup> Trademark Act (n12) s 14.

<sup>19</sup> *Ibid*, s 9.

<sup>20</sup> *Ibid*, s 43.

For the purpose of trademark protection of indigenous knowledge, the similarity that exist between both is that like the conventional trademark protection, there is need to create a greater level of protection consistent with the goal of minimizing consumer confusion. The facts remain that unless amendments are made, the protection of indigenous signs and symbols requires a functional system taking into consideration that the goals and aspirations of TK/TCE are not the same as trademark registration.

### 2.3 Traditional Knowledge and Patent

Patent is one of the viable tools of intellectual property system for the protection of traditional medicinal knowledge especially in the area of biodiversity. There have been cases where patents were granted over traditional knowledge that relates to medicinal plant.<sup>21</sup> Unfortunately, the common reoccurrence in such cases are that patents over these medicinal plants are not granted to the communities to whom the traditional knowledge belongs but to external sources. Under the regulatory framework for inventions, there exist requirements that are incompatible with Traditional Knowledge.<sup>22</sup>

Among the requirements for an invention to be patentable is the requirement of newness<sup>23</sup> which negates traditional knowledge. This is because Traditional knowledge inventions have been passed from generation to generation. Using the patent system to protect innovations emerging from traditional knowledge has not been helpful in formalising the complex and historical root of an indigenous knowledge system from which the original innovations emerged.

Under the Patent and Design Act, patent cannot be validly obtained with respect to plant and animal varieties or essentially biological process for the production of plants or animals.<sup>24</sup> Traditional medicine which constitutes an aspect of traditional knowledge are derived from medicinal plants. Unfortunately, this position negates the necessity of traditional knowledge as an important source of knowledge necessary to preserve human life. The Patent and Design Act in its protection of inventions failed to take cognizance of defensive protection of TK/TCE which will serves as a deterrence to 3<sup>rd</sup> parties like pharmaceutical companies who end up getting patent right over inventions of indigenous communities.

With respect to the right to a patent in respect of an invention, right is granted to a statutory inventor whether or not he is the true inventor provided he is the first to file.<sup>25</sup> Unfortunately, this section indirectly encourages bio piracy taking into consideration that most of the so-called inventions such as traditional medicine are actually traditional and cultural knowledge utilized by pharmaceutical companies to boost their research. There ought to be investigative steps to ascertain the source of the inventions by the Patent and Design Registry.

The Patent and Design Act stipulates that the right granted shall extend only to acts done for industrial or commercial purpose.<sup>26</sup> This goes against everything TK/TCE stands for. In other words, making

---

<sup>21</sup> Z Ismail and T fakir, "Trademarks or Trade Barriers? Indigenous Knowledge and the Flaws in the Global IPR System" (2004)31 *International Journal of Social Economics*, 177.

<sup>22</sup> Patent and Design Act 1970 Cap P2 LFN 2004.

<sup>23</sup> *Ibid*, s 1.

<sup>24</sup> *Ibid* s 1(4)(a).

<sup>25</sup> *Ibid*, s 2.

<sup>26</sup> *Ibid*, s 6(3).



TK/TCE a public property to all without restriction and control will do more harm than good. It will turn TK into a commercial and tradable commodity which if not regulated adequately will encourage bio piracy. The ownership of right over TK by the indigenous community enables them to determine its commercial use and other uses. In the absence of which encourages infringements.

Under the Nigeria Patent and Design Act, for an invention to be patentable, it must be capable of industrial application.<sup>27</sup> Medicine can be successfully granted patent taking into consideration the industrial application requirement. The foremost question raised is whether traditional medicine can successfully be grouped here given the fact that the word, “traditional” attached reflects communal in juxtaposition to patent protection that is hedged on individuality.

Another requirement for the grant of the right of patent under the Patent and Design Act is the requirement for inventive activity as it flows from the state of the art either as to method, application, combination of methods or the product which it concerns or as to the industrial result it produces.<sup>28</sup> Traditional medicine which is a component of genetic resource, an aspect of TK cannot meet the inventive step requirement taking into consideration that it is passed down from generation to generation. Traditional medicine is quite different from western medicine that enjoy patent protection as a result of its nature, character, transformation having gone through the process of research and development based on certain scientific methods such as pharmacology.

So irrespective of the potentials that might exist for TK innovations under the patent system, the fact remains that traditional medicines have not benefitted from patent protection since they do not meet the requirements of novelty, inventive steps and industrial applicability. All three of these steps must be fulfilled together. The absence of one of these requirements denies the individual or community of patent protection. This raises the need for a copyright, trademark and patent system that will be more accommodating of TK peculiarity.

