

PRECEDENT, POLICY AND POSSIBILITY: A VICTIMOLOGICAL ORIENTATION TOWARDS THE PROTECTION OF TRADITIONAL KNOWLEDGE IN AFRICA

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DECLARATION

I declare that this dissertation is my own unaided work. All citations, references and borrowed ideas have been duly acknowledged. I confirm that an external editor was not used. It is being submitted for the degree of Doctor of Philosophy in Criminology in the School of Applied Human Sciences, College of Humanities, University of KwaZulu-Natal, Durban, South Africa. None of the present work has been submitted previously for any degree or examination in any other University.

Student signature

Date

DEDICATION

To my mother, Rerginah Mutsiwa

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ABSTRACT

The value and importance of traditional knowledge in Africa cannot be over emphasised. Paradoxically, such knowledge within the global knowledge economy is perceived to be raw, archaic and devoid of any economic value and not befitting instructive artificial and scientific exploration. The classification of traditional knowledge in such a negative category has constructively marginalised traditional communities, opening them up to adverse palpable effects which *inter alia*, include misappropriation of traditional knowledge for commercial exploitation with no or minimal consideration, social disintegration, to the sheer disappearance of the knowledge together with its associated genetic resources. The challenges affecting the victims of traditional knowledge misappropriation and marginalisation in Africa should not be conceived as natural and inevitable but should be traced back, to the history of the integration and subordination of traditional knowledge to the world system of knowledge. Through the aid of a radical and critical victimological paradigm, the thesis sought to identify the source of victimisation of traditional communities through a historical enterprise located in the elements and factors that influence the creation of a social formation, guided by material forces of production with their corresponding superstructure.

The findings of this study show that traditional knowledge within post-colonial Africa has become a contested discourse, inundated by a history of oppression, subjugation, colonialism, cultural violence and ideological prejudice. Institutional and structural power relations have been key in the facilitation of the sustained victimisation of traditional knowledge holders in Africa, to the extent that the framework that purports to protect traditional knowledge in Africa, largely reproduces inequality and victimisation of traditional knowledge communities. Within an emancipatory African victimological framework, remedial measures are proposed to dismantle the structures of knowledge imperialism thereby seeking to empower traditional knowledge holders in the furtherance of justice and sustained equilibrium. As such it is proposed that an 'African victimology' is not a mere abstract approach but refers to a lived experience that allows for transformation

through supplanting deleterious tenets of the intellectual property regime with the humanising values of *Maat* and Ubuntu. The thesis recommends that the policy framework that protects traditional knowledge communities should recognise the latter as victims of historical injustices and oppression. A policy framework that recognises traditional knowledge communities as victims of colonial and institutional imperialism, will be capable of addressing the factors and conditions that contributed to their marginalisation and victimisation. In this regard, from a theoretical perspective, victims should be empowered to self-assert and affirm dialogue with apprehensions affecting their humanity. Hence, justice is not the procedural and substantial administration of legal rules but the just and proper relational obligations reflective of the cultural conditions, affinities and connections.

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ACRONYMS

ARIPO	African Regional Intellectual Property Organisation
AU	African Union
CBD	Convention on Bio-Diversity
CSIR	Council for Scientific and Industrial Research (South Africa)
EU	European Union
IP	Intellectual Property
IPRs	Intellectual Property Rights
OAPI	<i>Organisation Africaine de la Propriété Intellectuelle</i>
TK	Traditional Knowledge
TKDL	Traditional Knowledge Digital Library
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organisation
WIPO IGC	World Intellectual Property Organisation Intergovernmental Committee of the Protection of Traditional Knowledge and Expressions of Folklore;
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America

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The traditional knowledge protection framework in Africa represents the law of the elephants and justice of the monkeys! (Anonymous)

CHAPTER 1

GENERAL ORIENTATION AND PROBLEM FORMULATION

“If you want to get to the root of the murder, you have to look for the blacksmith who made the machete” (Achebe & Innes, 1987: 14).

1.1. INTRODUCTION

The protection of traditional knowledge in Africa has been a subject of structural and institutional contested discourses, mainly grounded in intellectual property. Despite the continuance of contestations, hardly any settled solutions confirming the practical protection of traditional knowledge in Africa have been implemented; and where they have been adopted, they have not been effective in their application. In addition, the current legal solutions are largely a patchwork of ambivalent prescriptions that are not consistent with the cultural context and needs of traditional African communities. Consequently, due to the existent legal vacuum traditional communities have been on the receiving end of, these protracted contestations have contributed to the plunder and marginalisation of traditional knowledge through institutional instruments of the intellectual property system. Resultantly, the misappropriation of traditional knowledge for genetic or artistic production without assigning appropriate acknowledgements or considerations, treads the line of criminality.

Based on the stated assertion, the misappropriation and marginalisation of traditional knowledge contributes to the victimisation of traditional communities as it amounts to an alienation of their source of livelihood. Therefore, through the application of the critical Marxist paradigm, this thesis seeks to examine and possibly unravel the historical factors (precedent) that have contributed to the victimisation of traditional knowledge communities in Africa. In addition it shall, explore whether the historical factors (if any) that contributed to the peripherisation of traditional knowledge recur in the current frameworks (policy) and discourses that purport to protect traditional knowledge in Africa. Based on these findings, this study shall proffer alternatives for traditional knowledge protection grounded in African victimology (possibility).

1.2. CONCEPTUALISATION

Before placing the phenomenon of traditional knowledge misappropriations in a broader framework of victimisation, it is necessary to discuss the key concepts of this study.

1.2.1. Traditional knowledge

There is no agreed definition of traditional knowledge, due its complex and heterogeneous nature in terms of its locality, form and content. Hence, the context and object for its intended use, more often shapes the meaning of traditional knowledge.¹ For instance in general terms, the World Intellectual Property Organization (WIPO), defines traditional knowledge as a “broad description of subject matter, generally the intellectual and intangible cultural heritage practices and knowledge systems of traditional communities including indigenous and local communities (WIPO, 2008: 23). While in the strictest sense, ARIPO (2010) and WIPO (2010) define traditional knowledge as a product of intellectual activity which arises in a traditional form. This knowledge includes *inter alia* “know how, skills, practices and learning that form part of traditional systems and knowledge embodying life the styles of indigenous and local communities or contained in codified knowledge systems passed through generations” (OseiTutu, 2011: 164; ARIPO, 2010; WIPO, 2010). The difference between the two definitions is that the former refers to the general characteristics of traditional knowledge, while the latter refers to the constituent elements of such knowledge.

The Convention on Bio-Diversity (CBD) of 1992 defines traditional knowledge as “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles”.² On the other hand, the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of benefits³ (2010)

¹ The World Intellectual Property Organisation and the African Regional Intellectual Property Organisation define traditional knowledge in intellectual property terms, while the Convention on Bio-Diversity and the Nagoya Protocol define traditional knowledge in ecological terms.

² See Article 8 (j) of the Convention of Bio-Diversity, Available at <http://www.cbd.int/convention/articles/default.shtml?a=cbd-08> Accessed on 12 March 2013.

³ Hereinafter referred to as the Nagoya Protocol.

schedules that traditional knowledge is “associated with genetic resources that are held by indigenous and local communities”.⁴

Scholars have attempted to define traditional knowledge as a very broad concept of information, practices, lived experiences, traditions and cultural expressions that embrace the technical, spiritual and cultural dimensions of a local indigenous context (Aguilar, 2001; Arewa, 2006; Arewa, 2006b; Eyong, 2007; Gulyani & Singh, 2010). The said knowledge is derived from long-standing traditions and practices of certain regional, indigenous or local communities (Finetti, 2011). Other scholars, locate traditional knowledge as a “set of interactions between the economic, ecological, political, and social, environments within a group or groups with a strong identity, emanating from local resources through patterned behaviours that are transmitted from generation to generation and deals with change” (Eyong, 2007: 122).

Therefore, reference to the term ‘traditional’ does not “necessarily mean that the knowledge is old, archaic or static” (OseiTutu, 2011: 164) because it constantly evolves and adapts to the socio-economic conditions and needs that exist within a traditional or indigenous community at a particular time. Furthermore, the knowledge is passed from one generation to the other, adapted and applied to a context which transmits history, aesthetics, ethics and traditions of the indigenous community (Gulyani & Singh, 2010). These technical concepts are intrinsically connected to the cultural, spiritual, physical meanings and beliefs of the communities and they define the way indigenous people survive in the surrounding environment (Finetti, 2011).

From the foregoing, one can deduce the common thematic characteristics that constitute traditional knowledge:

- a) That knowledge is created, preserved and passed from one generation to another;

⁴ See also Article 7 of the protocol at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>. 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 is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components

- b) It is intrinsically linked to the local, indigenous or traditional community;
- c) The knowledge incorporates the social, spiritual, political and economic values of the traditional communities;
- d) The knowledge contains intrinsic value that contributes to the conservation of the environment, food security, sustainable agriculture, health, culture, artistic skills and the progress of science and technology; and
- e) The knowledge is integral to the cultural, spiritual and intellectual identity of traditional communities that hold such knowledge which is governed and maintained formally or informally by customary laws and practices.

Therefore, for the purpose of this study, traditional knowledge is distinctively associated with a traditional or indigenous group. Such knowledge contains social, cultural, economic, intellectual, ecological, agricultural, medicinal, technological and educational value, which is integral to the spiritual and cultural identity of traditional communities in Africa.

1.2.1.1. Authentication of traditional knowledge

The lived and demonstrable experiences of the elders and ancestors, which correspond with the historical reality of the indigenous community, determine the validity and authenticity of traditional knowledge. Rituals, initiation rites, symbolism and aesthetic expressions of song poetry, genetic resources, craft and designs among others represent modus for the expression of traditional knowledge. Hermeneutics of concealment also subside within traditional knowledge and this usually transpires through riddles, proverbs, rituals, epic stories and symbolism (Dutfield, 2001). Certain forms of traditional knowledge are kept secret and only accessed by the initiated, while at the same time they may be used for the greater benefit of the community (La Fontaine, 1986). Therefore, a fiduciary duty binds the custodians of sacred knowledge to use such knowledge for the overall benefit of the community *in toto*.

1.2.1.2. The metaphysical nature of traditional knowledge

Spiritual rituals and symbolisms validate traditional knowledge as a source of power within traditional African communities. Cosmology and theodicy form the epistemological foundation of traditional knowledge in an indigenous context for without it; the foundation of the traditional knowledge system collapses. In other words, the meta-physical principle affirms that traditional knowledge produced in an indigenous context has supernatural origins because reality is manifestation of interconnectedness between cosmology and universe. Therefore, traditional knowledge is integral knowledge of the living and non-living, divination, telepathy, physical phenomena, artistic productions and supernatural knowledge. This stated observation confirms Mbiti (1969) assertion that Africans are notoriously religious.

1.2.1.3. Difference between traditional knowledge and indigenous knowledge

The terms ‘traditional knowledge’ and ‘indigenous knowledge’ are used interchangeably, although they are conceptually different. Indigenous knowledge refers to knowledge that is held and used by communities that are or have been identified as ‘indigenous’⁵ (WIPO, 2010; 2001). Indigenous knowledge is generally considered to be a more precise body of knowledge than traditional knowledge because it is developed, maintained and disseminated by indigenous people who are recognised as such (WIPO, 2008). Therefore, indigenous knowledge is the traditional knowledge of a specific group that is known to be indigenous.

In other words, “all indigenous knowledge is traditional knowledge but not all traditional knowledge is indigenous” (Oseitutu, 2011: 162). Traditional knowledge can thus be held by a traditional or local community which is not necessarily indigenous (WIPO, 2008). Although traditional knowledge and indigenous

⁵ Indigenous communities, peoples and nations are “those which, having a historical continuity with ‘pre-invasion’ and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems (OseiTutu, 2011). Also see (WIPO, 2010)

knowledge are not synonymous in definition, they share many attributes, such as being unwritten, customary, pragmatic, experimental, holistic, and this may explain why these concepts are often used interchangeably in the same context (Kudngaongarm, 2010).

1.2.2. Intellectual property

Intellectual property refers to creations of the human mind where exclusive rights to such creations are recognised. Intellectual property is divided into two broad categories namely, industrial property and copyright. Industrial property includes patents, utility models, industrial designs, trademarks, service marks and trade names, indications of source or appellations of origin and the repression of unfair competition (Arewa, 2006). Copyright extends to literary and artistic expressions that are original and not to ideas, procedures, and methods of operation or mathematical concepts (Boyle, 2003). Patents protect inventions that are new, inventive and industrially applicable while trademarks extend protection to marks, symbols or words, which are distinctive (Boldrin & Levine, 2002). The shelf life for patents is 20 years, while for copyright it is 50 years, subject to restrictions governed by national laws.

The owners of intellectual property have the rights to exclude any person or juristic persona from the making, use, sale, distribution or commercialisation of the stated property without their consent; hence, the exclusionary nature of intellectual property rights (Carrier, 2004). The owner of the intellectual property has the exclusive right to commercially exploit his or her intellectual product to the exclusion of others. In that light, the monopoly mainly creates an incentive for further innovation through the protection of the rents that arise through commercialisation of such creations. It is on this basis that intellectual property rights are argued to spur economic development to provide benefits to all (Boldrin & Levine, 2002). However, the monopoly that is granted by intellectual property rights is not absolute in nature, as it is limited in time and scope and granted only to creators who meet certain minimum requirements (Lemley, 2004).

In this thesis, intellectual property shall refer to all the creations of the human mind that are protected by the state subject to certain limitations and in return, the owners of such incorporeal property are expected to disclose the knowledge which is under protection.

1.2.3. Victimology/Victimisation

Victimology is the study of victimisation where the plight of a victim of abuse of power is critically analysed within a context of interrelations between him or her and the formal justice system and the victim's relationship with the perpetrator of the criminal act (Hudson & Galaway, 1975). The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power delineates the study and scope of victimology to persons who either individually or collectively suffered harm, through acts or omissions that are in violation of criminal laws and criminal abuse of power. The international instrument focuses on the harm that becomes apparent because of a breach of national and international law pertaining to crime.

The major objective of any victimological research is to analyse the impact and effect that victims suffer as a result of the actions of perpetrators of their harm. This assessment is observed and explored in a specific context, which victimologists seek to analyse the extent to which the victim's plight has been exploited, belittled, neglected and manipulated by ideological, socio-economic and politico-legal forces (Viano, 1994).

In terms of ideology, three victimological paradigms occupy the theoretical space within the discipline. These are positivist victimology, radical victimology and critical victimology. For purposes of this thesis, positivist victimology shall not be utilised in analysing the factors that have contributed to the victimisation of traditional knowledge communities as it focuses on victimisation "through the so called ordinary or criminal acts,"⁶ thus neglecting important issues of mass or collective victimisation" (Letschert, 2012: 95).

⁶ The positivist perspective on victimology is criticised for its cardinal allegiance to the social construct of a victim in the purely legalistic ambit of criminal law. Such an approach, excludes other categories of victims,

Hence, this thesis shall draw from radical and critical victimology in analysing factors that have plunged traditional knowledge communities into an unending cycle of victimisation. Radical victimology questions how the relationship between the state and law has been used in the social construction of the victim offender relationship. It seeks to make visible the power relations that underpin who is seen and responded to as a victim and who is not, and affords a much wider and far-reaching conceptualisation of what counts as crime (Walklate, 2012). It implores victims to stop being pawns in conventional criminal justice and instead to radically challenge official policies.

The thrust of radical victimology is centred on a human rights approach, which is believed to offer victimology with “boundaries that do not include merely official victimological definitions but offer more objective measures of victimisation” (Elias, 1985: 17). Therefore, international human rights standards and covenants become a yardstick in measuring how the law and the state create victims through the violation of the human rights norms. However, radical victimology has been criticised for its brazen attack on positivist victimology, while innately itself slips in positivism by assuming the applicability of human rights conventions without explaining how they were historically created (Mawby & Walklate, 1994). Radical victimology’s intense criticism arises from its assumption that the law and state are at all instances driven by capitalist tendencies. The problematisation of the law and the state as the major culprits of victimisation has been criticised for its simplistic assessment of the relationship between the law and the state.

Critical victimology, as a complementary tool of analysis shall be adopted to address the apparent shortcomings of radical victimology. Mawby and Walklate (1994) argue that critical victimology permits for the exploration of types of victimisation, which are unobservable and unfamiliar thus exposing processes that go beyond “our back” which contribute to victims. This ideology lays out a more active and politically sophisticated role for victims that could help develop a victim movement that challenges rather than submits to state policies (Elias, 1996).

like victims of the police force, victims of war, victims of the correctional system, victims of state violence and victims of any sort from criminological attention. See also (Quinney, 1972: New York)

Understanding how generative mechanisms of race, class capitalism and patriarchy set conditions in which different victims movements have gained prominence forms the dominant ethos of critical victimology. It recognises how individualised, victim rights can be co-opted, recommending instead of rights, claims that focus on collective, structural inequities that are suffered by vulnerable populations. By focusing on substantive and not merely procedural rights, this approach is justice-based, rather than rights-based, victimology (Mawby & Walklate 1994). However, critical and radical victimologies are too broad and based on the euro centric conception of what constitutes a victim. Both perspectives mainly focus on paper-based rights, which “chiefly serve to mask the hegemony of disenfranchised groups participating in mechanisms of their own oppression” (Peacock, 2013, 2).

Peacock (2013b), argues that any study of victimology within Africa, needs to be located in a broader multifaceted historical context of colonialism, institutionalised racism, institutional and structural violence, abuse of power and conflict. Such an analysis generates the need to look closely and further explore the historical and political legacy together with its associated interlocking systems of oppression that lie behind victimisation (Shalhoub-Kevorkian & Braithwaite, 2010).

Therefore, a historical conception of how power relations, the law and the state operate within the social, economic and legal spheres, in producing victims’ traditional knowledge victimisation. Such an observation has been omitted in mainstream victimology, which has consequently excluded traditional knowledge communities to be recognised as legitimate victims of subordinate stages. The trickle-down effect of the exclusion largely denies these traditional communities from receiving the requisite assistance they require. The aim of this thesis is to analyse the extent to which policies, processes and practices that amount to an abuse of power by governments and economic powers contribute to the victimisation of traditional knowledge communities and holders.

1.2.4. Human security

Human security is the latest in a long line of neologisms which include common themes of security, global security, cooperative security, and comprehensive security. It encourages policymakers and scholars to consider international security as something more than the military defence of state interests and territory (Paris, 2001). The state has remained the fundamental purveyor of security yet it often fails to fulfil security obligations and has always been a source of threat to its own citizens. The reason for the paradigm shift from state security to security of the people - human security; seeks to enhance human rights, protect people against a broad range of threats to individuals and communities and further seeks to empower them to act on their own behalf.

Two paradigms, the qualitative and the quantitative dimensions constitute human security. The quantitative aspect of human security operates at a level where basic human needs require fulfilment. For instance, at the most basic level; food, shelter, education and health care are essential for the survival of humans. Therefore the pursuit of human security must have at its core the satisfaction of basic material needs of all human kind (Thomas, 2000: 6).

The qualitative aspect of human security pursues the achievement of human dignity, which incorporates personal autonomy, control over one's life and unhindered participation in the life of the community. In this realm human security is oriented towards the active and substantive notion of democracy at all levels, that ensures the opportunity of all for the participation in the decisions that affect their lives. In that regard, human security is grounded on human integrity (poverty, disease and environmental concerns); human consequences of armed conflicts and dangers posed to civilians by repressive governments and state failure; non-traditional security issues such as HIV and AIDS, drugs, human trafficking and terrorism (Newman, 2010; Roe, 2008; MacFarlane & Khong, 2006; Mack, 2004; UNDP, 1994).

In this thesis, human security shall be applied to enhance the protection of human rights held by communities that are custodians of traditional knowledge in Africa, through the:-

- a) Protection from actions, laws and policies that present an imminent threat to their proprietary rights over land, environment and bio-diversity;
- b) Incorporation of personal autonomy of traditional communities and unhindered participation in processes that directly or indirectly affect their lives and
- c) Creation of an environment that operates at a level where all basic material, legal, psychological and physical needs are fulfilled without direct interference of the state.

Traditional knowledge holders and communities in Africa have hardly been taken into consideration in the analysis of factors that threaten their human security. Therefore any conception of security which neglects this reality is conceptually, empirically and ethically inadequate (Newman, 2010).

Before outlining the scope and objectives of the study, it is imperative that a general impression of the historical background of the development of the African knowledge systems together with their associated civilisations is given.

1.3. HISTORICAL PERSPECTIVE

There is a general assumption that Africa is a dark continent with no history whose significance emerged upon the arrival of the Europeans (Hobson, 2004). A random selection of a conventional history scripts instructs that the history of civilisation developed on the contributions of one race group, the Europeans. Accordingly, the averment is:

Greece begot Rome, Rome Begot Christian Europe; Christian Europe begot the Renaissance, the Renaissance the Enlightenment, the Enlightenment Political Democracy and the Industrial Revolution. Industry crossed with democracy, in turn yielded the United States embodying the right to life , liberty and the pursuit of happiness (Hobson, 2004: 1).

Therefore, history has been convoluted into a tale where the west emerged at the top of the world owing to its “unique ingenuousness, scientific rationality, rational restlessness, democratic and progressive qualities” (Hobson, 2004: 2; Bernal, Spencer, Ali, Bingham & Britain, 1993). However, the converse of this assertion is true. The development and success of the world’s civilisation is largely founded on African civilisation. The following discussion shall trace and demonstrate evidence of the latter while at the same instance disproving the fact that Africa was a dark continent.

1.3.1 Ancient times

Archaeological and anthropological evidence suggests that Africa is the cradle of humankind (Lewin, 1987). The *locus* is, to a great degree of certainty that mankind was born in Africa within the region of Kenya and around the area of Ethiopia and Tanzania (also known as the Great Lakes Region), dispersing along a north-south axis all the way to South Africa (Allen, 2008). Humans born around the Great Lakes Region almost on the equator were necessarily pigmented and black because the Gloger Law calls for warm-blooded animals to be pigmented in a hot and humid climate (Allen, 2008).

Van Sertima (1992: 241), observes that “mankind having developed in Africa, the first was black-skinned; therefore blacks had to be the originators of the world’s first civilisation”. Therefore, the pod and prime mover of ‘western civilisation’ was Africa, specifically the Egyptians. Nevertheless, who were the Egyptians? Herodotus, a Greek historian, repeatedly reported in 365 B.C that the Egyptians were dark skinned people with woolly hair, who had the same tint as that of the Ethiopians (Greene, 1987; Diop, 1991). Maspero & McClure (2003) summated the opinions of ancient historians by asserting that the Egyptians belong to the African race, which first settled on the middle Nile and following the course of the river gradually.⁷

⁷ The prehistoric native of Egypt both old and new stone age was African and the earliest settlers came from the South. This assertion is based on the similarity of the customs and religions with those that are practiced in Uganda. See (Budge, 1902).

In that regard, the fundamental pillars of African civilisation were heralded during the desertification of the Sahara in 7000B.C (Bernal, 1987). The desiccating of the Sahara instigated the migration of its occupants towards the Nile River, as the living conditions became intolerable and callous. Migration into equatorial Africa was deemed unviable because of the dense nature of the woodlands (Bernal, 1987; Diop, 1989). The Nile was more appropriate but it provided different living conditions to those that existed before the desertification of the Sahara. The new migrants in the Nile valley had to adapt to the new living conditions, which led to the creation of the first known form of civilisation, presently known as Egypt. Adaption in the Nile valley “required technical expertise in terms of irrigation and dams, precise calculations to foresee the inundations of the Nile, geometry to delimit property after floods had obliterated boundary lines, transformation of the hoe into ploughs first drawn by humankind and then later by animals” (Diop, 1989: 23). This civilisation developed over a period of 10 000 years and gradually spread through to the lower Nile and Mediterranean basin (Diop, 1989; 1991), thus developing the first form of globalisation (Hobson, 2004).

It is postulated that during these 10 000 years that the Africans who had moved and spread to the lower Nile gradually penetrated into the interior of the continent to form the nuclei of the continent’s civilisation.⁸ Evidence of the stated observation is strewn across Africa in countries such as Zimbabwe,⁹ Cameroon,¹⁰ and Ghana.¹¹ The Africans who had moved into the epicentre of a once feared dense forest encountered different existential conditions that were different to those that existed in the upper Nile. Therefore, the scientific and technical instrumentality that had assured their survival in the Nile was no longer applicable in the interior of Africa. Hence, a novel form of adaption was required to establish a new equilibrium. The abundant economic and natural resources at their disposal

⁸ The movement was caused as a consequence of overpopulation of the valley and of social upheavals (Diop, 1989).

⁹ In Zimbabwe they are monuments and cities built of stone famously known as the Great Zimbabwe which cover a radius of “100 to 200 miles, a diameter almost as great as the nation of France” (Cole, 2009) The stones that built the cities are placed on one another with no cement holding them in fashion similar to the Pyramids of Egypt, a form of architecture known as Cyclopean (Diop, 1989).

¹⁰ An authentic piece of hieroglyphic writing exists in Cameroon, which is similar to Egyptian hieroglyphics.

¹¹ In Ghana there is what is termed the lost city of Kukia, which is deemed to have been in existence during the time of the pharaohs. The designs and construction of the city have been labelled to be complicated with an assortment of metallurgical workshops, outside tombs, well designated streets and stone walls which are thirty centimetres thick (de Pedrals, 1950).

assured the new settlers the insignificance of perpetual inventions thus making them largely materially indifferent to material progress from their predecessors. The migrants were thus oriented towards the development of their social, political and moral organisation rather than speculative scientific research (Diop, 1989).

However, these new African civilisations were isolated from their motherland by virtue of distance, expansion of maritime trade around the coasts of Africa and the subsequent conquest of Egypt by the Persians in 525 B.C, the Macedonians under Alexander in 333 B.C and the Romans under Julius Caesar in 50 B.C. (Diop, 1989; Connah, 2001). However, the invasion of Egypt and the plunder of its knowledge resources relatively contributed to the development of knowledge in Rome and Greece (Cribiore, 2005). During these invasions, scholars from Europe went on pilgrimages to drink at the fountain of scientific, religious, moral and social knowledge that the Africans had acquired through their ingenuity (Diop, 1989).

For instance, Isokrates truly adored the “caste system, the rulership of the philosophers and the rigour of Egyptian philosophers, priests and *paideia* (education) that produced the *aner theoretikos* (contemplative man)” (Bernal, 1987: 240). In the *Phaidros*,¹² Plato, a student of Socrates, forced Socrates to proclaim that “*Theuth-Toth*, the Egyptian God of wisdom was the one who invented numbers, arithmetic and geometry and most important of all letters. Aristotle the great mathematician and astronomer is believed to have stayed in Egypt for sixteen months shaving his head in order to study with the priests there.¹³ Aristotle argued, Egypt is the cradle of mathematics, geometry, arithmetic and astronomy, which the Greeks were beginning to possess (Diop. 1989). Bernal (1987) and Diop (1989), have argued that Greek Mythology is an import of Egyptian myth and religion.

However, the transition of African knowledge systems and civilisations from the ancient period to medieval period has hardly been documented.

¹² *Phaidros*, 274 D (Translated by H.N Flower, page 563)

¹³ See Diogenes Laertius, VIII. Pages 86 - 9

1.3.2. Medieval period

There is little concrete data available on Sub-Saharan civilisations because much of their history is based on oral traditions rather than writings (Blaha, 2003). However, upon the arrival of the Europeans within Sub-Saharan Africa in the 15th Century they found particular systems of advanced civilisation flourishing. For instance, the Great Zimbabwe civilisation located between the Limpopo and Zambezi rivers east of the Kalahari Desert shows the magnitude of this civilisation which is estimated to have lasted approximately from 500AD to 1600AD (Blaha, 2003). The construction of freestanding, dry stone-walls required skill and architectural brilliance which might escape the imagination of modern day architectures¹⁴. Mining and metallurgy, were conducted at a considerable scale which in turn led to the production of gold, iron, tin and copper (Connah, 2001). The moral and social organisation of the region and the Great Zimbabwe was in constant trade with the Portuguese and the Arabs at the port of Sofala in Mozambique.¹⁵ Such magnificence and construction of one of the greatest civilisations in sub Saharan Africa required substantive intellectual capacity and a tried and tested system of advanced knowledge.

The moral and social organisation of West Africa was similarly at the same level of perfection. Monarchies were constitutional, with a people's council representing every individual at every level in the social strata (Diop, 1989). The revelations of the navigators from the 15th - 18th century provide positive proof that black Africa which extended south of the desert zone of the Sahara was still in full bloom, harmonious and well organised (Frobenius, 1952). Northern Africa at the same time was in a continuous momentum of development. For instance, in Ethiopia and Eritrea, there was an advanced system to quarry and transport, which saw the construction of a monolith which was 33 meters long and about 517 tonnes in weight which required advanced theoretical knowledge, practical skill and good knowledge (Connah, 2001).

¹⁴ The most remarkable of the monuments is the great enclosure with a diameter of 89 meters. The wall is 244 meters and at its greatest, its 5 meters thick and 10 meters High. It is estimated to contain 5151 cubic meters of stone work. This wall has been described to be the largest single prehistoric structure in sub-Saharan Africa. see (Garlake, 1973)

¹⁵ *ibid*

The influence of Egyptians in European science was also evident during this period as exemplified by Sir Isaac Newton's laws of gravity. He certainly believed in the Egyptian *prisca sapientia* which was essential in the development of the theory of gravitation, and through its use in measuring the degree of latitude of the pyramids he was capable to get an accurate measurement of the circumference of the earth (Bernal, 1987).

1.3.3. Exploration and colonisation of Africa

The demands of survival and progress of traditional communities in Africa spurred the development of traditional knowledge and African civilisation. On the flipside, in Europe technical development was stressed, as the climatic conditions demanded the same for the continuance for their survival. Though the Africans were the first to develop iron, they had not built canons, "the secret gun powder was known only to Egyptian priests who used it solely for religious purposes, at rites such as the Mysteries of Osiris" (Diop, 1989: 35). By virtue of the technical superiority of the Europeans (which was not necessary for the Africans), Africa was labelled a 'dark continent' that supposedly required the assistance of the Europeans to deliver it from savagery and barbarism.

Africa grew "dark" as Victorian explorers, missionaries, and scientists flooded it with light, because the light was refracted through an imperialist ideology that urged the abolition of "savage customs" in the name of civilization (Brantlinger, 1985: 166).

Inflated by their technical superiority, the Europeans looked down on Africa and the discovery of America with its virgin land made Africa into readymade reservoir for cheap labour spurring it into the slave trade (Diop, 1989). Africa was thrown into its darkest history that was to last for four centuries. The question of skin colour during the 16th and 17th century reared its ugly head, with the presumption that whites were superior to blacks. This dominant ideology justified slavery and domination of the African indigenous communities.

A dominant ethos immediately materialised; western knowledge was organised, structuralised and conceptualised as a mode of economic activity (Hountondji, 1997). African traditional knowledge was deemed to be archaic, complex, primitive, the wild and natural, based on spiritual, superstitious and cultural

connotations devoid of economic significance.¹⁶ The negative connotations attached to traditional knowledge presumed that scientific western knowledge leads the path for others to follow. Hence, non-western epistemologies were deemed to be backward and unscientific thus occupying the lower rung of the epistemological ladder, a design which was a result of the colonial agenda i.e. the traditional healer, accordingly was labelled as an odious figure, the personification of the devil himself and embodiment of darkness.

The colonisation of Africa in the 19th century, shaped by power, economic and race relations typified the relevance and certainty of the western knowledge system (Arewa, 2006b). The international political structures during that time marginalised indigenous Africans through barring them to participate in processes that affected them. Resultantly, the political and cultural orders that emerged were asymmetrical; establishing a hierarchy that played an important role in which type of knowledge was to be protected by the intellectual property regime. The dialectical impact of colonialism enclosed African traditional knowledge as insignificant, which needed replacement with western knowledge (Ntuli, 2002).

The colonisers gathered traditional knowledge as raw data for transmission to their laboratories which would interpret the knowledge before integrating it into a comprehensive system of 'main stream' knowledge (Hountondji, 1997). As a consequence the use of western science in the transformation of traditional knowledge, was and is still deemed to be "tool of progress but while on the backcloth it is imperialistic and hegemonic" (Ratuva, 2009: 153). Western science has been used as a tool for the exploration of new frontiers of knowledge, pursuing neo liberal objectives through legal arrangements used as a basis for the capital accumulation of knowledge resources (Ratuva, 2009). Science has thus been used as a tool to modify the cultural, political, economic and ideological polemics; turning the cultural properties of the traditional knowledge into commodifiable goods that serve the Masters of the perceived 'western science'.

On the auspices of development and progress in science, traditional knowledge holders have suffered different forms of victimisation, which has resulted in

¹⁶ Underneath these designated superstitions lay layers of thought that seem to have eluded western scientists (Ntuli, 2002).

traditional knowledge misappropriation and marginalisation. The integration of traditional knowledge into the world process of knowledge production has entailed, among other palpable effects, such as the “steady withering, impoverishment and in worst cases sheer disappearance of such knowledge together with its associated resources” (Hountondji, 1997: 13).

Therefore, the troubles and shortcomings of the traditional knowledge protection in Africa should not be conceived as natural and inevitable but it should be traced back, to the history of the integration and subordination of traditional knowledge to the world system of knowledge (Hountondji, 1995). Therefore, to understand the subordination of traditional knowledge, “one must know the genesis, context and development of such subordination; for every event that occurred in the past created the context of future events, which is the present” (Robinson, 2011: 4).

The main objective of this thesis seeks to critically unravel the factors that contributed to the exclusion and marginalisation of traditional knowledge from the intellectual property frameworks and how such neglect or failure has contributed to the victimisation of traditional knowledge holders in Africa. It would be enlightening to place the present state of affairs in Africa into its historical context and view present-day shortcomings and weaknesses in the field of traditional knowledge protection in hindsight (Hountondji, 1995).

With the key concepts and a brief historical background of the development of traditional knowledge as a general orientation, the following discussion will formulate the statement of the problem based on politico-legal and social factors that have inspired this study.

1.4. PROBLEM FORMULATION

Traditional knowledge as the fundamental bedrock of primary health care in Africa remains important, as 80% of the inhabitants of the African continent depend on traditional medicines for primary health care (World Health Organisation, 2008). Up to 72 percent of the South African population and 68 percent of the Ethiopian population rely on traditional medicine, and at least 20,000 plant species are used for medicinal and related purposes (Omokhua, 2011). These plant species are part of the holistic spiritual, political, social and cultural practices of African

communities. The commercial value of traditional knowledge has been on steady increase. To demonstrate, the global market of herbal medicines associated with traditional knowledge was estimated at US\$16.5 billion in 1997 and it rose to US\$22 billion in 2000 (Biswal & Biswal, 2003). In 2008, the estimated market value of traditional knowledge in Africa per year was pegged at US\$60 billion (Tilburt & Kaptchuk, 2008) with industrial analysts estimating the value to increase to US\$90 billion per year in 2015 (Global Industry Analysts, 2012).

The fact that research companies resort to medicinal plants used by traditional communities in Africa, as an alternative for research and development has been identified as the major reason for the rise of the value of traditional knowledge (Chakrabarti, 2014). However, such juristic personas misappropriate traditional knowledge, patent and commercialise it, without acknowledging or compensating the producers of the traditional knowledge (Aguilar, 2001). For instance, in 1995 the Council for Scientific and Industrial Research (CSIR) patented the chemical component P57 of the Hoodia plant,¹⁷ without the consent of the San population situated in the Kalahari Desert (Vermaak et al., 2011). In 1998, the patent was licensed to Phytopharm a British pharmaceutical company which later licensed it for US\$32 million to Pfizer (Laird, 2010). In all these processes, the indigenous San communities never received appropriate consideration and acknowledgement as the original producers of such knowledge. It was only when the indigenous group threatened to sue CSIR under the Convention for Bio-Diversity (CBD) in 2002 when a settlement was reached to award a proportion of royalties received from Phytopharm to the San community, but in reality the San received only 0.003% of total retail sales of the products (Chakrabarti, 2014). Another case is that of the Rose Periwinkle flower found in Madagascar, which cures the Hodgkinson disease. The plant was misappropriated and is currently selling at an estimated US\$100 million a year (Nejat, Valdiani, Cahill, Tan, Maziah & Abiri, 2015) with no compensation or recognition of the indigenous communities of Madagascar.

¹⁷ The hoodia plant has been used by the San people in the Kalahari for generations as an anti-appetite and anti-thirst suppressant when they go for long hunting trips. However, the chemical component that causes that was patented by CSIR for it to be used as an anti-obesity drug (Vermaak, Hamman & Viljoen, 2011).

In Zimbabwe, the Snake-Bean plant (*Mutukutu*) a plant used by traditional communities to treat fungi was subject to misappropriation by University institutions. The University of Zimbabwe and the University of Lausanne based in Switzerland entered into an agreement whereof the Department of Pharmacy from the University of Zimbabwe would extrapolate the chemical components of the plant while the University of Lausanne would provide financial and material support to the former (Magaisa, 2007). It was a further term to the agreement that the University of Lausanne would have access to more than 5 000 plant species used by traditional communities in Zimbabwe (Magaisa, 2007). The beneficiaries of this agreement were the University of Zimbabwe and the University of Lausanne, whereof the results of the research were to be patented and the proceeds from commercialisation shared equally by both parties (Magaisa, 2007) at the exclusion of traditional communities.

However, the agreement suffered a major setback when the University of Lausanne solely applied for a patent for the plant and negotiated licencing arrangements with a United States (US) pharmaceutical company, Phytera without consent from the University of Zimbabwe. When this development was discovered, contestations ensued not only between the two contracting parties; with traditional communities whose knowledge had been misappropriated by the University of Zimbabwe claiming disenfranchisement of their knowledge (Magaisa, 2007). The University of Lausanne defended itself, arguing that no documented evidence of the use of such a plant to treat fungal infections had been uncovered.¹⁸ The underlying reverberation from the foregoing is representative of the misappropriation of traditional knowledge without recognising or assigning appropriate consideration to the initial producers of such knowledge.¹⁹

¹⁸ The Head of research from the University of Lausanne, Dr Merton argued that ““I don’t want to pretend nobody has used it in any antifungal activity in traditional medicine, but we don’t have any documented evidence” (Magaisa, 2007: : Page 4)

¹⁹ Canada’s Option Biotech, a Montreal based company, had patented the seeds of *Aframomum stipulatum*, obtained from Congo, for making of anti-impotency drug ‘Biovigora’. The *Tabernanthe iboga* has been used for long years in Central and West Africa as a stimulant. In larger doses, it acts as a hallucinogen. It is traditionally used for these properties by ‘shamans’. Now iboga is found to be effective in treatment of drug addiction and quite a few patent applications have been made by Myriad Genetics and by Washington University. Brazzein a protein derived from West African berry (*Pentadiplandra brazzeana*); it is used as a replacement of natural, low-calorie sweetener as it is many times sweeter than sugar. Researchers of University of Wisconsin have isolated the protein, brazzein, discovered the genetic sequence coding for it and also made

This form of injustice is not limited to traditional medicines but it extends to literary and artistic works, expressions of folklore and cultural expressions (Garnweidner, Terragni, Pettersen & Mosdøl, 2012). The improper and unjust utilisation of a very broad spectrum of community heritage affects the holders of that knowledge who are more often from the lower echelon of society, inflicting great losses to their lives and communities (WIPO, 2001b). Consequently, it contributes to the dissolution of communities, inciting socio-economic and cultural degradation of their individual members (Francis, 2008). Furthermore the loss of bio-diversity through human depredations is a real risk because traditionally utilised medicinal plants disappear, thus preventing its use by those who discovered them, as well as by the rest of humanity (Eimer, 2012).

However, despite the existence of evidence that has contributed to the victimisation of traditional communities in Africa there is hardly an effective legal framework that seeks to protect the interests of these vulnerable groups. The following discussion shall critically examine the efficacy of frameworks that purport to protect traditional knowledge.

1.4.1. Adapting intellectual property mechanisms to traditional knowledge

Traditional knowledge largely shares similar characteristics with knowledge protected under the intellectual property system. For instance, traditional cultural expressions are entitled to protection under the copyright system. However, traditional cultural expressions do not meet the prescribed requirements for copyright protection because it is deemed not to be original.²⁰ Traditional medicines fall within the ambit of products and processes under the Patent regime. However, they do not meet the definitive requirements of novelty,²¹ inventive step, and industrial applicability²² to be entitled patent protection because they are deemed to be prior art. Furthermore, knowledge protection

the transgenic organisms that produce brazzein in the laboratory. For that they have been granted US patents and European Patent. West African native communities knew this property since ages (Chakrabarti, 2014).

²⁰ Originality is determined if the artistic or literary work has 'not been copied' and it contains a 'modicum of creativity' (Lavik & Gompel, 2013).

²¹ The invention or process should not be part of prior art (Scotchmer & Green, 1990).

²² It should be capable of being produced industrially. See (Ordover, 1991)

granted under the intellectual property system is limited to a specific period while traditional knowledge is passed from generation to generation thereby making its relevance to the community continuous with no prescribed fixed period (Rahman & Mamun, 2015). In that regard, the “intellectual property system does not necessarily protect traditional knowledge relating to the medicinal uses of plants, reproductions of communal works, traditional cultural practices, or spiritual rituals” (OseiTutu, 2011: 151). In addition, intellectual property recognises individual rights rather than community rights in its general ambit for knowledge protection (UNESCO, 2014). This is contrary to the general structure of knowledge ownership within traditional communities where knowledge is communal rather than individual. In cases where the individual holds it, he or she holds it in a fiduciary capacity for the overall benefit of the community.

The ‘disclosure of origin’; a defensive tool to traditional knowledge protection makes it mandatory for patents based on genetic resources and traditional knowledge to specify the origins of such knowledge (Dutfield, 2005). Failure to disclose the origin would enable the invalidation of a patent based on traditional knowledge that has been improperly acquired or utilised (Alison, Hoare & Tarasofsky, 2007). However, the viability of this policy option is highly contested especially after considering that intellectual property laws are territorial.²³ Therefore, the question of enforceability of such a requirement treads the thin line of sovereignty as it goes beyond the geographical jurisdiction of the affected state. In addition, countries benefiting from misappropriated traditional knowledge might be reluctant to pass legislation prescribing such a remedy. Furthermore, the monitoring and policing of patents together with the patent applications that have not adhered to this requirement might be cumbersome and expensive. This is because traditional communities hardly have the means and technological capability to monitor patent applications globally. Such issues raise questions of how and to what extent the historical development of the intellectual property system has contributed to the marginalisation of traditional knowledge.

²³ In Europe, if a patent application is based on biological material of plant or animal origin the patent application is required to provide information on the geographical origin of such material, but neglect of providing such information shall not prejudice the processing of patent applications or the validity of rights arising from granted patents (Schneider, 1998).

1.4.2. The second enclosure movement

The intellectual property system is currently undergoing what is termed the ‘second enclosure movement’ where knowledge in the public domain is privatised under the auspices of intellectual property ²⁴ (Boyle, 2003). Overtly and covertly, common facts and ideas are enclosed or privatised in the name of property. For instance, patents are increasingly stretched out to cover ‘ideas’ that 20 years ago all scholars would have agreed were unpatentable (Boyle, 2003). Most troubling of all are the attempts to introduce intellectual property rights over mere compilations of facts (Boyle, 2003).

Power relations of those who control the means of production determine these changes. However, the expansion of the intellectual property regime hardly addresses concerns of “social justice as it often reflects who has access to the decision-making process at the international and national level” (Pagano, 2014: 9). The second enclosure movement has seen the enforcement of politically protected monopoly rights to exclude others from using information that has been in the public domain (Evans, 2005). In that regard, the second enclosure movement is a source of great inequality and stagnation within the knowledge domain (Pagano, 2014). The inequality promoted by the second enclosure system is that it treats traditional knowledge as being part of the public domain because it is not part of the intellectual property system and yet paradoxically treats such knowledge as raw materials for the intellectual property system.

The inequality is more prominent in light of the bedrock principle in international law that the right to own property is fundamental.²⁵ When the interests and assets of an entire group are by definition not embraced within the protective mantle of property, it prompts questions of why and how the right to property has hindered the full development of full-fledged rights for the protection of traditional knowledge (Bratspies, 2007). Furthermore, an exploration of how the development of the intellectual property system has trapped traditional knowledge holders as

²⁴ The public domain is any knowledge which is not protected under the general ambit of the intellectual property system. See (Wong, 2012)

²⁵ See Article 17 of the Universal Declaration of Human Rights which states that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his/her property.

victims in a seemingly and unending cycle of dispossession and exploitation needs to be undertaken.

1.4.3. Traditional knowledge framework in Africa

The frameworks for the protection of traditional knowledge at a national level in Africa are few and far between with only Ethiopia²⁶ and Zimbabwe²⁷ having enacted legislation to protect traditional knowledge. The efficacies of these legislative measures in the administration of justice remain elusive because their practical application is yet to be realised. At a regional level, three instruments have been adopted namely the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol), the *Africain Relatif a la Protection des Savoirs Traditionels* (OAPI framework on traditional knowledge) and the African Union Model law on the protection of genetic resources and access benefit sharing (AU Model law). The regional approach towards the protection of traditional knowledge is arguably incoherent because the general formulations of the instruments are different in legal and political approaches and enforcement strategies, which represent a clash of cultures. Eventually, such incoherence has resulted in the loss of the goal and purpose of traditional knowledge regulation in Africa (Drahos, 2007).

Furthermore, the three regional instruments have been labelled as a patchwork of ambivalent, inconsistent and often contradictory prescriptions that are characterised by a considerable variance both in their ratification status and in respect of available enforcement mechanisms (Randeira, 2010). The predominant view is that the legal treaties are mainly bound to a kind of insularity. That is to say, they omit answering the needs and concerns of the traditional societies and act like artificial islands floating on the surface of a sea without any roots (Hountondji, 1995; Hountondji, 2002b; 2002a). A critique of the regional traditional knowledge framework is necessary because the said instruments do not proffer a clear representation of the interests and needs of traditional

²⁶ Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006

²⁷ Section 33 of the Constitution of Zimbabwe states that the State must take measures to preserve, protect and promote indigenous knowledge systems, including knowledge of the medicinal and other properties of animal and plant life possessed by local communities and people.

communities. The non-reflection of the interests of traditional communities in the regional frameworks invokes questions about the foundational ideology of the protocols or treaties in question. In this context, issues of colonialism, sovereignty, identity and exploitation inevitably swirl beneath the surface of the exclusion of the protection of traditional knowledge holders in processes that affect them.

Therefore, the possible interaction of these instruments and traditional communities is likely to raise troubling questions about their impact upon implementation (see chapter 4 for a discussion of the challenges that will affect traditional knowledge communities through the application of these treaties and protocols). The lack of ‘rigor’ in understanding and redressing the real concerns of traditional knowledge protection in Africa represents a troubling phenomenon for traditional communities. An exploration of reasons underlying the exclusion of traditional knowledge communities from the broader discourse of traditional knowledge protection becomes imperative within a victimological paradigm.

1.4.4. International policy options

At an international level, various policy options for the protection of traditional knowledge have been advocated which *inter alia* include; state ownership as articulated in article 8(j) of the Convention of Bio Diversity (CBD) and private ownership under Trade Related Aspects of Intellectual Property (TRIPs). The Nagoya Protocol calls for States to place measures that ensure that traditional knowledge and its associated genetic resources is accessed after traditional communities have granted prior informed consent. The United Nations Declaration on the Rights of Indigenous People recognises the rights of traditional communities to maintain, control, protect their traditional knowledge and their associated cultural and genetic resources. It further calls on contracting states to ensure they provide the requisite mechanisms for indigenous communities to realise these rights while at the same time protecting them from the depredations of traditional knowledge misappropriates.

The stated international frameworks vary in terms of the objectives pursued towards the protection of traditional knowledge. For instance, Trips’ major

objective is to reduce distortions and impediments to international trade and therefore proposes that the international intellectual property framework to protects any form of knowledge that falls under its scope.²⁸ The CBD considers traditional knowledge protection as a means to achieving conservation and sustainable use of bio-diversity. Therefore, the protection of traditional knowledge is secondary to environmental conservation. Furthermore, subjecting the state protection to traditional knowledge is prejudicial to traditional knowledge communities because states have been identified as being at the centre of undermining the human security of its citizens (Newman, 2010). The Nagoya Protocol and the United Nations Declaration on the Rights of Indigenous Peoples' main objective is to recognise, preserve and protect the cultural heritage and knowledge of traditional communities, while ensuring that it is commercially exploited for economic development subject to prior informed consent. The challenges associated with these international instruments is that they are not binding on member states thereby relegating them to model laws which are applicable at the discretion of member states.

The international frameworks for the protection of traditional knowledge potentially conflict with the true aspirations of the needs of traditional knowledge holders (See Chapter 4 for an in-depth discussion for the needs and interests of traditional communities). Traditional knowledge holders in Africa have found themselves in direct conflict not only with their own states,²⁹ but also with multinational companies; all vying for control over traditional knowledge (Bratspies, 2007). Questions of whether ideological prejudices attached to these international frameworks are the result of global capital or historically constructed within the general development of the international knowledge regimes requires further interrogation. Understanding the root cause of such ideological prejudices

²⁸ Note should be made that the intellectual property system is not crafted to protect traditional knowledge.

²⁹ Although the principle of national sovereignty is important in promoting equitable benefit sharing between countries, it is generally interpreted as government ownership, with the rights of other actors, notably indigenous and local communities, often unclear or unrecognised. The CBD only requires the Prior Informed Consent (PIC) of State Parties for access to genetic resources, and not of indigenous and local communities. Thus, it separates rights over natural and genetic resources, which are 'owned' by the state, and rights to traditional knowledge, which are 'owned' by indigenous and local communities (Swiderska, 2007).

is imperative in constructing an appropriate response to the marginalisation of traditional knowledge in Africa.

1.4.5. WIPO Intergovernmental Committee on Traditional Knowledge (WIPO IGC)

WIPO, in response to the contestations regarding the misappropriation and marginalisation of traditional knowledge from the intellectual property system; convened an Intergovernmental Committee on the Protection of Traditional Knowledge (WIPO IGC) in the year 2000. The mandate of the WIPO IGC at its inception was the

selection of appropriate terms to describe the subject matter for which protection is sought; develop new international standards for the protection of traditional knowledge not covered by the intellectual property tools; the integration of traditional knowledge into intellectual procedures for defensive protection and to enable traditional knowledge holders to use and enforce rights under the intellectual property system (WIPO, 2000: 6-7)

After nine years of deliberating the appropriate framework towards the protection of traditional knowledge, the mandate of WIPO IGC in 2009 changed. Its new mandate was to “undertake text-based negotiations with the aim of reaching an agreement on a text of an international legal instrument which will ensure the effective protection of traditional knowledge and traditional cultural expressions” (WIPO, 2013; OseiTutu, 2011: 162). The 15 year deliberation has resulted in the WIPO IGC formulating draft provisions concerning the protection of traditional knowledge and has documented the views of the states, indigenous communities, and civic society on various issues.

However, there has been more divergence than convergence within the WIPO IGC between industrialised countries and the African countries concerning the need and scope of protection for traditional knowledge. The background of such divergence is; that the longer the deliberations take, the greater they benefit industrialised countries. In other words, the WIPO IGC negotiations simply serve as a diversion for African countries not to focus on implementing their regional protocols and treaties on the protection of traditional knowledge but rather concentrate on the economic benefits to be attained from the commercial

exploitation of traditional knowledge *vis-à-vis* a balanced international system of traditional knowledge protection. Against this diversion and controversy, most African governments have failed to realise that the “world economy remains highly territorialised, based around demarcated trading blocs, national and sub-national sources of competitiveness and innovation, and national patterns of economic exclusion and inequality” (Amin, 2004: 222).

Therefore, the debates at the WIPO IGC unravel a powerful transformative process that have acquired hegemonic status as a result of its operative logic and ideological connotations (Prempeh, 2004), which bid to keep profitable opportunities in Africa open. Such developments are representative of an international enclosure movement that seeks to fence off areas that provide attractive policy options for less developed countries (Yeutter & Goldberg, 1996). Consequently, African countries are likely to adopt inappropriate intellectual property mechanisms that result in them losing the ability to respond to domestic crises within their borders (Yu, 2007). Accordingly, the romantic optimism and euphoria of the WIPO IGC provides new frontiers, which are likely to entrench and legalise traditional knowledge misappropriation.

In addition to the above, if the WIPO IGC comes out with well thought model laws and provisions, including a misappropriation regime, there is a great possibility for its non-support by all member countries by virtue of the divergence of opinion within the forum. What exacerbates these challenges is the effectiveness and validity of the results of the WIPO IGC because traditional communities are not fully represented in these meetings thereby making the applicability of the laws in the member states experimental whose results will serve as another case study.

1.4.6. Socio-Economic Implications of Traditional Knowledge Misappropriation

The misappropriation and marginalisation of traditional knowledge in Africa manifests itself within a context burdened by countless vulnerabilities caused by colonialism, which distress the socio-economic sphere of traditional communities. These vulnerabilities among others include;

. . . land issues and loss of territory that sustains indigenous peoples and local communities; cultural absorption of indigenous peoples and local communities into dominant societies as indicated through language loss; biodiversity loss and its impact on traditional biodiversity-related knowledge; and loss of traditional biodiversity knowledge in conflict and post-conflict areas. Many have been disrupted by the imposition of external regimes and by colonial and postcolonial military and civil conflicts. Such disruptions have caused the collapse of rural economic systems in some cases, and thereby diminished the capacity of these small scale societies to continue their traditional subsistence activities (Langton & Ma Rhea, 2013: 48-49)

African governments have further embedded this victimisation through neglect of traditional communities, which are often considered backward and impediments to modernisation (Mervyn, 1999). Such neglect is a result of the poor understanding of the interrelatedness of traditional knowledge to the socio-economic life of traditional communities; a factor that has contributed to the continued loss of biodiversity and traditional knowledge (Langton & Ma Rhea, 2013).

As a result, traditional communities are often omitted from national development agendas only to be included if it pursues the interests of the political elite. The challenges of traditional knowledge misappropriation are made less obvious because politics and power dynamics are embedded in the process (Shackeroff & Campbell, 2007). This creates silent or unknown victims of abuse of power. Furthermore, the absorption of traditional communities into the nation-state poses a great threat to the capacity of these groups to sustain their social and economic systems and to some extent cause their complete disappearance (Langton & Ma Rhea, 2013).

Lack of awareness of the impropriety of traditional knowledge misappropriations by traditional communities compounds their predicament. Witlessness on the part of traditional communities has been crucial to the success of traditional knowledge misappropriations, as most traditional communities not parties to international agreements and treaties that affect them.

1.4.7. Cultural implications of traditional knowledge misappropriations

Traditional knowledge is influenced by cultural values that cannot be translated without the aid of its social and spiritual context (Correa & del Sur, 2002). The use of traditional knowledge in a community forms part of the cultural practices that are central to the social and symbolic system, which links individuals to families and families to the community (Frommer, 2002). This makes traditional knowledge, “sacred with a systemic unity that supplies a foundation upon which members of a traditional culture sense their *communitas*, personal identity, and ancestral anchorage” (Brush & Stabinsky, 1996: 26). Its use forms the glue that strengthens social cohesiveness and cultural identity (Dutfield, 2006).

Therefore, the use of traditional knowledge outside its context disables its continuous evolution in a dynamic system (Coombe, 2005). The misappropriation of traditional knowledge and its privatisation under the intellectual property system construct a genetic monoculture that concentrates on industrial and agricultural activities, which is a phenomenon that is in conflict with the morals of many traditional societies (Mugabe, 1999). The challenge is a derivative of the public domain notion, which classifies knowledge held by traditional communities as being the common heritage of humankind. The privatisation of traditional knowledge under intellectual property eliminates the holistic nature and spiritual value of the knowledge that gives it relevance.

In addition, the misappropriation of traditional knowledge largely inhibits traditional communities from practicing their own culture. For instance, trademarks have been used by third parties to harness cultural icons, signs, and symbols in pursuit of their own commercial ends (Frankel, 2007). Consequently, traditional communities lose control of their signs and symbols to the trademark owner, effectively barring them from using those signs in any cultural event they have (Frankel, 2007).

The implications of a system that effectively bars or precludes a particular traditional community from practising its culture, presents an immediate threat to the survival of the traditional community and the culture itself. It impinges the

identity and self-determination that the community is entitled to naturally. In that regard, intellectual property has become a tool to control and distort all facets of life and has gradually contributed to structural and institutional victimisation (Peacock, 2013a). The harm that is caused by the misappropriation of culture embellishes the continuance and entrenchment of systems of dominance and subordination that were used to colonise, assimilate, and oppress traditional communities (Riley, 2005).

1.4.8. Human security and victimology concerns

Expanding markets, “industrialisation, urbanisation, state power, economic globalisation and the alteration of property rights has been instrumental in marginalisation and misappropriation of traditional knowledge” (Kellert, Mehta, Ebbin & Lichtenfeld, 2000: 706). Such developments centred on state power and state security, have gradually peripherised traditional communities thereby affecting their human security. The current insecurity suffered by traditional knowledge holders in Africa represents a case of extreme vulnerability. The weak state-society relations between traditional knowledge communities and their respective governments have hindered the attainment of human security (Thomas, 2000). The continued misappropriation of traditional knowledge and the absence of an effective property regime that protects traditional knowledge present a case of glaring inequalities and abuse of human rights especially in light of the bedrock principle of the right to property as enshrined by the Universal Declaration of Human Rights.

The fundamental causes of traditional knowledge misappropriation, unequal treatment of traditional knowledge holders and neglect by their governments require attention lest the realisation and achievement of the human security ideal will be impossible. The challenges suffered by traditional knowledge holders need to be reviewed and understood within a context which recognises the colonial past of Africa and the existent global power structures. Adopting such an approach increases the possibility of identifying threats and underlying interdependencies that affect traditional communities. It is important that while identifying and

preventing the latter and the former from occurring there is need to mitigate their effects when they do occur (Letschert, 2012).

Human security and victimology alternatives can therefore play complementary roles in assisting traditional knowledge holders to address issues, which are injurious to their communities and individuals. Human security and victimology combined would address issues of protection and empowerment of the vulnerable, emphasise the importance of a bottom up approach, adopt a holistic and comprehensive approach and use human rights as a standard benchmark in protecting and assisting individuals (Letschert, 2012). The application of both concepts in remedying the harm that traditional communities suffer is not reformative but it provides alternative pathway towards protecting the vulnerable. Hence, the solution is not founded in a formalised system but is underpinned by evolving ideas about the appropriate nature, purpose and policy focus on governance, from local to global (Thomas, 2000; Thomas & Wilkin, 1999; Letschert, 2012). Adopting such an approach in the development of this thesis will emphasise a comprehensive human security oriented approach toward victim protection within the traditional knowledge discourse in Africa; enriching the human security concept through the incorporation of progressive victimological approaches.

From this perspective, it will be possible to comprehend how the structural historical development of knowledge misappropriations resulted in certain groups being systematically disadvantaged or victimised in relation to other groups. This approach will effectively open the field of traditional knowledge protection for examination to a variety of factors that are injurious to societies (Viano, 1994) thus enabling the creation of remedies that are founded in the cause rather than a symptoms.

1.5. RELEVANCE OF THE STUDY

The viability and value of traditional knowledge within the 21st century has sparked an inappropriate knowledge enclosure movement, which has attracted its share to prospectors, pirates, hucksters and thieves (Bratspies, 2007). Such a phenomenon has raised essential questions on how to safeguard the valued knowledge capital.

An effort to address such demands has produced vast writings about traditional knowledge misappropriation, bio-piracy and anticipated protection regimes. Such developments are important because the knowledge accumulated so far, sets a foundation for the further development of effective frameworks that protect traditional knowledge.

The disconcerting part is that the solutions proffered have failed to gain legitimacy from traditional communities. As a result, the vast amount of literature may not have produced the desired results and in some cases, they may even have caused more harm than good. The absence of a legitimate and effective property protection regime that consolidates the rights of traditional knowledge holders and communities has made this situation increasingly precarious as it exposes the later to victimisation. Interest in and support for the protection of traditional knowledge has surged, but there are questions about the basis for such support and about its depth. Despite the existence of academic literature around this field, no research has endeavoured to analyse how the historical development of knowledge misappropriations has contributed to the victimisation traditional communities. Furthermore, victimology has failed to recognise traditional communities as victims, in the broader scope of traditional knowledge misappropriation.

This research will assist political leaders, traditional knowledge officials and internal constituencies in Africa who know little about knowledge protection experiences. It will proffer in-depth knowledge of relevant knowledge protection mechanisms and the myths and misunderstanding that often obscure and mask their relevance. Equally great is the need for effective use of a broad range of economic and social insights in developing the proper infrastructure for the protection of traditional knowledge. Therefore, this thesis endeavours to analyse and understand how deviance that has been inspired by the knowledge economy was historically constructed thus plunging traditional communities into an unending cycle of victimisation.

1.6. RESEARCH AIMS

The challenges affecting traditional communities are not only obstacles but also present an opportunity for the further development of a framework on the protection of traditional knowledge. Consequently, this research examined how the historical development of knowledge misappropriations contributed to the marginalisation of traditional knowledge. The importance of studying the history of knowledge misappropriations; is not for its own sake but for the great lessons it contains. Without an understanding of the development of the knowledge misappropriations, it is not possible to foresee future perspectives or the reasons why traditional knowledge policies have failed to gain legitimacy within the knowledge frameworks in Africa. Hence, a thorough inquiry requires attention with the objective of producing new knowledge that addresses the neglected concerns of traditional knowledge holders in Africa. In pursuing the above, the research shall be guided by the following aims:

1. To examine the historical factors that contributed to the victimisation and marginalisation of traditional knowledge communities in Africa within a critical and radical paradigm of victimology;
2. To assess whether or not the historical factors that contributed to the marginalisation and victimisation of traditional knowledge communities have been reproduced in the current traditional knowledge frameworks in Africa and,
3. To recommend the incorporation of African victimological remedial measures in the traditional knowledge discourse to render traditional knowledge policies effective.

The research unravelled the complex historical factors namely the political, legal, economic and ideological factors that contributed to the victimisation of traditional knowledge communities, which in turn culminated in the systematic exclusion of traditional knowledge as a legitimate form of knowledge.

1.7. CONCLUSION

In understanding the factors that have contributed to the victimisation of traditional communities, one should take cognisance of the cultural and historical context of the African continent together with the colonial antecedents of structural and institutional victimisation (Peacock, 2013b). Such a historical appreciation would allow the exposition of factors that have contributed to the creation of silent or forgotten victims. Furthermore, such an approach will create a context of prescribing the appropriate responses to the nemesis that has haunted traditional communities for centuries. Therefore, realising the stated goal requires a theoretical framework was used to explain the factors that contribute to the development of a social phenomenon. The deconstruction of a social phenomenon within a historical paradigm assists in exposing the vices that have beleaguered traditional communities in their fight for self-determination. The following chapter shall set out the theoretical framework that was used in the development of this thesis.

CHAPTER 2

SETTING THE STAGE: THEORITICAL PERSPECTIVES

“Without the belief that it is possible to grasp the reality with our theoretical constructions, without the belief in the inner harmony of our world, there would be no science” (Peter, 2007: 296)

2.1. INTRODUCTION

Louis Althusser stated,

In the development of a theory, the invisible of a visible field is not generally anything outside and foreign to the visible defined by that field. The invisible is defined by the visible as its invisible, its forbidden vision: the invisible is not therefore simply what is outside the visible, the outer darkness of exclusion - but the inner darkness of exclusion, inside the visible itself because it is defined by its structure (Althusser, 1970: 48).

The assertion sets a platform for inquiry into the factors that contribute to the inner darkness of exclusion of global knowledge regimes, which set a prescribed embargo on traditional knowledge. The outer darkness of exclusion (that is the visible) of the global knowledge infrastructure has stipulated market and industrial expedience as the major reasons for the embargo (See Chapter 1 for a discussion into the reasons that have prohibited traditional knowledge protection). The invisible which is the theoretical problematic non-vision of traditional knowledge by global knowledge regimes has been the blinded eye of the latter; where it scans its ‘non-problems’ without seeing them, in order not to look at them (Althusser, 1970). Therefore, there is need to unravel the complex historical processes of the theoretical problematic ‘non vision’ of traditional knowledge because it presents a realistic opportunity to understand the victimisation of traditional communities through historically concrete systems of relationships endowed with corresponding institutions (Correa & del Sur, 2002).

A historically constructed analysis of the victimisation of traditional communities is imperative because it unravels the complex elements, which are associated with the present historical reality under investigation (Weber, 1930). Such an approach to victimisation presents a phenomenon unique in its individuality. It cannot be defined according to a formula *genus proximum* (nearest genus) or *differentia specifica* (specific difference) but it should gradually be constructed of individual

parts which are taken from historical reality to make it up with the aid of a defined theory or theories (Weber, 1930).

Critical Marxist, Weberian, Althusserian and Foucauldian theoretical approaches on historical structural causality proffer an appropriate conceptual premise to initiate a discussion on the factors that contribute to the victimisation of traditional knowledge holders. The theories permit for the structural and institutional demystification of the existent social order in retrospect thus allowing a full appreciation of the factors that influenced the victimisation of traditional knowledge communities in Africa. Furthermore, these theories seek to understand and explain society as a social whole, intrinsically connected to a complex hierarchy of instances that unearth domination, subjugation and oppression within every epoch of a historical formation. This affirms Peacock's (2013a) assertion that victimisation within a social formation is embedded in the functional historical institutional structures of society (Peacock, 2013a).

Other causality theoretical models have been omitted from this thesis because of their approach in understanding a problem in an abstract nature (Frommer, 2002). Such an approach applies "epicyclical codas to the models in order to account for ever further deviations from empirical expectations" (Wallerstein, 1974: 59). In that regard;

We turn to history and only to history if what we are seeking are the actual causes, sources, and conditions of overt changes of patterns and structures in society. (Nisbet, 1969: 302).

Therefore, the structural causality theories align appropriately to the main objective of this thesis which seeks to espouse the sources and development of the factors within the structures of society that have contributed to the victimisation of traditional knowledge holders.

2.2. DETERMINANTS OF A SOCIAL FORMATION

To understand the factors that contribute to the development of a particular social phenomenon there is need to historically understand society as whole (Weber, 1949). Understanding a social whole within a historical framework requires an appreciation of Marx's theory of general social development and Weber's theory of

society as a totality of instances (Milovanovic, 2003). The discussion that follows explores the historical factors that contribute to the creation of a social formation, which gradually contributes to victimisation of marginalised groups.

2.2.1. Marx's theory of general social development

Marx (1906) set out to investigate an economic system, which produced misery along with the immense growth of wealth, science and technology. In his analysis, he broadened the general theory of society where he discovered that world history could be comprehended as a series of class struggles which were caused and in their form determined by the mode of production of the particular period (Weber, Rheinstein & Shils, 1954). In that regard, he located the causal primacy of a social formation in the relative overburdening of productive forces over the relations of production (Callinicos, 1989). Consequently, the primary forms of oppression, subjugation and victimisation in “every social formation arise from the interaction between the dominant mode of production and the relations of production” (Althusser, 1968: 91). Hence, the success of victimisation and oppression is reliant on the material conditions of production (Marx & Engels, 1976). Marx conceived of such phenomenon is his *locus classicus* where he stated;

*In the social production of their life, men enter into definite relations that are independent of their will, **relations of production** which correspond to a definite stage of development of their **material productive forces**. The sum total of these relations of production constitutes the **economic structure of society**, the real basis on which raises a legal and political superstructure and to which correspond definite form of social consciousness.* (cited in McLellan, 1977: 389).

The superstructure and the economy formulate “the ‘real basis’ that constitutes a causally determined system of society (Grebo, 1985: 90). Therefore, the superstructure and the economic base equally and unevenly influence each other in establishing and maintaining oppressive relations of production (Cullenberg, 1999). The aggregate total of the mode of production contributes to the victimisation individuals and groups in any given society. Within that understanding, the victimisation of traditional knowledge holders is located within praxis where the economy and superstructure mutually interact with each other thereby determining the context within which traditional knowledge communities exist.

The continuation of the oppressive material conditions of production is grounded in the reproduction of its relations of production together with their associated productive forces (Althusser, 1968).³⁰ Althusser (2006) and Marx (1906) argued that a society that does not reproduce the conditions of production at the same time it produced would not survive within its predetermined mode of production. Engels (2003) enhanced the clarity to this analysis in his letter to Joseph Bloch, where he noted that in the materialist conception of history, the ultimately determining element of oppression and violence is the production and reproduction of real life (Stephens, 1979).

In that regard, the institutions and structures of politics, law, economy and ideology are historically conditioned to facilitate the reproduction of oppressive social conditions that have been borrowed from the past. Therefore, history is not made under “self-selected circumstances but under existing circumstances given and transmitted from the past.” (Marx, 1937: 1)

It is important to qualify the words of Marx, with the aid of an example. When feudalism evolved into capitalism, the latter developed along the lines and principles of the latter³¹. The material conditions of production under capitalism mirrored that of feudalism; namely, the production of wealth was dependent on the reproduction of repression (Marx, 1963). In other words, the oppressive material conditions of production that produced a movement that made history (Marx, 1963). Therefore, the development of society corresponds to the development of humankind and its productive forces. To understand traditional knowledge misappropriation, there is need to understand the development and reproduction of the historical material conditions of knowledge production that trapped traditional knowledge communities in an intricate web of victimisation.

³⁰ A nation that is not industrious would not last a year (Marx, 1868).

³¹ Within the knowledge domain, privileges accorded to the Guilds under Feudalism became monopoly patents under the capitalist regime. The underlining philosophy concerning these two regimes was the same, which is to award exclusive economic rights to new knowledge produced under specific political conditions (Botoy, 2004).

In that light, if the sustenance of the material mode of production is dependent on the reproduction of conditions and relations of production; the economic base operates as a determinant of last instance³² (Althusser, 2006; Stephens, 1979); “the final cause, the prime mover” (Ricoeur, 1994: 44). Poulantzas (2000) developed this concept further by critically assessing that the primacy of productive forces over relations of production enabled the process of production and reproduction. Therefore, a social formation is a complex structure that consists different levels of activity which influence one another in a complex set of mutual relationships (Ferretter, 2006). To understand the phenomenon that negatively affects traditional knowledge holders, one should have an appreciation of the framework of structures, integrated and articulated into a meaningful whole.

It is important to note that each individual structure has a distinct existence of its own yet each maintains a relative autonomy and mode of determination (Resch, 1992). To explicate this point, a social revolution does not *ipso facto* transform the existent superstructure and ideologies. They have their own constitutive consistency that enables them to exist and transform beyond the immediate life context, (Althusser, 1977). For example, the colonial and apartheid antecedents of structural and institutional victimisation in Africa have continued to reproduce oppression, social imbalances and injustices despite the much celebrated independence from political colonialism (Peacock, 2013a; 2013b).

2.2.2. Weber’s multi-causal formulation of a social phenomena

Weber unlike Marx, views the latter’s mono-causal approach of the factors that influence the creation of a social phenomenon as prejudicial to the appropriate reconstruction of social historical connections (Weber, 2013). Max Weber (1930) disputed the economic determinist approach to the development of social phenomenon. He labelled Karl Marx’s approach as naïve, as the domination and the victimisation of marginalised groups by an elite group arose somewhere, not in

³² A social formation is a totality of instances articulated on the basis of a determinant mode of production See, (Althusser, 1977)

a group of isolated individuals (bourgeois), but as life of the whole groups of people (Weber, 1930).

In dismissing social relations model of Marx (1906), Weber (1930: 21 -22) opined that “universal reign of absolute unscrupulousness in pursuit of selfish interests by the making of money, ruthless acquisitions, had been a characteristic that appeared in all periods of history which however could not be ethically justified but had to be accepted as a fact for its unavoidability”. He likened the latter to war, piracy and trade, which are unrestrained in their relation to outsiders. However, Weber did not explicitly disregard the historical interpretation of a social phenomenon in economic terms, but he rejected the “absolute petrification of its explicative criterion and its solidification into a dogma” (Ferrarotti & Fraser, 1982: 69). Nevertheless, Weber (1954) argued that the economy and the superstructure are interrelated and it was impossible to explicably understand the superstructure in legal terms only. That is to say, “it cannot be understood as a set of norms of logically demonstrable process and correctness, but rather as a complex of actual determinants of actual human conduct” (Weber et al., 1954: 12). He criticised the ‘materialistic conception of history’ on the basis that in some instances a strict economic explanation of a particular phenomenon, in certain instances faced obstacles (Ferrarotti & Fraser, 1982). He highlighted that;

Sometimes every historical event, which is not explicable by the invocation of economic motives, is regarded for that very reason as a scientifically insignificant “accident.” At others, the definition of “economic” is stretched beyond recognition so that all human interests which are related in any way whatsoever to the use of material means are included in the definition. If it is historically undeniable that different responses occur in two situations, which are economically identical? Due to political, religious, climatic and countless other non-economic determinants? Then in order to maintain the primacy of the economic all these factors are reduced to historically accidental “conditions” upon which the economic factor operates as a “cause.” (Weber, 1949: 69)

Weber was against the conception that the superstructure reflected the economic base (Weber, 1949). The reflective discourse of the base and the superstructure was in Weber’s opinion given so much extra ordinary significance while it omitted the fact that certain factors play an independent role in the victimisation of marginalised communities. In dismissing the former argument, Weber gave an

analogy to the effect that “if the conduct of a dog, a men’s best friend, is inspired by the man, such conduct, obviously cannot be described as a reflection of man by dog”(Weber et al., 1954: 23).

Therefore, in Weber’s view citing economic causes as a sole contributor to the development of a social phenomenon is irrational (Weber, 1930). In other words, the victimisation of traditional communities in Africa cannot only be explained in economic terms but through other historically conditioned factors and institutions. In that regard, several factors contribute to victimisation. The degree of a factor’s contribution to victimisation is determined by the cluster of antecedents to “which impute those specific elements of the phenomenon in question to which we attach significance in given cases and in which we are interested”(Weber, 1949: 71). Therefore, Weber is of the opinion that for one to understand the conception of a particular phenomenon there is need to examine society as whole within its particular period of historical development. The initial step requires the construction of an unambiguous definition, classification, and systemisation of the social phenomena whose interrelationships are to be traced (Weber, 1930). In other words human history cannot be comprehended until it is observed, described and systematically arranged for ready reference (Weber et al., 1954). It is thus the particularisation of the elements, which help in characterising or describing a concrete historical phenomenon.

From this angle, the elements that need particular characterisation in an analysis of a social phenomenon are the political, religious, economic and other non-economic factors (Weber et al., 1949). Weber (1949) explained that non-economic factors, among others included, human relations, norms, normativity, society and its corresponding structure (state), religious, social stratification and law created a an appropriate context for change and in turn altered not only the definition of cultural wants or preferences but their constituents in the most subjective aspects. The economy, therefore is one factor, but a plethora of factors simultaneously are at work in producing a social phenomenon (Milovanovic, 2003). It is thus the responsibility of a social scientist to view that polity, social structure, economy, religion, and law, and the political, social, economic, religious, and

legal structures of given societies separately and investigate their interrelationships in history to best understand victimisation (Trubek, 1972; Milovanovic, 2003). For Weber, historical and social uniqueness results from specific combinations of general factors, which when isolated are quantifiable (Weber, 2013: 50). The indiscreet influence of social relations, institutions and social classes governed by the material productive forces extend into all corners of victimisation without any reservation.

As such, Weber(1954) recognised capitalism as a phenomenon of the mind, a specific human attitude, the rise of which from medieval traditionalism required a specific combination of circumstances, political, economic and among others religious. Accordingly, victimisation is constituted and conditioned by of socio-economic conditions which are distinguishable into events and constellations of norms and institutions (Weber, 1949). These events and constellations of norms and institutions determine victimisation. Therefore, the events of everyday life are no less than the historical events of the higher reaches of political life, collective and mass phenomena (Weber, 1949: 69). In the same light, all critical conjectures within a historical context affect the mode and ideology behind any form of victimisation. That is their mode of stratification of society, the integration of interest groups and types of power exercised; consequently influence the path of victimisation (Weber, 1949).

According to Weber (1930), the socio-economic conditions of a given society have a reciprocal influence on one another in determining victimisation (while being independent of the other) and, “the strength and direction of their influence varies from one historical situation to the other” (Kronman, 1993: 119). In certain instances, these socio-economic conditions have developed on independent lines propelled by forces of their own.³³ In that regard, social formations should be recognised as a complex hierarchy of *functionally* organised levels and *instances*, which are articulated by a specific determination.

³³ These are known as intra juristic factors. See (Weber et al., 1954)

There three functional *instances* in a social formation, namely the political, the economy and the ideological (Althusser, 2006). The economic, political and ideological *functions* which hold society together are executed in a plethora of determinate institutional forms which are historically located (Weber, 1949). The levels of relative influence of these institutional functions vary from one given historical phenomenon to another. For example, the political level might be the dominant influence in the production of victimisation than the other institutional forms (economy, religious, legal, ideology) and then followed by the economy, and so on. The most influential institution that influences the victimisation of individuals and communities in a social formation within a particular historical period referred to as the “*dominant level*”, which dialectically changes as societies develop through history. Therefore “the complex whole in society has a unity of structure articulated in dominance” (Althusser, 1977: 202). This is the reason why Althusser (1977) averred that there is an uneven influence between instances in the development of a social phenomenon that is determined by its ever-changing complex.

The following section shall look at how the instances that influence the victimisation of individuals and communities at a local level (within national geographical boundaries) transcend at an international level in further perpetrating domination and oppression.

2.2.3. Gramsci’s conception of society as an international complex of instances

Thinking globally, national (geographical) relations and international relations both passively and actively react on each other in producing and reproducing a phenomenon often burdened with victimisation. This happens when the economic interests of one group, transcend international interests to become interests of subordinate nations. In other words, the national interests of a group, propagate themselves into a political and economic ideology of domination and oppression thereby establishing a hegemony over various subordinate nations (Gramsci, 2000). At this instance, the state of the dominant group ceases to represent the interests of its geographical nation but it becomes a tool for the universal expansion and development of its national energies (Gramsci, 1971). The universal economic

expansion surpasses national geographic boundaries thereby creating its own structure at an international level popularly known as the world economy (Gramsci, 2000). Political energies and sanctions become tools to secure monopoly rights over property (inclusive of traditional knowledge) and economic transactions in the world-economy.