### 3.0 *Sui Generis* System Approach to Traditional Knowledge

The inadequacies of the conventional IP system to protect traditional knowledge have raised arguments about the need to have a functional and substitute system that will take cognizance of the peculiarities that hinders and obstruct adequate administration of traditional knowledge under the conventional IP system. Notable among the existing options is the establishment of a stand-alone IP system or a stand-alone system external from intellectual property system specifically designed for TK/TCEs. A *sui generis* IP system will require extension or adaptation of the features of the conventional IP system to specifically focus on TK/TCE.<sup>29</sup> While a stand-alone system external from intellectual property system will be a system created to tackle TK/TCE. A typical example will be Kenya National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions 2009. On the other hand, a *sui genesis* IP system will require the amendment or reform of existing IP system to reflect the

---

<sup>27</sup> Patent and Design Act (n22), s 1(1)(a).

<sup>28</sup> *Ibid*, s 1(2)(b).

<sup>29</sup> WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expression* (WIPO Publication 2020) 37-38.

peculiarities of TK as was done by South Africa through their Intellectual Property Law Amendment Act 28 of 2013.

Irrespective of the stand- alone system a country adopts, there is no doubt that the protection of TK is important for communities in Nigeria. The reason being that TK plays an important role in the economic and social life of Nigeria. The act of placing value on such knowledge helps to strengthen cultural identities and the enhanced utilization of such knowledge achieve social and developmental goal through genetic resources, affordable and appropriate public health through traditional medicine among others. For most of this communities, TK forms part of a holistic world view and is inseparable from their way of life and cultural values. This means that it is vital to sustain not merely the knowledge but the social and physical environment which forms an integral part of TK.

In Nigeria, we have a stand- alone system tackling a section of TK/TCE known as Traditional Medicine Policy (NTMP).<sup>30</sup> Even though the Traditional Medicine Policy seeks the preservation of traditional knowledge through documentation, the reality and practical implementation of this Policy is yet to be seen.<sup>31</sup> This particular Policy lacks the requisite approach to the protection of indigenous knowledge. This is because, the power to control and assign benefit is bestowed on the government instead of the indigenous community who ought to control their creation. The power to determine benefit sharing and royalty returns also rests on the Government. Even though the Policy sought to promote intellectual property rights and indigenous knowledge of traditional medicine, the defensive approach to protection which would have ensured a regulation of usage by external sources lack the requisite force to ensure compliance.<sup>32</sup> To have a robust *sui generis* system for traditional knowledge, it will require the vetting the legislation through several important issues such as;<sup>33</sup>

- a. What TK/TCE should be protected? This will require an in-depth analysis of the particular form of TK/TCE to be considered for protection. Tackling this issue is important because of the vastness of TK/TCE. The TK/TCE which is at most risk to exploitation should not be neglected. Even though the Traditional Medicine Policy seek to protect the intellectual property rights of the practitioners, there also exist other sectors of traditional knowledge at risk of exploitation such as the folklore. This makes it important to have a system that covers all aspects of TK/TCE.
- b. What objectives ought to be achieved through this *sui generis* system? In other words, what is the motivation behind the establishment of a stand-alone system. Often times, countries establish a stand- alone system because of the inadequacies of the existing framework on IP in the protection of TK/TCE, but this can be countered by the fact that many jurisdictions have amended their existing frameworks to be more accommodating.
- c. Who are the true beneficiaries of this protection? This is an intricate part in the protection of TK/TCE through a stand-alone system. The cultural diversity in Nigeria has raised the possibilities of having more than one community with the same knowledge. With respect to

<sup>30</sup>Nigeria Traditional Medicine Policy (NTMP) 2007.

<sup>31</sup>*Ibid* Part 2

<sup>32</sup>*Ibid*.

<sup>33</sup>WIPO, 'Background Brief 2: Developing a National Strategy on Intellectual Property & Traditional Knowledge, Traditional Cultural Expression and Genetic Resources' < <https://www.wipo.int/export/sites/www/tk/en/resources> > accessed 10 June 2023.



the Traditional Medicine Policy, reference to a group of people ranging from traditional medicine practitioners, researchers, regulatory agencies, policy makers, culture practitioners, law enforcement agents and business entrepreneurs creates a gap about the position of the indigenous communities in the equation.<sup>34</sup> Ascertaining the community from which this knowledge emanated have become an important issue which a robust stand-alone system can help to ascertain.

- d. What behaviour in relation to the protection is illegal? The Copyright Act recognises certain exceptions when it comes to the usage of Folklore without authorization that does not amount to an infringement such as fair dealing and educational purposes.<sup>35</sup> With respect to Traditional Medicine Policy 2007, great effort is laid on the need to accommodate the usage of the existing traditional medicine knowledge for research and development.<sup>36</sup> This presuppose that usage for the purpose of research and development is not illegal. Unfortunately, the Policy is silent with respect to the remittance of royalty arising from the positive results of research and development thereafter.
- e. How can the existing IP system be used to protect TK/TCE? This will require exposing the adequacy and inadequacies that exist in the conventional IP system. Exploring the protection of traditional knowledge has fallen short taking into consideration that certain aspects of the conventional intellectual property system are not compatible with traditional knowledge. Countries like South Africa have been able to explore protection of traditional knowledge through the amendment of their intellectual property system.<sup>37</sup> Even though it has its advantages, its disadvantage is that it exposes the discrepancies that already exist between the conventional intellectual property system and the traditional knowledge.
- f. Are there gaps in the protection available and if so could those gaps be filled by adapting existing IP framework or better protected by a distinct stand-alone system? After exploring the adequacy and inadequacies that exist in the conventional IP system, it is important to find out if the inadequacies fall outweighs the adequacies.
- g. How long the protection should be accorded? In Nigeria, the existing legal frameworks on IP stipulate duration of protection for the various intellectual property rights. Taking all these into account, the need for stipulation as to the duration of protection for TK/TCE arises.
- h. What sanction or penalties should apply in the case of infringement of TK/TCE. The Copyright Act stipulates that any person who acts without the consent of the Nigerian Copyright Commission in a manner contrary to the provisions of the Act will be liable in damages, injunctions or other reliefs which the court may impose.<sup>38</sup> Infringement of folklores attracts a fine of N100,000 or imprisonment of 12 months or both and N500,000 for body corporates. It is important to take into consideration the need for a punitive measure that is deterrent to further infringement or bio piracy.

---

<sup>34</sup> NTMP (n30).

<sup>35</sup> Copyright Act (n2) s 74 (2) (a).

<sup>36</sup> NTMP (n30), Pt 2.

<sup>37</sup> Intellectual Property Law Amendment Act 28 of 2013.

<sup>38</sup> Copyright Act (n2) s 29

- i. Should newly recognised rights in TK/TCE have a retrospective effect. It is important to establish the relevant fact that TK/TCE are not novelty right but are rights that have been in existence from generation to generations.
- j. What are the best approach to adopt to ensure effective protection and administration of TK/TCE? A stand- alone system of protection entails taking cognizance two approaches namely positive protection and defensive protection. The effectiveness of a stand- alone system to guarantee the much needed protection of traditional knowledge is dependent on its ability to successfully apply the two approach of protection.

By adopting positive protection, the indigenous people or community can exclude, license and profit from their own creations. Just as the copyright right owner can successfully institute action in the court for copyright infringement so also can the communities do so. Positive approach will also enable the communities who are the creators of this innovations to prevent unwanted, unauthorised or inappropriate use by the third parties including cultural offensive or demeaning use.<sup>39</sup>

The absence of any form of positive protection for Folklore in countries can undermined their sustainable development and value creations. Nigeria as a country has suffered immensely as a result of theft of its folklore in the form of art crafts. In 1897 during the British raid on Benin, the British Empire confiscated 3000 objects which found its way to their museums and private collections around the world.<sup>40</sup> Unfortunately, the British Government have not been forth coming with respect to repatriation on the ground that until British parliament changes the status, they are not in a position to do so.<sup>41</sup>

Countries like United States and Germany have been forth coming with ensuring that stolen artefacts are returned back to Nigeria.<sup>42</sup> With respect to Germany, Nigeria in 2022 signed an Agreement for the repatriation of over 1130 looted Benin Bronze artefacts back to Nigeria.<sup>43</sup> Museums in Nigeria lost over 400 heritage items between 1969 and 1999 including Ife and Benin Bronzes, Nok and Owo terra cotta wood and ivory sculptural pieces.<sup>44</sup> The Agreement signed between US, Germany and Nigeria respectively seeks to ensure border control by identifying, intercepting, repatriating and protecting cultural property and related heritage works.<sup>45</sup>

To effect compliance, Nigeria can resort to the UNESCO 1970 Convention that enjoins member states to the Convention whose cultural patrimony is in jeopardy from pillage to call upon other member states to participate in concerted international measures to prevent illicit import of Nigeria artefacts into their country.

---

<sup>39</sup>WIPO, 'Traditional Knowledge' <<https://www.wipo.int/tk>> accessed 16 November 2022.

<sup>40</sup> E Elebeke, 'Germany to Return 1,130 looted Benin Bronze to Nigeria' *Vanguard Newspaper* (Lagos, October 13 2022).

<sup>41</sup>*Ibid*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Elebeke (n 40).

In the midst of all these repatriations by these countries, nothing has been said about the remittance of the royalties that have accrued throughout the years through illegal possession. It is only necessary for the indigenous communities from whom these cultural heritages emanated to enjoy the royalties accumulated all through the years.

Another notable approach to ensure effective protection of TK/TCE is the defensive approach. As is common with the absence of protection over an innovation, there arises usurp of the right over that creation. This is exactly what defensive approach of protection seek to prevent. In other words, defensive approach of protection prevents a 3<sup>rd</sup> party from obtaining or exercising invalid IP rights over the TK/TCE. This approach bears so much importance when it comes to patent. It seeks to ensure that existing TK is not patented by 3<sup>rd</sup> parties.

In Nigeria, there is a common occurrence where traditional medicine compositions are patented by pharmaceutical companies and projected as their creation. In recent times, modern medicine has seen the capsulation of knowledge like charcoal popularly known to neutralise poisons into tablet form. This is not limited only to charcoal but also bitter leaf used to reduce sugar level and high blood pressure. Now bitter leaf has now been reduced to powder or tablet form and sold in pharmacies. This is a few of most of the medicinal knowledge that have been stolen by pharmaceutical and manufacturing companies without acknowledgement of the source.