The world economy develops as a core (which is composed of industrialised nations) and peripheries (industrialising nations) from which the former extract surplus raw materials that fuel expansion of the world economy (Wallerstein, 1974). Peripheries produce key primary goods like traditional knowledge “while their towns often wither and labour becoming coerced in order to keep down the costs of production. Technology is subsequently stagnated, labour remains largely “unskilled or even become less skilled and capital rather than accumulating, is withdrawn toward the core” (Wallerstein, 1974: 67). *Prima facie*, the differences between the core and the periphery are minute, but when the core exploits these differences through the misappropriation of primary products in return for manufactured goods, the gap between the core and the periphery expands. Uneven development immediately becomes the foundation for capitalist development in a world of unequal exchange of value.

For instance, the commoditisation of traditional knowledge without assigning the proper benefits to its holders is a major indicator of unequal development and exclusion of certain groups and knowledge from the broader economic and political systems associated with globalisation (Arewa, 2006). Indigenous communities are not always appropriately rewarded for the capitalisation of their traditional knowledge, perhaps due to the deliberate refusal of the exploiters to pay, difficulties in identifying the proper owners to whom payment is to be made, or simple mismanagement (Kuruk, 2007). Even where the communities are compensated, the benefits are often pale in comparison to the huge profits made by the exploiters (Kuruk, 2007). The knowledge revolution supported by the infamous legal infrastructure of the TRIPS agreement, which globalised intellectual property frameworks, has made the protection of traditional knowledge a fathomable exercise as unauthentic reasons for its non-applicability have been

advanced (See Section 2.1 of this Chapter for an examination of reasons provided). Globalisation has thus been strewn around as a convenient scapegoat for anything that seems unjust or disorienting about contemporary life (Brown, 2005).

Therefore, globalisation enhances the interests of hegemonic groups (the core) to intertwine with the national relations of subordinate groups (the periphery), thus creating new unique and historic combinations (Gramsci, Nowell-Smith & Hoare, 1971). For example, the introduction of an ideology created in industrialised countries, to subordinate countries, affects the interplay of the factors between the economy and superstructure of the subordinate nation (Gramsci, 2000) thereby contributing to the victimisation of marginalised groups in the periphery, specifically traditional knowledge holders.

In light of the foregoing the institutions and structures that perpetuate the victimisation of traditional knowledge holders can be surmised as:

- a) Superstructure, the economy ideology and class formations, which are;
- b) relatively autonomous within a specific historical formation;
- c) influence each other within varying degrees
- d) influenced by other social systems, and
- e) they are ultimately conditioned by the economy

Within a broader framework of the victimisation of traditional knowledge holders, the following discussion will focus on how institutions and frameworks function in perpetrating victimisation.

2.3. ECONOMIC DETERMINISM

The economic stratum to a larger extent is the primary mover of victimisation, because the social relations in society correspond with the level of development of the material productive forces (Callinicos, 1989). These productive forces explain the material conditions of existence *functionally*.³⁴ Therefore, the relations of production are determined by the *functional* requirements of the material productive forces. For example, the 21st century's development of material

³⁴ Functional explains the existence of a phenomenon by virtue of their effects.

productive forces is determined by intellectual capital, which “dominates as a means of production” (Granstrand, 1999: 9), thereby making it the prime determinant of social relations.

Through the second enclosure movement, knowledge resources are becoming scarce which in turn increases their demand (Williams & McShane, 1994). The enforcement of politically protected monopoly rights to exclude others from using knowledge that has been defined as “private property while at the same instance misappropriating knowledge that is part of the common cultural heritage of humankind” (Evans, 2005: 86-87). Marx and Engels (2013) support this observation by arguing that the need to exploit raw materials extends to the intellectual creations of individual nations (traditional communities). This system operates on a disproportionate optimal scale of plundering and looting traditional knowledge resources while not recognising nor compensating the rightful owners. The looting takes different forms of misappropriation which includes, “the commodification and privatisation of traditional knowledge, the conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights; the suppression of rights to the commons and imperial processes of appropriation of assets (including natural resources)” (Harvey, 2005: 145). The logic of this process is not only meant to misappropriate and impoverish but to incorporate non-capitalist economies into capitalist relations of production (Harvey, 2005; Sassen, 2010). Force, fraud, oppression, looting are openly displayed without any attempt at concealment, and it does not require an effort to unravel structural and institutional victimisation within this tangle of political conflict, contests of power and the stern laws of the economic process (Harvey, 2005).

Consequently, the attempt to control traditional knowledge resources generates conflict between traditional communities and industrialised countries. The control of resources creates power and that power is used to maintain and expand the resource base of one group at the expense of the other (Williams & McShane, 1994). Once dominance by one group over the other has been attained, the dominant group applies the available state apparatus to repress the subordinate

group so as to maintain dominance (Williams & McShane, 1994). Therefore, state coercion becomes a tool for oppression and subjugation of the marginalised groups (Marx & Engels, 1848).

The economy is therefore “conceived as a basis for the social superstructure, which in turn serves as a mere instrument by corresponding at all times to it” (Coombe, 2005: xiv). In that regard, every single systematic change in the historic development of capitalism saliently contributes to the political advance of the bourgeois class (Marx & Engels, 1848). The executive of the modern state thereby represents a “committee for managing the common affairs of the bourgeoisie” (Marx & Engels, 1848: 5). The bourgeoisie therefore construct a state (the superstructure) according to its “requirements bending it at will, to suit their own interests” (Poulantzas, 2000: 12). The “ruling class” (who control income, wealth and institutional leadership) is based upon “the national corporate economy and the institutions that the economy nourishes” (Domhoff, 1967: 156).

Therefore, the superstructure should be perceived as an instrument that can be manipulated, “almost at will, by the capitalist class as a whole or, in certain moments, by particular fractions of capital” (Beirne, 1979: 379). Resultantly, the definition of laws, policy formation and everyday functioning of society is often manipulated by some conspiratorial and like-minded ruling class (Milovanovic, 2003: 79). The absence of effective mechanisms to prevent traditional knowledge misappropriation is symbiotic of who controls the means of production and who is benefiting from such knowledge misappropriations. Skogan (1979) expands this point by observing that misappropriation is something that does not exist outside law and government but instead is, “a hidden but none the less integral part of government and the economic structures of society”. Within such a framework it is impossible to recognise justice for the traditional communities in Africa, as justice is an ideological and practical instrument that is tied to material forces of production and used to maintain the existing order of class subordination (Quinney, 1977). This preposition reveals a dark secret, that if the bourgeoisie interests are at stake, justice counts for little.

Capitalism therefore provides the basic conditions for any social existence supported by politics³⁵ that joins with the capitalist mode of production to create a fertile ground for the victimisation of individuals and groups who are outside the privilege and status of the bourgeoisie ruling class, specifically traditional knowledge holders.

A critical appreciation of the foregoing posits more questions with regard to the traditional knowledge misappropriation discourse from an economic point of view. Thinking locally, one would question the objectives of economic infrastructure of African countries whose inferior technological advancements are largely incapable of transforming traditional knowledge into commodifiable goods (Arewa, 2006) *vis a vis* the portentous incapability of economically benefiting from the traditional knowledge. What is critical about this reality is the participation of African state enterprises in the victimisation of traditional knowledge holders, through neglect in providing protection mechanisms to the latter. Paradoxically the absence of an elaborate and effective traditional knowledge protection system Africa provides a lucrative incentive for the continued misappropriation of traditional knowledge.

The reality that confronts traditional knowledge holders in light of the foregoing raises intriguing academic questions on the lack of a practical response by African governments on issues that affect traditional knowledge holders. The absence of legal sanction that reprimands the abuse of traditional knowledge holders can possibly be attributed to historical reasons of colonialism and the disenfranchisement of African population (Arewa, 2006). Furthermore, there is need to question whether the economic influence exerted on African governments by western has facilitated the misappropriation of traditional knowledge to remain outside the domain of justice and from the shelters of penal sanctions (Fattah, 1992).

The next discussion shall focus on the role played by the state in repressing the interests of marginalised groups in preference to those of the bourgeoisie.

³⁵ Capitalism is threatened by its own inherent contradictions; the law and repressive state apparatus are used to maintain domestic order (Quinney & Shelden, 1974). Capitalism own its own standing is unable to solve its own inherent contradictions thus the law and the repressive state apparatus are used to as a repressive tool or authoritarian measure to secure its own survival.

2.4. REPRESSIVE STATE APPARATUS

Marxist philosophy conceives the state as a repressive tool, is at the whims and caprices of bourgeoisies to subjugate and dominate the proletariat to ensure dominance (Marx, 1906). Resultantly, the state is an instrument that guarantees the implementation of the objectives of the ruling class, thereby making them *repressive state apparatus*. Government administration, the police, soldiers, courts, prisons, law and secret military and intelligence officers often constitute the repressive state apparatus. The functions of these institutions are organisational, coercive and connective in exercising direct domination on a social formation (Gramsci et al., 1971) which consequently perpetuates the victimisation. In other words, the repressive state apparatus execute the executive mandate³⁶ of the government, i.e. the creation of laws, its interpretation and implementation.

The repressive state apparatus operate as a function of state power. All political class struggle within every given social formation revolve around the state, for the seizure and conservation of state power (Althusser, 1971). Repressive State Apparatus have been known through history to have remained unchanged after state power had changed hands after revolutions (Althusser, 2006). A closer appreciation of this analysis presents a case whereof the post-colonial state in Africa has done nothing to change the core of relations that disenfranchised and marginalised traditional knowledge communities during colonialism but it has rather opted to manage them at the prejudice of the latter. Therefore, state power,³⁷ is the ideological function of the government that ensures that the material conditions of production are reproduced.

³⁶ The executive mandate of government's is usually determined by the bourgeoisie.

³⁷ State power is the ability to harness state apparatus and use them to pursue the objectives of a particular class. It should further more be noted that what changes after every revolution is state power. State apparatus rarely and hardly change (Althusser, 2006).

2.5. IDEOLOGICAL STATE APPARATUS

State power is composed of specialised institutions known as *ideological state apparatus*. These among others include “religious ideological state apparatus³⁸, educational ideological state apparatus,³⁹ family ideological state apparatus, legal ideological state apparatus,⁴⁰ the political ideological state apparatus,⁴¹ trade union ideological state apparatus, the cultural ideological state apparatus⁴² and the communication ideological state apparatus”⁴³ (Althusser, 1968: 143). The difference that perambulates between *repressive state apparatus* and *ideological state apparatus* is that the latter falls in the private sector of society and the former in the government domain.⁴⁴ Both forms of apparatus are the same in their functionality, because the distinction between the public and the private is a distinction internal to bourgeois law and valid in the (subordinate) domains in which bourgeois law exercises its ‘authority’ (Althusser, 1971; Gramsci, 2000).

Repressive state apparatus function by violence while ideological state apparatus function by ideology. The primary function of repressive state apparatus is oppression using coercion and that force operates through a predetermined ideology of the state. The ideological state apparatus predominantly operate on ideology while secondarily it functions by violence and repression. The ideology that functions through these institutional apparatus belongs to the capitalists (Althusser, 1971). It is impossible for one class to predominantly victimise a social formation through repressive state apparatus without having a hegemony over ideological state apparatus (Althusser, 1968; Althusser, 1971; Althusser, 2006; Gramsci et al., 1971).

Therefore, the ideology behind the victimisation of traditional knowledge communities should be unravelled within the operational hegemony of ideological

³⁸ A composition and system church denominations. *ibid*

³⁹ A system of private and public schools, universities, technical colleges etc... *ibid*

⁴⁰ Law cannot adequately be understood as a dependent instrument of state coercion but must be understood in its educative and moral dimension securing the conditions of class relations (Hunt, 1981)

⁴¹ The political system together with its associated political parties

⁴² Sports, arts, literature

⁴³ Print and electronic media

⁴⁴ Repressive state apparatus function by violence while ideological state apparatus function by ideology.

and repressive state apparatus. The reason behind such an assertion is that it is through the institutions that the abuse of state power is realised; through politically and economically immunising structured and disguised conspiracies of traditional knowledge misappropriation. For instance, traditional knowledge misappropriation is hardly recognised as a threat to human security, in comparison to issues like poverty, HIV and AIDS and terrorism that need immediate attention. Aid is thus provided as a package by affluent western nations towards the stated issues as a deviatory tactic to distract attention from the African countries while keeping profitable opportunities for knowledge misappropriation open.

The main objective of the repressive and ideological state apparatus is to protect and maintain the political conditions for “the reproduction of relations of production and in the last resort to maintain relations of exploitation” (Althusser, 1971: 24). Through violence,⁴⁵ the repressive state apparatus create and maintain the ideal political environment for the implementation of ideological state apparatus that ensure that traditional knowledge holders are gatekeepers of their own oppression (Althusser, 2006).

Ideological state apparatus, on the other hand reproduce capitalist relations of exploitation behind a cloth concealed by the repressive state apparatus (Althusser, 2006). The ideological state apparatus perform various functions in creating and reproducing conditions that oppress a social formation. For example, the political ideological state apparatus more regularly ensure that individuals and groups believe in the existence of a state political ideology, which more often than not assures them of a government made by the people and for the people. This ideology is entrenched through the creation of an ideological institutional parliamentary system while in the background it is a direct dictatorial ‘democratic ideology’ (Althusser, 1971). The functional efficiency of the political ideological state apparatus is complemented by the communication ideological state apparatus which subjugates individuals and groups by constantly and fervently conditioning them with doctrinal ideologies of nationalism, chauvinism, liberalism and moralism by means of electronic and visual media (Althusser, 1968). Such an

⁴⁵ Interdictions, law and mere brutal force

approach facilitates the distraction of people from the real problems that oppress and subjugate them.

The religious ideological state apparatus, by recalling in sermons and other great “ceremonies of birth, marriage and death, that man is only ashes, unless he loves his neighbour to the extent of turning the cheek to whoever strikes first” (Althusser, 1971: 28). These religious notions internalise the theme that when one’s traditional knowledge is wrongfully misappropriated, the victim of such a wrongful action should not retaliate but offer more, to enable their recognition as human among a community. Religion in that context often serves to distract grave abuses by urging the victims to forgive (Peacock, 2013a).

The cultural ideological state apparatus, integrate the ruling class ideology into music, movies, plays and literature. The themes of the humanism of great fore fathers who produced the Greek miracle before Christianity and afterwards the glory of Rome, the Eternal City and the themes of interest and the particular and general i.e. nationalism, moralism and economism” (Althusser, 1968: 146), all play a significant role in diminishing the spiritual and cultural importance of traditional knowledge.

The dominant ideological state apparatus within a capitalist social formation is the educational ideological state apparatus, which drums into pupils, students and scholars of the current and old methods of ‘know-how’ which are clothed in the ruling ideology. Such an ideological state apparatus produces reserve labour for the capitalist system, “agents of exploitation (managers and capitalists), agents of repression (policeman, politicians, administrators and soldiers), intellectuals of collective labour, professional ideologists (priests of a sorts most of whom are convinced layman)” (Althusser, 1971: 29). The masses produced by this ideological state apparatus are inculcated with a particular ideology to fulfil a particular role within the social classes while at the same instance it demonises traditional knowledge as having no practical application within the determinant mode of production:

it is by apprenticeship in a variety of know how wrapped in massive inculcation of the ideology of the ruling class that relations of production in a capitalist social formation, i.e. the relations of exploited to exploited and exploiters to the exploited, are largely reproduced. The mechanisms which produce this vital result for the capitalist regime are naturally covered up and concealed by universally reigning ideology of the School, universally reigning because it is one of the essential forms of the ruling bourgeoisie ideology: an ideology which represents the school as a neutral environment purged of ideology (because it is lay) (Althusser, 1971: 30).

The educative ideological apparatus impute that knowledge should be scientifically authenticated through rigorous experiments in laboratories and knowledge institutions. Its validations are contained in well-known standardised libraries of knowledge. Therefore, knowledge (traditional knowledge included) that is not validated by the dominant knowledge institutions and procedures is more often deemed superstitious and unauthentic. Consequently, traditional knowledge becomes a fertile ground for the extraction of raw materials, which are to be investigated through scientific experimentation, whereof the results and proprietary connotations of such lie within the scientific enterprises which have misappropriated the knowledge.

Though ideological state apparatus are a set of disparate institutions, they are unified by the ideologies within which they function (Ferretter, 2006). The Ideological state apparatus be it the political, religious, school, communication, family are ideological discourses that are dominated by ruling class. Therefore, social formations reproduce themselves, through a network of apparatuses and daily practices (Balibar, 1990).

Therefore, different vectors of causality implicitly, if not explicitly, “require that ideology, ideas, and non-materialist phenomena could be causal and constituent elements of the social order and culture” (Waller, 1999: 840).

2.6. IDEOLOGY AND FALSE CONSCIOUSNESS

During their conception of a social phenomenon that victimises individuals, Marx and Engels highlighted that the superstructure was composed of the political, legal and on the other hand, the ideological. The preface to the Communist Manifesto,

articulates that “definite forms of social consciousness correspond to the economic structure, the real basis, the mode of production of material life conditions the social, political and intellectual life process in general, determine the consciousness of the social being” (Marx & Engels, 1848: 15). Therefore every idea is born and developed through the existent material mode of production;

We set out from real active men and on the basis of this we demonstrate the development of the ideological reflexes and echoes of this life process. The phantoms of the human brain are necessarily sublimates of men’s material life process, which can be empirically established and which is bound to material preconditions. (Marx & Engels, 1976: 36)

Prima facie ideology is the totality of the forms which men and women are conscious of the relations of production and class struggle in which their society is in reality constituted (Ferretter, 2006). This historical materialist perception of ideology conceives that material relations of production determine the social consciousness of people within a social formation. Humanity therefore cannot be separated from material conditions of life for what is thought, believed and valued is based on the conscious existence because “as individuals express their lives, so they are” (McCarthy, 1979: 2). In other words, ideas, beliefs and ideology within a social formation are “determined by the existent material conditions and constituent social relations within society” (Augoustinos, 1999: 298). Section 2.5 of this chapter argued that, ideological state apparatus facilitate the reproduction of the material conditions of social relations. The imputation of such reproduction aligns society towards a particular form of thinking, which is structured according to the material relations of production (scientific and technological advancements in present society), a movement that largely categorically brands traditional knowledge to appear backward by virtue of its non-conformity to present day modes of knowledge production.

Therefore, ideology is not a *theory of ideologies* i.e. religious, legal or political which express class positions (Althusser, 1971). Theories of ideologies are historically constructed; whose determination purely falls outside reality thereby making ideology is a pure illusion. Ideology is a pure dream, that is constituted by the day’s residues from the reality history of material individuals reproducing their existence (Marx & Engels, 1976). The peculiarity of ideology is that it transforms a

non-historical reality into an *omni-historical* reality (Althusser, 1968). The turning point in the conception of ideology is that it is not real and thereby operates as an instrument that interpellation of communities into a system that oppresses and marginalises them.

Hence, the consciousness of men within a social formation is false. In his letter to Franz Mehring (14 July 1898), Engels observed that:

*Ideology is a process accomplished by the so-called thinker consciously; it is true but **false consciousness**. The real process impelling him remains unknown to him; otherwise, it would simply be not an ideological process. Hence he imagines false or seemingly, motive forces (Marx & Engels, 1976)*

The relationship between false consciousness and ideology is conceived in terms of the relations between “who one is (objectively) and what one thinks (subjectively) and is applied primarily to the bourgeoisie” (Eyerman, 1981: 44). The illusionary role of ideology is deemed to operate within a format that conceals social conflicts and victimisations by “embodying ideas, values and language which justify social and economic inequalities” (Augoustinos, 1999: 298). The consequent effect is that people within a social formation fail to realise the political and economic interests of the bourgeoisie, thus internalising the values of their oppressors. The cause for such an imaginary transposition of the real conditions of existence is based on a small number of cynical men who base their domination victimisation and abuse of the people on a falsified representation of the world (world outlook) which they have imagined in order to enslave other minds by dominating their imaginations.⁴⁶ For instance, such a reality is imputed through deviating the impact of traditional knowledge misappropriation through magnifying the direct and immediate fears that the affected communities have concerning issues like poverty, and victimisations of crimes of physical nature. The non-personification of the misappropriation of traditional knowledge is used as a tool to avert detection of such a crime while in actual instance the same conglomerates bear the largest brand of victimisation.

⁴⁶ World outlooks are largely imaginary and they do not correspond to reality. See (Althusser, 1968)

Such a form of domination (which is imaginary) creates an alienated society, which in turn creates an impression that traditional communities belong to the lower echelon of society. Therefore, it is not the 'real conditions' of humanity that construct ideology but it is their relation to those conditions of existence, which are represented to them that they construct their ideology (Marx, 1906). It is then this relation that is the *cause* which explains "the imaginary distortion of the ideological representation of the real world" (Althusser, 1971: 38).

...the representation of the real conditions of existence of the individuals occupying the posts of agents of production, exploitation, repression, ideologization and scientific practice does not in the last analysis arise from relations of production but from relations deriving from relations of production." (Althusser, 1971: 38)

Ideology is thus an imaginary relationship of people within a social formation, which is related to their material relations of production. This imaginary relationship is constituted and executed by ideological state apparatus (carved to suit the whims and caprices of the ruling ideology). Ideological state apparatus ensure that ideology is inserted into people through practices, which are regulated by rituals "in which these practices are inscribed within the material existence of the ideological state apparatus" (Althusser, 1968: 158).

An individual's actions are therefore material actions inserted into material practices governed by material rituals, which are themselves defined by material ideological state apparatus from which he/she derives the ideas. The central function of ideology according to Marx and Engels (1976) is ensuring that that society becomes subject to the interests of the bourgeoisie. Ideology constructs that relations of social production are normal and obvious,⁴⁷ (that is the way life is) while recruiting individuals to become subjects. The system of oppression survives by virtue that it does not only reproduce social relations but also the reproduction of its subjection to the ruling ideology or practice of that ideology (Althusser, 1968; Ricoeur, 1994).

In light of the foregoing, ideology should be recognised as a tool that is used by bourgeoisie to maintain and preserve relations of power and dominance over

⁴⁷ Without appearing to do so

traditional knowledge holders within a social formation. The basis of this assertion is derived from the fact that ideology is a construct of the ruling class that creates physical, non-material conditions and instruments for the victimisation of traditional knowledge holders

the ideas of the ruling class are in every epoch the ruling ideas: i.e. the class which is the ruling material force of society is at the same time its ruling intellectual force. The ruling ideas are nothing more than the ideal expression of the dominant material relations (Marx & Engels, 1976: 59).

Consequently, the class that owns the material productive forces determines the dominant ideology that victimises traditional knowledge holders. By virtue of the fact that the material relations (means) of production are owned by the capitalists, society adopts the ideas and interests of the ruling class as their consciousness⁴⁸ (Stoddart, 2007). In turn traditional knowledge holders participate within their own means of oppression and subordination (Milovanovic, 2003). In other words, people become gatekeepers of their own oppression. The ideological infrastructure together with its associated systems integrates traditional knowledge holders into social networks of subordination and oppression.

This form of social power is more often referred to as “hegemonic power”, which works to convince individuals and social classes to subscribe to social values and norms of an inherently exploitative regime (Stoddart, 2007). It produces a theoretical consciousness, which is implicit in its application, adopted from the past, uncritically absorbed and often powerfully produces a condition of moral and political passivity (Gramsci, 2000; Gramsci et al., 1971). Ideological State Apparatus are usually institutional alternatives that create and maintain hegemonic power through ideology. Therefore, through ideology traditional knowledge communities are integrated and interpellated as social subjects thus ensuring that they remain politically passive and neutral to the victimisations they

⁴⁸ This process is achieved through the process of commodity fetishism whereof the products that are produced through economic processes such as manufacturing are divorced from the labourer. This has been referred to as the alienation of the proletariat from the fruits of their production. This process is then entrenched through the transmutation of labour into wages which in turn creates a false reality for the labourers. This is explained through the fact that workers are rewarded by money for their labour in producing goods which they themselves cannot own, whereof in turn they use the money that they have been paid to buy the same products they have made. Therefore money the commodity form and money play an ideological role in securing the working classes in their own domination. See (Marx, 1906)

suffer. The following shall discuss how discursive formations through ideology contribute to the victimisation of marginalised groups in society.

2.7. DISCURSIVE FORMATIONS

As previously noted, the superstructure operates through state power, which reciprocally influences the economy to create an environment that victimises marginalised communities. However, the economy and the superstructure require a support function to facilitate the implementation of their objectives, but the question is who carries out that function. The base and superstructure define the support functions but it is the individuals within a social formation that discharge that function in pursuance of the objectives of the former and the latter. In that regard, ideology interpellates individuals by constituting them as subjects (ideological subjects and therefore subjects of its discourse) and “providing them with the reasons for being a subject through the assumption of the functions defined by the super structure and the economy” (Althusser, 1995: 51).

The reasons why an individual should be a subject to carry out such a support function are clandestinely and perversely incorporated within the ideological discourse that relates to the subject thus making the subject a signifier of the discourse (Marx & Engels, 1976). Therefore, for an individual to be constituted as a subject he or she must recognise him or herself as a subject in the ideological discourse. Ideological discourse should not be comprehended as an order or commandment but it must be recognised as constitutive ‘pure force’ that is manipulated by persuasion and conviction which in turn provides guarantees for the interpellated subject (Althusser, 1995). Therefore:

the subject function which is the characteristic of ideological discourse in turn requires, produces and induces a characteristic effect, the unconscious effect that is peculiar which makes the discourse of the unconscious possible (Althusser, 2003: 53)

The consequence of the *unconscious effect* of ideological discourse, underwrites the recruitment and the establishment of individuals as subjects. This is achieved through the provision of answers to future questions, which the interpellated subject may ask about the rationality of the system. Therefore, all questions in discourse are feigned questions, which are specular reflections of the answers that

pre-exist the question (Althusser, 1995). The preposition that would follow this analysis advances the notion that the, “the interpellation of human individuals as ideological subjects produces as specific effect in them, the unconscious effect which enables these human individuals to assume the function of ideological subjects” (Althusser, 1995: 56). The unconscious effect of the ideological discourse creates a lack of awareness of the harm suffered by traditional knowledge communities, thereby ensuring the success of traditional knowledge misappropriations. Therefore, the ideological reasons behind the neglect of victims of traditional knowledge misappropriations should be investigated within the parameters of an ideological discourse that is feigned by the structures of a social phenomenon.

Such an approach is imperative because discourses assign a set of signs which traditional knowledge holders experience and live in setting up frameworks, which impose structures that determine what is to be experienced while at the same instance influencing what is barred from being said or done. Therefore, discourse “focuses attention on the terms of engagement within social relations by insisting that all social relations are lived and comprehended by their participants in terms of specific linguistic or semiotic vehicles that organise their thinking, understanding and experiencing” (Purvis & Hunt, 1993: 476).

The construction of individuals as subjects is formulated through the engagement of the latter with a multitude of discourses where such a “construction of the subject positions and shapes the peoples’ acceptance of unequal social relations” (Stoddart, 2007: 203). The effect of this is reordered and extended by the subjects, because discourse “invests in them, is transmitted by them and through them” (Foucault, 1977: 27). This power goes to the roots of society. The acceptance of social inequality is facilitated by the adoption and incorporation of hegemonic discourses by individual social actors into their lives while on the other hand discourse produces hegemonic effects across a multiplicity of social locations (Laclau & Mouffe, 2001).

The central focus of this analysis is peculiarly hinged on systems and procedures of exclusion and prohibition which are constituted by the 'will to know' (Hook, 2001). These systems and procedures comprise of a *discrete* realm of discursive practices within a terrain of knowledge production. Therefore, through the firmament of knowledge production, discourse translates itself into systems in which domination and power are exercised on the interpellated subjects. For example, during the middle ages, the averments of the so-called mad person were deemed to be null and void, neither having truth or importance and worthless of evidence in a court of law (Foucault, 1971). Nevertheless, from the 18th century to present day doctors and psychologists deemed to be on the other side of reason have been capacitated to verify the meaning of the mad man's words. It is important to note that because certain professionals are capacitated to study 'insanity', does not remove the divide that existed during the middle centuries. There is a need to look at the whole body of knowledge, the institutions that are set in place to permit certain individuals to listen or study such insanity and not forgetting the procedures that have been put in place that allow a mad man to speak (Foucault, 1971). Therefore, the division is far from removed, working in a different format through new institutions, systems and procedures though the effects of such a division are not the same. The exclusion of traditional knowledge from the intellectual property regime has been achieved through the imputation of procedural barriers of patent examination, which have no technical or cultural relation to the cultural traditional heritage of the African continent.

Another example that sets out the real functionality of discourse is based on the difference between truth and false, which is a discourse that was constituted historically. In 6th century B.C, true discourse inspired respect and terror, one had to submit because he or she was ruled , where prophecies never only allowed the prediction of future events to happen, but also ensured that activities of men made it happen, carrying men's minds with it weaving itself into a fabric of destiny (Foucault, 1971). However, this will to know the truth changed in the 16th century when sophists were banished and scientific truths were established (Foucault, 1971). The history of truths changed to a history of objects to be known of the function and position of knowing subjects of the material, technical and

instrumental investments. Therefore, the verification of the truthfulness of knowledge was determined by research and development of scientific institutions, controlled by the bourgeoisie. The system of exclusion imputed into the whole process, institutional support reinforced and renewed by a strata of practices - system of books, publishing, libraries and laboratories (Foucault, 1971). Hence, “power and knowledge directly impute one another and there is no power relation without a correlative field of knowledge” (Foucault, 1977: 27).

Now it is important to note that knowledge cannot merely arise, as an effect separate from its cause (power relations). Knowledge should be understood as being immanent in the “materiality of practices and apparatuses” (Montag, 1995: 73). Its production is dependent on an ideology formulated and dispensed by ideological state apparatus. Hence, such knowledge becomes rituals and practices within which subjects are interpellated, thereby making act within the realm of ideological discourse that exploits traditional knowledge holders.

This constituent part of discourse makes it virtually impossible for people to act or think outside the box, as doing so one would be characterised as being ‘mad’ and unreasonable (Young, 1981). Consequently, unwanted or socially undesirable acts are labelled as crimes. Because, the economy is outside the power of the state, “the weak state becomes more visible by governing the lower classes, who to a large extent are controlled through their minor infractions (at the expense of effectively addressing corruption and organised crime)” (Peacock, 2008: ii). The reason behind such an understanding is based on the view that the production of discourse in society is controlled by a number of procedures whose role is to ward off powers and dangers; to gain mastery over its chance events to evade its ponderous, formidable materiality (Foucault, 1971).

Therefore the exercise of discursive rule is linked to the use and exercise of power: discourse ensures the reproduction of a social system through factors of selection, exclusion and domination (Young, 1981). These practices therefore work at inhibiting and producing ways of exclusions and choices. As such, the interaction

between knowledge, power and the protection of traditional knowledge is determined by those who are economically and politically powerful.

These structures of inequality inevitably lead to the formation of a few identifiable cohesive social groups (classes) which can be distinctively recognised as ‘actors’ in historical development of a particular historical formation (Stephens, 1979). One of the common characteristics that is evident during the interaction of these social groupings is one of domination and oppression.

2.8. CLASS FORMATIONS

The history of the victimisation of all hitherto existing societies is the history of class struggles (Marx & Engels, 1848). To clarify this synopsis Marx and Engels (1848), provided examples which include, freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman. They surmised this relationship as one of the *oppressor and oppressed, villain and victim* of which the latter and former stood in constant opposition to one another in a revolutionary re-constitution of society. Marx and Engels argument pronounced that modern day society breathes life from the capitalist system, which borrowed the way it operates from past and has not changed anything but has “established new classes, new conditions of oppression, new forms of struggle in place of the old ones: Bourgeoisie and Proletariat”(Marx & Engels, 1848: 15).

This rendition clarifies that inequality, status and privilege, all concomitant to victimisation is not a new phenomenon. It has been developed and borrowed from a dark history where its form, nature and appearance have been defined by the corresponding mode of production. The notoriety of this preposition is visible in “ancient Rome where there were the patricians, knights, plebeians, slaves; in the Middle Ages, feudal lords, vassals, guild-masters, journeymen, apprentices, serfs; and “in almost all of these classes, again, subordinate gradations existed” (Marx & Engels, 1848: 3). Warren Buffet during an interview with the New York Times would not have put in better terms when he stated that:

“There’s class warfare but it’s my class, the rich class, that’s making war, and we’re winning”(Stein, 2006).

What is apparent from Warren Buffet’s statement is that, social classes demarcate every social formation. These classes are distinguished on the basis of who owns the means of production and those who do not whereof the latter are exposed to the whims and caprices of the bourgeoisie. However, the interaction between these two classes leads to contradictions or conflicts, which Warren Buffet’s calls ‘war’ and he confirms that it is them; the bourgeoisie that is causing that war and they are winning.

A practical appreciation of such an assertion would question the conditions that ferment conflict within a given society. A preliminary answer to this question is the economy, i.e. “a historical *prius* which determines all creations of the human mind” (Weber et al., 1954: xxix). Therefore, the possible prime mover of the victimisation of traditional knowledge holders is deemed economic expedience that transcends its self to all institutions and structures in society. The stated rendition prescribes for a further investigation of how economic determinism propels the victimisation of traditional knowledge holders, through the question of class struggles.

Although, the bourgeoisie and the proletariat are pursuing different interests within a singular context, contestations are bound to ensue. These contestations determine the *modus* of victimisation, based on the likelihood of a social revolution that might transform the economic mode of production and its corresponding superstructure. The ultimate but ever evolving result of such a social revolution is the creation of a new social order and social classes together with its new economic structure (i.e. from feudalism to capitalism). Therefore, the development of society that victimises traditional knowledge holders can be understood not through the consciousness of men within the particular mode of production but through an analysis of the contradictions of material life in which conflicts between the social reproductive forces and the mode of production exist (Marx, 1906).

These contradictions are known as *dialectical materialism*; a concept of the self-movement of the things; the principle of the unity of opposites and the transition of quantity into quality.⁴⁹ Dialectical materialism assists in comprehending that a phenomenon is not a complex of readymade things, but is a set of complex of processes which are apparently stable and go through uninterrupted change of coming into being and passing away, “which in spite of all temporary regression, a progressive development asserts itself in the end” (Brush & Stabinsky, 1996: 543). This process allows for the production and reproduction of the conditions that determine the environment in which victimisation is perpetrated. The next section developed a theoretical framework that was applied in the historical analysis of traditional knowledge victimisation. This framework borrows its elements from the discussions in a dialectical manner, with specific focus on the factors that contribute to the development of a social phenomenon that facilitates victimisation.

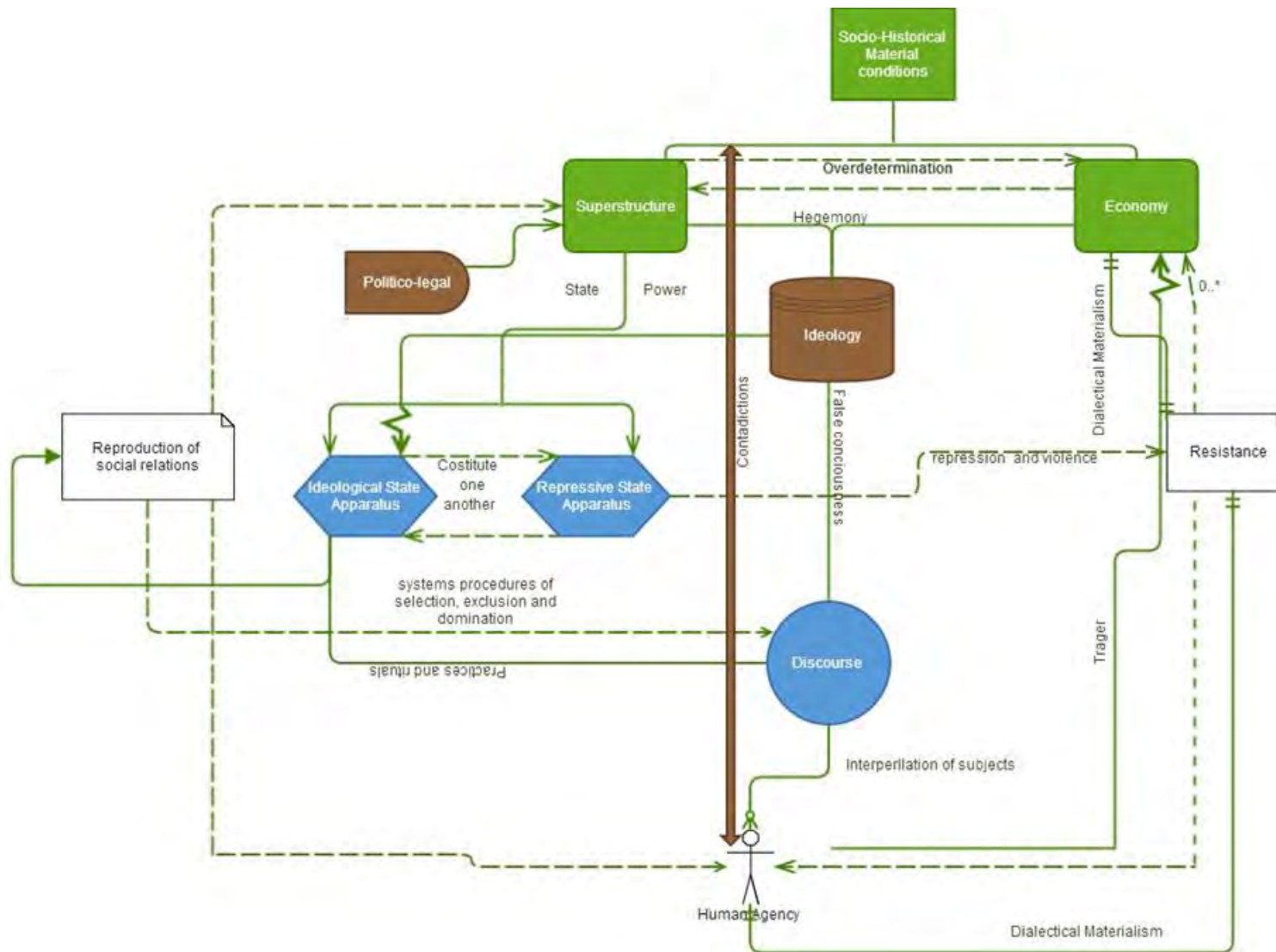
2.9. THE SOCIAL RELATIONS PRODUCTION MODEL

Having comprehended the factors that contribute to the development of a social phenomenon, the thesis developed a conceptual framework that was applied in understanding the factors that facilitate the victimisation of traditional communities. This conceptual framework was titled the ‘social relations production model’.

Althusser (2006), highlighted that one can easily conclude that the domination and oppression of a social phenomenon through an interaction of various factors that inter-determine each other while there are independent and separate of one another (See *Figure 1* hereunder).