Defensive protection of TK involves two aspects which are the legal and practical aspect.<sup>46</sup> The legal aspect seeks to protect trade secrets by ensuring that orally disclosed information are taken into account. This is important since TK are normally transmitted and disseminated orally. Unfortunately, in Nigeria, trade secrets are recognised and used but there is absence of a legislation to regulate them.<sup>47</sup>

In the face of this *lacuna*, entities have invented means to ensured protection of trade secrets in Nigeria through the entering of a non-compete and non-disclosure agreements with their employees and partner as was seen in the case *Koumoulis v Leventis Motors Ltd*,<sup>48</sup> where the Appellant who was in the employment of the respondent and in the know of the Respondent's trade secret resigned and started working with their competitor. Apart from leaving their service, the appellant also disclosed business plan of the respondent which caused immense economic damage. In line with the agreement signed by the appellant for a non-disclosure of trade secret for a period of one year, the appellant was held liable to damages imposed by the court for the breach. This non- compete and non- disclosure agreement seem more clear cut under corporate entities unlike when applicable for the indigenous communities and this is what the legal aspect of defensive protection seeks to accomplish.

The practical aspect of defensive protection entails documentation and digitization of TK so it is made available to relevant authorities in the event of a search. That way any company desiring to acquire patent right over these inventions upon search will find that it not only is a prior art but is also an acquired right by the indigenous community. This protection is more effective through the instituting a

---

<sup>46</sup> WIPO, 'Consolidated Analysis of Legal Protection of Traditional Knowledge' <<https://www.wipo.int>> accessed 16 June 2023.

<sup>47</sup> G Elias, 'Trade Secret and Consumer Protection in Nigeria' <<https://www.gelias.com>> accessed 16 June 2023.

<sup>48</sup> (1973) LPELR-1710 (SC).

registry or database of existing TK by providing details about the prior art. By so doing, future claims of originality or novelty by those trying to assert copyright or patent rights over TK/TCE are exposed.

A notable example of a company stealing the patent right over traditional medicine of indigenous community will be the case *Quassia Amara*. This case arose in French Guiana, a region in the north eastern coast of South America. The region which is located in the rain forest, is constantly plagued with malaria. To ensure their protection against malaria, the indigenous community there developed a traditional plant based preventive systems to control outbreak. In 2003, a group of researchers from the *institut de Rechercher pour le Developpement* (IRD) conducted a research and in the course of their research discovered 27 plants used by the indigenes as traditional medicine to combat malaria.<sup>49</sup> Significantly, one of the plant a *Quassia Amara* was the most effective cure to malaria which could be used either alone or in combination with the other plants.<sup>50</sup> The researchers interviewed the indigenes in that vicinity after which they proceeded to extract the compound from the *Quassia Amara* and conducted further research on the effectiveness of the plant in various stages and how to utilise it.<sup>51</sup> Their findings led to the researchers obtaining patent protection for the compound. Without acknowledging the Guianas communities, the institute applied for a patent from the European Patent Agency which was granted in March 2015.

In 2015, French *Liberte* Danielle Mitterrand Foundation filed an opposition to the European Patent Office against a patent belonging to the *Institut de Rechercher pour le Developpement*.<sup>52</sup> In the words of Rodolphe Alexandre, French Guiana's highest ranking official, "the misuse of people's traditional knowledge without prior consent and return to

the community cannot be tolerated and the filing of patent by IRD depicts lack of ethics".<sup>53</sup>

On February 2016, the authority of the *institu* issued a statement stating that IRD would work with "authorities" in Guiana to develop a protocol that would guarantee a fair division of the benefits accruing thereof.<sup>54</sup>

There is also the turmeric patent case.<sup>55</sup> In 1995, Tumeric patent was granted to two researchers Somank Das and Harihar Kohli of the University of Mississippi Medical Center taking into account its healing of wound capabilities.<sup>56</sup> At the time of application, the patent application was considered to be novel as a result of the information available to the examining authority. The patent was subsequently challenged and found invalid. India forced the US Patent and Trademark Office to revoke the patent granted. Subsequently, the patent was withdrawn after a year legal battle with

<sup>49</sup> W Fisher, 'Toward Global Protection for Traditional Knowledge' (2018) (198) *Centre for International Governance Innovation Article*, 3.

<sup>50</sup> E Pain, 'French Institute Agree to Share Patent Benefits After Bio Piracy Accusation' (2016) <<https://www.science.org>>accessed 17 June 2023

<sup>51</sup> G Bourdy and Others, 'Quassia Bio Piracy Case and the Nagoya Protocol: A Researcher's Perspective' (2017) (206) *Journal of Ethnopharmacology*, 290-297.

<sup>52</sup> *Ibid.*

<sup>53</sup> M Valo, 'Biopiracy, When Indigenous Practices Are Stolen and Patented' (2016) <<https://worldcrunch.com>>accessed 18 June 2023

<sup>54</sup> *Ibid.*

<sup>55</sup> K S Jayaraman, 'US Patent Office Withdraws Patent on Indian Herb' (1997) <<https://www.doi.org/10.1038/37838>>accessed 20 June 2023

<sup>56</sup> *Ibid.*

India's Council of Scientific and Industrial Research that argued that turmeric a native Indian plant had been used for centuries by its people for wound healing and as such lacked the novelty criteria required for patenting.

Unfortunately, the protection accorded to TK in the cases above cannot be said to be applicable in Nigeria which currently lacks a robust *sui generis* system that will take cognizance of defensive protection approach. In the application of the two approaches, it is of utmost importance for them to complement each other since one without the other is not effective.

No matter the role a *sui generis* system can play to ensure effective preservation and protection of TK, the fact remain that it is only part of a holistic approach and will need the presence of a foundational and grass root system like a customary law. The duo of *sui generis* system and customary law are so compatible in such a way that a stand- alone system serves as the vehicle to guarantee structural justice for traditional knowledge while customary law is the oil needed to lubricate the vehicle. The stronger the integration and coordination between a *sui generis* IP system, customary law and Access and Benefit sharing system, the more likely the overall effectiveness in the protection of traditional knowledge.

#### 4.0 Traditional Knowledge Under Nigerian Customary Law

Of utmost importance to the communities, is the need to take into account their customary laws and practices rather than imposing an unworkable mechanism that does not recognise their needs and expectations. Customary law is a workable mechanism for the indigenous communities since it is central to their identity as it regulates many aspects of their lives.<sup>57</sup>

Maintaining customary law within indigenous community have not only become an important aspect in the safeguarding and preservation of their cultural and legal identity but has also become a tool for the sustainability and management of their intellectual knowledge.<sup>58</sup> The push for wider respect and recognition of customary laws and protocols has also been a consistent feature of international policy discussions on protection of TCEs, TK and related GRs.<sup>59</sup> A typical example is WIPO's consultation with the holders of TCEs and TK to extract what their needs and expectations to IP system is and one notable recommendation is the need to accord customary law the appropriate recognition due to it.<sup>60</sup> At this consultation, key stakeholder together with holders and custodians of TK/TCE have stressed that respect and recognition of customary law is integral to appropriate protection of TCEs, TK and related GRs against misuse and misappropriation by others. At the end of the WIPO consultation, it was discovered that what sets knowledge or cultural expressions apart as being 'traditional' is the existence or operation of customary law. Customary law protection is integral to the cultural identity of an indigenous or traditional community or people who is

---

<sup>57</sup> WIPO, 'Background Brief 7: Customary Law and Traditional Knowledge' <<https://www.wipo.int>>accessed 23 June 2023

<sup>58</sup> *Ibid*

<sup>59</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) (WIPO Publication 2001) 16

<sup>60</sup> *Ibid*.

recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility.<sup>61</sup>

As TK increasingly becomes of interest to individual outside the traditional setting, TK holders have called for their customary law, practices and beliefs to be recognized and respected by those seeking to use their TK.<sup>62</sup> For the custodians of these communities, customary law is the cornerstone of appropriate form of protection for TK.<sup>63</sup> This has led to consideration of a range of ways to accord the necessary respect to customary law and practices within other legal mechanisms such as a *sui generis* approach to intellectual property right including conventional IP system.

When it comes to the role it plays with respect to TK, customary law and practices often define how traditional communities develop, hold and transmit TK.<sup>64</sup> Apart from this, the usage of customary law with respect to TK may define custodial rights and obligations over TK including obligations to guide it against misuse or improper disclosure. They may determine how TK is to be used, how benefits should be shared and how disputes are to be settled as well as many aspects of the preservation, use and exercise of the knowledge.

Nigeria is a country that is indigenous nature with cultural diversity. Even though currently, customary law is not one of the regulatory laws for TK, it is important to understand the position it holds in a community which is that of an acceptable law which is best described as a community's accepted rule that regulates the social, commercial, political relations among the indigenous people. For a custom to command obedience, it must have the force of law that carries with it sanction. In the event of using customary law to regulate TK, an individual or community seeking to invoke it, must plead or prove it by direct and the provision of credible evidence.<sup>65</sup>

To be accepted as a regulatory law for TK, it is important for the customary law to not promote customs that are contrary to public policy and must be aimed at promoting natural justice, equity and good conscience. Among the notable characteristics identified by the court in the case of *Ojisua v Aiyebelehin*<sup>66</sup> as it pertains to customary law are:

- a. The law must be in existence. To successfully have a customary law that will regulate TK in Nigeria, it must already be in existence and practiced in the community at the relevant time. This simply means that only when the customary law bordering on the protection, preservation and safeguarding of TK has been recognised and made applicable in the community in question can it be accepted by the court. It is important for the customary law to not be inconsistent with any statutory provisions.

---

<sup>61</sup>WIPO (n 59)

<sup>62</sup>WIPO Secretariat, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on IP and Traditional Knowledge* (WIPO 1998I-1999) 3.