⁴⁹ The dialectical way of looking at things is, therefore, to view them (a) in their relatedness and (b) in the process of development and change (Brush & Stabinsky, 1996: 542).

Fig.1: Social relations production model



A society, which victimises traditional knowledge holders is located in a continuous complex set of historical systems together with their associated corresponding institutions. Therefore, understanding the factors that have contributed to the victimisation of traditional knowledge holders, one has to come to terms with the historical factors that created, developed and concretised the current order. These factors have to be dug out from the historical enclave of the development of society. An appreciation of such a historical *prius* would set the platform for the examination of the conditions that determine the victimisation of traditional knowledge holders.

The primacies of social relations that perpetuate victimisation (through domination and oppression) are hinged on the correlative autonomous relation between the economy and the superstructure, which in turn mutually and unevenly overdetermine each other (Marx, 1906). Therefore, in defining the elements that influence the creation of a social formation, which victimise traditional knowledge holders it is important to understand the material forces of production together with the corresponding superstructure. While the economy and the superstructure are the prime movers of a social phenomenon, the latter as whole is articulated by a totality of instances (Weber, 1949). These are a set of structures, which are functionally organised by a specific mode of production and articulated by dominance and oppression.

Dominance and oppression are discharged through ideological state apparatus (that are responsible for the reproduction of relations of production) and repressive state apparatus (responsible for oppression and repression through violence and interdictions). These institutional apparatus operate through state power (ideological function of the superstructure) (Althusser, 2006). Ideological state apparatus and repressive state apparatus are mutually constitutive of one another. Repressive state apparatus predominately operate with violence while secondarily they operate on ideology; ideological state apparatus predominantly operate on violence while they secondarily operate on violence and repression. Repressive state apparatus henceforth produce the ideal environment for the implementation

of the ideological state apparatus while in the last resort it enforces repression within a social formation (Althusser, 1968).

While a social formation participates in a process that victimises them, they form a consciousness (ideology) that is determined by the material conditions of production (Marx & Engels, 2008). However, the consciousness is a false representation of the world (world outlook). Such a pure dream is inculcated into the social formation by the ideological state apparatus through practices and rituals (marriage, funerals, and sport contests among others). The major objective of the latter is meant to enslave the minds of the dominated by colonising their imaginations thus ensuring that individuals are constituted as subjects. Such a system ensures the reproduction of the subjects to the ruling ideology. This form of social power is hegemonic as it creates a theoretical consciousness, which makes a social formation adopt norms, and values that are oppressive while creating a system of political and moral passivity.

As individuals are constituted as subjects by ideology; they are however recruited and interpellated as subjects by ideological discourse to discharge the support functions of the superstructure and the economy. A more social form of discourse sets standards and benchmarks of what is deemed to be socially acceptable behaviour and what is not: that is how one should think, speak and understand. The power of this discourse goes to the roots of society thus establishing hegemony of social inequality, which society should subscribe to without questioning. The stated discourse operates through systems and procedures of exclusion and prohibition, which are constituted by knowledge. Such a system is sustained by ideological and repressive state apparatus, which ensure that actions that deviate from the main discourse are thwarted.

As the material forces of production within a social formation are threatened by its own internal contradictions, the repressive state apparatus are used to maintain its own survival. It is through resistance to repression that transforms the material conditions, thereby in creating a new system of material production (dialectical materialism).

2.10. CONCLUSION

A social formation is a complex whole that is articulated by instances that perpetuate domination and oppression on traditional knowledge holders who come from the lower echelon of society. Unfortunately, current victimology approaches seek to understand the problems that have bedevilled victims in fragmentation. The perception of trying fix a piece of the problem has had its own challenges as the proffered solution will deteriorate and collapse because real problem (which emanates from the social whole) has been ignored. The particularised problem fails in its solution as it does not address the cause of the problem, but temporarily diagnosis the effects. The social relations model seeks to understand the challenges that have bedevilled traditional knowledge holders within a conceptual whole framework. The stated framework shall be applied in the analysis of the historical development of the intellectual property system so as to unravel the inner darkness of exclusion that has prompted the current victimisation of traditional knowledge holders.

CHAPTER 3

A CRITICAL HISTORICAL ANALYSIS OF KNOWLEDGE MISAPPROPRIATIONS AND VICTIMISATION

“One precedent creates another. They soon accumulate and constitute law. What yesterday was a fact today is a doctrine.”(Juniust, 1968)

3.1. INTRODUCTION

The history of knowledge misappropriations and the victimisation of traditional knowledge communities in Africa; are largely determined by a hierarchy of complex intricate gated frameworks, which are constituted by inter-determinate dialectical contestations between the political, legal, technological, economic, religious and ideological networks. With issues of imperialism and colonialism, swelling underneath these frameworks, the marginalisation of traditional knowledge has been exacerbated by global capitalism, which has frequently denied traditional knowledge space in the knowledge arena. The remnants and ghosts of this complex intricate framework are apparent in modern knowledge regimes, which are a structured labyrinthine endowed mostly by systems and procedures of exclusion that have been borrowed from the past.

The following discussion will show that the exclusionary procedures coupled together with the discriminatory and imperial attitudes, reproduced within the modern knowledge frameworks have become signifiers for the exclusion of traditional knowledge. It would be next to impossible to understand the historical exigencies that have contributed to the exclusion and marginalisation of traditional knowledge, “without understanding the limits of political power, subtle forms of domination and development constrains that are invoked by and structure of historical enterprise” (Benavides, 2004: 159). An appreciation of the development of these systems and procedures of exclusion would primarily assist in the explanation of current values that have led to the systematic victimisation of traditional knowledge holders and communities in Africa. This chapter unravels the forces that contributed to the development of the knowledge infrastructure while at the same instance it critically examines their relative contribution to the exclusion of traditional knowledge.

3.2 EARLY CONCEPTION OF KNOWLEDGE MISAPPROPRIATION (525 BC - 1000AD)

The history of knowledge misappropriation in Africa approximately began in 525 B.C Egypt, where invading armies plundered and looted Egyptian knowledge as ‘spoils of war’. Egyptian knowledge was a prized possession for the invading armies by virtue of the fact that, Egypt was the epitome of ancient civilisation. The priceless value of Egyptian knowledge is evidenced by the fact that it attracted renowned Greek and Roman scholars who *inter alia* included Aristotle, Plato, Pythagoras, Isokrates, who joined the Egyptian priesthood in a bid to attain the highest levels of *sophia* (wisdom).

However, the invasion of Egypt by the Persians (525 BC), the Greek (332BC) and the Romans (30 B.C), exposed their knowledge to the misappropriation nemesis of war, where the invading armies looted libraries and temples that contained Egyptian sacred knowledge, texts and manuscripts (James, 2013). These texts and manuscripts relatively contributed to the philosophical foundations of the Greek and the Roman civilisation. Imperialism and territorial expansion can therefore be deemed to be the prime instigator of knowledge misappropriations (Naas, 2011).

To put this assertion into perspective, after the invasion of Egypt by Alexandria the Great in 332 B.C, Aristotle made a library of his own with plundered books as his pupils converted the Royal Library of Alexandria, Menephtheion, Memphis and Heliopolis into a research centre (James, 2013). Aristotle furthermore, “transferred pupils from Athens to these Egyptian Libraries, who in turn received instructions from Egyptian Priests” (James 2013: 37). This trend reappeared again after Athens was run over and conquered by the Romans in 84 B.C, where the library of books belonging to Aristotle were looted and taken to Rome (Turner, 1903).

The imperialist notions of knowledge accumulation and misappropriation are not far from Weber’s (1930) assessment, that looting and pirating against foreigners was exercised without any form of discretion for political and economic gains. Oppression and subjugation over the subject nation therefore created conditions for the plunder of knowledge resources.

3.2.1. 'Ownership' as a tool for knowledge misappropriation (332BC - 480 AD)

At the time when Plato and Aristotle were stripping down the ancient texts of the Egyptians, a knowledge ownership regime was crafted whereof the 'knowledge pirates' assumed *de facto* ownership to misappropriated knowledge. For instance, Aristotle and his pupils misappropriated Egyptian classical works and passed it off as theirs. Plato is neither innocent of adopting such a practice. Krantor an early commentator on Plato's work remarked that Plato was not the inventor of 'The Republic' because it was an idealisation of the Egyptian system (Bernal, 1987). He is criticised for having adopted the Egyptian story to be the narrative of the Athenians and the Atlantis, to make it as if the Athenians had lived under this regime at a certain moment in the past (Bernal, 1987). Karl Marx (1906) commented on Plato by highlighting that,

Plato's Republic, insofar as division of labour is treated in it, as a formative principle of the state, is merely an Athenian idealisation of the Egyptian system of Castes (Marx, 1906: 299).

Furthermore, Socrates' command, 'know thyself' is of Egyptian origin. Egyptian temples carried inscriptions on the outside addressed to Neophytes and among them was the injunction 'know thyself' (James, 2013). All mystery temples, inside and outside of Egypt carried such inscriptions. In addition, the four cardinal virtues of 'justice, wisdom, temperance, and courage' as ascribed by Plato are misleading; for the Egyptian Mystery System contained ten virtues from which Plato derived his four cardinal virtues (James, 2013).

The *de jure* concept of knowledge ownership developed in 1 B.C. Rome, through the creation of authorial rights in literary and artistic works. The recognition of authors was a direct response to mass theft and plagiarism of ancient works which were being passed off as works of modern writers (Long, 1991). For instance, Vitruvius a renowned Roman architect expressly condemned individuals, "who relied on writings which is not their own notions but boast with odious behavior, doing violence to the works of others who lived in an impious way, for they must not only be censored but must be punished" (Vitruvius & Cesariano, 1969: 41). In a bid to curtail plagiarism and theft, individuals claiming authorship to works began to append signatures on their illustrations or paintings asserting their rights (May,

2002). This practice was stratified by students (i.e. the sophists) of great philosophers and masters of craft, who ensured that the works of their teachers were not passed off as belonging to individuals who had not expended intellectual labour in the work or the craft (Long, 1991).

The Roman government endorsed and institutionalised the stated customary practice of authorial rights, “through punishing faulty workmanship” (Leeds, 1956: 1456). Recourse to the criminalisation of defective workmanship of knowledge products resulted in the civilisation and institutionalisation of conflict, thereby embedding it into the cultural fabric of society (Peacock, 2008). The determination of defectiveness was subject to the discretion of Roman officials. Therefore, instead of addressing the problem knowledge misappropriations in its constitutive nature, the new practice embedded the problem of plagiarism as plagiarisers sought to evade creating knowledge products that were divergent to the government policy through the reproduction of unknown works.

The approach adopted by the Roman government permitted the individualisation of knowledge that was the common heritage of humankind. This approach created conditions for the pursuit of personal aggrandisement in knowledge production, which in turn facilitated rent seeking on the monopolised knowledge products (Aoki, 1998). Consequently, the claim to knowledge ownership through authorial rights became problematic as monopolies over intellectual works were inequitable and were always a failure due to mass plagiarism (Prager, 1952). Resultantly, in 480 A.D Emperor Zeno outlawed knowledge ownership by decreeing that:

“No one shall exercise monopoly over any ...material whether by his own authority or under that of an imperial rescript heretofore” (cited in Prager, 1952: 115)

The impact of the decree meant that any artistic or literary work had no authorship or ownership rights attached thereto. However, after the invasion of Rome by the northern Barbarians, “political thinking was impoverished by the physical destruction of books, demonstrations of brute force, dogmatism, intolerance and intimidation . . . for industrial arts the Middle Ages were Dark Ages indeed” (Prager, 1952: 117).

3.2.2. Origins of religious exclusionary polemics to traditional knowledge (6 A.D)

The historical implications of religion in the exclusion of traditional knowledge from the knowledge frameworks are far reaching. Ideological religious state apparatus through the inseparable role-played by the state and the church in 6 AD facilitated the marginalisation of African knowledge. Justinian, closed all the Egyptian schools of mysteries and philosophies that were existent in Europe and Egypt through the establishment of the Roman Catholic Church (James, 2013). James (2013) aptly surmised the factors that contributed to the abolition of African knowledge in Europe when he highlighted that,

The higher metaphysical doctrines of those Mysteries could not be comprehended; the spiritual powers of the priests were unsurpassed; the magic of the rites and ceremonies filled the people with awe; Egypt was the holy land of the ancient world and the Mysteries were the one, ancient and holy Catholic religion, whose power was supreme. This lofty culture system of the Black people filled Rome with envy, and consequently she legalized Christianity, which she had persecuted for five long centuries, and set it up as a state religion and as a rival of Mysteries, its own mother. This is why the Mysteries have been despised; this is why other ancient religions of the Black people are despised; because they are all offspring of the African Mysteries, which have never been clearly understood by Europeans, and consequently have provoked their prejudice and condemnation (James, 2013: 109).

The alliance between the church and the state that emerged facilitated the abolition of African traditional knowledge from the domains of formal knowledge. As a consequence, “intellectual darkness spread over Europe and the Graeco-Roman world for ten centuries; during which time, knowledge disappeared” (James, 2013: 31). The Greeks and Romans showed no creative powers, and were unable to improve upon the knowledge which they had received from the Egyptians (Sedgwick & Tyler, 1917). For knowledge production, it was indeed the ‘Dark Ages’.

3.3. THE EMERGENCE OF INTELLECTUAL PROPERTY (1400 - 1800)

The abolished concept of knowledge ownership re-emerged from the intellectual wilderness in 14th century Venice. The protection of knowledge against knowledge pirates; guaranteed by the state became a necessary factor for the instigation of knowledge misappropriations and manipulation by the bourgeois. The effects of the reintroduction of knowledge ownership under the flagship of the intellectual property regime were far reaching to both knowledge producers and the knowledge end users. The nemesis that haunted the latter and the former in the history of knowledge production and protection are synonymous to the reverberations that have currently caused irreparable harm to traditional knowledge communities in Africa (See Chapter 4 for an in-depth discussion to how these factors have been reproduced in the current traditional knowledge protection discourse). This section shall critically explore how the concept of knowledge ownership together with its associated framed structure of intellectual property developed thereby contributing to the knowledge victimisations and misappropriations.

3.3.1. The Venetian moment (1400-1500)

Knowledge ownership in Venice emerged through a community-oriented model of the Guilds,⁵⁰ who were renowned for their craft of producing the finest glass in Europe. The skill and knowledge of Venetian glass makers was intrinsic to the success of their products and as word spread across Europe of their sophistry so did their specialised knowledge attain increasing value (Long, 1991). The increasing significance and value of knowledge of the Venetian guilds prompted the Commune to promulgate regulations that governed the use and dissemination of knowledge by the guilds.⁵¹ Consequently, the guilds were reduced to, “state supervised administrative agencies” (Prager, 1944: 713), where the guilds were subjected to

⁵⁰ Craft knowledge of the guilds was not particularly linked to any individual or group but it was deemed to be communal resource of the guild's governance structure of their activities while ensuring the protection of their craft secrets through apprenticeship and non-disclosure (May, 2007).

⁵¹ These regulations were known as the Capitularies. The earliest record of the capitulary was a decree which was adopted by the major council of Venice on 21 May 1297, which stated that; if a physician makes a medicine based on his own secret, he too must make it only of the best materials, it must be kept with the guild and all guild members must swear not to pry on it (Mandich, 1960).

governmental control, while in return they were accorded an economic monopoly over knowledge production, use and value maximisation, which was guaranteed by the Commune.

On that basis, political and ideological relations of society found their expression in class powers (Guilds and the Commune) that articulated the process of knowledge production and value maximisation (Poulantzas, 2000). The established system was preconfigured to recognise the economic value of knowledge subject to conditions of ownership (Long, 1991; May, 2002). This development became the foundational basis for the determination of awarding certain types of knowledge protection at the exclusion of others. Traditional knowledge would suffer at the hands of such an economic discriminatory procedure latter in history (See Section 3.5. of this chapter).

However, the community oriented knowledge model struggled to attain legitimacy in all societal structures because the lucrative sales and demand for Venetian products in Europe prompted artisans to leave the Guild community framework to establish their workshops independently in foreign countries.⁵² These actions were contrary to standing regulations on knowledge ownership, whereof export of the craft itself attracted a death penalty for Venetian glass-blowers who tried to practice their art abroad (Frumkin, 1945; Yu, 2009). The harsh punishment that awaited the defectors did not deter nor stop such deviation, as the mass migration of artisans to foreign lands.⁵³ The continued migration of artisans from the Guilds, despite the existence of harsh regulations served as a signifier to the Venetian Commune of the non-rivalrous nature of knowledge. The trickle-down effect of the migrations increased foreign economic competition, as their artisans become the functional knowledge producers accorded privileges by the foreign governments (Prager, 1952).

In light of the increasing foreign competition, the Venetian Commune in 1420 introduced the *previlegi* system where artisans who brought valuable foreign

⁵² It should be noted that the failure of the Guild community ownership model should serve as a lesson to the community oriented model for knowledge ownership that is being advocated within the traditional knowledge discourse in Africa. It is bound to fail one way or another. For a more detailed analyses of this argument see Chapter 4 which discusses the problems that are associated with the community oriented model.

⁵³ Craftsman migrated from Venice to offer their services to other countries either voluntarily, or to escape religious persecution of economic hardships (Epstein, 1998).

technology, where accorded privileges to solely make, use and sell that technology without third party interference. In its functional capacity, the *previlegi* permitted the misappropriation of foreign knowledge without assigning the proper benefits to the real knowledge producers, in the name of economic development. It achieved the latter through encouraging the importation of valuable foreign technologies, explicitly for the purposes of “strategic economic development underpinned by a proto capitalist accumulation strategy” (May, 2007: 215).⁵⁴

However, the new *previlegi* system directly infringed the existing economic knowledge monopoly that was enjoyed by the Guilds⁵⁵ (Finlay, 1980). Resultantly, contestations between the Guilds and the Commune ensued, as the former challenged the Commune over the introduction of the *previlegi* but the political powers of Venice did not support their cause. Politics largely determined the legal system in Venice (Stern, 2004), as the law making process was dominated by the oligarchy (the nobility) who are believed to have been the embodiment of the law and frequently attacked any form of economic muscle that threatened their hand in power (Stern, 2004). The Guilds of Venice became pawns to the power struggles perpetrated by Commune, as they were sacrificed for the economic development of the geographical jurisdiction of Venice.

The schematic development of the knowledge ownership regime in Venice became a contested political process, which “altered the rules of the game, constituted new actors, and altered opportunities for others thereby redefining winners and losers” (May & Sell, 2001: 468). The Commune clipped the economic wings of the Guilds, through undermining the community-oriented model by establishing an individual monopolistic knowledge ownership regime. The ‘rules of the game’ in knowledge ownership and protection changed through the adoption of first known Patent Act of 1474. Consequently, individual technology entrepreneurs became the new winners while the Guilds became structural victims of governmental policies, which sought to undermine their functionality by perpetuating marginalisation and inequality. In that regard, the development of the knowledge protection regime

⁵⁴ This is a similar strategy applied by western bio-technology corporates which appropriate traditional knowledge from Africa, selectively engineer it and patent it for their own financial and economic gain. See (McManis, 2003)

⁵⁵ It should be noted that guilds were arch enemies of inventions and inventors. See (Prager, 1952)

was more of a political imposition rather than the recognition of creative capabilities of knowledge producers.

3.3.2. The Venice Patent Act of 1474

The Venetian Patent Act of 1474 is the first known piece of legislation that granted private property monopoly rights to knowledge importers and producers to prohibit third parties from making, using or selling the invention without their consent within a specified territorial jurisdiction of Venice. In other words, the Patent Act created an institution of the right to exclude others (Mundich, 1960). The exclusionary dynamic of the Patent Act, created a regime that did not protect certain types of knowledge deemed not to be economically viable. This ideological premise became the foundation for modern day intellectual property frameworks, which has largely, contributed to the marginalisation and exclusion of traditional knowledge (See Chapter 1.4.1.). The basis of this argument derives its veracity from the preamble of the Statute of Venice, which clearly spells out that knowledge protection was afforded to “devices of great utility and benefit to our common wealth” (cited in Mandich, 1948: 176).

From this auspice, the development of the patent institution rather followed than preceded the economic system in Venice (Frumkin, 1955; Yu 2009). The foundation of the Patent Act was based on economic determinism supported by the structural imperialism of the Venetian government, which created a discriminatory environment of inequality between different types of knowledge that could be protected and that could not be protected.

At the end of the 15th century, European governments and monarchies adapted the Venetian model of knowledge protection to meet their own political and ideological ends. However, the subsequent grant of intellectual property rights to knowledge importers and producers, became “subject to the vagaries of political power and personal relationships” (May & Sell, 2006: 80). The backcloth of the development produced and reproduced oppression, monopoly, cartels and the personal and economic victimisation of authors whose intellectual ingenuity was not recognised. An understanding of the processes and factors that contributed to

this development permits one to understand the exclusionary polemics that have continually haunt the current traditional knowledge discourse in Africa.

3.3.3. Historical development of the patent regime (1500 -1800)

The fact that knowledge ownership rights were granted subject to the vagaries of political power inconsequently made them an object of abuse. For instance, patents were issued to obtain, “favours from courtiers, to procure money for the crown or to assert a national economic policy against some local *previlegi*” (Mundich, 1948: 168). This approach of awarding knowledge rights was bound to be problematic, as the awarded patents delegated the crown’s power to the patentee, to search and seize goods that infringed his or her patent (May & Sell, 2006), with no appropriate measures in place to ascertain the reasonableness of such actions. Resultantly, the delegated power of the crown was abused as the patent holders began to hire private police for the purposes of harassing competitors with virtual impunity (Walterscheid, 1994). Supported by an extreme and severe punishment system, infringing such monopoly grants attracted serious punishment, which was described by Adam Smith as follows:

Like the laws of Draco, these laws may be said to be all written in blood . . . the exporter of sheep, lamps, or rams, was for the first offence to forfeit all his goods for ever, to suffer a year’s imprisonment, and then to have his left hand cut off in a market town upon a market day, to be there nailed up; and for the second offence to be adjudged a felon, and to suffer death accordingly (cited in Smith & Nicholson, 1887: 701).

On the economic front patent grants became enormously unpopular as most of them were being granted for basic necessities like salt, paper, starch, and glass (May & Sell, 2006). The consequent effect of this practice saw an abrupt increase in the prices of basic commodities. As a result, ordinary citizens became victims of a policy that was bended and used to meet the illicit ends of political expediency and to service the pockets of the court stewards of the monarchy.

Furthermore, the non-regulation of the issuance and revocation of patents plunged Europe into regulatory chaos. For instance in England, Nachbar (2005) observed that:

Patents were granted, routinely revoked (frequently because they had become overly burdensome), and re-issued to someone else. James granted broad supervisory control over whole industries and with it broad powers to search and arrest infringers. These powers were predictably subject to frequent and profound abuse by the patentees, who were commonly unpopular favorites of James and allies of George Villiers (Duke of Buckingham), further fomenting public scorn for both the monopolies and the monopolists. (Nachbar, 2005: 1346)

With no regulatory framework in place, the use of patents was left to the machinations of the patentees. Patents became economically burdensome and politically unpopular because of poor administration. The unpopularity of “monopoly patents and the consequent attack upon them was symptomatic of an economic depression and an increase in the number of range of monopolies” (Kyle, 1998: 1263). The development the Patent regime in Europe should to act as a learning curve in the development of a regime that protects traditional knowledge. The current non-regulation of traditional knowledge in Africa has placed traditional knowledge holders in a compromising position as the intellectual property system has been used a tool for the disenfranchisement of traditional knowledge communities (See Chapter 1.4.1).

The unpopular nature of the patent regime gradually created contestations between the monarchy, patent holders and the community. In 1624 England, a political settlement was reached, through the enactment of the Statute of Monopolies. The statute was crafted as an economic exception against royal indiscriminate grant of monopoly patents (Cornish, 1993). However, MacLeod (1988) argues that in as much as the statute sought to “proscribe the crown’s abuse of dispensing powers, the statute’s role as a legal basis for the patent system was a curious side effect, a quirk of history” (1988: 15). The law permitted the continuation of the grant of patents despite their general dislike by the populace. Therefore, the recognition of patents by the statute was more of a compromise rather than an allowance of monopolies (May & Sell, 2006) because of their unique character of inventiveness rather than the abandonment of monopolies.

It is imperative to note that the rise of the patent system in Europe had nothing to do with inventive genius of inventors, but it was because of the expansion of the

institutions of the capitalist mode of production. The recognition of man's inventiveness played a role in the justification of the overall system, though such recognition needs to be located in a broader political economic shift of time (May & Sell, 2006). Therefore, any assertion that knowledge protection is based on the novelty and an inventive requirement is not only misleading but it ought to be recognised as a discursive practice that seeks to justify the unequal power relations that created the intellectual property regime.

Regardless of the apparent political, economic and ideological influences that led to the formulation of the Statute of Monopolies, the doctrine of novelty and inventiveness have been taunted as a basis for the exclusion of traditional knowledge within the current intellectual property framework. The impact and effect of the Statute of Monopolies was open for everyone to see. In 1641, the Parliament of England disgruntled with the patent regime argued that patents:

... a nest of wasps—a swarm of vermin which have over crept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectic (Mossoff, 2000: : 1272).

The oppressive nature of the patent grants that haunted England was indeed a tragedy and they have continue to disentomb the same tendencies in present day. For instance, traditional knowledge misappropriations have continued and the United States patent system permits and encourages such misappropriation to the extent that “it fails to recognise foreign prior art unless it is published, enables broad patents on minor modifications, syntheses, and purifications” (Coombe, 2001: 281) while cognisant of the fact that traditional knowledge is not documented.

17th Century Europe institutionalised knowledge protection through the adoption of systems and procedures that excluded knowledge, which did not meet the economic and scientific functionality of the State. For instance in France, scientific knowledge became the only form of knowledge that could protected under the patent regime and for such protection to be awarded the knowledge had

to procedurally and substantively examined by the *Académie des Sciences* (Prager, 1944). Therefore, any knowledge that did not pass the scientific test as ascribed by the Academy was not awarded protection. However, despite the knowledge having gone through a rigorous scientific substantive examination, the political forces of the day had the final determination of which knowledge was subject to protection, as the recommendations of the *Académie des Sciences* were not binding on the King or Parliament in the determination of whether or not to grant a patent (Isoré, 1878). Therefore, the validity or grant of a patent remained as a purely political function despite the existence of the academy.

Therefore, once a patent granted was issued, a barrister was instructed to present it to parliament, which would in turn appoint technical examiners whom would determine the economic value of the invention in consultation with the officers of the crown who were responsible for Guilds, commerce and taxes (Prager, 1944; Isoré, 1878). While *Académie des Sciences* was interested in the originality of the invention, *Parlement de Paris* was interested in the “future commercial success of the invention” (Prager, 1944: 726). In as much, as the competing interests between the Academy and Parliament were different, the economic value of the patent was real determinant for the award of the patent.

The impact and effects of such an approach were far reaching because “learned bodies and fiscal aids controlled the system which necessarily led to corruption” (De Boufflers, 1790: 60). The implication of this system was that it created a structure of whereof certain forms of knowledge were recognised to the exclusion of other contesting knowledge forms. Therefore, the existence of the *Académie des Sciences* was purely an exclusionary institution, though the final determinant of which knowledge was protected was determined on economic grounds, which Althusser (1968) and Marx (1906) argued was the prime mover of any social process of victimisation.

3.3.4. Development of copyright law under mercantilism (1500 - 1800)

Copyright law “emerged close on the heels of patents in Venice” (Mandich, 1948: 168). These rights arose through the extension of patent protection to printed works, since printed works were a product of the patented inventions. There was

no distinction between patent privileges and proto-copyright privileges because the granted patent monopolies, extended to the rights of exclusive use to exploit new technologies of printing and the books so printed by the technology. However, they were no appropriate procedures, which determined which printed works were entitled to protection.

As a result, in the year 1500, copyright monopolies were granted indiscriminately for both new and old texts (Prager, 1944). The copyright system plunged all existing literary and artistic works into the public domain thereby facilitating an enclosure movement that permitted anyone to misappropriate and claim ownership to any text, which they did not expend intellectual labour. Therefore, publishers began to frequent their respective governments to reserve well-known book titles in their stead (Prager, 1948). A rat race to assume proprietary rights on literary works within the public domain ensued. Resultantly by virtue of the shrinking number of books in the 'public domain', counterfeiting and piracy ensued⁵⁶. To compound the already chaotic nature of the indiscriminate grant of monopolies on literary texts, magistrates lost track of book titles that were protected under the monopolies system (Kostylo, 2010). The environment that existed was sufficient for the misappropriation of the author's knowledge, a scenario which is not far removed from the current context of traditional knowledge misappropriations, whereof all traditional knowledge is deemed to fall within the public domain (Dutfield, 2000) and free for anyone to claim title to through the intellectual property system.

At the turn of the mid-16th Century, a group of opportunistic individuals in the form of cartels sought to manipulate the copyright system by establishing publishing houses. To ensure efficiency in their approach, the cartels merged their interests with that of the State and the Church⁵⁷. The ensuing agreement between these intermediate structures was that, copyright would be a domain regulated by the publishers (cartels) who could claim perpetual property rights on all literary

⁵⁶ Aldus profusely complained that the works of his competitors deceived unwary buyers with similarity of the letter and that the works of the counterfeiters represented brazen forgeries of the purest qualities. See Antoine-Auguste Ronouret (1803), *Annales de l'Imprimerie des Alde, ou l'histoire des trois Muannuce et de leurs éditions*. Paris

⁵⁷ An inter-determinate relationship between the economy and politico-legal structures was redefined by the prevailing socio-economic conditions

and artistic works and the government would in turn use the cartels as an effective tool of for policing censorship under the guise of copyright infringement. In that regard, “a perpetual copyright was a much more effective tool for this purpose than a term copyright” (Patterson, 2002b: 36). Examples of the Cartels that emerged in the mid-16th Century was the Guild of Printers and Book Sellers of Venice (Prager, 1944), The English Stationer Company of England and the Paris Corporation of Printers and Publishers in France (Kostylo, 2010). The ideological schema of the governments and monarchies behind this system was that it was easy to censor any material that was to be published by the printers. The publishers would then act as the repressive state apparatus of the government and church to punish and victimise any knowledge producer who wrote anything that criticised the government or the church. In turn, the publishers were incentivised by the state to claim economic privileges in all the literary and artistic works that were published.

The cartel run copyright regime became popular across Europe not because of the economic incentives it provided but because of the censorship features it presented (Prager, 1952). This censorship model was meant to keep “heretical, schismatical, blasphemous, seditious and treasonable books out of the hands of subjects” (Patterson, 2002: 43). Therefore, the cartels were mandated to police the circulation of ‘dangerous’ books and in return the Cartels through their own charter allowed themselves to exert *de-facto* copyrights over books⁵⁸. The formation of the copyright involved the circulation of cultural products as commodities where private rights were subsequently claimed upon (Rose, 2003) at the expense of knowledge producers.

However, the newly introduced exclusionary cartel system also had its own adverse effects especially on the authors. It became extremely difficult for individual authors (as they were non-members of the cartels) to claim privileges and retain control over their own works. In short, authors found it problematic to control the commercial and artistic utilisation of their own works (Kostylo, 2010). The author

⁵⁸ To ensure that the guilds fulfil their duties they were mandated to, “make and ordain and establish ordinances, provisions, statutes ...and to imprison or commit to jail anyone who shall disturb, refuse, or hinder them in the execution of their duties the Master and Wardens of the Company were authorized to seize, take, or burn unlawful books” (Patterson, 2002a).

of the work was left at the whims and caprices of the publishers who were at the liberty of printing the formers' work with impunity without recognising their intellectual contribution (May & Sell, 2006).

The operational scope of the publishers' monopoly dominated by the Cartels created a shortage of texts, which in turn contributed to an increase in the price of books. Resentment against the printing monopoly ensued and illicit trade in books and printing sprouted as demand for literature rose. The resultant wide spread piracy was a dangerous condition, as seditious material began to circulate (Patterson, 1965). The exclusionary inter-determinate relation between the Monarchy and the Guild Cartels created an environment that perpetuated piracy, a practice that become embedded in society because of the structural exclusionary conditions that existed. As such, the victimisation of knowledge producers was embedded in the contestations that emerged between the authors, the publishers and the monarchy.

As contestations, heckling and bundling between the Guild Cartels and the authors became the order of the day, most governments in Europe though at different periods in time intervened. For instance, in 1624 England monopolies over all books were abolished and printers were forbidden to print or reprint books without the author's permission (Rose, 1993). The implication of the revocation of the monopolies on books translated into the authorial recognition but it was purely meant to ensure that, "that libelous or blasphemous literature could be traced to the author, with anonymous works being the responsibility of the printer" (Patterson, 1968: 147). Authors were not recognised for the intellectual contributions to literary arts but they were viewed as "possible producers of scandalous materials⁵⁹" (Rose, 2009: 133). In 1641, John Milton protested that:

⁵⁹ In 1789 France after the overthrowing of the monarchy of Louis XVI, during the French revolution in 1789, the newly formulated National Assembly, dismantled and renounced all the grants of monopoly that had been issued under the crown. it was conceived that the right of the author ought not to be the not creation of the legislature (positive right) but was conceived as the *le droit de' auter* in that it was natural right created through an act of creation and then formalised through legislation (Burkitt, 2001). However the objective of the national assembly was not protect authorial rights but to control libelous material that was being circulated passed a law that required the authors of their work to sign their name on their work so as to make them accountable and responsible for their intellectual productions.

The author appeared in print like a punny (child) with his guardian (the printer) and his censor on the back of his title to be his bail and surety that he is no idiot or seducer. Such compelled infantilism cannot be but a dishonour and derogation to the author, to the book, to the previledge and the dignity of hearing (Milton, 1886: 735).

Instead of recognising the fruits and labour of the author, the government was more interested suppressing the dissemination of slanderous materials. The main reason for the adoption of such a position was that the government was not interested in the private ownership copyright, but it was more concerned of libelous material proliferating into the public (Patterson, 1965). Nevertheless, this was a matter of self-interest, not logic. The law did not alleviate the injustices that saw knowledge producers losing value of their works, through misappropriation of it by the Guild Cartels but it was used as a blunt weapon for silencing dissenting voices.

Resentment and opposition to the oppressive Guild Cartel monopoly increased over the years with John Locke joining the attack on the system in 1693 when stated that:

I wish you would have some care on book buyers as well as the book sellers and the company of Stationers, who having got a patent for all or most of the ancient latin authors (by what right or pretence I don't know) claim the text to be theirs and so will not suffer fairer or more correct edition that any they print here or new comment to be imported without compounding with them, whereby these most useful books are excessively dear to scholars and a monopoly is put into the hands of ignorant and lazy stationers (Locke, 1927: 366).

The lethal attack on the guilds never ceased with Lord Comden, referring the to the Stationers Guild Cartel as a “a gang of notorious pirates who seek to accumulate economic proceeds to works that they never sweated for”(Cobbett, Hansard & Britain, 1966: 319). As the fight against the monopoly held by the Stationers Guild Cartel in England increased, in 1695 the Parliament abolished the monopoly that was held by the Cartels on the basis that;

The Stationers are empowered to hinder the printing of all innocent and useful books and have the opportunity to enter a title to themselves and their friends for what belongs to the labour and right of others ((Patterson, 1965: 235)

However, in 1710 a Copyright Act known as the Statute of Anne was adopted, which introduced four notions of modern copyright law; namely the recognition of the natural right to fruits of labour, just reward for authorial labour, stimulation of creativity, social requirement for accessibility of texts to the public (Davies, 2002). Authorial recognition was at the center in the protection of literary and artistic works. The author was made equal to the publisher, the only difference being that the author did not need to pay the publisher to get a right but it was vice versa, which was significant move towards the “commodification of intellectual property” (May & Sell, 2006: 93).

However, the Statute of Anne accorded rights to the authors with one hand and took them away with the other, as it was very clear that the author upon completion of his work would require the services of the Publishers who had held an oppressive hegemony on the authors for more than one hundred and fifty years. Thus, the ideological premise of an equal footing between the author and Publisher was a fallacy, as no such equality ever existed. Clearly, the absence of provisions that prohibited unfair practices by publishers upon the authors ensured that the latter retained their original *status quo* of domination. Therefore, the fundamental impact of the Statute is on issues that the Act did not legislate. The *de-jure* copyrights were paper based rights because on the ground they were useless as the structures and institutions that had victimised authors previously were not dismantled.

To explicate this observation, the express allowance for the continuance of existent patent monopolies on already existing books for a period of 21 years from the date of the promulgation of the Act (May & Sell, 2006; Patterson, 1968) was a representation of the reproduction of oppressive relations within the publishing industry. The Statute of Anne literary borrowed and codified the complexities that had bedeviled and haunted the copyright system while at the same it introduced ineffective rights for the authors to be capable to control their works⁶⁰.

⁶⁰ In advocating for the promulgation of the Statute of Anne, David Defoe the author of the renowned novel, Robinson Crusoe averred that legislation was important to put stop to a certain sort of thieving which is now in full practice in England and which no law extended to punish (Feather, 1980).

From the foregoing one can deduce that the distributional consequences of the ability to own and control knowledge, intellectual property was frequently used as an instrument of power and once captured it become the basis for further accumulation of power. This power goes to the process of who defines what constitutes intellectual property, “effectively reinforces particular perspectives that may benefit some at the expense of others, rendering some things as property while others remain freely available” (Sell & May, 2001: 468). It is within this power praxis that traditional knowledge holders have been disenfranchised through the reproduction of conditions that initially contributed to its marginalisation and exclusion of knowledge producers.

3.4. RELIGIOUS EXCLUSIONARY POLEMICS OF TRADITIONAL KNOWLEDGE (1500 - 1800)

The unholy alliance that was established between the State and the Church in 6 A.D. continued to reproduce the conditions that marginalised traditional knowledge. As a result, religion became an independent variable concerning the peripheralisation of traditional knowledge in Africa. The ideology underlying the abolition and exclusion of African knowledge was tenaciously reproduced by the Roman Catholic Church which labeled any rival religion or practice as pagan.

For instance, in 16th century Europe there was a radical shift from the reliance on traditional practices to scientifically authenticated methods of knowledge production. Supported with the knowledge infrastructure of the ballooning intellectual property system (see section 3.3.3. of this chapter), different forms of knowledge, which did not fall within the politically recognised knowledge institutional structures were excluded, banished and taunted as witchcraft. This form of knowledge was excluded from the rubric of the intellectual property system, as it was contested knowledge and deemed to represent rebellious attitudes of the peasants against the Church and the State (Day, 1992). The State in support of the Church unleashed its repressive state apparatus, to descend upon the continental ‘pagan’ religion, “forcing them to close their temples and suppressing their priesthoods. Upon its destruction European pagan traditions survived in folk customs and secret communities” (Walker, 1950: 43).

Even after the suppression of 'pagan' religion, the Church unleashed a reign of terror on traditional healers through what was known as the '*Maelleus Malificarum*' (The Witches Hummer), which was officially endorsed by Pope Innocent VIII (Ehrenreich & English, 2010). Based on the *Maelleus Malificarum*, the Church in collaboration with the State instigated witchcraft persecutions as an ideological and repressive mechanism for destroying any traditional practice and knowledge that was contrary to Catholicism. In her analysis of the way this reign of terror was unleashed, Christ (1987: 44) observed that, "witchcraft persecutions were instigated at the instance of the educated elite who saw themselves as defenders of canonical tradition". The *Maelleus Malificarum* set a standard so great that western civilisation is still influenced by its hateful ideas.

Throughout the witch persecutions, the practice of using herbs in healing illness became the basis of charging⁶¹ and convicting 'witches' (Day, 1992). The persecution of traditional healers was based on the ideational understanding that the traditional medicines they used during the healing process contained power over life and death (Day, 1992). The State and the Church viewed that power as a source of life, which threatened the hegemony of the Clergy and the State. Therefore, to render that power ineffective, the Clergy unleashed a campaign that denigrated the practice of traditional healing through witchcraft trials. Such a practice, sought to entrench and assume control of the human mind and knowledge through an ideological practice that marginalised traditional knowledge, while enforcing such an ideology through the repressive state apparatus of the State.

When faced with the misery of the poor, the church turned to the dogma that the experience in this world was fleeting and unimportant⁶². But there was a double standard at work for the church was not against the medical care for the upper class. Kings and Nobles had their court physicians who were priests. The real issue was that of control. Upper class healing under the auspices of the church was acceptable, peasant healing under the shaman was unacceptable (Ehrenreich & English, 2010: 14)

⁶¹ The charge of "witchcraft" came to cover a multitude of sins ranging from political subversion and religious heresy to lewdness and blasphemy. *ibid*

⁶² On Sundays, after Mass, the sick came in scores, crying for help, – and words were all they got: "You have sinned, and God is afflicting you. Thank him; you will suffer so much the less torment in the life to come. Endure, suffer, die. Has not the Church its prayers for the dead?" See (Locke, 1927).

As a means to truncate fear into the hearts of people, the *Maelleus Malificarum* became the basic book of instruction for religious rituals and academic study. Universities represented standard institutions for knowledge production and any rival knowledge produced outside the parameters of the university was banished and tainted as witchcraft. The *Maelleus Malificarum* made it very clear, “that if any person dare to cure without having studied medicine then he or she is a witch and must die” (cited in Day, 1992: 10). Recourse to herbal medication in the development of a puritan culture by the church was referred to as backward and archaic (Day, 1992).

Special mention needs to be made to the fact that, during the period of ‘witchcraft’ persecutions’, for a patent to be granted it ought to have been substantively examined by *Académie des Sciences* and approved by parliament (Prager, 1944). Therefore, any form of knowledge that did not have its origins in science was fanatical and heretical, and its contents highly likely to be formulate the basis of a witchcraft charge. Supported by the *Maellus Malifacarum*, the intellectual property system effectively gave more preference to scientifically generated knowledge rather than traditionally constituted knowledge. This analysis confirms the observations of Skinner (1978) who highlighted that the development of law follows pre-meditated axioms of religious law and naturalism. In conceptualising this analysis Drahos (1998), stated that:

The norms of positive law had to converge with the divine design which natural law communicated to men. The rules of positive law then met the test of validity, not by being a mirror reflection of some metaphysical counterpart, but rather by whether or not they contributed to the overall divine plan (Drahos, 1998: 3).

This devine plan that reified traditional knowledge as witchcraft regenerated itself primarily clothed as an ideological discourse during the conquest and colonisation of Africa by European nations⁶³. The stated approach as was adopted by the missionaries during the colonisation of Africa and centralised around the objective

⁶³ Who brought "education" but Christian missionaries? Who fought against tradition religions but Christian and Muslim missionaries? Who saw traditional religions as deadly adversaries but Christian missionaries? Who therefore detached the African from his [sic] religion but the church people? See Lo Liyong, Taban. (1988) "Reverend Dr. John Mbiti is a Thief of Gods." In Criticism and Ideology: Second African Writers Conference. Conference Proceedings, Uppsala: Scandinavian Institute of African Studies. 81-91

that was meant to integrate Africans into a web of symbolic transactions that would bind the latter securely into the colonising culture (Fabian, 1990).

As a result, African religions and practices were treated as an 'evil' that had to be destroyed to enable the cultural and political domination of the Africans by the Europeans. In the process, institutionalised religion marginalised traditional knowledge by disputing the existence of spirituality within the norms, practices and values of the African community. The African people were advised to abandon the tradition of worshipping their ancestors and to avoid the use of traditional knowledge, as the practice was ungodly (Magaisa, 2007).

For instance, over three-quarters of a century after the London Missionary Society established the first mission in 1857 in what would later become colonial Zimbabwe, one of its employees wrote the Society's Foreign Secretary about the problem of attracting African men to the mission. He lamented that polygamy and beer-drinking seem to be the two great attractions, as the country is steeped in customs which centre around witchdoctors and other medicine men (Waite, 2000: 236)

Therefore, the direct attack of African traditional knowledge under the auspices of religion "changed the body of knowledge, beliefs and customs of African communities thereby resulting in the neglect and peripherisation of traditional knowledge, values, norms and practices" (Trosper, 2011: 379).

The ideological imputation of such an approach was bent on ensuring that domination and abuse of resources extended to all realms of social life of the Africans. The denigration of African traditional knowledge was achieved through a successive regeneration of an ideology that had been formulated by Justinian during the 6th century A.D, which was meant overthrow the mastery of African knowledge. The dominant ruling class influenced the ideological discourses, which in turn created a context of cultural preferences that seem to support the bourgeoisie form of knowledge at the exclusion of African traditional knowledge.

3.5. THE DIALECTICAL IMPACT OF COLONIALISM ON AFRICAN TRADITIONAL KNOWLEDGE (1800 - 1960)

The imperialist notions of knowledge misappropriation reproduced themselves in the 19th and 20th Century during the colonisation and conquest of Africa by European states, who had the aim of looting anything that was within their scope of influence. In essence colonial Africa, “became a laboratory of caprice where all sorts of clinical trials (political, social, and cultural) were performed, causing untold suffering to African communities, whose effects still remain visible to this present moment” (Wanda, 2010: 4). The riotous dialectical inter-phase of colonialism to a larger extent destroyed Africa’s intellectual, while leaving a legateship that foisted western thought and cultural realities of Africans (Wanda, 2013b: 4). African resources including their traditional knowledge were misappropriated under the auspices of them being raw materials for scientific exploration in European orientated laboratories (Hountondji, 1997).

The regeneration of the imperialist notions of knowledge misappropriations in Africa can be traced back to Napoleon Bonaparte, who in 1799 accompanied with the French army embarked on the Egyptian expedition with the aim to collect scientific information and artifacts from the ancient land of Egypt (Jordan, 2003). With his army was a party of 300 men of science and letters whose objective was to record the culture of Egypt (Russell & Russell, 2003: 1). Though the Egyptian expedition was a military failure for Napoleon, the accompanying scientific expedition uncovered the Rosetta stone in Rashid, an artifact that became the foundational basis for the study of Egyptology. After the discovery of the Rosetta Stone, a knowledge imperialist rivalry ensued between Britain and France which opened up Egyptian knowledge and culture to looting and plunder. The zenith of such misappropriations reached their greatest heights during the uncovering of the tomb of Tutankhamen in 1922 (Reid, 1985). It has been argued that deciphering of the Rosetta stone in 1822 by Jean Champollion, represented the first victory of the West in its cannibalisation of African knowledge and civilisation (Hassan, 2003). Therefore, the invasion of Egypt by Napoleon Bonaparte was essential for the new colonial paradigm of victimisation as possession of the antiques of Egypt by colonial powers became a claim for cultural hegemony (Hassan, 2010).

Furthermore, the colonisation of Africa saw the westernisation of African knowledge systems. For instance, when the British invaded Egypt they were:

Initially not concerned principally with military and economic power over Egypt but the knowledge of the orient...the objective was to have such knowledge about the "distant other" in order to be able to dominate it (exert authority over it). This in effect meant denying the autonomy of knowledge over the object of domination since to do so would have recognised the existence of knowledge over object itself. The object's existence could only be recognised in the world of colonial representatives in as much as we know it (Said, 1992: 87).

As consequence, western knowledge tried to establish hegemony within an African cultural set up dominated by African religions and practices. Such an approach had scathing implications to traditional knowledge because the imposition of a knowledge system that is alien to the other is bound to cause harm (Magaisa, 2007). Immediately contestations between the two knowledge regimes flared, as traditional communities fought to maintain the place and relevance of their knowledge (Magaisa, 2007). The ideological battle between the two knowledge regimes manifested itself through the wars fought between the traditional communities and the early European settlers.

African traditional practices represented a source of power and resistance to European colonisation. Traditional healers and Spirit mediums played the dominant role against the intrusion of European culture within their communities. As a means to suppress such resistance besides the use of repressive means, the religious doctrine as developed during the witchcraft craze was reproduced to label African traditional practices as devilish and the traditional healer as the devil incarnate. However, traditional knowledge was consequently side lined or marginalised not because it was archaic or backward, but because western knowledge was propped up and supported by other factors that sought to establish a colonial state.

3.5.1. Role of colonial laws in marginalising traditional knowledge

Colonial legislation as a repressive and ideological state apparatus played a significant role in suppressing the significance of traditional knowledge in colonial Africa. Ideologically the law facilitated the process of assimilation and integration of the subject nations into the overall ideological realms of the oppressive intellectual property regime. The Berlin Act of 1885 formalised the Europe's scramble for Africa (Peacock, 2013b) and the liberation of the 'Dark Continent' which consequently resulted as Keevy (2008) put it "in the European cannibalisation of Africa" (cited in Peacock, 2013b: 5)

Accordingly, upon the ratification of the Berlin Act, imperialist European nations declared through their respective national legislation that the operational ambit of their intellectual property laws and treaties would extend to all their colonies. As a result, "non-western societies, principally Africa were swept under the aegis of the international intellectual property system through the agency of colonial rule" (Okediji, 2003: 316). The effect and consequence of such an approach meant that all the ills associated with patents or copyright (See Section 3.3. of this chapter for an in-depth discussion of the challenges associated with the intellectual property system) were automatically extended to "his majesty's colonies and plantations abroad" (Bently, 2011: 163). In French colonies, African natives were treated as subjects of French colonial rule, a policy which included political integration through the direct application of French law within French territories (Betts & Asiwaju, 1990).

Two ideological objectives dominated the integration of imperial intellectual property law in Africa. Firstly, it was to safe guard the interests of the metro-pole right holders who wanted to control knowledge production in colonial markets (Peukert, 2012) and secondly, to exclusively exclude and marginalise traditional knowledge from gaining prominence over western knowledge. Early on in this chapter (see Section 3.4) it was discussed that religious factors played a dominant role in exclusion and subjugation of European folklore and traditional knowledge in preference for scientific based evidence that was supported by the intellectual property system. Consequently, the introduction of intellectual property into

Africa was meant to secondarily reproduce the witchcraft trials that haunted Europe, in a bid to suppress the practice of traditional knowledge.

The repressive state apparatus of the colonial governments enacted oppressive laws that criminalised the practice traditional knowledge. These laws found their expression in the notorious Witchcraft Suppression Acts⁶⁴, enacted across the African continent. The general running ideology of the witchcraft legislation aimed to punish anyone who claimed to have knowledge about healing herbs through labeling that practice as witchcraft, despite the fact that most herbs had nothing to do witchcraft. Furthermore, the definition of witchcraft was vague, as it was defined as “the throwing of bones, the use of charms,⁶⁵ and any other means or devices adopted in the practice of sorcery” (Chavunduka, 1980). In the definition there was nothing that referred to witchcraft, thus the enacted legislation had the prime objective to witch-hunt those who practiced traditional knowledge. The severity of the legislation did not only affect the practitioners but also people who consulted and patronised the ‘witchdoctors’ for their services⁶⁶.

The operational ambit of these laws, included the consistent inferiorisation of traditional cultures, concerted efforts to erase existing systems of knowledge and their replacement with western-driven belief and knowledge systems (Osman, 2010). The implementation of these laws “successfully culminated in, the absolute submission of the communities and stigmatisation of their knowledge systems with the consequence that most of the communities were trapped in a design that perpetuated their own subjugation” (Proglor, 1999: 1) through “western education, christianisation, and degeneration of relatively self-sufficient economies into dependent consumers” (Eyong, 2005: 131). Briefly, the laws were the cutting edge of colonialism, an instrument of the power of an alien state and an instrument of coercion, which conceptualised new relationships and power against African traditional communities and their associated knowledge.

⁶⁴ Examples of these include the Witchcraft Suppression Act (1895) of the Cape Colony, The Witchcraft Suppression Act (1898) of Zimbabwe, Witchcraft Act of Zambia (1914), Witchcraft Act of Uganda (1957),

⁶⁵ Many charms have nothing to do with witchcraft. A large part of the traditional healer's practice is concerned with prescribing remedies and preventive charms. Some of these charms confer or are believed to confer immunity against specific types of illness or to protect the individual against misfortune. See (Chavunduka, 1980)

⁶⁶ See section 8 of the Malawian Witchcraft Act of 1911 which punished anyone who claimed to be witch doctor through life imprisonment

3.5.2. Impact of the western educational systems on african traditional knowledge

The educational ideological state apparatus of the colonial governments played a significant role in the exclusion of traditional knowledge from the main institutional structures of knowledge production. Through the institution of education, the colonisers managed to inoculate the African population with the notion that traditional knowledge had no practical application in the real world because it lacked scientific backing (a structured process that was used to exclude certain types of knowledge from the realms of intellectual property). For instance in 1938 a cleric called Father Shropshire highlighted that,

Not until a truly Christian and scientific education has corrected the balance of the present native psychological complex and enabled the Africans to meet their phobias with critical mind ... will they throw away the beliefs in magic and sorcery (cited in Chavunduka, 1994: 7).

The colonial education discourse supported by religious institutions undermined the importance of traditional knowledge and practices as the youth were taught that “their parents religious beliefs, cultural practices and traditions were superstitious, backwards, inferior and lacking supporting scientific empirical evidence” (Trosper, 2011: 379).

The colonial education system hampered and interfered with the traditional education systems as it sought to replace African traditional knowledge with European knowledge. The system excluded the traditional ways of learning and much of the content was foreign to the traditional communities (Magaisa, 2007). The net effect of the colonial educational discourse created new African elite, whereof most of them were educated at mission schools, consequently expressed disdain of in African traditional culture as they were deeply seated in the European way of doing things (Waite, 2000). However, the risk of them reverting to their traditional norms and values was so high to the extent that the missionary educators ensured that they do not relapse back to the traditional system. In commenting in their 1934 Southern Rhodesia’s Annual review, a Salvation Army officer highlighted that, “Army Officers and Teachers have ever to be on the alert

to prevent their people [African converts], when sick, being doctored by the heathen⁶⁷”

3.5.3. Cultural violence

In a bid to sanctify western knowledge as the preferred form of knowledge over traditional knowledge the colonial governments, denigrated traditional knowledge as an embodiment of witchcraft and the devilish practices (Chavunduka, 1994). The colonial governments presented western knowledge as “scientific” and attached the “unscientific” tag to traditional knowledge as it was deemed not be verifiable through western procedures of knowledge production. To put this argument into perspective, reference ought to be given to one of the Parliamentary debates that were made in colonial Zimbabwe, whereof a motion was introduced to recognise African traditional medicine as a legitimate form of knowledge. The response from the then Speaker of Parliament left a lot to be desired as he averred that, “we should not encourage the use of these primitive remedies . . . either in the local market or in an export market⁶⁸”.

Such notions were derived from the basic premise that the traditional African way of life was uncivilised, barbaric and primitive (Arewa, 2006). These statements were not merely descriptive of the nature of the subject matter but were assertions of power and superiority of those making the descriptions” (Magaisa, 2007: 10).

The knowledge and power nexus ... generates inequalities and domination by the way such knowledge is generated and structured, the way it is legitimised and alternatives are delegitimised, and by the way in which such knowledge transforms nature and society. Power is also built into the perspective which views the dominant system not as a globalised local tradition, but as a universal tradition, inherently superior to local systems (Shiva, 1993: 2)

The western knowledge system sought to establish a monopoly whereof it was to be the only recognised system of knowledge while it relegated and denigrated African traditional knowledge as a superstition. Ultimately, “western scientific

⁶⁷ Salvation Army, Officer’s Review (May, 1934).

⁶⁸ Rhodesian Parliamentary Debates (House of Assembly), Vol. 77 (1970).

knowledge breeds a monoculture of the mind by making space for local alternatives disappear ... very much like monocultures of introduced plant varieties lead to the disappearance and destruction of local diversity” (Shiva 1993: 83).

The dominant monoculture in which the western knowledge system sought to establish hegemony extended to all spheres of society. In commenting on the exclusionary polemics of western knowledge over traditional knowledge, a commentator mentioned that:

Opposition to traditional medicine was very strong among the missionaries, colonial officials, doctors and nurses who laid the foundation of western medical services in colonial Africa. The champions of western, medicine took various measures against traditional medicine, such as seeking to undermine its legitimacy through the mission schools, organizing their own professional organizations which could censure colleagues who referred patients to traditional doctors, and insulting patients who used traditional medicine. People could be fired if they missed work while undertaking traditional medical treatment, but those who were treated by western doctors could submit certificates and letters attesting to this (Waite, 2000: 238).

Consequently, colonial institutions participated in the segregation of traditional knowledge. As Althusser (2006) highlighted that ideology transcends all government and private institutions, thus making them ideological state apparatus of the bourgeoisies. The ideological nemesis of the ‘dominant western knowledge’ infiltrated all institutions from religion, parliament, medical institutions and schools in a well-orchestrated agenda to marginalise traditional knowledge.

5.3.4. Linguistic imperialism

The exclusion and marginalisation of traditional knowledge within colonial Africa even extended to discursive practices of the institutional apparatus of the colonial governments. The imperialist governments attacked African indigenous languages, as language was recognised as the main repository for traditional knowledge systems, whereof traditional knowledge was stored and transmitted by oral means⁶⁹ (Magaisa, 2007).

⁶⁹ Language serves as dynamic bridges between the past and the future and as vehicles for the continued and continuously innovative, transmission of a community's knowledge, beliefs, values and practices . There is a strong connection between linguistic diversity, biological diversity and traditional knowledge. Linguistic

Colonial African communities through duress were coerced to master the languages of the imperialist European nations and apply same in their studies and communication. Ngugi (1986: 6) put this argument into perspective when he stated that, “one of the most humiliating experiences was to be caught speaking Gikuyu [local language] in the vicinity of the school. The culprit was given corporal punishment - three to five strokes of the cane on bare buttock”. European language became a dominant language and while the indigenous languages were only limited to domestic use.

The net effect for the marginalisation of indigenous language in every day social life ensured that the latter lost its space thereby restricting its use, which consequently affected the transmission of traditional knowledge orally from one generation to another. An analysis of this phenomenon made African communities to, “see their past as one wasteland of non-achievement thereby making them want to distance themselves from the wasteland. It makes them want to identify with that which is furthest removed from themselves; for instance with other people’s languages rather than their own” (Ngugi 1986: 5). Language imperialism thereby became a way of marginalising traditional knowledge from the lives of the African communities.

5.3.5. Notions of colonial traditional knowledge victimisation

The introduction of the western knowledge system in Africa was more of an ideological construct rather than as a structural imputation. It sought to domineer over the knowledge and cultural heritage of traditional communities while at the same instance replacing the former with its own cultural preferences. The need to identify traditional knowledge misappropriation and victimisation of its holders within the domains of colonisation is very imperative as it allows one to understand the context within which current traditional knowledge victimisations apparently exhumed themselves. The victimisation of traditional knowledge holders in Africa transcends beyond the intellectual property system, as the question for

ecologies and biological ecologies are mutually related through human knowledge, use and management of the environment and through the languages used to convey this knowledge and practices (Maffi 2002: 386).

knowledge imperialism is more of a question of cultural domination. The words of Hall (1994) would put this argument into perspective:

All I could think of was the arrogance that had gone unnoticed. It had been taken for granted not only that our system as the best and the most sensible one in the world, but that we had a right to impose it on anyone in our power. I now know, however-lest I appear to be unnecessarily hard on my fellow countrymen-with the benefit bestowed by years, that it isn't just my own culture but all cultures that act in these ways. Each culture has its own reasons and rationalizations for forcing its way on others. (Hall, 1994: 70)

It would be misleading therefore to argue that the origins of the victimisation of traditional knowledge communities are purely associated with colonialism and integration of intellectual property into Africa during the 19th century. The misappropriation of traditional knowledge and the victimisation of the possessors of the knowledge is one that originated when the Persians invaded Egypt in 525 B.C.

Colonialism and intellectual property are merely an extension and reproduction of the forms knowledge imperialism. Colonialism is but a structure of the imperialist ideology. In that light, colonialism created conditions that furthered the imperialist agenda of knowledge misappropriations in Africa, while intellectual property set up the frameworks, which facilitated the former. The institutional framework meant to serve the ballooning commercial interests of the Europeans within colonial Africa while at the same instance segregating traditional knowledge. It is however, difficult to understand the role intellectual property plays within the overall knowledge imperialist notions without a historical perspective on how it was introduced into Africa.

Therefore, the victimisation of traditional communities within the intellectual property realm is one that cannot be purely understood at a local level. It is one that ought to be explored from a regional and international perspective, as the latter and the former determine the material conditions of their existence at a local level (Gramsci, 1971). In trying to grasp this reality there is need to see how Africa in its totality was interpellated into the overall hegemonic international intellectual property regime during the post-colonial period.

3.6. POST-COLONIAL EXCLUSIONARY POLEMICS OF TRADITIONAL KNOWLEDGE (1961 - 1994)

After the independence of most African states in 1960, the dominant imperialist ideology regenerated itself within post-colonial Africa. Despite the independence, most African are still reliant on “ western political constructs, socio-legal ideas and judicial and epistemological philosophies” (Wanda, 2013b: 4).

3.6.1. Robust integration of africa into the international knowledge economy

After the independence, most African states were automatically integrated into the international intellectual property system without even negotiating for their participation in such. For instance, international intellectual property treaties such as the Berne and Paris Convention had declaratory clauses which provided for the continued adherence of countries to the Convention despite change of government (Ricketson & Ginsburg, 2005). Furthermore, the Berne Convention did not have a mechanism that distinguished independent states from colonial states. Therefore, International law set the:

... conditions of application, it being left to the former colonial states to fit them within the framework of their national laws. When the present state separates from the colonies or overseas territory and grants its independence, continuity must be normally assumed, the new state must continue to benefit from the advantage provided by the convention in question and remain bound by the obligations derived from it...This continuity is all the more necessary as the right acquired by third parties must be safeguarded (Ricketson & Ginsburg, 2005: 806).

In other words, African states were subjected to obligations of adherence, which consequently contributed to the inheritance of an intellectual property system that did not service the interests of African traditional knowledge. On the converse, it protected the interests of former colonial masters. Formalism glossed over the purpose and functions of the intellectual property system in Africa legitimised a process by which African countries inherited colonial legislation, firmly secured under the guise of international law divorced from the domestic needs, priorities or contains of the African countries.

Congo Brazzaville raised such concerns in 1960 during the 11th session of the United Nations Economic Scientific and Cultural Organisation whereof it highlighted that the intellectual property system never met the needs of Africa, as “the legislation that was derived from European Countries did not reflect the problems [the real existential conditions] of Africa.”⁷⁰ The continued adherence of newly independent African states to the intellectual property system that supported the western knowledge model amounted to inheriting a system that had marginalised traditional knowledge during the colonial era. However, dismantling the ghosts of the colonial regime was a complex process as reproduction of the knowledge imperialist ideology was facilitated by the “classical international legal system that consolidated the state sovereign as the only subject of international law and extended a proceduralised order to the universal application of civilisation as an expression of European enlightenment” (Kennedy, 1997: 569). Consequently, the recognition of individuals and communities together with their associated traditional knowledge at a local level was impugned by such a doctrine that only recognised states rather than traditional communities and their values.

Furthermore, after the independence of most African states in 1960, traditional knowledge remained in the peripheries of western knowledge because colonialism assimilated African systems and institutions into the exploitative western model. Therefore, de-colonisation literary restructured the context of engagement between Europe and Africa as the transition from subjects to independent states was mediated by western created international institutions (Anghie, 2001). To surmise the foregoing the words of Crabb (1970: 32 -33) are worth noting:

To a substantial degree, independence in Africa has involved principally a formal change of leadership at the top rather than a reordering of the structure of the society. It has not altered the fundamental structures of these legal systems or the nature of the relationship between their European and customary parts. Colonial laws governing the juridical systems were merely replaced by national institutions and statutes containing similar dispositions. Still, this transition has caused varying degrees of disruptions and difficulty.

⁷⁰ See Report on the Working Party on the Development of United Nations Economic Scientific and Cultural Organisation activities in Tropical Africa. 11 C/PRG/20. 5 December 1960. Paris. Page 9. Document also available at: <http://unesdoc.unesco.org/images/0016/001630/163089eb.pdf> accessed on 7 July 2014

The words of Althusser (1977) are relevant in this assessment where he highlight that, every social revolution does not *ipso facto* transform the ideology and structures of the previous order because they have their own consistency and history that allows them to transform, recreate and establish secrete conditions beyond their immediate context. Gramsci (2000) supported this observation when he highlighted that the establishment of hegemony over subject nations is a continuous process, facilitated by an international structure. Therefore, the transition from colonialism to political independence did not alter the instruments that perpetuated structural and institutional victimisation of traditional knowledge communities in Africa. On the converse, these institutions and structures reproduced oppression and social imbalances that previously haunted traditional knowledge communities.

3.6.2. Dependence on the western ideational education system

The major objective for the integration of independent African States into the intellectual property system was designed to meet the interests of Western countries that were the net exporters of intellectual works.⁷¹ On this backcloth, the recently de-colonised African States were struggling to invest “heavily in education, and especially in the training of scientists and technicians” (Merson, 2000: 283). However, the education systems that the countries had inherited from their former colonial masters largely followed western notions of academia. Accordingly, the newly independent African States thus became heavily reliant on western methods and textbooks of education thereby making them consumers of imported academic literature. Research institutions sprouted all over the continent which too relied on the import substitution schemes for the transfer of industrial technology (Merson, 2000).

The hegemony of Western knowledge systems entrenched itself into the roots of learning in Africa together with all its associated ravages of the contemporary knowledge imperialism and the capitalist globalisation (Zezeza, 2006). One scholar highlighted the extent of the proliferation of western knowledge system:

⁷¹ See African Study Meeting on Copyright Draft Recommendations, Document Number RADA/11, page, Brazzaville 5 - 10 August 1963.page 2 Document available at: http://www.wipo.int/mdocsarchives/RADA_63/RADA_11_E.pdf

...it is everywhere, dominating the disciplinary and interdisciplinary discourses and departments, paradigms and publications, academic politics and practices (Zezeza,2006: 197).

The western ideologies were entrenched into the academic world, to the extent that some African scholars, “who were exposed to Eurocentric education denied the existence of African philosophy during the great debate of the 1960’s and 1970’s” (Nwala, 1992: 5). It was their argument that Africa could not create any tradition of philosophy if they did not integrate it into western philosophy.

A further challenge was that, access to textbooks was inhibited by the copyright regime, which made these literary and artistic texts very expensive. Instead of addressing the challenges, African states internalised and further entrenched the Western model of learning during the African Copyright Symposium held in Congo Brazaville from the 5th to the 10th of August 1963 where they recommended to Western nations that

African countries be permitted to respect their own folklore on the other hand and permitting on the other the free use of protected works for educational and school purposes (emphasis of the author).

The internalisation of western knowledge system by African States provided a minimum opportunity for traditional knowledge ways of knowing to find their way into the academia curricula. In other words, the newly independent African States adopted the colonial discourse that labelled traditional knowledge as inferior and invaluable to knowledge production and dissemination. The adoption of the western knowledge regime can be viewed as a bid to “turn an illiterate African from someone who is illiterate from the alphabet, to an absolute ignorant, pitting what is not written to be thoughtless and primitive, a theme which has been central to the disempowerment of traditional knowledge” (Hountonji, 1997:33).

To surmise the foregoing argument the words of Hoppers (2002), are central in appreciating the extent to which the post-colonial education system segregated and marginalised traditional knowledge while at the same instance the African population was made a victim to such a policy. The reliance on western ways of knowing by and large rendered African knowledge irrelevant by colonialism and introduction of modern science (Hoppers, 2002: 10).

3.6.3. Culturally rootless African state

Most post-colonial governments in Africa are not rooted in the cultural traditions of the communities from which they assume legitimacy. They are driven by modernity and cultural benchmarks of western societies. Such cultural alienation of African governments, is as a consequence of western imperialist ideology which instils an, “allergic instinct or reaction against African cultural rootedness, which is castigated as backward, ignorant, superstitious, primitive, and parochial” (Wanda, 2013b: 6). Resultantly African governments have become non-organic thereby making them more incapable of addressing the traditional knowledge needs of their communities.

Mandaza (1999), confirms these assertions when he argued that African states have become a mere extension of Europe. The basis of his argument is that the emergence of the *petit* or the *compradorian* bourgeoisie through the politics of reconciliation allowed the latter to forgive their oppressors in exchange of state power without the fulfilment of social justice and social transformation of the majority (Mandaza, 1999). As a result, the African state became a hostage state, as “old relations of exploitation and unequal structures remained in exchange of state power” (Mandaza, 1999: 81).

Resultantly, within the premises of traditional knowledge the African post-colonial state creates an enabling environment for traditional knowledge exploitation, whereof the former imperialists “implant higher technologies to supplant local based traditional inventions thus destroying home grown technology” (Coetzee, 2001: 624). In the process, the dominant international capital strips former colonial states of their resources and uses them to their own development.

Such a phenomenon explains the current traditional knowledge misappropriations that have hogged most African states, where the abuse of traditional based innovations have been used to profiteer international based corporates. Cases of misappropriation and patenting of the *Hoodia cactus* in South Africa and that of the Rose Periwinkle in Madagascar immediately come to mind (See Chapter 1 for an extensive discussion on how this traditional knowledge has been misappropriated and patented for the benefit of western based conglomerates).

The misappropriation of these traditional remedies was to some extent facilitated by the silence of the respective governments despite widespread outrage against such misappropriations. The ideological prejudices against traditional knowledge further facilitated the neglect of the importance of traditional knowledge.

3.6.4. Ideological prejudices to traditional knowledge

Traditional knowledge in post-colonial Africa has remained in the margins of western knowledge as it has been constantly been referred to as informal knowledge (Hountondji, 2002a). This process has contributed to the stifling of traditional knowledge by the law. For instance in 1965 Benin a law was passed to prohibiting the production of locally produced Palm Oil wine purely on the basis that the processes of making such wine included cutting down palm trees (Hountondji, 2002a).

These prejudices have also been produced at an international level whereof the protection of traditional knowledge is regarded imperative yet it is undermined by the international institutional ideological frameworks. For instance, questions about how to protect of traditional knowledge in post-colonial Africa came to the fore in 1960 during the 11th session of the United Nations Economic Scientific and Cultural Organisation. At this conference, it was recognised that the intellectual property system never met the needs of Africa as “the legislation that was derived from European Countries did not reflect the problems of Africa”.⁷² Based on such an agenda African Countries pushed for the recognition and protection of traditional knowledge in the Berne Convention, which is an international treaty that protects copyright in literary and artistic works.

However, Ringer (1967) a participant in the Berne Revisions observed that the latter:

Paid a great deal of lip service to the interests of developing countries ... the attitude of developed Berne members was full of apathetic resignation and futility. They exhibited a notable lack of leadership and of affirmative actions (Ringer, 1967: 1067)

⁷² See Report on the Working Party on the Development of United Nations Economic Scientific and Cultural Organisation activities in Tropical Africa. 11 C/PRG/20. 5 December 1960. Paris. Page 9. Document also available at: <http://unesdoc.unesco.org/images/0016/001630/163089eb.pdf> accessed on 7 July 2014

The Berne Revisions resulted in an obscure Article 15(4) of the Stockholm Act, which allowed a member country to secure some international protection for its unpublished works of folklore by filing a declaration with the World Intellectual Property Organisation (Ringer, 1968). The practical effect of this provision is by no means clear, but it would presumably not require a country to protect foreign works that it would consider in its own public domain (Ringer, 1968). The vagueness of the resultant article effectively did not have any binding effect on Berne Union Countries, thus making the folklore provision as proposed by Africa states a *brutum fulmen* (paper bulldog). Therefore, the Berne revisions of 1967 were used as a platform for the alienation of the African interests in traditional knowledge (Spinello, 2009) as they re-organised the way within which industrially developed nations assimilated the creative labour of traditional knowledge communities from African countries. The glaring vagueness of the folklore provision was an act of imperialism within the knowledge domain, which was meant to give an impression that something had been done to cater for the African interests while in reality it maintained the status quo.

The same ideological prejudices towards the non-protection of traditional knowledge can also be seen within article 8 (j) Convention of Bio-Diversity (CBD) which mandates member states to provide protection to knowledge that is associated with genetic resources and bio-diversity. Clearly the Convention does not expressly call for protection of traditional knowledge but it generally proffers tools which are driven by the underlying objective (Muller, 2013). Therefore, the protection of traditional knowledge is inferred. Furthermore, the protection of the knowledge that is associated with genetic resources and biodiversity has a qualifier that subjects it to state protection, a state that is non-organic to the cultural preferences of African society.

The ineffectiveness of the CBD becomes more apparent upon a cursory analysis of Article 16 (5) of the Convention, which highlights that, “...*patents may have an influence on the implementation of this convention*”. The curious side effect of this provision is, considering the immense role that is played by intellectual property in the Biotechnology industry in genetic resources, why would the convention afford an obscure lifeboat clause to the patent industry. This question

comes from the background that there is research that has confirmed that patent regime is intrusive and exploitative with regards to traditional knowledge (Kadidal, 1993; Roht-Arriaza, 1995). Deductive reasoning would advise that the inclusion of the provision in the Convention, “clearly shows that the drafters of the Convention deliberately subordinated the interests of conservation and sustainable use of biodiversity to the often competing interests of industry.” (Mgbeor, 2001: 168).

The marginalisation of traditional knowledge became more apparent within the Trade Related Aspects on Intellectual Property Rights Agreement (TRIPs), adopted in 1994. It established global minimum standards on the protection of intellectual property world over. Supported by global capitalism the TRIPs agreement reproduced gross inequalities between the rich nations and the poor nations (May, 2013). In light to the question traditional knowledge the TRIPs agreement created structures that permitted corporate ethno botanists to rifle through the shaman’s bag in search for pharmaceutical miracles (Aoki, 1998). For instance Article 27 (3) (b) of the TRIPs Agreement permits member states to protect plant varieties either by patents or any other *sui generis* means. This provision allows for the misappropriation of traditional based genetic resources that lie within traditional communities. Therefore, instead of protecting traditional knowledge the TRIPs permits piracy of such traditional based genetic resources through the use of intellectual property.

It is from this basis that the TRIPs agreement has been attacked as one of the international treaties that does not respond to the innovative trends of indigenous communities (Weeraworawit, 2003) because it reflects and represents western knowledge values (OseiTutu, 2011). The globalised protectionist model as is introduced by the TRIPs agreement has further been criticised for its ability to use intellectual property law to expand into other societal domains and cultural objects that permit the subjection of the latter to misappropriation and use it at a global scale without paying benefits to the knowledge generating communities (OseiTutu, 2011).

However, attempts were made in the year 2001 to reconcile the brazen asymmetries that are apparently existent between the TRIPs Agreement and

Convention for Bio-Diversity⁷³ through the adoption of the Doha Declaration (2001). However, since the declaration was passed in 2001, no progress has been made in the amendment of the TRIPs Agreement to accommodate the protection of traditional knowledge. While a plethora of proposals have been submitted for the protection of traditional knowledge under the TRIPs Agreement, such proposals have met fierce opposition from countries like the Republic of Korea, the United States, Japan, Canada and Australia who have been arguing that the issue should be discussed at WIPO (Adede, 2003). Ironically, these are the same states that refused during the TRIPS negotiations, for trade related intellectual property issues to be discussed at WIPO.

The way the TRIPs Agreement is structured makes it difficult for traditional knowledge communities to claim any intellectual property rights over the unmediated products of their traditional knowledge. As a result, traditional knowledge is consigned to the global commons. This produces a striking imbalance whereof the ‘creations of the mind’ of modern science are considered property and eligible for the full panoply of TRIPs protections, while the ‘creations of the mind’ of traditional communities are not (Bratspies, 2007). When goods and services are made possible by combining traditional knowledge with western science, the contributor of the western scientific thinking is entitled to patent protection; a recognition of his or her property interest in creations of the mind under the TRIPs Agreement while the contributor of traditional knowledge is entitled to nothing (Bratspies, 2007). At its worst, the TRIPs legitimises the transfer of exclusive ownership and control of biological resources and traditional knowledge from traditional innovators to western ones, with no recognition, reward or protection for the contributions of the traditional innovators (Bratspies, 2007). Thus, in the definitional moment itself, the TRIPs Agreement excludes indigenous innovation about biological diversity from what will be property in this new globalised legal world.

By defining property to exclude the resources of traditional communities while including what is developed from those resources, this vision of property

⁷³ See Paragraph 19 of the Doha World Trade Organisation Ministerial Roundtable Declaration at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

reconstructs the cycle of victimisation that was at the heart of colonialism. The TRIPS Agreement has to date proven itself resistant to accommodating and protecting traditional knowledge within the hyper-owned world it has created. The fate that apparently seems to have been suffered by traditional knowledge holders through the TRIPS Agreement concerning the protection of traditional Knowledge seems to have influenced proceedings regarding the protection of genetic resources, traditional knowledge and folklore at the World Intellectual Property Organisation (WIPO IGC). The impasse that has been reached at the World Intellectual Property Organisation Intergovernmental committees is clear reflection of the imperialist notions on the non-need to protect traditional knowledge. The conflicting positions between “industrialised countries and industrialising countries is based on the utility of addressing the concerns of traditional knowledge holders by creating new legal rights” (OseiTutu, 2011: 174). Developing countries tend to support traditional knowledge protection while the industrialised countries are more hesitant. For instance, in its response to a 2007 WIPO questionnaire, the United States conveyed its reluctance to move forward on international legal protection for traditional knowledge (Kuruk, 2006).

3.7. CONCLUSION

The misappropriation of traditional knowledge in Africa is one that needs to be understood with a historical context of knowledge imperialism and colonial capitalism. The clash of cultures between the traditional knowledge and western knowledge systems, has contributed to the victimisation of traditional knowledge holders not only in a colonial context but also in a post-colonial framework. The intellectual property system supported by ideological state apparatus has further entrenched the marginalisation of traditional knowledge with the knowledge realm. The next chapter shall explore whether the factors that contributed to the exclusion and marginalisation of traditional knowledge, are existent with the traditional knowledge frameworks in Africa. Such analyses will assist in developing a conceptual framework that is better suited to address the needs of traditional knowledge holders especially within a context of colonialism and ideological prejudices.