<sup>63</sup>*Ibid.*

<sup>64</sup>WIPO, *Protection and Promoting TK: Systems, National Experience and International Dimension* (UNCTAD 2004) 3.

<sup>65</sup>A O Enabulele and B Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law*, 2.

<sup>66</sup>(2001) FWLR (Pt 66) 710.



- b. It must not only be a custom but also have the backing of the law in order to command compliance and obedience. Especially once it gets the nod of legislations like the Evidence Act.<sup>67</sup>
- c. The customary law must be acceptable to all the persons to whom they apply. This simply means that the indigenous community for whom the customary law regulates their affairs must have accepted its regulatory function when it comes to TK.
- d. Customary law is flexible. This is a common trait shared by TK and customary law. TK by nature is dynamic and not static in nature just like customary law and matches the need to accommodate changes in the social environment. This means that customary law if used to regulate TK must be reflective of new changes in the area of TK/TCE.
- e. Another notable characteristic is the fact that customary law is largely unwritten and handed down from generation to generation. There has been so much clamour for customary law to be written. Those that believe in its codification believe that codification can be employed as a legal mechanism to achieve clarification and unification of the customary law of different ethnic groups.<sup>68</sup> It can also help in resolving conflicts that might arise between customary law and other globalised laws. For a country like Nigeria that is highly indigenous in nature with diverse cultural diversity, codification can achieve the much needed national unity so desired while protecting the interest of the vulnerable social groups. On the other hand, codification can best be described as a positivist turn in legal theory.<sup>69</sup> Taking into consideration that traditional knowledge is dynamic in nature and not static, codification will not favour this dynamic nature of TK. An unwritten customary law which is flexible shares this same characteristics with traditional knowledge that evolves from time to time.

For customary law to be valid with respect to a matter, it must not be repugnant to the principles of natural justice, equity and good conscience, must also be compatible with existing laws and should not be contrary to public policy.<sup>70</sup>

When it comes to customary law not being repugnant to the principles of natural justice and good conscience, customary Law as it pertains to the TK/TCE of indigenous people presupposes community property derived from communal effort. It does not matter if the creation was individualist in creation, traditional knowledge only accords communal ownership. This aspect of disregard for individual effort goes against the very core foundation of natural justice, equity and good conscience. The right approach would have been to accord more benefits to the individual whose effort led to that creation.

In the context of traditional knowledge, the guarantee for protection of TK will be if the custom regulating protection has at its root the need to ensure fair and equitable benefit for the indigenous people in the community. Communal ownership also presupposes that each individual whether male or female of an indigenous community has the right to own and protect their creation. At the regional

---

<sup>67</sup> Evidence Act 2011, ss 16-19.

<sup>68</sup> A Abdulah, 'Why Africa Needs to Document Customary Law' (2016) *Vanguard Newspaper* (Abuja: September 15 2016).

<sup>69</sup> T Meyeh, 'Codifying Custom' (2012) (160) *University of Pennsylvania Law Review*, 11-13.

<sup>70</sup> Evidence Act 2011, s 14(3).

level, cognizance is taken of the vital role that women play in the generation, conservation, and sustainable use of biological diversity and associated knowledge.<sup>71</sup> In other words, to effectively guarantee equality, it is of utmost importance for the inclusion of women in any decision-making pertaining to access and prior informed consent relating to traditional knowledge.<sup>72</sup>

In Nigeria, there is a bias against women especially as it pertains to their rights to be counted among the owners of communal properties. This is as a result of the cultural role attributed to them by the patriarchal society and tradition no matter what legislation stipulates.<sup>73</sup> This runs contrary to the provision of the Constitution of the Federal Republic of Nigeria which prohibits discrimination of grounds of sex.<sup>74</sup> Patriarchy has created an illusion in which women are regarded as temporary members of the community who are deprived of communal ownership. The position of three major customs will be explored below to ascertain their point of view.

**Igbo Custom:** The Igbos occupy the south eastern region of Nigeria. Under Igbo custom, women are regarded as chattels to be purchased through marriage. Though in recent times, the position has changed with decisions like *Ukeje v Ukeje*,<sup>75</sup> where the court found that any custom that deprives women's right to property is uncivilised, punitive and only intended to protect the selfish perpetration of male dominance that suppress women's right in the society. There is also the case of *Anekwe & anor v Nweke*,<sup>76</sup> another case bordering on the rights of women to partake in ownership of property. The court in this case condemned customs and practices that disinherit women from partaking in property as being repugnant to natural justice equity and good conscience. In *Uke v Iro*,<sup>77</sup> a custom that raised the question or sought to question the rights of women to give evidence in court by relegating them to the status of a second hand citizen was declared by the court to be fit for garbage and consigned to history. Looking at the recent position of the court and law, the tides have changed to recognise the rights of women when it comes to property and by extension to be counted as communal owners of traditional knowledge. Irrespective of the decisions reached by the courts in the above cases, the facts remain that the discrimination persist against the women. The reason being the much needed reform has not spread at the grassroots level. It is important to involve the custodians of the traditions such as the Chiefs and Eze in the reform. They are the authority figures at the grass root level and whatever they declare stands.

**Yoruba Custom:** The position as it pertains to Yoruba women is more accepting taking into consideration that they are usually involved in various aspects of community life such as the economic, religious and political spheres.<sup>78</sup> Even though property rights favour men, they are not absolute as factors such as women's kinship, birthplace, class status, intelligence industriousness and

---

<sup>71</sup> AU Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and the Regulation of Access to Biological Resources 2000, Preamble.

<sup>72</sup> *Ibid*, s 5.

<sup>73</sup> P O Kuye, 'Rights of Women Under Customary Law' in: P Ajibola (ed), *Towards a Restatement of Nigeria Customary Law* (Lagos: Federal Ministry of Justice Law Review Series 1991)384.

<sup>74</sup> CFRN 1999 (as amended), s 42.

<sup>75</sup> (2014) 11 NWLR (Pt 1418)384.

<sup>76</sup> (2014) LPELR 22697 SC.

<sup>77</sup> (2002) FWLR (Pt 129) 1453.

<sup>78</sup> Y Aluko, "Patriarchy and Property Rights among Yoruba Women in Nigeria", (2015) (21) *Feminist Economics*, 58.

connections have been working to change the African customary norm.<sup>79</sup> The position of the woman in the family goes a long way to determine her right to partake in communal ownership. The difference between Yoruba custom and Igbo custom is the fact that Yoruba custom recognises an eldest child whether a male or female as having the necessary recognition which ordinarily under Igbo custom will be accorded to the male. In conclusion, it can be said that among the Yoruba's, patriarchy is selective on the type and nature of rights that women enjoy.<sup>80</sup>

**Hausa Custom:** Under the Sharia law which is the dominant religion in some Northern parts of Nigeria, women's interest and rights are ignored or even sacrificed in an attempt to appease the religious rights while giving men their dominant position.<sup>81</sup> This simply means that women are not regarded as partakers of the community property and as such cannot be counted among the benefactor.

Having a *sui generis* traditional knowledge system that is in cognizance of customary law does not end there without measure being put together to ensure that the indigenous community are inclusive of benefit sharing over their creation. Taking into consideration that most of the traditional knowledge is already in the public domain, it becomes of urgency to ensure that the indigenous communities do not lose out completely from their creation. This is where the access and benefit sharing system of the National Biodiversity Policy comes into play.

## 5.0 Access and Benefit Sharing Under Biodiversity Policy

The protection of bio diversity contributes to the flourishing of TK because in the absence of resources upon which TK thrives, there would be no need to protect TK. Even though both concepts differ, they both compliment and supplement each other. The existence of a biodiversity policy exists as a yardstick to ensure access and benefit sharing of TK creation, guarantee that prior informed consent is gotten and to disclose the origin from which the creation emanated.

For a country like Nigeria where there has been unlimited access to biodiversity to the extent of bio piracy, the access and benefit sharing system which is operational under the Convention on Biological Diversity becomes a way out to curb the act.<sup>82</sup> Just as the name implied the Access and Benefit Sharing system creates a system of regulation that guarantees equitable balance between the users and the providers of the biodiversity so as to conserve biological diversity. Foreigners or external sources desiring to use the biodiversity of Nigeria in accordance with the CBD are expected to recognise the sovereign rights of Nigeria over their natural resources; to obtain prior informed consent and to reach a mutually agreed terms with respect to benefit sharing.<sup>83</sup>

---

<sup>79</sup> M G Yakubu, "Principles of Property Law" in: M A Ajomo (ed) *Fundamentals of Nigerian Law* (Lagos: Nigerian Institute of Advanced Legal Studies 1989) 63-64.

<sup>80</sup> Aluko (n78).

<sup>81</sup> A Imam, Women, 'Muslim Laws and Human Rights in Nigeria' <<https://www.wilsoncenter.org>>accessed 29 November 2022.

<sup>82</sup> CBD 1993, art 15.

<sup>83</sup> Nagoya Protocol on Access to Genetic Resources 2014, preamble.

Irrespective of the important progress in the development of the principles that the Convention on Biological Diversity and Nagoya Protocol represent in Nigeria legislation, there hasn't been much progress in making the access and benefit sharing requirements as a mandatory obligations in the applications for TK protection. The existing legislation on intellectual property have done little of nothing to reflect or create an equitable balance between the public and the creators in such a manner that the creator is not left out of his benefit.

Nigeria in 1995 started the process of preparing its National Biodiversity Strategy and Action Plan (NBSAP).<sup>84</sup> The goal of the plan was to conserve and enhance the sustainable use of the nation's biodiversity and to integrate biodiversity-planning considerations into national policy and decision-making.