CHAPTER 4

TRADITIONAL KNOWLEDGE PROTECTION IN AFRICA: A LEGAL FRAMEWORK FOR CARTELS

When plunder and looting becomes a way of life for a group of men living in society, they create for themselves in the course of time a legal system that authorizes it and a moral code that glorifies it (Bastiat, 1873)

4.1. INTRODUCTION

The regional institutional apparatus for the protection of traditional knowledge in Africa were crafted in response to the misappropriation nemesis which is estimated to be at more than US\$ 5 billion per year (Visser, 2004). The response has more often been characterised by ‘laws’ and ‘incentives’, which resemble ‘a carrot and stick dichotomy’ that reigns in on those who misappropriate traditional knowledge while at the same instance creating an enabling environment for traditional knowledge value maximisation and equitable access benefit sharing of the proceeds. The steps adopted for the protection of traditional knowledge in Africa are commendable as they represent an initiative in the field. However, the encroachment of intellectual property rights⁷⁴ and western epistemologies within the perceived ‘new’ regulatory framework raises concerns that it might consequently contribute to the commodification and fetishisation of traditional knowledge.⁷⁵ The approach adopted towards the protection of traditional knowledge in Africa represents a ritualisation of the law where it is systematically used to create a false consciousness, under the guise of addressing the needs of traditional knowledge holders.

In addition, the history of knowledge protection has demonstrated that regardless of how detailed, specific, monitored or enforced the rules and incentives are; knowledge misappropriations flare the ideological prejudices that have haunted knowledge producers. These ideological prejudices are entrenched in the

⁷⁴ The dominant ideology behind the intellectual property is that of value creation. Therefore the expansion of intellectual property rights into traditional knowledge contributes to its colonisation by commodity form

⁷⁵ Karl Marx in his objective analysis of society argued that the emergence of industrialisation contributed to the elevation in the value of the product and the reduction of the workers labour, thus the term “commodity fetishism”. See generally (Coombe, Schnoor & Ahmed, 2006) By this, participants in commodity production and exchange experience and understand their social relations as relations between the products of their labour—relations between things, rather than relations between people. See also (Hudson & Hudson, 2003)

perceived ‘new’ institutional apparatus thus perpetuating and internalising the subjugation and victimisation of knowledge producers. As a consequence the current traditional knowledge framework in Africa represents a case where traditional knowledge holders are “exploited and mystified to the extent that they have been made accomplices for their executioners” (Hountondji, Evans & Rée, 1996: 170).

4.2. BRIEF OVERVIEW OF TRADITIONAL KNOWLEDGE PROTECTION IN AFRICA

The framework for the protection of traditional knowledge in Africa is constituted at two levels, notably at a national level and at a regional level. At a national level, only two countries have adopted legislation that expressly protects traditional knowledge, namely Ethiopia and Zimbabwe. However, such national legislation does not expressly confer protection to traditional knowledge, as it is more concerned with matters relating to the preservation of biodiversity and its associated community knowledge.

At a regional level, the African Union (A.U),⁷⁶ African Regional Intellectual Property Organisation (ARIPO),⁷⁷ and the African Intellectual Property Organisation (OAPI),⁷⁸ adopted regional instruments that protect traditional knowledge in Africa. The A.U established a model law to maintain the customary relationship between traditional knowledge, genetic resources and various cultural protection including rights that are attached to indigenous creations and inventions (Frommer, 2002). ARIPO adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Hereinafter referred to as the Swakopmund Protocol), which protects traditional knowledge and cultural

⁷⁶ The African Union is made up of 54 African States. Morocco is the only state that is not part of the African Union.

⁷⁷ ARIPO came into existence in 1976 pursuant to the provisions of the Lusaka Agreement. Its membership is open to countries that are members of the African Union and its current membership is composed of 19 African countries namely Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, São Tomé and Príncipe, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. See www.aripo.org/index.php/about-aripo/membership-memberstate Accessed on 12 December 2014.

⁷⁸ OAPI was created in 1977 and is governed the Bangui Agreement. It is mostly composed of French speaking countries in Africa. Its current membership is composed of 17 member states namely of Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, and Togo. See also www.wipo.int/wipolex/en/outline/oapi.html Accessed 12 December 2014

expressions. On the other hand, the Bangui Agreement governs the protection of traditional knowledge under OAPI.

The highlighted regional instruments are fundamentally incoherent concerning the protection of traditional knowledge in Africa. For instance, the ARIPO and OAPI legal infrastructure for the protection of traditional knowledge, respectively reflect the historical political legacies of the Anglophone and Franco-phone institutions of imperialism. Resultantly the ideological formulations of these organisations together with the established protectionist mechanisms of traditional knowledge do not *strictu sensu* reflect African realities and conditions about traditional knowledge protection. One can therefore assume that the regional initiatives towards the effective protection of traditional knowledge tend to fail on the basis that its formulation is a transposition of colonial heritage and intellectual imperialism; factors that have been at the core of the peripherisation of traditional knowledge in Africa.

On that basis, a critical examination of the regional measures that have been adopted for the protection of traditional knowledge is imperative as activities at a regional level more often than not, “influence the development of national laws in most African States” (Arowolo, 2009: 2). Therefore, for the purposes of this thesis, this chapter shall critically analyse and examine whether the historical factors that contributed to the marginalisation of traditional knowledge in Africa are manifest within the current institutional regimes that protect traditional knowledge in Africa. In pursuance of the stated objective, the following section shall explore the factors that contributed to the establishment of the ARIPO Swakopmund Protocol and critically examine whether or not it addresses the needs and interests of traditional knowledge communities.

4.3. THE SWAKOPMUND PROTOCOL

The Swakampund Protocol is one of the most detailed regional instruments on the protection of traditional knowledge in Africa. The Swakopmund Protocol came into effect on the 11th of May 2015, after six member states ratified it in terms of Article 27 (3) of the Protocol. However, the development of the Swakopmund Protocol was subject to ideological influences of intellectual property frameworks,

a process facilitated by WIPO. The consequent structure of the Protocol reflects an intellectual property framework, which was adapted to protect traditional knowledge. However, the framework was developed without a clear understanding of the development of the intellectual property system and the repercussions that it inflicted on traditional knowledge communities in Africa.

To confirm, the veracity of the fore going statement, the following section shall explore the factors that contributed to the development of the Swakopmund Protocol while critically examining whether or not those factors reproduce the vestiges that contributed to the historical marginalisation of traditional knowledge in Africa.

4.3.1. Background of the Swakopmund protocol

The 8th Session of the ARIPO Council of Ministers adopted a resolution for the development of regional instrument for the protection of traditional knowledge in member states (ARIPO, 2002a). The philosophical foundations for this resolution were derived from the research findings of the Fact Finding Mission of Intellectual Property needs for Indigenous Communities, that was conducted by WIPO between September 1998 and February 1999 (ARIPO, 2000). One of the results of the WIPO Fact Finding Mission was to “develop an intellectual property framework for the needs of indigenous knowledge holders in order to promote the distribution of the intellectual property system to their social, cultural and economic developments” (ARIPO, 2000: 1). Based on the generic findings of the WIPO Fact Finding Mission, ARIPO resolved to link its initiative for the protection of traditional knowledge with that of WIPO, through an active involvement in WIPO’s activities in the field of traditional knowledge (ARIPO, 2000).

The findings of WIPO’s fact-finding mission adopted by ARIPO as the basis for the establishment of a regional framework were oblivious to the overall interests and needs of traditional knowledge communities within the ARIPO member states. For instance, only three countries out of an aggregate number of 21 ARIPO member States, namely Ghana, Tanzania and Uganda where visited during the WIPO Fact Finding Mission. As such, the findings in these three countries were translated to be representative of the interests of traditional communities in ARIPO member

states, which are culturally, politically, socially and economically diverse. Furthermore, the adoption of WIPO's agenda on the protection of traditional knowledge by ARIPO translated into the integration of intellectual property principles into traditional knowledge protection mechanisms in Africa.⁷⁹ Ideologically such an approach is symbiotic of the expansion of the knowledge imperialist agenda through the integration of intellectual property, an instrument that has been fundamental in the marginalisation and misappropriation of traditional knowledge in Africa. This integration is representative of what had transpired during the colonisation of Africa; that is the extension of intellectual property in colonial territories was primarily to extend the knowledge market and secondarily to marginalise traditional knowledge (See Chapter 3.5.1).

ARIPO failed to take into consideration the historical local conditions underlying policy objectives that contributed to the introduction of intellectual property into colonial Africa (Adewopo, 2002). In that regard, ARIPO omitted to identify whether their approach towards the protection of traditional knowledge as a regional body was compatible with the existential conditions in member states. The former Prime Minister of Swaziland raised these concerns during the 7th session of the ARIPO Council of Ministers when he stated that:

Where the issue of protection relates to human beings, failure is generally the result of conflict and oversight rather than systematic arrangements. With such issues as trade, increasing globalization and the benefit of trade liberalization has led to moving away from protection as a general rule (ARIPO, 2000: 3)

The Prime Minister of Swaziland inferred that a globalised approach towards the protection of traditional knowledge questioned the general notions of the traditional knowledge protection, as concepts of trade liberalisation and knowledge commercialisation,⁸⁰ would gradually infiltrate the traditional knowledge protection discourse. Therefore, failure by ARIPO to circumscribe to the

⁷⁹ Geoffrey Onyeama, during a speech during the ARIPO, 7th Session of the Council of Ministers highlighted that there was a need for a strategy to promote the protection of traditional knowledge innovations and creativity by exploring the existing intellectual property system, including ancillary mechanisms and practices to be developed (ARIPO, 2000).

⁸⁰ Such fears were entrenched during the ARIPO-WIPO roundtable meeting of Heads of Industrial Property which was held in Windhoek, Namibia from the 25th to the 29th of November 2002. It was resolved that there was a need to create an enabling environment such as a legislative infrastructure to facilitate the promotion, development and exploitation of traditional knowledge based assets (ARIPO, 2002b)

jurisprudential divergence between traditional knowledge and intellectual property signals how the hegemonic ideological dominance of western knowledge had a hold during the conceptualisation of the Swakopmund Protocol.

In that regard, the drafting and development of the Swakopmund Protocol pursued WIPO's intellectual property approach,⁸¹ towards the protection of traditional knowledge. For instance, in 2006 the Heads of Intellectual Property Offices within the ARIPO member states recommended that the draft Protocol should incorporate the positions and recommendations of the WIPO IGC (ARIPO, 2006). The focus of the WIPO IGC was to explore how intellectual property can be applied to promote and protect traditional knowledge and folklore (ARIPO, 2004b). The adoption of such a resolution institutionalised the negotiation positions that were being advocated within WIPO IGC thereby limiting ARIPO's ability to adapt to the ever-changing environment within the field of traditional knowledge. This recommendation ensured the alignment of the regional instrument to the international discourse of the protection of traditional knowledge while negating the interests of traditional knowledge holders who were being victimised. The development of the traditional knowledge infrastructure in Africa was thus embedded in intellectual property solutions, "which separated traditional knowledge from the cultural and spiritual values that establish its collective ownership" (Swiderska, 2007: 5)

Boxed within the general running ideology of the protection of traditional knowledge as advocated at the WIPO IGC. WIPO's influence in the development of the Swakampund protocol grew as it was appointed as the technical advisor to develop the legislative infrastructure that would facilitate the promotion development and use of traditional knowledge (ARIPO, 2004b). Resultantly, WIPO developed a policy framework, which extended intellectual property rights towards the protection of traditional knowledge (ARIPO, 2005b)

⁸¹ The framework was deliberated during the ARIPO-WIPO Symposium on Topical Intellectual Property issues for the Heads of Industrial Property and Copyright Offices which was held in November 2003 in Dar es Salaam, Tanzania, where an adoption for a hybrid approach of adapting existing 'intellectual property rights and a *sui generis*' approach towards the protection of traditional knowledge, genetic resources and folklore was upheld (ARIPO, 2004b).

The conceptual framework that was developed by WIPO became the basis for the development of the legislative framework of the Swakopmund protocol (ARIPO, 2005b). Despite the progressive development of Protocol at a conceptual level, the views, interests and aspirations of traditional knowledge holders and communities where neither solicited nor taken into consideration. The process that developed the Swakopmund Protocol was externally driven, thereby impugning upon the rights of self-determination and self-governance of traditional communities. The neglect of the views of traditional knowledge holders amounted to victimisation, which can only be recognised when identified from the inside.

Neglect victimisation has its source in institutional apparatus which appropriate marginalisation, to create an innocence by locating oppressors outside the body politic of victimisation thereby creating a less complicated political image laden with internal oppressors and victims (Mackey, 2002). Such an assessment is synonymous to the development of the Swakopmund Protocol, which sought to identify the oppressors of traditional knowledge holders as western conglomerates while in essence its construction entrenched the same concepts of victimisation at an ideological level. Consequently, the development of the Swakopmund Protocol involuntarily made traditional knowledge holders, the bearers of structures that they did not choose to create.

Furthermore, the dominant role that was played by WIPO in the creation of the Protocol allowed the proliferation of western ideologies and epistemologies into the protection discourse of the Swakopmund Protocol. The words of Reichman (1997) within this context become relevant; whereof he argued that the;

protectionist appetites of powerful industrial combinations seek to successfully capture the legislative and administrative exponents of intellectual property policies and holding the interests of traditional knowledge holders hostage (Reichman, 1997: 17, 25).

The role of WIPO in the drafting and development of the Protocol should be questioned as the former represents transnational intellectual property regimes that erode traditional territorial and political notions of sovereignty (Aoki, 1998). Furthermore, WIPO's sincerity in assisting in the development of the traditional knowledge framework casts doubt into the process because it is a collector of intellectual property rents from multinational corporations. It is estimated that 90

per cent of its budget does not come from member governments but from patent revenues paid through patent applications under the Patent Cooperation Treaty (Tauli-Corpuz, 2005). Therefore, WIPO's independence and neutrality to the issue of the protection of traditional knowledge is questionable as its main obligation is to ensure that member states adopt and implement intellectual property rights.

Therefore, the development of the Swakopmund Protocol in its constitutive nature leaned towards protection of the intellectual property aspects of traditional knowledge and folklore (ARIPO, 2009). The development process of the Swakopmund Protocol failed to take into consideration the impact of the legacy of colonialism and the power of multi-lateral organisations that have to a significant extent created a highly unequal knowledge system. A system where the 'haves' cling to a legal framework of any knowledge institutional structure to manipulate associated knowledge products rather than recognise the need to protect the interests of the developers of the knowledge. Consequently, influences of the western epistemologies as propagated by WIPO during the development of the Swakopmund Protocol weigh in heavily on the content of the Swakopmund Protocol.

4.3.2. Scope and subject matter of protection

The purpose of the Swakopmund protect is to protect traditional knowledge holders against any infringement of their rights; to protect expressions of folklore against misappropriation, and unlawful use of traditional knowledge beyond their traditional context (Martens, 2014). The Protocol recognises the intrinsic value of traditional knowledge and expressions of folklore; acknowledges the need to respect traditional knowledge and expressions of folklore; and to reward and protect the authentic tradition-based creativity of traditional and cultural communities.

The operational scope of the Protocol only applies to the protection of traditional knowledge and expressions of folklore. In that, regard the Protocol consciously separates traditional knowledge from expressions of folklore as the latter and the former are deemed to raise different legal policy issues. The rationale behind the separation is that traditional knowledge and expressions of folklore are subject to

different forms of misappropriation thus necessitating specific solutions (Wendland, 2006; Zikonda-Kraus, 2012). Hence, the distinction seeks to emphasise that the protection of traditional knowledge and expressions of folklore must be ‘tailored’ to the specific characteristics of such knowledge and expressions (Hinz, 2011).

Resultantly, the distinction incorporates different policy options that seek to protect traditional knowledge from infringement and misappropriation; misuse and unlawful use for expressions of folklore on the other. This distinction suggests that expressions of folklore are incapable of being infringed or misappropriated, and traditional knowledge is incapable of being misused or exploited (Munyi, 2008). The implications of such a distinction are far reaching to the general ambit of the protection of traditional knowledge.

The separation of traditional knowledge and expressions of folklore is contrary to the basic notions of traditional knowledge which is deemed to be holistic and inextricably linked the life of traditional communities and thus cannot be separated (See Paragraph 1.1. of Chapter 1 for an in-depth discussion on the definition of traditional knowledge). African traditional communities have expressly highlighted that the compartmentalisation of their knowledge into distinct categories as is advanced by the Protocol is incongruent with their material and spiritual interests:

Our knowledge cannot be separated into component parts. It should be regarded as a single integrated, interdependent whole. We do not award different values to different aspects of our heritage and we do not classify them into different categories such as ‘scientific’, ‘spiritual’, ‘cultural’, ‘artistic’ or ‘intellectual’, nor separate elements such as songs, stories, science, etc. We also do not differentiate levels of protection to the different aspects of our heritage. All aspects are equal and require equal respect, safeguarding and protection. (Tauli-Corpuz, 2005: 4)

The non-responsive nature of the Swakopmund protocol to the needs of traditional knowledge communities in Africa represents a case of secondary victimisation whereof institutions and laws have adopted discriminatory attitudes and practices which do not conform to the interests of victims (Wolhuter, Olley & Denham, 2008). The Swakopmund Protocol seeks to emphasise on distinct intellectual creations of traditional communities which are abstracted, “from the cultural,

biological and customary law context which sustain them” (Swiderska, 2007: 3). This presents a picture which creates a victimisation mode of adaption, which can be viewed as an outcome of the imperialist and colonial, “experiences of recurrent indignities and multiple deprivations that are associated with capitalism and class struggles” (Peacock, 2013a: 346).

Furthermore, the influence of the intellectual property system, which does not necessarily protect the interests of traditional knowledge holders, is apparent in operational scope of the Swakopmund Protocol. Intellectual property pursues a policy, which distinguishes knowledge into compartments of patents, copyright, trademarks and industrial designs among others to ensure that each form of knowledge is protected according to its constituent nature. This distinction resonates within the Swakopmund Protocol in distinguishing traditional knowledge from expressions of folklore.

In addition, the subtle ideologies of intellectual property are recognisable from the fact that the protection of traditional knowledge and expressions of folklore shall not be subjected to any form of formalities.⁸² Therefore, for the purposes of the Protocol, protection towards traditional knowledge and expressions of folklore shall arise automatically; a conceptual mechanism that is derived from copyright law (See Chapter 3 which discusses how copyright protection emerged). The policy rationale behind this provision is that the imposition of formalities will create boundaries and barriers to access the protection of traditional knowledge.

In addition, the term ‘protection’ in the Swakopmund Protocol was loosely used, because reference to the word ‘protection’ with regards to knowledge products refers to the grant of exclusive and exclusionary rights to creators of knowledge through intellectual property tools (Muller, 2013). On this basis of the Swakopmund protocol creates property rights in traditional knowledge and expressions of folklore, “a notion which is diametrically opposed to the traditional African concept underlying those types of creativity” (Adewopo, 2002:753).

⁸² Formalities of protection are official requirements that applicant claiming any rights to knowledge must fulfill so as to acquire and maintain their intellectual property rights within a given jurisdiction. These may include registration notification and payment of fees (Zikonda-Kraus, 2012).

The systematic scientific realisation of traditional knowledge as ‘it’, ruled by laws influenced by intellectual property to makes its behaviour predictable is contrary to the philosophical realisation of traditional knowledge. Traditional knowledge should be realised as ‘thou’, imbued with a character of an individual, a presence known only in so far as it reveals itself . By virtue of its protean character, traditional knowledge thereby becomes more versatile with the capability of being applied in different contexts with specialised competence

4.3.4. Rights awarded to traditional knowledge holders and communities

The Swakopmund Protocol’s rights based model for the protection of traditional knowledge borrowed its substance from the global intellectual property frameworks. The causative value of the model was facilitated by the development praxis of the Swakopmund Protocol whose content was largely influenced by WIPO (see section 4.2. of this chapter, which highlights how the intellectual property model infiltrated the framework of the Swakopmund Protocol).

The substantive influence of WIPO is evidenced by Article 7 of the Swakampund Protocol, which awards the beneficiaries of traditional knowledge protection the exclusive rights to authorise and prevent the exploitation of their knowledge without their prior informed consent.⁸³ These rights represent a positive and defensive approach to the protection of knowledge, a concept that is a linchpin within the conventional intellectual property system. The similarities in the wording of article 7 of the Swakopmund Protocol and the rights awarded by the intellectual property system become apparent when juxtaposed with Article 16, 26 and 28 of the TRIPs agreement. These sections generally state that the owner of a an intellectual product or process shall have the right prevent third parties not having the owner’s consent to make, use, offer for sale, sell, or import the product or process.

The incorporation of ‘intellectual property’ oriented rights in the Swakopmund framework is prejudicial to the interests of traditional communities because

⁸³ Section 7 (3) of the Swakompund Protocol defines “traditional knowledge exploitation” to the manufacturing, importing, exporting, offering for sale, selling or use of a process based on traditional knowledge beyond the traditional context the product.

intellectual property has been identified as the prime mover in the victimisation of traditional knowledge communities in Africa (See Section 3.6.4. of Chapter 3, where it is discussed how the intellectual property system had facilitated the misappropriation of traditional knowledge in Africa). Such an approach is contrary to the needs and interests of traditional communities who have took exception to the use of an intellectual property based archetypal for securing the interests and needs of traditional communities. They have argued that;

instead of traditional communities getting benefits ... we have seen experiences where indigenous peoples who entered into some kind of an intellectual property partnership with biotechnology or pharmaceutical firms, ended up as the gatherers of the raw materials for the corporations (Tauli-Corpuz, 2005: 8).

Turning the screw further, an introspection into Article 19,⁸⁴ reveals that the text of this provision is fundamentally inspired by rules relating to copyright law (Ngombe, 2011). Article 19 of the Protocol obligates contracting States to provide adequate and effective legal and practical measures to ensure acknowledgement of the source community, prevent distortions, mutilations, modifications or derogatory treatments,⁸⁵ of expressions of folklore. It further mandates for the prevention of false, confusing or misleading indications or indications which would suggest an endorsement or linkage with a community and ensure equitable remuneration or benefit sharing where use is for gainful intent (Zikonda-Kraus, 2012). Therefore, the Swakopmund Protocol mandates that member States to provide legal and practical measures to prevent certain acts such as reproduction, publication, adaption, unauthorised disclosure or public performance⁸⁶ of expressions of folklore without the community's prior informed consent.

In reproducing the operational ambit and functionality of the intellectual property system, the Swakompund protocol creates exceptions to protection of traditional knowledge. Article 11 of the Protocol highlights that the "protection of traditional

⁸⁴ Article 19 (1) of the Swakompund protocol plainly states that "expressions of folklore shall be protected from all acts of misappropriation, misuse and unlawful exploitation".

⁸⁵ The rights awarded herein are a direct reproduction of Article 6bis of the Berne Convention which states that the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. Available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726 accessed on 30 November 2014

⁸⁶ Such rights are directly borrowed from article 14(2) and (3) of the Trips agreement. Supra Note 20

knowledge shall not be prejudicial to the continued availability of traditional knowledge for the practice, exchange, use and transmission of the knowledge by its holders within the traditional context”. The rights and exceptions that are awarded to the custodians and holders of traditional knowledge are synonymous to ones that arise within a conventional intellectual property system. The award of these rights amounts to the propertisation of traditional knowledge because the definitional scope of property is in most instances accompanied by a “set of rights which consist of claims, privileges, powers to exclude and immunities” (Honoré, 1961: 107).

The propertisation of traditional knowledge translates into the commodification African knowledge resources, a process that alienates traditional knowledge from its cultural context. To put this argument into perspective, the protection of traditional knowledge through rights which are alien to African culture amounts to the disenfranchisement of customary practices that protect traditional knowledge within a cultural context. Consequently, the practice of traditional knowledge will not be governed by the customary norms that bind society together but it will be governed by abstract intellectual property principles that are not culturally rooted within the African context. This contributes to the fetishisation of traditional knowledge because objects rather than the relational obligations between the knowledge and the community will determine relations within that context.

Therefore, the inclusion of the intellectual property provisions within the Protocol, largely permits to the reproduction of discursive practices that contributed to the marginalisation of traditional knowledge during the colonial period. An understanding on this phenomenon can only be comprehended in the terms of Foucault (1977) and Althusser (2006) who argued that it is through discourse that oppressive subject positions are formed, invested and reproduced over history to allow society to voluntarily participate within a sphere that reproduces unequal power relations. Marx (1906) confirmed this phenomenon when he highlighted that every revolution does not necessarily create something that is new, as it borrows its language, structure and nature from the ghosts of the past that it sought to dismantle. Therefore, the Swakopmund Protocol reproduces the materiality of the

discourse that reifies intellectual property over traditional knowledge, while acknowledging the inferiority of traditional knowledge to intellectual property.

In that light, one would therefore realise that the extension of intellectual property law within the Swakompund Protocol is largely destructive to the very spirit of traditional knowledge protection as it promotes knowledge imperialism and reinforces colonial capitalism. The objective of traditional knowledge protection as advocated by the Protocol translates into a false consciousness as the framework, “embodies ideas, values and language which justify social and economic inequalities” (Augoustinos, 1999: 298). By virtue of the fact that the established alien dominant legal regime is not capable to address the material, spiritual and cultural needs of traditional knowledge, the “subordinated knowledge system will be exposed to all forms of piracy and extraction which prejudices its holders” (Magaisa, 2007: 8). A new form of information capitalism will emerge whereof all “hitherto socially-owned knowledge, culture and information is accumulated into the hands of private corporations, whence repackaged as informational goods and sent around the world through the networks of information flow” (Kundnani, 1998: 51 - 52).

Traditional knowledge is non-rivalrous within its traditional context and the use of intellectual property principles to protect it “ceases it to be non-rivalrous through the creation of private monopolies that yield rents in global markets” (Wendland, 2006: 894). This will contribute to the capitalisation of traditional knowledge by knowledge property entrepreneurs who have the capacity to pressure traditional knowledge communities to assign and waive their rights over that knowledge for a fee. As critical legal theorists have aptly warned, “there is need to be ready to openly question when and how ‘rights’ might work to the disadvantage of the poor rather than to the poor’s benefit” (Kennedy, 2009: 334).

From a human security point of view, the rights that are awarded under the Protocol represent the neo-liberal conception of individual security, which focuses on, “liberal notions of competition and possessive individualism of private power over property rights” (Thomas, 2001: 161). Such a rights based regime is highly likely to:

inflame cupidity, excite fraud, stimulate men to run after schemes that may enable them to levy a tax on the public, beget disputes and quarrels betwixt inventors, provokes useless lawsuits, bestows rewards on the wrong persons, makes men ruin themselves for the sake of getting the privileges over traditional knowledge (Mgbeor, 2001).

All these machinations may result because the ARIPO framework for the protection of traditional knowledge, assigns sole and despotic dominion over knowledge assets, owned by various traditional communities across Africa. Therefore, instead of alleviating the injustices suffered by traditional communities; the Swakopmund Protocol administratively burdens and creates conditions for conflict in traditional communities thereby limiting their ability to emancipate themselves from the loins of knowledge capitalism.

4.3.5. Beneficiaries of the protection of traditional knowledge

The recipients of the rights established by the Swakopmund Protocol are traditional communities and individuals who preserve and transmit traditional knowledge within an intergenerational context.⁸⁷ A similar specification applies to expressions of folklore, whereof the Protocol nominates local and traditional communities that are custodians of expressions of folklore as pre-determined by their customary laws and practices. The progressive nature of these provisions is that the selection of the beneficiaries of traditional knowledge protection is governed by customary law. This process largely prevents the possible award of rights in traditional knowledge to people who are not indigenous to the community in question.

After assessing the beneficiaries of traditional knowledge protection as prescribed by the Swakopmund Protocol, one would deduce that a community oriented property regime governs the protection of traditional knowledge in ARIPO member states. However, such an approach runs parallel the communal property model that is currently used by traditional communities in Africa (UNESCO, 2014). In that regard, it can be argued that the development of the communitarian model within the Swakopmund Protocol responded to the challenges that are associated with communal property model. One of the challenges, concerning a communal

⁸⁷ See Article 6 and 18 of the Swakopmund Protocol

property model is that it results in the tragedy of the commons (Heller, 1998), whereof no one had the right to exclude the other in the external use of traditional knowledge. This phenomenon contributes to the overuse of knowledge resources; an occurrence that fosters conditions for the misappropriation of traditional knowledge without any form of liability attaching to misappropriates.

Therefore, the Swakopmund Protocol addresses these challenges associated with the tragedy of the commons by introducing a community oriented property regime. Individual members in the community become multiple owners of traditional knowledge, each endowed with a right to exclude others members when the knowledge is to be used for purposes that are not conglomerate with the community's interests. Furthermore, the community-oriented model assures that no one has exclusive privilege to use the traditional knowledge.

Yet the communitarian model addresses the challenges of the tragedy of the commons, the transition from a communal model to a communitarian one comes with an embedded crisis. Gramsci et al. (1971: 276), warns that during every transition the, "crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear". History has its lessons that a legal transitional phase is more likely to be trapped to the conventional trappings of affluence, misuse or abuse by those who control the means of production (Bauman, 2012).

To put these assessments in context, the Swakopmund Protocol allows individuals of traditional communities' rights that prevent the selling or use of the traditional knowledge held by the community without their collective consent. However, when too many people hold the right to exclude; the knowledge will be prone to under use thus culminating into what is known as the tragedy of the anti-commons (Heller, 1998). By virtue of the fact that multiple parties hold the same rights collectively against the external use of traditional knowledge, the external use of traditional knowledge would require the agreement of multiple parties. However, if one party opposes its use, that party effectively interdicts other members of the community from exercising their rights. The net effect of such a legal smog will contribute to the emergence of illegal transactions as:

. . . informal and corrupt norms will emerge to routinise the bundling of rights as property entrepreneurs will bully their way into control through negotiating with individual community members. Overtime these corrupt channels will be routinised to replace legal transactions (Heller, 1998: 641).

Consequently under development will ensue within the field of traditional knowledge, as it will be constituted by a combination of badly specified formal rights and their *ex post facto* rearrangement through illegal contracts (De Soto, 1990). The resultant conceptual framework, is a legal system that allows the commodification of traditional knowledge through capitalist accumulation by dispossession (Harvey, 2005). Hence, the collection of rights into private property as prescribed by the Swakopmund Protocol becomes brutal and slow.

From a social context level, the privatisation of traditional knowledge will lead to the emergence of a social stratification, as better-informed or educated individuals linked to traditional communities will use the system to create cartels. Not to mention the creation of a property regime will spurn individuals in traditional communities into a rat race where anyone would want to claim rights on any knowledge that has not being documented or assigned ownership. This phenomenon is not new; reference is given to the events that transpired during the developmental phase of copyright right law, which saw a book rush whereof individuals competed to assign copyright privilege to every text that was not protected. The results of such a rush led to the creation of cartels, which consequently began to victimise knowledge producers (See Chapter 3.3.4.). The same can likely be realised within the traditional knowledge context as the legal framework reproduces the same phenomenon that transpired in history. It is therefore likely that overtime communities will lose their knowledge to cartels as it will be sold off for commercial benefits. Through this process of accumulation by dispossession; a social cleavage between the elites and ordinary people will emerge as the assignment specific rights which are tainted with intellectual property to communities, might restrict people's freedoms, entrench the powers of local elites, or subject communities to greater state surveillance (Wendland, 2006).

4.3.5. Administration and enforcement of traditional knowledge protection

The regional legal instrument for the protection of traditional knowledge within ARIPO member states hardly provides for a comprehensive framework for the administration of justice concerning matters of traditional knowledge misappropriation. Article 14 (2) of the Swakopmund Protocol highlights that;

National competent authorities shall be entrusted, in particular, with the task of advising and assisting holders of protected traditional knowledge in defending their rights and instituting civil and criminal proceedings, where appropriate and when requested by them

In that regard, the administration of justice for traditional knowledge misappropriations is dependent on a governmental institutional apparatus, which shall guarantee the rights of traditional communities through the application civil and criminal law. However, the administration of justice through the application civil and criminal law, translates into the entrenchment of a juridical processes that hardly addresses the interests of justice in traditional communities in Africa.

To explicate, recourse to criminal law in addressing the injustices perpetrated against traditional communities amounts to the use of pain as punishment (Peacock, 2008). However, the use of pain as punishment in addressing conflict in a democratic society amounts to the institutionalisation and civilisation of conflict (Peacock, 2008). Therefore, instead of ameliorating the challenges faced by victims of crime, the system reproduces the victimisation through secondary victimisation. For instance, the criminal justice system intensifies rather than diminishes crime as a problem because it “reinforces dominant ideological constructions of crime, reproduces social divisions and distracts attention from crimes committed by the powerful” (Sim, 2012:5).

Christie (2005), argued that making the government a custodian for the administration of criminal justice creates a ‘gardener state’, which eliminates ‘weeds’ (social undesirables and street thugs) in preference of social order, a phenomenon which has failed to improve human conditions (Peacock, 2008). Furthermore, the institutionalisation of justice within the state creates a superior-dependent relationship (Christie, 2005) that makes traditional communities dependent on the state on the administration of justice.

This process permits the incorporation of justice for the victims for traditional knowledge misappropriation into institutional state apparatus; a case of assimilation, were “everyone should be like everyone else; everyone should follow a basic pattern” (Christie, 2005: 9). However, is it justice if people who are different from most people have it like most people have it? Such, a phenomenon does not eliminate the conditions that have contributed to the marginalisation and victimisation of traditional communities because the latter will be included or integrated into a system that has contributed to their victimisation. The consequent effect of such an integration coupled with the un-eliminated exclusionary conditions slowly but surely relegates these communities to the fringes, “making them observers rather than participants, unless they take on the role of class clown or troublemaker: Assimilated, but alone at the bottom of the pecking order” (Christie, 2005: 9). As such, the assimilation modus of incorporation of traditional communities into a justice model dictated by state institutions destroys diversity because it creates a monolithic structured justice system that does not respond to the elastic and heterogeneous nature of traditional knowledge.

The failure of institutionalised justice remind of the conditions that existed during the colonial period where criminal law was referred to

pain law when observing how the criminal justice system, yet it continues to systematically deliver pain so that people should suffer? Those who are punished are supposed to suffer (the very meaning of punishment) but what kind of society do we wish to create with the systematic punishment of different groups of society? In our analyses of conflict, we need therefore to transcend comparative and at times absorbing conceptualisations in relation to criminal justice. If not, we risk being caught up in a network of supporting oppositions of the criminal justice model rather than to truly challenge the ideologies of social defence, resulting in more pain and more violence (Peacock, 2008: i-ii).

Furthermore, the use of the criminal justice in addressing the question of traditional misappropriation is highly likely assign the latter action to the criminal law of theft. Theft is when a person unlawfully and intentionally appropriates movable, corporeal property which belongs to, and is in the possession of, the other with the intention to deprive him of that property permanently (Miller, 2014). However, the challenge concerning traditional knowledge in this context is

that it is non-rivalous. That is to say that the misappropriation or possession of traditional knowledge by another person does not dispossess the owner of his knowledge. The dispossession of traditional knowledge by one from another, which is practically impossible to dispossess, raises fundamental philosophical questions that require further research. For instance, under what circumstances can one be deemed to dispossess knowledge from another permanently considering that the process of knowledge accumulation and acquisition is permanent (Kirshin, 2014; Basurto, Gelcich & Ostrom, 2013). A person or individual cannot be mandated to forget the knowledge that he or she acquired.

Furthermore, the Protocol does not provide for victim rights for communities that have suffered traditional knowledge misappropriation. The non-inclusion of victim rights in the Swakopmund Protocol refers to the express non-recognition traditional knowledge holders as victims of traditional knowledge misappropriation. A regional framework that purports to protect traditional knowledge should set a precedent that allows member states to recognise traditional communities as victims of marginalisation and traditional knowledge misappropriation. This approach will allow for a comprehensive application justice that addresses the needs of traditional communities.

4.3.6. Traditional knowledge digital library (TKDL)

Besides the operation of the Swakopmund Protocol, ARIPO intends to establish a database that will store all ‘public domain’ traditional knowledge that is existent in ARIPO member states (ARIPO, 2002a). The TKDL is deemed to be the appropriate remedy for preventing the grant of patents in respect for inventions based on traditional knowledge (ARIPO, 2002a). The ideological events transpiring at an international level influenced the development of the database. For instance, in line with the WIPO IGC deliberations, ARIPO believes that the development sub-regional registries and databases on public domain traditional knowledge as well as undisclosed traditional knowledge is very imperative for defensive protection (ARIPO, 2004b; 2004a). However, the documentation of traditional knowledge is not being done to promote or preserve it but it is being documented for intellectual property related issues (ARIPO, 2004a).

Furthermore, ARIPO's approach towards the establishment of a TKLD to protect traditional knowledge fails at a conceptual level. The documentation of traditional knowledge within a database that is held by an inter-governmental organisation makes it fall within the public domain. The concept of 'public domain' is one that has its roots in intellectual property, which refers to knowledge that is not owned by any one. The public domain argument has been used in the justification of the misappropriation of traditional knowledge as it is deemed to have no specific owner (Heald, 2013; Hansen, 2011). Therefore, assigning the public domain value to traditional knowledge, to some extent amounts to the entrenchment of a discourse that has facilitated traditional knowledge misappropriation and victimisations. What compounds the TKDL conceptual framework is the objective that it seeks to achieve. Its objective is governed as a response to addressing the illicit patenting of traditional knowledge based products. However, it does not focus on the cause that has led to the misappropriation nemesis that seems to haunt traditional communities. In any event, traditional knowledge does not fall within the public domain as it is established and held by traditional communities despite the fact that it may be widely shared across traditional communities in different jurisdictions.

In addition, traditional communities have objected to the documentation of traditional knowledge under the TKDL system as it argued that the documentation of traditional knowledge is likely;

To cause the disappearance of traditional knowledge as ceremonies, rituals, songs, storytelling and other processes that are used to transmit traditional knowledge might not be done anymore, thus contributing to the erosion of culture and the apprenticeship, which forms the very nature of traditional knowledge. Furthermore the centralization of traditional knowledge within a databases whereof traditional communities have no means for direct access or control their knowledge, will impair their ability to regulate how such knowledge shall be used (Tauli-Corpuz, 2005: 16).

Because the documentation of traditional knowledge counters an illicit patent granted for traditional knowledge, the process unconsciously integrates traditional knowledge into the intellectual property system because for the documentation to be recognised as comprising prior art; it has to adhere to the international

classification standards of patents that is regulated by the International Patent Cooperation Treaty (Tauli-Corpuz, 2005).

From an economic front, the creation of the TKLD will “perpetuate the unfair economic paradigm that conceptualizes indigenous peoples as mere producers of raw materials and importers of finished products” (Mgbeor, 2001: 172). The creation of a traditional knowledge digital library would encourage property entrepreneurs to create private databases of traditional knowledge, which will be accessed for a fee. In other words, the TKDL would allow the privatisation of traditional knowledge under the name of incentives. The problem with the TKLD, is that it does not examine the level of protection that is necessary for traditional knowledge holders and it does not weigh the benefits and costs that are likely to occasion traditional knowledge holders.

Having noted the unfortunate consequences created by the Swakopmund Protocol it is imperative to examine whether the African Union Model Law addresses the factors that have contributed to the marginalisation of traditional knowledge communities in Africa.

4.4. AFRICAN UNION MODEL LAW

The African Union model law was crafted on a background that recognised that the TRIPs Agreement promoted the patenting and granting private monopoly rights on living organisms and traditional knowledge (Egziabher, 2002; Ekpere, 2000; Munyi, Mahop, Du Plessis, Ekpere & Bavikatte, 2012). Within an African traditional context, the TRIPS agreement was deemed to have profound repercussions on traditional communities especially after considering that its framework did not protect traditional knowledge. On this background, the African Union recognised that there was need to create a legal instrument that would protect the livelihoods of African traditional communities together with their associated biological resources and traditional knowledge (Munyi et al., 2012).

In addition to the foregoing the African Union Model law was drafted in response to “the requirement of the World Trade Organisation (WTO) TRIPs Agreement for member states to adopt either patents, a sui generis system, or a combination of

both, for the protection of new varieties of plants” (Munyi et al., 2012: 9). As a consequence, of the implications of the TRIPS Agreement, the African Union model law was adopted Ouagadougou in 1998, whereof it was recommended that it be the basis of African national laws on the protection of traditional knowledge (Egziabher, 2002). However, the foundations of the African Union Model law do not have footing in the interests and aspirations of traditional communities. Its ideological formulations are steeply entrenched and borrowed from the Convention on Bio-Diversity (CBD), which regulates the protection and access benefit sharing of genetic resources together with their associated traditional knowledge (See Chapter 3.6 for a brief overview of the CBD).

4.4.1. Scope of Protection

The African Union model law seeks to pursue a number of interrelated objectives which among others are to recognise, protect and support the inalienable rights of local communities over their biological resources, knowledge and technologies. It seeks to provide an appropriate system of access to biological resources, community knowledge and technologies subject to the prior informed consent of the State and the concerned local communities. Furthermore, it aspires to promote appropriate mechanisms for a fair and equitable sharing the use of biological resources, knowledge and technologies and provide appropriate institutional mechanisms for the effective implementation and enforcement of the rights of local communities, including farming communities and breeders, and the conditions of access to biological resources, community knowledge and technologies.

The operational ambit of the African Union model law applies to biological resources in both *in situ* and *ex situ* conditions together with their associated derivatives of biological resources and community knowledge that is owned by local and indigenous communities.⁸⁸ However, the African Union Model Law expressly excludes traditional systems of access, use or exchange of biological resources; access, use and exchange of knowledge and technologies by and between local communities and the sharing of benefits based upon the customary

⁸⁸ Section 2 (1) (i – iv) of the African Union Model Law

practices of the concerned local communities from its scope of protection.⁸⁹ This provision was applied to protect customary practices from being altered by legislation which is not grounded within the cultural traditions of traditional communities (Egziabher, 2002).

Two provisions are worth noting within the African Union model law, concerning the protection of traditional knowledge. Article 17 of the Model Law specifies the need for African states to recognise the role played by customary law and norms in the protection of traditional knowledge. Read together with Article 23, the protection of traditional knowledge should be facilitated within a context of local customs and traditions. This provision permits traditional communities to pursue their rights in the self-determination of an appropriate legal regime that is conglomerate to their interests and needs. Therefore, traditional knowledge holders are capable of collectively benefit from the use of their knowledge. However, the full realisation and implementation of these provisions are dependent on the state as discussed below.

4.4.2. State Guaranteed Rights

The model law provides that the regulation of access to traditional knowledge by persons not indigenous to the traditional community will be subject to the prior informed consent of the state and the traditional community concerned (Ekpere, 2000). The AU model law mandates that the application process for access to communities that hold traditional knowledge be made to a competent authority that is administered by the state. Traditional communities are assigned no role in this process other than granting *de-facto* consent, which can be vetoed by the state. The state thus has the sole prerogative to allow access or decline it despite the fact that the traditional community has agreed in allowing such access.

State protection of resources is by its very nature and structure problematic as it more often causes socially undesirable results.⁹⁰ (See Chapter 3.3.2 which shows

⁸⁹ Section 2 and 3 of the African Union Model Law

⁹⁰ Decisions made by the State are more often than not beneficial if they are made for the benefit of a few stakeholders (Heller, 1998).

how intellectual property rights in England were granted to the vagaries of political abuse thus subjecting the system to abuse).

From a human security perspective, granting the state a responsibility to guarantee the rights and benefits of traditional knowledge communities, represents a scenario which furthers, “individual insecurity as it fails to respond to the more pressing threats of individuals” (McDonald, 2002: 277). In other words, approving the state with the mandate of protecting the interests of traditional knowledge holders and communities, increases the current level of their insecurity, as the State is more likely to use the existing structures of power to determine who shall and who shall not enjoy the benefits of traditional knowledge protection.

Boyle (1997) recognised that the problem of relying on the state in protecting its own citizens:

It is a matter of rudimentary political science analysis or public choice theory to say that democracy fails when the gains of a particular action can be captured by a relatively small and well identified group of the state while the losses are low level spread over a larger more inchoate group (Boyle, 1997: 110).

In addition to the foregoing government leaders, have failed in the application and implementation of the AU model law. Traditional knowledge misappropriation has continued unabated despite the existence of laws that seek to protect it, yet the same leaders are expressing their rage in different international forums (WIPO and WTO) far removed from the context of traditional knowledge victimisations. The discrepancy of such an approach was highlighted at Earth Summit (2002), where it was stated that;

Government leaders pledged to protect and respect the knowledge and practices of traditional communities through article 8 (j) of the CBD. Progress in this field has fallen short of expectation (UNESCO, 2002: 1).

What further compounds the challenges of traditional knowledge holders relying on the state for the protection of its resources is that the state is not culturally rooted within the traditions of its geographical jurisdiction. It is on this basis that traditional communities have objected state protection of traditional knowledge because it is inconsistent with their needs and interests;

Our claim to the right to control and manage our heritage, knowledge and biodiversity is based on our inherent right to self-determination. The success of our struggles to have our right to self-determination and to our territories and resources recognized will ensure the perpetuation, safeguarding, protection and further development of our heritage (Tauli-Corpuz, 2005: 4)

Placing the protection of traditional knowledge under the state exposes communities the whims and caprices of the dominant capital, which have more often been behind the misappropriation of traditional knowledge. This argument is hinged on the fact that the superstructure (State) is determined by the economic base which controls the modes of production (Marx, 1906).

4.4.3. Prior Informed Consent

In the preceding paragraphs, it has been argued that access to traditional knowledge shall be granted after the communities that hold the knowledge have granted prior informed consent subject to approval by the state. However, the challenge that is associated with the prior informed consent concept is that it is more likely to create information asymmetries between the state and the traditional communities during the negotiation processes (Muller, 2013). These asymmetries may possibly extend between the traditional community leaders and the community as whole. The existence of such a possible risk factor will create informational loopholes that create an elite class that holds on to information that might be prejudicial to the community for the financial gain of a few.

Another problem arises, within the context of shared traditional knowledge held by different traditional communities in different jurisdictions. The grant of prior informed consent by one traditional community to the exclusion of others may cause conflicts and contestations between different communities thus contributing to secondary victimisation.

In a context of widely shared traditional knowledge, prior informed consent is complicated to achieve and most importantly friction and tension might begin to appear when certain traditional communities are excluded from negotiations of traditional knowledge that they claim is theirs (Muller, 2013: 70)

Traditional knowledge is not confined or practiced in a single context or community. The same traditional knowledge may exist simultaneously in different communities, including communities located in different countries. Therefore; the operational validity of the prior informed consent principle becomes complex, as the grant of consent by one community might be prejudicial to the other community which holds the same traditional knowledge. Furthermore, the question of technically identifying the real owners of the trans-boundary traditional knowledge held by different communities is in itself a mammoth task.

Another issue omitted by the African Union model law is how prior informed consent can be obtained from a plethora of traditional communities that hold the same knowledge. What complicates, prior informed consent under the African Union model law is the feasibility of negotiating a single contract that is mutually beneficial to traditional communities that hold the same knowledge and what are the economic advantage when the traditional knowledge in question is accessible from different sources.

The African Union Model law represents a significant step taken by the African Union in a bid to address the interests of traditional knowledge holders. However, the approach that was adopted did not yield outcomes, as it was deemed not to be in conformity with worldviews of traditional communities (Munyi et al, 2012). There is thus need to explore whether the OAPI legal regime on the protection of traditional knowledge is context oriented and addresses the needs to traditional knowledge communities.

4.5. OAPI TRADITIONAL KNOWLEDGE LEGAL REGIME

The Bangui Agreement and the *Africain Relatif a la Protection des Savoirs Traditionels* governs the OAPI, legal framework for the protection of traditional knowledge. The following discussion shall discuss the factors that contributed to the development of these frameworks while critically analysing whether or not the frameworks address the interests and needs of traditional knowledge holders in former French colonies.

4.5.1. The Bangui agreement

The founding ideology for the protection of traditional knowledge within the OAPI regional framework is grounded in the Bangui Agreement. The objective the Bangui Agreement is to contribute to the protection and promotion of expressions of cultural and social values (Olembo, 1996). Annexure VII of the Bangui Agreement has a provision for the protection of cultural heritage,⁹¹ through the application and adaption of copyright law to meet the need and interests of traditional communities. However, this provision does not address other matters related to traditional knowledge with its associated genetic resources.

In addition, OAPI member states are obligated to provide protection to their cultural heritage,⁹² and to inform traditional communities of their rights with regards to their cultural heritage. However, traditional communities are expected to notify their governments if they intend to protect or dispose of their traditional property. In that regard, the government has the sole responsibility over the administration of traditional knowledge within their geographical jurisdiction (See Section 4.4.2. of this chapter where the challenges associated with state guaranteed rights)

4.5.2. The *Africain relatif a la protection des savoirs traditionels*

The significant development in OAPI's approach to the protection of traditional knowledge was achieved through the adoption of the *Africain Relatif a la Protection des Savoirs Traditionels* in 2007. Its foundations and constituent elements are similar to those of the Swakopmund Protocol. Such an ideological similarity is one that can be tracked back to 2005 when OAPI participated in its technical capacity during the 29th session of ARIPO Administrative Council where a proposal was tabled for the adoption of the draft legislative framework of the Swakopmund Protocol (ARIPO, 2005a). The representatives of OAPI present at the meeting showed a keen interest in the draft Swakopmund Protocol through making

⁹¹ Article 67 of the Bangui Agreement defines cultural heritage as all material or immaterial human productions that are characteristic of the nation over time and space relating to folklore, sites monuments and ensembles

⁹² See Article 48 of the Bangui Agreement

a commitment to present the latter to its Council of Ministers to allow for the harmonisation of the traditional knowledge legal framework between the two organisations.

In 2006, ARIPO held a regional consultative workshop on the ARIPO-OAPI draft legal instrument on the protection of traditional knowledge and folklore. Heads and senior officials of intellectual property offices in ARIPO and OAPI member states attended this workshop. The meeting recommended that the draft legislative framework for the Swakopmund Protocol be formulated into a legal instrument containing substantive provisions for the protection of traditional knowledge and expressions of folklore (ARIPO, 2006). Interestingly, the views, concerns, and interests of traditional knowledge holders and communities were not taken into account and neither was their input incorporated in the formulation of the legal instrument.

The alignment of the development of the OAPI legal framework with that of ARIPO, represented an infiltration of the international discourse of the protection of traditional knowledge in Africa while in negating the interests of traditional knowledge holders who suffered victimisation from the misappropriations. In that regard, the founding notions of the OAPI regional instrument was determined by those who occupied the top echelons of power within the intellectual property realm in Africa.

4.5.3. Key provisions in OAPI legal instrument

Most of the provisions in the OAPI legal instrument are similar to the ones existent in the Swakopmund protocol. The only difference between the two regional instruments is that the OAPI legal instrument does not address the question of expressions of folklore, as the Bangui Agreement (see section 4.5.1 of this chapter) addresses the latter. Its overall operative context stipulates that the access and utilisation of traditional knowledge should be based on the prior informed consent of traditional communities that own the traditional knowledge (See Section 4.4.4 of this chapter for the challenges that are associated with the conceptual principle of prior informed consent).

In its broad application, just like the Swakopmund Protocol, the OAPI legal instrument co-opts intellectual property principles within its framework, thereby allowing for the commercialisation of traditional knowledge (Munyi et al, 2008). The provision that exists within this legal instrument is that traditional communities that have authorised access to traditional knowledge shall enjoy the benefits of utilising traditional knowledge. However, the down side of the OAPI legal instrument, similar to its regional counterpart ARIPO, is that it separates traditional knowledge from access to genetic resources (For more on this, see section 4.4.1 of this chapter, which discusses the human security and victimology implications of compartmentalising traditional knowledge).

The OAPI legal instrument on the protection of traditional knowledge represents a stark contrast to the indigenous worldviews of traditional knowledge. Such comments are born from the fact that the legal instrument commodifies traditional knowledge, a scenario that will gradually leads to the fetishisation of traditional knowledge (See section 3.4.4 for an in-depth discussion into the fetishisation of traditional knowledge).

The following discussion shall, critically examine the implications of the African regional framework of the rights of traditional communities.

4.6. CRITICAL ANALYSIS OF THE TRADITIONAL KNOWLEDGE FRAMEWORK IN AFRICA

Having examined the traditional knowledge framework in Africa it is particularly imperative to conceptually highlight the pitfalls that are associated with the framework. The next section shall evaluate the impact of these frameworks from a victimology and human security perspective.

4.6.1. Continuing violations to traditional knowledge communities aspirations

The framework for the protection of traditional knowledge in Africa makes a pre-theoretical classification by ascribing the misappropriation nemesis to incentive problems. It neglects the historical factors that contributed to traditional knowledge misappropriation and marginalisation. In other words, the laws “proffer

a finely honed sensitivity to misappropriation while ignoring the challenges and losses generated by the very rights that have been granted” (Boyle, 1997:97)

One of the major challenges that beset the traditional knowledge framework in Africa is that it does not recognise the historical context of injustices. It casts a blind eye to the fact that traditional communities together with their associated knowledge “suffered the destruction of their societal community structures and their traditions because of colonialism” (Yamamoto, 2009: 117). Their culture, knowledge and way of life were subordinated by colonial governments, which tried to force assimilation through the expansion of the western knowledge system together with the neo-liberal conceptions of private property at the expense of communal holdings.

In light of such an oppressive past, the regional instruments do not seek to redress these social injustices. Questions concerning reparative entitlements and obligations are not addressed. As a result, the regional frameworks in their institutional totality fail to provide the necessary remedies to the victims of the stated violations. This is compounded by the fact no consultative processes was undertaken by the regional bodies with the support of the relevant states in understanding the spiritual, cultural and material aspirations of the concerned communities. Recognition of crimes or wrongs of the past wherever and whenever they occurred is essential to reconciliation and the creation of societies based on the concepts of justice, equality and solidarity.⁹³ It is therefore imperative to recognise that, ‘historical injustices’ have undeniably contributed to the poverty, marginalisation and social exclusion, instability and insecurity of traditional knowledge holders in Africa.

Thus, the failure of the regional frameworks to recognise the historical exigencies that contributed to the marginalisation of traditional knowledge translates into the institutionalisation of historical injustices thereby obstructing the due carriage of justice. These assessments might appear to be too farfetched, but the neglect of

⁹³ See the paragraph 106 of the Durban Report on the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) available at http://www.un.org/WCAR/aconf189_12.pdf Accessed on 10 January 2015

in recognising the factors that contributed to the marginalisation of traditional knowledge is in itself appalling to the rights of traditional communities.

To bring this argument into perspective the words of Yamamoto (2009:123) are imperative to reproduce:

An event which happened in the past continues to have significance for our present time, as a piece of the past continues to have significance for our present time, as a piece of the past has its own contemporary effects...therefore such wrongs ought to be acknowledged and addressed to ensure that past wrongs are not repeated, while ensuring that the victims of the violations are addressed.

4.6.2. Restorative justice

The traditional knowledge framework on Africa failed to embrace the concept of restorative justice, which seeks to effectively respond, repair and undo the harm that is associated with the marginalisation and misappropriation of traditional knowledge. However, on the converse the framework treats the misappropriation of traditional knowledge as a crime, which requires state interference to determine guilt and punish accordingly. This notion is one that is borrowed from the western notion of the traditional justice system which focuses on (i) pain and punishment (Peacock, 2008); (ii) takes into account a small group of perpetrators; (iii) pays little attention to the causes of conflict and (iv) imposes western notions on other cultures without taking their peculiarities into account (Peacock, 2013b).

A restorative justice approach would be imperative in the creation of a traditional knowledge framework because it would have sought to address the needs of traditional knowledge communities that have been victims of a legacy of colonialism. It would furthermore make perpetrators of traditional knowledge marginalisation responsible for repairing the harm caused. Therefore, a restorative justice approach would:

Focus on the victims and their sufferings, look at the underlying cause of victimisation, the approach would have been culturally sensitive as it would focused on the harm caused by [misappropriation and marginalisation], while at the same instance meeting the needs of the victims redress and promoting the reintegration of both victims and offenders (Weitekamp, 2013: 137).

The adoption of such an approach would have been in conformity with African values and norms of justice which seek to “restore harmony as quickly as possible while restoring and maintaining the equilibrium of African communitarian societies” (Peacock, 2013b: 4).

4.6.3. Economic determinism

The traditional knowledge protection discourse in Africa has fallen prey to homologisation, whereof it is viewed as an economic good rather than as part of the traditional community. However, the problem with the privatisation of traditional knowledge is a conceptual one, an economic analysis beset by internal contradictions and uncertainty. The running argument of the protection regime of traditional knowledge in Africa is that, the propertisation of traditional knowledge would achieve market perfection by incentivising traditional knowledge holders and communities to bear rewards from their knowledge. However, each property right that is granted to protect traditional knowledge is a cost on the community when viewed from an efficacy perspective.

In addition, founding the protection of traditional knowledge on the economic front is not an option as history reveals that markets routinely fail, thus making economic factors to internalise their own cost, a cost that more often disrupts and destroys fragile knowledge systems with unpredictable and irreparable consequences (Boyle, 1997). An example is helpful to this analysis, (See Section 3.3.3. of chapter 3) whereof the creation of the Statute of Monopolies did not transform the economic monopoly that was held by the Stationers Company. It merely reinforced their positions while at the same instance entrenching the victimisations the authors had suffered at their hands. There is need to adopt another view towards the protection of traditional knowledge which incorporates wider functionalities within a cultural context.

Furthermore, the propertisation of traditional knowledge is contentious “with regards to distributional ideological and efficiency” (Boyle, 1997:87) as it destroys the social structure that constitutes it. The commoditisation of traditional knowledge is not only an incomplete solution but it is unethical, as the only traditional knowledge that will be protected is one that survives the rigorous

economic discrimination. Furthermore, the problem with the African regime for the protection of traditional knowledge is that it seeks to see the challenges that are being suffered by traditional knowledge holders as technical. This in its form inhibits popular participation of traditional knowledge holders within their protection discourse. Relying on a regime that treats traditional knowledge as private property entails engineering a system that treats the world as simple, linearly related sets of causes and effects. The net effect of such a system erases the concept of communitarianism and to a larger extent subjugates the relevance of traditional knowledge and its communities.

However, it would be naive to think that the challenges of the African framework on the protection of traditional knowledge can be corrected by tweeking the dysfunctional discourse that is being advocated for traditional knowledge protection. A purely instrumental approach to traditional knowledge protection is not healthy as an attraction of economics conceals danger. The words of Aldo Leopold are relevant to this analysis, whereof he highlighted that

One basic weakness in a conservation system based wholly on economic motives is that most members of the land community have no economic value. When one of these non economic categories is threatened and we happen to love it, we invent subterfuges to give it economic imporatance. It is painful to read these circumlocutions today (Leopold, 1949: 210).

4.7. CONCLUSION

The African traditional knowledge framework ritualises the law in seeking to address the misappropriation of traditional knowledge. This ritualisation in part forms a false consciousness, as the law has become an instrument of oppression and fraud for traditional communities. This has been achieved through the trafficking of western notions of “individualism, entrepreneurialism and scularis” (Harvey, 2005: 4) into traditional communities thus affecting the very notions of communalism that are key to traditional knowledge protection. The legal protection regime for traditional knowledge in Africa has created a structure that alters the distribution of “property rights of traditional communities while locking it in the power of market leaders (Boyle, 1997: 101). There is therefore a need to address the question of traditional knowledge from an African perspective other

than from the neo-liberal conception of private property. The next chapter shall proffer an African victimological approach in the way traditional knowledge could to be protected.

CHAPTER 5

THE PROTECTION OF TRADITIONAL KNOWLEDGE IN AFRICA: TOWARDS A FRAMEWORK OF AFRICAN VICTIMOLOGY

I experience awe at encountering philosophical language ever conceived by man and at the same time express sorrow at witnessing its debasement...it is so strange that so simple and evocative language as ancient Egyptian should be obscured by the very instrument of its discovery. Can someone who believes that Ancient Egypt was a primitive society, incapable of abstract thought transmit its wisdom? It is as if a sleepwalker were placed as a judge over the awake.(Reed, 1978: 11)

5.1. INTRODUCTION

From the previous discussion, it is apparent that the protection of traditional knowledge in Africa is a contested discourse, inundated and tainted by a history of oppression, subjugation, colonialism, cultural violence and ideological prejudice. The marginalisation of traditional knowledge by the stated vestiges questions or denies the humanity of the disenfranchised (Teffo, 2011). Accordingly, these prejudices have largely contributed to the multiple victimisation and peripherisation of traditional knowledge holders and communities. The traditional knowledge framework in Africa hardly derives its legitimacy from the cultural traditions of communities, a factor that affects its efficacy in addressing the needs and aspirations of these communities. In light of these disenfranchising epistemologies, this chapter advocates for an emancipatory paradigm in African victimology for the protection of traditional knowledge in Africa. African victimology is informed by the political, social, spiritual and cultural context of traditional communities, as their context informs the approach that can transform or complicate the appropriate responses to traditional knowledge misappropriation and marginalisation.

The philosophical underpinnings of African victimology are embedded in the African epistemological and ontological principles of *Maat*, Ubuntu and Afrikology, all which view society as being bound by a harmonious and ordered balance. This philosophical worldview further recognises that the disruption of the ordered balance through traditional knowledge misappropriation and marginalisation

consequently leads to inequality and oppression. A failure in addressing the imbalance over a period will amount to a reproduction of the conditions that are unequal and oppressive (Althusser, 2006; Marx, 1906) (see Chapter 2.1). In seeking to restore the societal balance that has been disturbed, African victimology adopts a restorative and declarative approach, which restores traditional knowledge victims back to their status quo through the reinforcement of humanity, selfhood and being. Reclamation and restoration reflect a new reality, which transforms traditional knowledge holders from a state of “victimhood, servitude and powerlessness to a state of victory, participant and agent” (Dastile, 2013: 96). Therefore, African victimology is not an abstract concept but a lived experience that allows for social transformation through supplanting injurious values with humanising values (Elechi, Morris & Schauer, 2010; Karenga, 2012b; Nabudere, 2011; Ramose, 1999).

5.2. AFRICAN VICTIMOLOGY

The notion of an African victimology follows the epistemological paradigm of Afrikology which pursues “a true philosophy of knowledge and wisdom on African cosmologies that are inspired by the ideas originally produced from the universal system of knowledge originating in Africa” (Wanda, 2013a: 2). It recognises all sources of knowledge as “valid within their historical cultural and social contexts and seeks to engage them into a dialogue that can lead to better knowledge for all.” (Nabudere, 2011: 92). Therefore, each culture should be measured and judged on its own terms as human thought processes are “strongly social and cultural in terms of their origins and application, as they strive for universal principles and values that lead to a harmonious co-existence” (Teffo, 2011: 26). The denial of African philosophy as a major contributor for the development of knowledge systems consequently leads to the encapsulation of a dominant monolithic western epistemological world view which views the African context with a blinded eye whereof “it scans its ‘non-problems’ without seeing them, in order not to look at them” (Althusser, 2006: 46).

In confirming this analysis Peacock (2013b), the progenitor of African victimology contends that victim oriented perspectives and mechanisms within Africa,⁹⁴ omit the cultural and historical context of Africa. More often, victimological approaches fail to address the needs and aspirations of victims within an African setup. Peacock (2013) further propagates that mainstream victimology in Africa applies dehumanising concepts of victimhood, victim-producing cultures, hidden victimisation and repeat victimisation, which are abstract from an African historical reality. Consequently, victimology can arguably be fashioned to be conformist to the functional structural norms of a social phenomenon (see chapter 2 for an in-depth discussion on the factors that contribute to the development of social phenomenon), that reproduce the conditions that facilitate victimisation. It is through this processes that an ‘ideal victim’ is created while negating the context and specific conditions that have define a ‘real’ victim (Christie, 1986a; 1986b).

On that basis, it becomes imperative that victimology engages with;

African philosophic practice in a critical and systematic exploration of indigenous forms of knowledge: practical and theoretical. It must be done by sifting through our legacies: retaining that which is alive, casting off that which is lethargic and critically fusing the heritage of the past with modern scientific conceptions (Serequeberhan, 2000: 55)

From this auspices, Peacock (2013) advocated for an African victimology as an area of specialisation that affirms its specificity, scientific nature and own identity. Based on Peacock’s (2013) assertions, this chapter seeks to develop and affirm the relevance of African victimology within the realms of the marginalisation of traditional knowledge in Africa.

Adopting an African philosophical approach towards victimisation becomes imperious within an African context that is bound by elements, which create harmony and an orderly balance (Martin, 2008). It affirms for a “connection with the composite cultural world, to undo past damage and make constructive contributions to ameliorations of evident evils” (Howard, 2005: 3). In other words, it seeks to “restore, reframe and theorise African existential experience, from

⁹⁴ African traditional knowledge protection framework falls under this view as the regime is designed to assist the victims of traditional knowledge misappropriation (See Chapter 4 for an in-depth discussion of the mechanisms available on the protection of traditional knowledge).

African lived experiences” (Teffo, 2011: 27). In that light, this thesis proposes a framework that, “redresses the epistemicides [of knowledge] in Africa, while it grounds itself in the history and existential conditions and relations of African communities” (Dastile, 2013: 94).

In pursuit of the stated, African victimology as an emancipatory framework dismantles the internal structures of knowledge imperialism through a rationalistic process that rejuvenates African renaissance. This is achieved by “conducting an investigation of the causes underlying African reality, detailing it in an accurate manner to what is true, right and useful to African communities” (Obenga, 2004: 36). Through the latter African victimology squarely falls within reasonable limits because it operates through a balanced paradigm that pursues a truth, which avoids intellectual adventurism, knowledge inequity and degradation.

By advocating for an African victimology within the domains of traditional knowledge, does not necessarily translate into isolating traditional knowledge from the vestures of western knowledge systems. Isolating traditional knowledge from a broader context of other knowledge systems places traditional knowledge into a cultural museum (Harvey, 2005). The framework should permit the transcendence of traditional knowledge from a level of inferiority to a region of equilibrium within the knowledge frameworks. This paradigm shift seeks to advance the decolonisation, revalorisation and appropriation of traditional knowledge.

Questions regarding the applicability and viability of African victimology are highly probable, especially in a context where western cultural values have taken root in the name of modernisation. Ramose (1999) has argued that the post-colonial African state represents a symbol that alien culture has been imposed upon the African way of life, thereby becoming part and parcel of an African experience. As such, the African communities have been conditioned to accept western civilisation at the prejudice of their own culture.

On the contrary, the fact that Africa suffered or is still suffering from the chains of unjust conquest, does not necessarily translate into Africa being without any foundational cultural determinism. Reverting to such questions amounts to “concentrating on the non-cognitive features of [African] tradition which not only

misrepresent them but also leads to an underestimation of the role of reason in the life of traditional cultures” (Appaih, 2002: 271). The basis of this assessment is hinged on the fact that despite of modernisation or the conversion of Africans into various religious traits, they still believe in the ontology of their traditional cultures. This assessment was clarified by Amin (1974) who argued that, “the vestiges of African past cultures especially the survival of their configurations are still a living reality (i.e. tribal ties) which continually hide in the new structures created by capitalism” (Amin, 1974: 377). African societies have remained largely intact despite colonisation and modernity;

the young nations rightly fear seeing their original world being swallowed up in the whirlpools of the industrial society and disappear forever, somewhat like an animal species we try with difficulty and often in vain to protect against the invasion of the technological man (Bigo, 1974: 23)

Within the traditional knowledge realm, customary practices that govern traditional knowledge are still existent (Tauli-Corpuz, 2005: 5). In that regard, each society develops and adapts to internally generated innovation, therefore internally imposed change affects the natural local conditions thereby adjusting social structures and ideologies so as to ensure legitimacy is attained (Harvey, 2005).

African communities are still deeply embedded in the “practices, beliefs, and cultural traditions, and shaped by interaction among other communities (Finnemore & Toope, 2003: 743). The application of African victimology within an African context creates provisions for conceptual clarity that facilitate the operationalisation of its notions within a cultural context. Therefore, African victimology is not about ‘legalising’ a social practice through a political process, but it also subsumes other non-political issues such as legitimacy that enable it to be congruent to the social practices that are at a community level thus allowing legality to be derived from informal to formal norms. Founding victimology in Africa within a cultural philosophical context of African values and ethics enables its legitimisation by virtue of its accustomed nature to the local conditions and in particular that of traditional knowledge. Having noted, the functional ideological *modus* of grounding victimology in African philosophy, it is imperative to examine

basic primordial elements that would constitute African victimology for the purpose of protecting traditional knowledge.

5.3. MAAT

Maat, an ideal of ancient Egyptian philosophy is polysomic in nature as its conceptual elasticity transcends all spheres of an ordered universe (Tobin, 1987; Karenga, 2012b; 2014). It represents the “substance of human life whose objective is order in defence of chaos” (Helck, 1980: 1110ff). The centrality of *Maat* is the “conception and practice of virtue within a social and natural order of things” (Karenga, 2012b:5). It provides for a “framework of possibility of what it does, how it acts, and what it provides for society and human relationships” (Asante, 2011:51). In Ancient Egypt, *Maat* was the revered goddess of law, order, truth and wisdom.⁹⁵ Her duty was to maintain an ordered balance within society through the application of humanitarian principles. It is in that light, that Bou-Sada (1909) identified *Maat* as the truth of justice.⁹⁶ Corroborating the latter, Budge (1906) conceptualised *Maat* as righteousness and integrity that lives upon truth. In the Coffin Texts⁹⁷, *Maat* is comprehended as balance, stability and order (Budge, 1967).

Based on these premises, Obenga (2004: 47) argued that *Maat* at a philosophical level represents “reality, a totality of all things,⁹⁸ possessing actuality of existence or essence”. This totality represents a unity of being whose functions are determined through the “personification of law, order, rule, truth, right, righteousness, canon, justice, straight forwardness, integrity, uprightness, conscientious and perfection” (Obenga 2004:47). In a phrase *Maat* can be described as the “*rightness of things*” (Karenga, 2012b: 6). Rightness in itself is not sufficient; it is the *interrelatedness order of rightness* that creates a lawful and harmonious social order. From the foregoing one can deduce the seven cardinal virtues of *Maat*, namely “truth, justice, propriety, harmony, balance, reciprocity and the rightful order which inform and undergird the lightness and righteousness

⁹⁵ The History of Creation (British Musuem) Papyrus No. 10, 188 (discovered in 1862) available at www.sacred-texts.com/egy/leg04.htm Accessed 25 February 2015

⁹⁶ The Cry of the 17th of Aethyr which is called Tan

⁹⁷ The Papyrus of Ani (British Musuem) No. 9901.

⁹⁸ *Maat* is all embodying from the devine, sacred, cosmic, physical, political and familial. See (Obenga, 2004)

of human practice and relations in the world and with the world” (Karenga, 2012: 3).

After having noted the constituent elements of *Maat*, in philosophical terms, *Maat* represents three theoretical pillars namely:

- a) *The ideal of knowledge, that is the love of science, the aspiration for knowledge for the true ‘being’ of which is true, sure and certain;*
- b) *the moral ideal of truth, justice and rectitude and;*
- c) *the metaphysical ideal of love and of knowledge of being which is at the beginning of all being* (Karenga, 2012b: 6-7; Bilolo, 1988).

Therefore, *Maat* is a philosophical ideal, which is against systems, procedures, and institutions that seek to distort the balance and *rightness* of order, which exists within all spheres of life. The stated spheres of social life, *ipso facto* include,

The political domain, where Maat is justice in opposition to injustice; the social domain which focuses on right relations and duty in the context of community and; personal domain in which following the rules of Maat to realise concretely the universal order in oneself, to live in harmony with the ordered whole (Obenga, 1990: 158 - 167; Anthes, 1954).

The binding force that holds all these *Maatian* principles together to create a ordered harmonious balance is the human being. Therefore, the focus of *Maat* is on humankind, which should coexist in harmony with the ordered universe. In that, light humanity becomes the underlying value before any material objects.

Adopting and applying these philosophical notions to the traditional knowledge discourse, one would understand that traditional knowledge is administered and operated in an ordered whole that is bound by elements and processes of the cosmic universe. Therefore, abstract laws not grounded in the philosophical notions of African philosophy cannot adequately address the needs of traditional communities. The more appropriate approach in protecting traditional knowledge is recognising traditional knowledge producers and communities at core of the cosmic universe defined by *Maat*. In that way, humanity and dignity forms the core of any discussion relating to traditional knowledge protection. The rights and obligations that immediately flow from such a framework are connected to the interrelated rightness of order in the cosmic universe within which traditional knowledge is administered.

Consequently, the traditional knowledge discourse, “becomes more of a relational concept of what is perceived of one by the community and what one thinks of self-based on the substantial part of this evaluation by the significant others” (Karenga, 2012b: 8). In that regard, humanness is centrifugal to any discourse that seeks to protect victims. The materialistic self-interest doctrine within such a framework ceases to exist as traditional knowledge protection will be more focused “on relationships, reciprocal obligations and related rightful expectations” (Assmann, 2003: 133-134). However, that is not to say individuality is not significant in social relations, it is recognised but within a framework that relates to other humans, the community and the entire ordered universe (Mabona, 1967: 12).

In that light, it is important to examine how the application of the virtues of *Maat* within the traditional knowledge domain in Africa would address the victimisation of traditional knowledge communities.

5.3.1. Truth

Maat is conversed as a signifier of truth, that is to say ‘the word’ that created an ordered and balanced world (Karenga, 2012b). Therefore, the word and truth are a “mechanism for re-establishing the order that was manifested in the reasoned creation of the universe” (Karshner, 2011: 52). The truth, “searches for harmony, balance, order, justice, righteousness, and reciprocity which creates a society that is non-dominative and non-combative” (Asante, 2011: 46). Its connects with the higher realms of actuality which are structured in an intense epistemic interaction with other discourses which debunk the anti-foundationalism rhetoric of dominance and oppression (Karshner, 2011).

Mediating disorder or chaos through the a close observation of being in a cosmological society facilitates the definition of truth (Assmann, 2003). The cosmos itself becomes a heuristic tool for revealing knowledge of the creative power of the ‘word’, which is concerned with building communities, reaffirming human dignity, reciprocal solidarity and enhancing the life of people (Karenga, 2013). Therefore, behind the ‘word’, is a force that empowered the creation

event which established the order of existence manifest in normality of a phenomenon (Karshner, 2011; Wilkinson, 2003; Frankfurt, 1961).

Maat facilitates for the universality of humankind in their ideals, knowledge and practices, which allow for a plural communicative humanitarian discourse despite the question of otherness (Asante, 2011). As such, truth abrogates the normative norms that seek to make communities to participate in social relations that perpetuate their own oppression (See Chapter 2.7 and Chapter 3.9, which discusses how unequal power relations determine social relations in the field of traditional knowledge)

In that regard, truth provides for a framework to traditional knowledge holders in Africa to self-assert and affirm a dialogue with continuing apprehensions that affect their humanity. This process requires the critical questioning of every traditional knowledge discursive practice in Africa to understand whether it encourages or enriches human conditions. To comprehend the truthfulness requires the incorporation of the past in the critical examination of the present, to define the desires and strivings of the future.

Therefore, in light of the historical and current oppression of traditional knowledge communities, truth becomes a reformatory discourse that affirms Africans as bearers of “divinity and dignity, their right to a free and meaningful life, and their right to speak to a cultural truth” (Karenga, 2013: 213). It appropriates and restores the dignity and humanity of vulnerable populations. In other words, the aim of truth within the traditional knowledge discourse is always to overcome *isfet*, that which evil, difficult, disharmonious, and troublesome. It is all about good overcoming evil, harmony replacing disharmony, and order taking the place of disorder. This is an optimistic view of reality where one believes that justice would always rise to the top and that truth would outlast untruth” (Asante, 2011: 52). The affirmation of truth permits traditional communities to pursue humanity and social justice within inhuman and oppressive conditions of traditional knowledge misappropriation and marginalisation. Therefore, truth in *Maatian* terms represents power that challenges the dominant oppressive regimes thereby allowing for a transformative process which favours equal and non-dominant relations in society (Foucault, 1971).

The efficacy of truth and justice within this context, requires *respect for* human dignity, economic justice, meaningful political participation, cultural integrity, mutual respect for all people and an uncompromising resistance to social forces and structures which deny or limit these (Karenga, 1995: 2). The attainment of truth necessitates the struggles of traditional knowledge communities to be constructed and addressed within a context grounded in African culture and philosophy. That process offers a purposeful framework to understand the deep cultural context within which traditional knowledge is enunciated. The practicality of a truth based approach allows for the interaction of traditional knowledge protection mechanisms with “shared experiences of a context which is understood” (Karshner, 2011: 55) by traditional communities. As such, traditional knowledge discourses grounded in the African conception of truth would produce something new intellectually, as it will provide a philosophical lived experience.

Therefore, *truth* provides a space to build and advance alternative ways for a communal deliberative discourse that is grounded in ‘pragmatic and practical’ lived experiences of post-colonial Africa (Serequeberhan, 1994). The incorporation of an African centred truth within victimology empowers disenfranchised traditional communities by understanding their cosmological worldview that focuses on connectedness and balance. The sense of connectedness within a socially constructed historical reality enhances the positive impact of creativity in the truth, which allows for a recreation of norms and reciprocity between the individual, the community and society (Gordon, Iwamoto, Ward, Potts & Boyd, 2009).

5.3.2. Restoration

It would be inconclusive to advocate for an African victimology without assessing the real existential conditions that currently define the global knowledge infrastructure. There is need to develop such an understanding within a practical paradigm which reconciles the ever relentless violent and oppressive knowledge capitalist regime and the humanistic African paradigm of truth. With such an objective in mind, *Maat* within African societies is achieved through the application of a communitarian model hinged or founded in notions of *modus*

vivendi.⁹⁹ Bridging that notion with the doctrinal concept of self-interest (individuality) that has been applied to the traditional knowledge framework in Africa, becomes key in addressing this conundrum.