The 2030 Agenda for Sustainable Development, agreed by the 193 States Members of the United Nations (including Nigeria), sets out an ambitious framework of universal and indivisible goals and targets to address a range of global societal challenges.<sup>85</sup> Taking into cognizance the fact that biodiversity and ecosystem services contribute directly to human well-being and development priorities, their importance is reflected in many of the goals and targets.<sup>86</sup> In trying to comply with the CBD, Nigeria set up the Traditional Medicine Policy to conserve abundant natural resources of biodiversity that exists in Nigeria through its sustainable utilization.<sup>87</sup> The need to ensure fair and equitable access to the benefit acquiring from traditional medicine are the grounds upon which provisions of Convention on Biological Diversity and TRIPS Agreement are recognised under the Traditional Medicine Policy.<sup>88</sup>

Notable among the challenges of biodiversity as it pertains to TK in Nigeria is the utilisation of TK without giving a fair and equitable benefit to the communities involved. A typical example is the catering of our folklores in the form of art crafts to foreign museums with no indication of a fair equitable benefit calculated all through the years to the affected communities whose creations had been stolen upon return of the art crafts. The desire to ensure sustainability of our biodiversity led to Nigeria taking steps to revise the previous policy on biodiversity. Nigeria in 2016-2020 revised the previous National Policy on Biodiversity to serve as a guide to the conservation and sustainable utilization of genetic resources and the fair and equitable sharing of benefits arising from their utilization. To adequately fulfil its national targets and related global strategic goals, the National Biodiversity Strategy and Action Plan set several targets such as the creation of awareness of the importance bio diversity holds in our lives and economy.

---

<sup>84</sup> J Aku, Biodiversity Protection in Nigeria: A Synopsis of the Role of Multilateral Agreements (2021) 3(3) *International Journal of Comparative Law and Legal Philosophy*, 191.

<sup>85</sup> UN Environment Programme, *Biodiversity and The 2030 Agenda For Sustainable Development: Policy Brief* <<https://www.unep.org/resources/report/biodiversity-and-2030-agenda-sustainable-development>> accessed 10 June 2023

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

<sup>87</sup> Traditional Medicine Policy for Nigeria 2007, (Pt 2).

<sup>88</sup> *Ibid.*

Unfortunately, the awareness intended by the NBSAP has not materialised. Till date the indigenous communities are not aware of their intellectual ownership over medicinal knowledge like the paw paw leaf used for treating malaria, sour sop leaf used for treating diabetics and high blood pressure, bitter kola used for treating cough and having anti-inflammatory effects in knee osteoarthritis patents.<sup>89</sup> Even though Nigeria has acceded to the Nagoya Protocol, the aspect of fair and equitable sharing of benefit to the indigenous creators has not be realised.

The effective protection of traditional knowledge under conventional intellectual property system have been plagued with so many obstacles that if not tackled appropriately will constitute a hinged to the effective protection and implementation of a stand-alone system for TK/TCEs.

## 6.0 Conclusion

Nigeria is a country richly blessed with natural resource but the true economic potential which the indigenous communities and the country at large would enjoy is still evasive. This is as result of the of a number of factors such as the absence of a functional system in the form of structure to guarantee the much needed protection, the lack of awareness on the part of the indigenous communities of heir right of self-determination over their resource and the lackadaisical attitude of the Nigerian government in the Ratification and domestication of international instruments that will place them on the same level with other industrialised countries. The absence of these measures have continued to relegate Nigeria economically and affected our value creation at the global level.

## 7.0 Recommendations

### 1. *Sensitization of Intellectual Property Right/Traditional Knowledge*

Sensitization needs to start from the rural setting by educating indigenous communities of the existence of traditional knowledge resources within their community and the fact that as a rich and bio diverse communities, it can use its bio diversity resources to better its economy and ensure value creation. The sensitization programme will also aim at educating the indigenous communities to recognize their rights, roles and position when it comes to protecting their interest over their creations. They indigenous communities will also be sensitized of the need to safeguard certain secrets about their knowledge so pharmaceutical companies and manufacturing companies will not extract those secrets as they did in the case of French Guiana. This sensitization can best be carried through the joint efforts of the Federal Ministry Information & Culture and the Federal ministry of Agriculture and Rural Development.

### 2. *Enactment of Law or Policy for the Protection of Traditional Knowledge in Nigeria*

Taking into consideration that the existing law on intellectual property law is out dated and has colonial foundation, it is time for Nigeria to enact a law that is a reflection of its peculiarities. In other words, taking into consideration the indigenous nature, cultural diversities and our rich tradition, there is an urgent need to have a policy or law that can adequately project both a positive and defensive approach of protection over traditional knowledge. This is possible through a stand-alone system for traditional knowledge/ traditional cultural expression. The proposed law or policy should encourage protection of

---

<sup>89</sup> C Muanya, 'Ten Nigerian Medicinal Plants Proposed by NMC for Standardisation' *The Guardian* (Abuja:4 May 2017).

TK and natural resources by utilizing customary practices, authorities and structure at play in the community.

### *3. Ratification/Domestication of International Instruments that are beneficial to TK*

Our leaders are in the habit of ratifying international instrument with no real intention to domesticate them. It is time to break such habits. A nation can grow and learn from global market by understanding what is applicable internationally. There exists the possibility of being vulnerable at the global market if not properly fortified. The best form of fortification will be the ratification and domestication of the international frameworks so our interest will not just be protected at the national level alone but also at the international level.