The doctrine of self-interest stipulates that social stability and justice are grounded on mutually advantageous arrangements that are deemed to be more stable (Becker, 2005). Therefore, self-interest is founded on settlements or notions deemed to be politically correct or politically stable. However, the challenges associated with this conception is that the ‘politically correct’ positions adopted in pursuit of justice can be easily subverted; as such political settlements are usually at the whims and caprices of those who control the means of production (Althusser, 2006; Marx, 1906). Therefore, justice becomes justice of those in power (Poulantzas, 2000).

This scenario is often referred to as the ‘tough-crowd problem of justice’, because it is difficult to develop sustainable “commitments to justice from those who are powerful but evil, powerful but amoral, powerful but unreasonable, powerful but badly wrong in the conception of justice” (Becker, 2005: 14). What makes the tough-crowd phenomenon more complex is reconciling the interests of the “hard-boiled political realists, opportunistic free riders, enthusiastic anarchists and resourceful sceptics” (Becker, 2005: 15). It is therefore the aim of this section to analyse whether “radically opposed paradigms [of African Philosophy and self-interest] can be reconciled” (Ramose, 199: 134) with traditional knowledge protection.

Before proceeding to address aforementioned complexity, it is important to understand the underlying values of deviance, violence and crime. Assmann (2003: 215 -216), argues, “*isfet* lies not in human nature but in the nature of the human heart i.e. free will”. Accordingly, wrong or deviance in the world is a consequence of the use of free will in direct contradiction to the established harmonious balance. Such notions are similar to the ones advocated by Kant (1960) who argued that the determination of evil in the world is caused; on the subjective ground of possibility of the deviation of maxims of moral law (Kant, 1960: 24).

⁹⁹ An arrangement or agreement allowing conflicting parties to coexist peacefully, either indefinitely or until a final settlement is reached.

On the contrary African philosophy does not provide for an explanation of ‘evil’ or deviance as being a constitutive nature of the human being. It locates ‘evil’ and oppression in the cosmological view of the pre-creation of the universe, which is represented by disorder and chaos. In *Maatian* philosophical terms ‘evil’ therefore is a representation of disorder which manifests itself through confusion and crime (Te Velde & Te Velde, 1977). Therefore, ‘evil’ and disorder are interrelated (Baines, 1991). When the interrelatedness between ‘evil’ and disorder is juxtaposed against *Maat* (truth, justice and harmony), there is a realisation that the former means to deviate from the established societal harmonious balance. To understand this statement there is need to revert to the cosmological foundations of *Maat*, which stipulate that:

he riseth with two heads, whereupon one beareth the feather of Maat and the other the symbol of wickedness. He besoweth wickedness on him that worketh wickedness and right and truth upon him that followeth righteousness and truth (Budge, 1967: 19)

This means that a social phenomenon formulated on the contradictory notions of justice and oppression. As such, social relations are established on the doctrine of opposites i.e. good and ‘evil’ co-exist (Kamalu, 1990). Therefore, ‘evil’ and disorder are the opposite of the ordered balance that is created through *Maat*. This scenario creates conflict and contradiction within a social phenomenon. Within the African cosmological view, such conflicts are seen as being concomitant with the of duality of nature;

Just as there is a phenomenal aspect of the world which is subject to experience, there exists a nominal aspect which is not, but in which we find a basis for the phenomenal world. The phenomenal refers to thingness, to matter whereas the nominal does not. Therefore we have the foundation of society in thingness and nothingness (Kamalu, 1990: 34)

On that basis the phenomenal which is *Maat* (justice and truth) cannot be realised in the absence of the nominal or nothingness (disorder and evil). For example, one cannot conceive of justice in the absence of injustice.¹⁰⁰ In that regard, nothingness is a threat,¹⁰¹ to the harmonious balance as it “represents the

¹⁰⁰ What is the meaning of light in the absence of darkness or the importance of humanity in the absence of evil?

¹⁰¹ Nothingness does not necessarily represent itself as a threat but it also operates as a challenge to the phenomenal to overcome nothingness (Kamalu, 1990).

disordered, the 'evil', the unjust and all things negative to being" (Karenga, 2012b, 184). Hence, 'evil' or disorderedness becomes a field for active creation "for potentiality (nothingness) is the very structure and structure of existence" (Karenga, 2012b :186) just as "darkness is light waiting to happen" (Allen, 1988: 34-35). Therefore, evil is the unrealised and unstructured potentialities of doing justice. Hence, order, justice and harmony are always in a state of constant evolution, as there are always becoming another in response to the threat posed by the disorder and evil. Disorder exists as a necessity for order and justice to be conceptually possible (Kamalu, 1990).

Reverting to the discussion at hand, 'evil' and deviance (nothingness) becomes both a challenge and a necessity, "as it constantly calls for the administration of justice for the very purpose to end the confusion" (Kákosy, 1964). Therefore the

Essentiality of conflict, its subjugation and resultant equilibrium is what the process produces. What is projected here is a necessary dialectical built in the very structure of being i.e. a process of order and disorder, conflict and resolution, Maat and Isfet, Maat seen as inevitably triumphant (Karenga, 2012b: 206).

Therefore, the coexistence of the two leads to an interaction of contradictions between the good and the evil; a co-existence of reality defined by *Maat* is realised. Out of this interaction, a life force (truth) is developed, which is the author of change in relation to constancy, order and uniformity. This does not necessarily mean that one force (phenomenal and nominal) is superior to the other but both work mutually in becoming another. The process of becoming from the contradictions gives rise to a motion that brings order out of chaos (Kamalu, 1990).

Within African philosophical thought the bridge between a violent capitalist system and a humanitarian is one that can be achieved through a pragmatic action of creativity and effective action which "links the intellectual with the material" (Karenga, 2012b:189), "for it is through this process that living things work to transform the world around them" (Allen, 1988: 46). The potentialities that lie in nothingness (evil) therefore provide for the possibility of human action and agency in the creative transformation of society.

This principle furthermore articulates that the harmonious balance that exists in society is always under constant threat from the violent capitalist system and it needs to be reaffirmed through the application of African victimology, which seeks to restore and sustain the existence harmonious balance. To ensure the realisation of this phenomenon, justice and power should be grounded in *Maat* to assure the attainment of “lawful regularity” (Karenga, 2012b: 194). That in part requires the orderedness of being through becoming in Ubuntu, for without it an ordered balance is complex to achieve. Therefore, the “performance of order” (Bonnel, 1990: 82), within the realm of traditional knowledge will allow for the realisation of “justice, peace, reciprocity, propriety and uniformity” (Karenga, 2012b: 194).

As such, justice is not the legal administration of rules and regulations but the just and proper relational obligations between individuals and the community. Likewise, “truth is not the simple correspondence to reality but things being in their rightful place” (ibid). It is when the recognition of such norms within the broader structures of society are realised, that the philosophical ideals of creating an equilibrium balance are established. The process of overcoming evil requires constant creative orderedness which is reflective of the cultural conditions of society that do not see differences but one that stresses affinities and connections (Finnestad, 1986). The state of unity through connectedness ensures the creation of a community and world whose rightness would triumph regardless of evil and disorderedness in the world (Karenga, 2012b). However, that does not refer to the non-recognition of the continuous existence of ‘evil’. Ptahotep an ancient Egyptian scholar attested to the fact that evil, violence and chaos in some cases prosper within society but in the end, it provides false prosperity that marks failure (Karenga, 2012b). Therefore, the way to overcome evil and disorder requires recreating, sustaining and restoring conditions of rightness and humanity (Karenga, 2012b, 184). This posits a process of becoming within an existential environment that is cooperative and creative whose prime constant goal is the admiration of harmony and justice. It is within these philosophical bearings that African victimology enmeshes itself within for it is underlined by the virtues of African philosophy that aver that the exposition of falsehoods in any discourse assists in reducing evil (Kamalu, 1990). Hence, the exposition of the fact that the traditional knowledge frameworks in Africa reproduce victimisation, is the first step to bring

traditional knowledge communities into being; the primordial essence of creativity towards a harmonious and ordered balance.

5.3.4. Harmonious Co-Existence

Harmony in ancient Egyptian society was represented by the Goddess Maat,¹⁰² who embodied the natural “order of things, proportional measures and balance as the eternal truth of nature” (Stakhov, 2006: 490). Within this realm, there is no ontological distinction between human beings and the natural world. Finnestad (1989: 31) highlighted that this ontology of non-separation “defines a human being as an entity of life belonging to life total, temporarily manifested in a body of being but in essence not separated from other bodies of being”. This expression of harmony was constructed and applied within a human context, as it was significant for the growth of humanity. Asante argued that:

It is in the quest for harmony that is the source of all literary, rhetorical and behavioural actions. The sudic ideal which emphasises the primacy of the person can only function if the person seeks individual with collective harmony. . . one must understand to become human (Asante, 1998: 200)

Therefore, social organisations are bound by a cosmos of harmonious motion of coexistence between humankind and their immediate natural environment. The pursuit of a harmonious co-existence leads to growth of well-being, which grows naturally to express its nature (Verharen, 2008). In other words, the collective well-being of community members is the purpose for creation, dissemination and application of traditional knowledge. Because a harmonious co-existence integrates all elements in the universe; traditional knowledge creates a relational balance between the sacred, spiritual, individual and community (Martin, 2008).

This idea resonates with the *Maatian* ideal, which connects everything within the universe and relates it to the holistic nature of African society. In that regard, human action and knowledge must be derived from the cosmic harmony of the universe to ensure that it prevents ‘evil’ or deviant deeds from overwhelming the harmony of the cosmic world (Verharen, 2008). As such, “all things are bound in an

¹⁰² Maat symbolises both cosmic order and social harmony. See (Hood, 2009).

indestructible unity” (Tobin, 1989: 13). A quality phenomenon that unites all in a harmonious ordered balance.

The integrated unity and harmonious existence of social life within an ordered universe reverberates into everything including traditional knowledge, which is a holistic “inter-connected, intra-connected and interactive network of knowledge clusters” (Velthuizeni, 2012: 53). In that regard, traditional knowledge becomes a harmonious network of psychological, biological, social and spiritual interactions within communities (Martin, 2008). It operates within a broader interrelated context that subsumes that all knowledge grows within its immediate environment. It is in a state of constant harmony, which “sustains peace, justice and other conditions for being in life” (Verharen, 2008: 194). This includes people, communities, property, and custom as being part of a complete cosmic universe that permits them to grow. Therefore, the efficacy of any traditional knowledge protection mechanism must necessitate its viability with the harmony and peace of traditional communities and their immediate environment. Such an interactive approach contributes to the flourishing of humanity and their associated knowledge.

Therefore, the traditional knowledge protection mechanisms should have an internal (that is harmony with traditional communities together with their associated customs and practices) and external harmony (that is harmony of the co-existence of traditional knowledge communities and reciprocal obligations between human and nature). A harmony that obliges empowerment while acting on solutions endorsed and authenticated by traditional knowledge communities. A fragmented approach towards the protection traditional knowledge in the absence of its holders and immediate environment creates a disharmony within the natural order of things. Any disturbance (*isfet*¹⁰³) in the harmonious balance leads to social disruption. A distorted harmonious balance in society is deemed to be “fatalistic and restrictive” (Karenga, 2012b: 9) as it is a “negative force that prevents, change or development, holding the cosmos in a static condition” (Tobin, 1987: 113-114).

¹⁰³ Wrongdoing, evil or disorder

The disrupted harmonious social balance in the ordered harmonious universe becomes a fertile breeding ground for inequality, subjugation and oppression (See Chapter 2.2). The individuals or groups that are behind such a disruption tend to benefit from their *isfet* at the prejudice of the community as a whole. Hence, any omission or failure to address the imbalance or factors that contributed to the imbalance over a period would be tantamount to reproducing conditions that are unequal and oppressive. (For more, see Chapter 3 and 4 for a discussion on the factors that contributed to the marginalisation and victimisation of traditional knowledge holders and how they were reproduced within the institutional structures that seek to protect traditional knowledge communities). With humans at the centre of the harmonious universe, it is their obligation to maintain order and to address anything that causes disharmony (Martin, 2008). This can be achieved through practicing *Maat*, which reconciles tension, maintaining the delicate and ever elusive order with its associated cadencies.

5.3.5. Equality

Equality in ancient Egypt was presented through the symbol of the weighing of the hearts of the dead for their deeds against the light feather of *Maat* (Zubrow, 2010). This symbolic notion represented through *Maat* was applied to social relations based on social agreement of equal process that promoted social equality (Zubrow, 2010). *Maat* is therefore not the constituent element inequality but is the foundation of egalitarianism (Karenga, 2012b). This notion is conceptualised in *Coffin texts*, which reiterates that:

I relate to you the four good deeds in order to silence evil...I made four winds that everyman might breathe therefore like his fellow in him his time...I made great flood waters that the poor might have rights in them like great men...I made everyman like his fellow. I did not command that they might do evil but it was their hearts that violated what I said so (cited in Breasted, 1933: 221)

The equality as propounded by *Maat* did not only extent to man but also applied to women as a possessor of dignity and divinity in her own right; as an equal and complementary human being in relation to man. Women were equally “indispensable to the creator in the foundation of human society and the world” (Karenga, 2012: 2). Hence, *Maat* recognises human dignity as a concept that does

not diminish or reduce the status of any human being. All people are equal, enjoy equal legal rights, and participate in all areas of social, economic, religious and political life (Karenga, 2012).

Such notions of equality between the females and male are based on the ontological principle that both are derived from the “same cosmological source in Africa” (Asante, 2007: 49). Hence, equality is self-determining (Zulu, 2012). It seeks to recognise the “quality and dignity in human personality (humanness)” (Koka, 2002: 65). However, it should be noted that humanness is not constituted in human hood and humanity” (Komakech, 2012: 28). It extends this world not outside him or her but extended with him or her, the world besides human beings, and the world that is not non-human because humans are a composite of it and dependent on, but a world together-with-human beings (Komakech, 2014).

As such, equalitarianism is not a legal concept but a notion that “seeks out of good in relation to need” (Frankfort et al., 1946: 109). This relational need is determined by the concept of wholeness advocated by Ubuntu. However, equalitarianism is not a frigid concept, as circumstances defining it evolve according to the dictates of time and context. As such, time becomes very imperative to the definition of what equalitarianism is, as time is a lived experience not an abstract concept.

The inequality that exists between traditional knowledge holders and others knowledge producers is a reflection and a product of a disharmonious social relation in society. The restoration of harmony and equality (restorative justice) becomes imperative through the weighing and calculation of *Maat*: “levelness, evenness, straightness and correctness in the sense or regularity or order, uprightness, riotousness, truth and justice” (Frankfort et al., 1946: 108).

In addressing the question of inequality between the two-knowledge regimes, one needs to take cognisance of the concept of symmetry practiced in African communities. This concept counter poses conflicting elements to secure a harmonious balance (Frankfort et al., 1946). This symmetrical foundation of equalitarianism means that the sustenance of communities is supported and complemented by worldviews that are integrated in their totality. This guarantees

certainty and predictability thereby limiting the opportunities for its subjection to institutional structures, which are determined by the arbitrariness of the dominant mode of production. Based on these notions of equality, the conditions in which traditional knowledge is produced should not be the determinant of its equality with other knowledge regimes. It is not the means but the end that determines its equality. Such an approach guarantees the recognition of divergence within knowledge producing cultures as one of the challenges that affects traditional knowledge protection is the means of its production not its constituent benefits (Granstrand, 1999) (For an extensive discussion with regards to this phenomenon see, Chapter 2.4.).

5.3.6. Humanity

African philosophy seeks to affirm the humanity of an African person, which is guided by justice, truth and righteousness (Kamalu, 1990; Teffo, 2011). The *Maatian Declaration of Innocence* serves as the conceptual foundation for these humanitarian considerations (Budge, 1967). In its prescriptive nature, the *Maatian Declaration of Innocence* obligates:

Not to do wrong to people; not to impoverish familiars; not to cause pain; not to cause anyone to weep; not to do what is harmful to people; not to mislead people; not to be deaf to the truth; to cause strife; not to wink to justice, not discriminate (Karenga, 2012b: 325)

The underlying vestures of the foregoing statement emphasises that action should be guided by humanity (not to do wrong, not cause pain, not to cause anyone to weep, not to do something harmful to people). Hence, any enterprise that seeks to protect the victims of traditional knowledge should be cognisant and guided by the value and worthiness of human dignity. Humankind is not an object or subject but a personality (not to confuse the message with the messenger). Secondly, the declaration obliges that any conduct should operate within the considerations of humanity (not to mislead people, not to be deaf to the truth, not to cause strife, not to wink to justice, not to discriminate). The second filament of these humanitarian considerations seeks to extinguish conduct that might diminish the sanctity of communitarian life that is based upon reciprocal relationships.

Grounding the stated cyphers as articulated in the *Maatian Declaration of Innocence* within a traditional knowledge framework will permit for the recognition of traditional knowledge within social relational obligations that largely define African society. The rights pertaining to traditional knowledge would then be marked out by assessing the needs of the community *vis a vis* to that of an individual member as a, “man belongs to a society, not to himself. Property laws are not as important as the right relations with other man” (Frankfort et al., 1946: 109).

Humanity is therefore the root of all value (Kamalu, 1990; Ramose, 1999), which prohibits human mistreatment (Karenga, 2012b). It follows, that the denigration of one community or individual by another equates to the mutual disrespect of the person or group acting in the denigrate *modus*. Consequently, a vicious cycle of victimisation that does not recognise the value of humankind erupts whereof the material conditions end up determining social co-existence (Marx & Engels, 1976). Therefore, the divergence from humanity as a source of value in life will inevitably contribute to contestations based on material wealth, a scenario that has created victims within the field of traditional knowledge in Africa. The negation of the humanity by the material structural imputations of institutions is a source of concern in addressing the challenges that are associated with traditional knowledge misappropriation.

Solutions to this caprice should found in actual relations that recognise the humanity of one person in relation to other persons as;

Rights do not exist as an integral part of human nature. They arise from a person's destiny of living in a relationship with family, friends, ethno-linguistic group and nation. They are incidental, unavoidable and necessary, but not an attribute of being human. No rights can be exercised apart from one's relationship with another (Zvobgo, 1979: 90)

Therefore, conflict is not an abstract concept but a distortion to the harmonious balance caused by humans. Africans address any wrongdoing that has bedevilled the community by focusing on the individual that has distorted the harmonious balance. Breathstead (1933:27) could not have put it much better when he articulated that Africans, “think not of theft but the thief, not of love but the lover, not of poverty but the poor man: he sees no social corruption but a corrupt

society”. Therefore, crime for example is not interpreted in its abstract sense as is dictated by the law (ideological state apparatus) but in line with the person who has committed *isfet* to reintegrate him or her back into society to restore the harmonious balance that was initially disrupted.

Such an approach allows for a constant social transformation of the community as negative values are replaced with a humanising experience (Velthuizeni, 2012). Therefore, victimisation is addressed within a humanitarian spectrum where individuals and the community are at centre not at the peripheries, as the current traditional knowledge infrastructure presents.¹⁰⁴

5.4. UBUNTU

From the reverberations of *Maat*, the dominant resonating thought was communality and wholeness. The individual soul is justified by living according to *Maat* so enable the community to receive tangible benefits (Martin, 2008). This dynamic two-way relationship between the individual and the community forms the fundamental basis of African society, a concept that feeds into the notions of Ubuntu. To demonstrate this assertion; the *Zulu Declaration of Self* is worth noting:

I am sovereign of my life; my neighbour is of his life; society is a collective sovereignty; it exists to ensure that my neighbour and I realize the promise of being human. I have no right to anything I deny my neighbour; I am all, all are me. I cannot commit no greater crime to frustrate the life's purpose of my neighbour. (Asante & Abarry, 1996: 371)

The fore stated declaration advances the notion of peaceful co-existence of humankind that is not predetermined by any orientation. Hence, the respect for humanity transcends all boundaries of societal relations. It is from this ideational understanding that the term Ubuntu emerges. Ubuntu in its constitutive philosophical language is a hybridisation of two words,

It consists of a prefix ubu- and the stem -ntu. Ubu evokes the idea of be-ing in general. It is enfolded be-ing before it manifests itself in the concrete form or mode of existence of a particular entity. Ubu- as enfolded be-ing is

¹⁰⁴ It has been noted in chapter 4 that one of the challenges in traditional knowledge protection is the alienation of traditional communities from the discourse that concerns them.

always oriented towards unfoldment that is incessant concrete manifestation through particular forms and modes of being. Ubu is therefore oriented towards -ntu. -ntu as the nodal point, it assumes a concrete form or mode of being in the process of continued unfoldment. Ubu- and -ntu are not radically separate and irreconcilable opposite realities. On the contrary they are mutually founding in the sense that they are two aspects of be-ing as a oneness and indivisible wholeness (Ramose, 1999: 50).

It is very complex to translate Ubuntu into English, as it is an all-embracing African concept. In that regard, Ubuntu as a philosophical concept “is often interpreted in a flawed manner” (Venter, 2004). Maluleke (1999: 13) argues that Ubuntu is often “constructed in a sporadic, unstructured, naïve and dangerous way”. For instance, essentialist definition of Ubuntu, attempts to define it from the saying “*umuntu ngumutu ngabantu/ munhu munhu nevanhu*” (a human be-ing affirms his/her humanity by recognising the humanity of others and on that basis he/she establishes humane relations with them) (Letseka, 2012; Muvangua & Cornell, 2012; Gade, 2011; Ramose, 1999). In other words, a person’s humanity is dependent on the appreciation, preservation and affirmation of another’s humanity (Eze, 2008). In that light society is determined by social interdependence;

In traditional life, the individual does not and cannot exist alone except corporately. He owes his existence to other people, including those of past generations and his contemporaries. He is simply part of the whole. The community must therefore make, create or reproduce the individual for the individual depends on the corporate group. Whatever happens to the individual happens to the group and whatever happens to the group happens to the individual (Mbiti, 1969: 108-109).

The community is therefore, a guarantor of the individuals action, while the individual guarantees the community’s survival by “advancing constitutive goods under the cardinal principle that if the community hurts, the individual gets hurt” (Eze, 2008: 388). Consequently, by nature of such an arrangement the community generates values that enhance human identity within a cultural context. The concept of “personhood does not therefore become an automatic quality of the human individual, it is something that is achieved” (Wiredu, 1996: 15) by virtue of the fact that the “community characterizes relations among the individual as a direct consequence of communitarian social arrangements” (Gyekye, 1998: 318). Community, hence needs to be understood as a “group of people that live together

by fortune or misfortune of shared histories, heritage of common fate and destiny” (Eze, 2008: 389).

Therefore, from the perspectives of the essentialist definition of Ubuntu, the primary aim of Ubuntu is the achievement of beneficial arrangements in a society; whose convictions are shared by members of the community. Within this context, the individual’s pursuit of his or her individual goals is expected to be in harmony with the overall communitarian goals. In other words, there is need for a common consensus between members of the community for the attainment of common goals (Ramose, 1999).

However, the essentialist definition of Ubuntu is problematic. To understand the prejudices that are associated with such a preconception approach to Ubuntu, resort has to be made to the conceptual clarity of the terms “consensus and solidarity” in understanding of Ubuntu within a broader African setup. Generally, the attainment of a common good in Ubuntu in terms of essentialism is achieved through consensus within a community setup. Louw (2002: 18), defined consensus as “an equal chance to speak up until some agreement or group cohesion is reached in unity and in strength”. In other words, the validity of consensus is based on legitimation.¹⁰⁵ Therefore, consensus is a “stamp of approval, any claim to gain legitimacy or validity in an object of administrative procedure, a metaphor for power or an instrument for domination” (Lyotard, 2000: 45; Eze, 2008). As such, by virtue of the fact that consensus is based on an administrative procedure it is therefore grounded in rights rather than on issues that are mutually good or mutually beneficial to the community.

Consequently, divergence becomes “suspect while single-meta physical narratives are celebrated, unanimity becomes a prerogative, while dissent is pressured to conform to the language of the game” (Eze, 2008: 392). Consensus becomes a brutal and oppressive force, which suppresses the core values of human identity, promotes dogmatic adherence to a meta-physical discourse in the name of consensual tyranny and uniformity. In that context what becomes the norm is,

¹⁰⁵ Legitimation is an act or process that become authentic by its attachment to norms and values within a given society

To agree is more important than to disagree, conformity is cherished more than innovation, tradition is venerated, continuity is revered, change feared and difference shunned (Eze, 2008: 393)

In addition, the conceptual interpretation of Ubuntu in the terms of “I am what I am because of who we all are” (Elechi et al., 2010) is problematic. The presentation of Ubuntu in such terms, translates to *simunye* (we are one). As such, it creates a unity that is bound by uniformity. It creates a possessive ideology “in which we simply become a photocopy image of the other. Indeed this fusion of the subject suppresses the other whose uniqueness informs, educates and enriches me” (Eze, 2008: 396).

In close analysis,

the idea of communal engagement and common good are subverted because if we are unanimously one, then there is neither a constitutive engagement with the other nor any need for substantive commitment to good and humanity: to view another as the other, is to possess and objectify the other. I acknowledge the other to possess him or her in expanding the circle of sameness. The subject is truncated, it receives nothing and learns nothing, which it does not know or already possess. (Eze, 2008: 396-397)

Differently put, humanity is recognised through otherness. Such an interpretation of Ubuntu represents the individual notions of self-interest as it promotes individual rights rather than relational obligations as established by *Maat*. To avoid such a skewed understanding of Ubuntu, there is need to define it within its performative role.

Ubuntu is a value, which “unites self and the world in a peculiar web of relational reciprocal obligations in which the subject and the object become indistinguishable” (Eze, 2008: 396). In other words, Ubuntu promotes a policy of dialogue that seeks to understand the other in the overall ‘ontic-commitment’ to attain good in society. Therefore, humanity in Ubuntu seeks to understand the experiences and encounters of the other in his or her current historical context, which thereby informs and enriches the perspectives of others which in turn frees them from their dogma of judgment (Eze, 2008). Therefore, the values of goodness are internal to the people of Africa rather than external.

Ubuntu is not fixed to a particular function or characteristic; it is open ended allowing another to become thereby fostering diversity in humanity. That is to say,

the unfoldment of *ubu-* as *being* gravitates (becoming) towards the recognition of *-ntu* (humanity) to establish a harmonious balance of wholeness within a community. This balance is held by virtues which, Masina (2000: 170) identified as “caring, compassion, unity, tolerance, respect, closeness, generosity, genuineness, empathy, consultation and compromise”. As a consequence Ubuntu is a representation of collective interactive relational personhood that invokes “group support, acceptance, cooperation, care, sharing and solidarity” (Mbigi, 1997: 57).

Within the domains of traditional knowledge in Africa, Ubuntu represents “a process and philosophy which reflects African heritage, traditions, culture, customs, beliefs and value systems” (Makhudu, 1993: 5). It forms the foundations of collective consciousness that are grounded in the values of reciprocity, reconciliation, dignity and respect (Prinsloo, 1996). All these values are primarily appreciated within the concept of selfhood in relation to the community relations. The subject and the other do not dissolve into one rather they are in constant contact and interaction such that the others uniqueness enriches another (Eze, 2008). This process transforms society from a mode of production, which recognises individuals as objects to one that recognises the humanity of humankind, extinguishing oppression and victimisation (Brush & Stabinsky, 1996).

5.4.1. Unity of being

Ubuntu is applicable to most indigenous Africans because of its philosophical interrelatedness with cultural affinities and kinship (Ramose, 1999). Communalism therefore becomes the broader premise in which Ubuntu is understood, as the welfare of an individual,¹⁰⁶ is dependent on the welfare of everyone (Kamwangamalu, 1999). It is this form of communalism and social solidarity that defines humanness in relation to Ubuntu (Gyekye, 1987). Therefore, Ubuntu is concrete in the everyday lives of Africans as it advances values that promote social interdependence.

¹⁰⁶ Individualism cannot thrive in traditional African culture; and that in spite of individual talents and capacities, the individual ought to be aware of his or her insufficiency to achieve his or her welfare through solitary effort (Gyekye, 1987).

Based on this supposition the notion of *be-ing/personhood* within the conceptual framework of Ubuntu becomes imperative, as an individual exists by virtue of the fact that others exist. *Being* human therefore is not enough, it is *becoming*¹⁰⁷ that completes the circle of Ubuntu, as it is an “embodiment of the fundamental ethical, social and legal judgement of human worth and conduct” (Ramose, 1999: 52-53). Hence, *becoming* is centred on the *be-ing*. However, *be-ing* and *becoming* are not separate and apart from the other but they are a representation of two interrelated aspects of reality (Prigogine, Stengers & Toffler, 1984), which seek to establish an equilibrium balance within human relations. Therefore, the recognition of *be-ing* in the absence of *becoming* amounts to a fragmentation, which specifically focuses on the individual (self-interest) a scenario which consequently distorts the ordered balance of social relations.

In that light, the community does not have priority over the individual and neither does the individual have priority over the community. The individual and the community are not “radically opposed in the sense of priority but engaged in a contemporaneous formation which is governed by a dialogical relationship” (Eze, 2008: 386). Such an approach assists in constructing “human relations, human value, trust, dignity and social harmony” (Venter, 2004:151).

From a traditional knowledge perspective, there is a realisation within the frameworks in Africa that advance a radical separation of the *being* from his existential environment through the creation of laws that are not culturally rooted in Ubuntu. Consequently, this affects and displaces their relative role from the larger context of their existence. This analysis espouses the fact that Ubuntu does not only relate to relational obligations between human beings but it also extends to their social existential environment. This is because when a being is thrust into the sphere of becoming, he or she causes other forms of being to come into existence. This form of self-affirmation and self-infusion in the existential conditions of society “serves as proof, a demonstration of existing existence: I exist therefore existence exists” (Obenga, 1989: 306). This affirmation allows for reciprocity between the act of creating traditional knowledge and the unity of its being within the traditional cultural context. Hence, all knowledge produced in

¹⁰⁷ Becoming represents human development

African traditional communities “relates to an understanding of the concreteness of a lived life” (Karenga, 2012b: 196). Therefore, conscience is derived from the harmonious social relational environment that is in harmonious co-existence with the whole universe. Ubuntu is thus anti-materialistic as it is based on relational social interdependence.

Ubuntu is a philosophical branch of traditional knowledge; it fittingly merges within the cultural context of traditional knowledge. This renders traditional knowledge and Ubuntu a unity of being among many other social, political and cultural factors of traditional communities. However, the current traditional knowledge framework fragments traditional knowledge from the conventional practices in the local context. Such approach would necessarily cause social disharmony and destroy the lives of traditional communities (Muwanga-Zake, 2009). Furthermore, such an approach has psychological implications in that it gravely affects the ability of the traditional communities to make sense of their environment thereby affecting their self-esteem and confidence (Gilbert, 1997). Gradually dislocations from the conceptual whole are more likely to occur especially if communities are “obliged to engage in new activities whose origins lie outside the local context” (Gilbert, 1997: 277).

Ubuntu provides the necessary tools for protecting traditional knowledge in a systematic way. It is a lived experience which allows traditional knowledge communities to self-determine their being within their cultural and social realities. Such an approach will not merely give a ‘voice’ to traditional knowledge communities, but “evokes discourse through a process, which develops meaning or ‘truth’ through a relationship of trust, reciprocity and co-operatively evolved methods of inquiry that remain true to the context” (Prior, 2007: 165). It creates a harmony with the cultural values and epistemology of the indigenous people (Muwanga-Zake, 2009).

In other words, the interaction between traditional knowledge and Ubuntu becomes the seed for constructive development and the destruction of historical injustices (See Chapter 2.8). As such, Ubuntu becomes a means for social engineering and transformation (Gilbert, 1997). Furthermore, the reclamation of traditional cultural identities by knowledge holders through social transformation

in Ubuntu promotes the decolonisation of the knowledge infrastructure. Such an approach makes traditional knowledge protection more relevant and practical in addressing the needs of traditional knowledge holders and communities.

5.4.2. Restorative and social justice

The validity and efficacy of Ubuntu is measured by the way in which a community responds to the welfare of victims and the ability of the community to restore an equilibrium balance. It adopts a victim centred approach that restores victims through empowering them and addressing their needs (Elechi et al., 2010) while at the same instance holding offenders accountable to victims and the community.

This process is focussed on addressing the challenges that affect the victim while ensuring that the actions that harmed the victim will not be repeated in the future. The philosophical underpinning of such an assertion is based on the values that an act which is injurious to an individual injures the community as a whole. Therefore, redressing this injury becomes a corporate responsibility for the community. It sanctions healing, reintegration and transformation of the society from the harm that it has suffered. Restoring the victim back to his status quo is imperative as it allows for the continuance of his or her life within the same community context where the harm was committed (Elechi, 2004).

On the other hand, it permits the community to self-introspect and re-evaluate its societal values, while allowing a process of relearning the Ubuntu values of restraint, respect, empathy, forgiveness and responsibility (Elechi et al., 2010). The relearning of these virtues reminds the community about restoring relationships that establish an equilibrium balance. Such processes are exercised within an interconnected social equilibrium because individuals who are connected to communitarian values, value transformation than individuals who are fragmented and disconnected.

African Victimology therefore advocates for, “restorative governance and justice aimed at re-establishing social relations and establishing new balances that can enable people in the communities to regain control over their lives” (Tandon,

2012: 339; Shearer, 2012). Such a horizontal restorative epistemology is responsive to the cosmic relations of nature (Tandon, 2012).

Within the domains of traditional knowledge; restorative justice re-establishes and maintains an equilibrium balance within the community and the communities that surround it. An African framework in achieving the latter is of utmost importance because;

African law does not create offences, it does not create criminals, and it directs how individuals and communities should behave towards each other. Its whole object is to create an equilibrium, and the penalties are not directed against specific infractions, but to the restoration of an equilibrium (Driberg, 1934: 231).

The re-establishment of the 'equilibrium' within the traditional knowledge domain would facilitate the reintegration of African communities within the overall knowledge producing cultures thereby allowing communities to be participants of processes that affect them. As such, justice becomes a source of peace and harmony (Ramose, 1999) because restorative justice is a lived experience that seeks to bring finality of an equilibrium balance (Nabudere & Velthuisen, 2011).

The non-restoration of the equilibrium balance within African traditional societies has largely undermined the legitimacy of traditional knowledge, as the vestiges of colonialism and knowledge imperialism have permeated the current traditional knowledge protection framework in Africa (See Chapter 4.3.2.). The failure to acknowledge and address of these vestiges has left many concerns unanswered; a factor that can identified to have contributed to the non-functionality of frameworks that seek to protect traditional knowledge in Africa.

What complicates these current indignities that are being suffered by traditional knowledge communities is that an "African believes that time cannot change the truth" (M'Baye, 1974: 147). Therefore, a debt or feud is never extinguished until the equilibrium has been restored, even if generations elapse (Driberg, 1934: 238). In that regard, abdicating from addressing past wrongs does not draw a veil over the injustices of the past. Addressing the past confictions that affected traditional knowledge communities is imperative because it sanctions the recognition of the latter as vulnerable populations thereby permitting healing and reconciliation.

Therefore, restorative justice allows for the realisation of reparation for the vulnerable making it a “shared social wealth in terms of dealing, neighbourly generosity and special obligations to the vulnerable” (Karenga, 2012b: 332). These ethical notions derived from the ancient Egyptian *Book of Khunanpu* (written in 2100 B.C) are instructive to the “true balancing of the land in doing justice” (Karenga, 2014: 2). In confirming such values, Elechi (2004) argued that;

The African indigenous justice system is community based; human centred and employs restorative and transformative principles in conflict resolution. Restorative justice is negotiative and democratic; it empowers the community to mediate in conflicts. Conflict provides opportunities for primary stake-holders to examine and bring about changes to the society's social, institutional and economic structure (Elechi, 2004: 18)

Therefore, community-sustaining practices that respond to a community oriented restorative justice model should inform approaches that seek to address the needs and aspirations of victims. With that in mind, restorative justice becomes a pillar that stands at the centre of any progress in ending victimisation, for it begins in recognising individuals as human and responding to their needs starting with the most vulnerable. Such an approach dismantles the justice model that is advocated by current traditional knowledge framework which is a relatively an archetypal of false consciousness.

Furthermore, an economic based solution to the protection of traditional knowledge is deemed to enhance greed, which within African philosophy is seen as a “sever incurable disease, a collection of all kinds of evil and a bag of all kinds of hateful things” (Karenga, 2012b: 333). This analysis is not far from the critical analysis about the economy as was advocated by Weber (1930) and Marx (1906), who argued that economic determinism was the determinant of the working class, who were abused by the bourgeoisie (see Chapter 2.2.)

Therefore, the source and justification for social transformation are the people (Ramose, 1992). As such, law, politics, religion or ideologies should be anchored in Ubuntu, which guarantees authenticity and legitimacy within an African setting (Ramose, 1999). In that regard, political ends, strategic goals and the expectations of society are henceforth founded in the “meta-norms of humaneness, peace, trust, justice and social equality” (Velthuizeni, 2012: 53). This form of humanity, is

consolidated by group solidarity and respect for human dignity (Mokgoro, 1998). Ubuntu becomes a lived concept which treats community members with justice and fairness (Higgs, 2012; Letseka, 2012). Justice becomes a continuous balancing act of peace and reconciliation, which seeks to extinguish any disturbance that annuls the harmonious co-existence. However, on the other hand justice with no peace there will be a “negation of the cosmic harmony, while peace without justice is a dislocation of Ubuntu from the cosmic order” (Ramose, 1999: 64).

5.4.3. Reciprocity

Traditional knowledge communities are built on a person-community relationship. For such a relationship to be fruitful, it should be governed by reciprocal social relational obligations. Reciprocity shapes social relations. Assmann (1999: 39) defines reciprocity as;

A social memory and horizon of motivation which does not reconstitute itself newly from day to day according to momentary interests, but establishes itself in the past, encompassing yesterday and today, attaching today to yesterday and thus linking actions to consequences, acting to success and sowing to reaping.

These social relational obligations are governed by reciprocal actions, which represent “sensitivity to another, to seek to know another and understand one’s relationship to that other” (Karenga, 2012b: 363). Hence through reciprocity society is sustained through a process that allows “agents to develop a disposition for complementation that is necessary for mutually productive exchanges which create and sustain primary human goods” (Becker, 1986: 132-133). Such an approach allows a social formation that holds traditional knowledge to be grounded in notions of ‘justice’, ‘obligation’ or ‘duty’, ‘gratitude’ and ‘equality’ (Becker, 2014). The appeal for justice through reciprocity is based on harmony and equality where community reciprocal solidarity becomes a shared responsibility.

Hence, the recognition of human value becomes the primary determinant of social relations as mutual respect and compassion for everyone in society despite their creed, class, or politics. Reciprocity in its application is not vertical in terms of the institutional and structural imputations of a capitalist society but as a horizontal concept, informed by the spirit of justice and guided by the letter of

responsiveness. Karenga (2012b) aptly surmises the conceptual formulation of reciprocity in African society when he attested that:

The four basic norms of reciprocity in Maatian philosophy are constituted by: recompensatory, anticipatory, restraining and initiatory. Recompensatory is returning good for good received Anticipatory is that a good deed returns to its place yesterday Restraining reciprocity requires restraint from and of evil conduct by oneself and others The fourth and final form of reciprocity is initiating reciprocity, which is taking an initiative to do what is good and just so as to set an example to be emulated and to create a context of maximum mutuality (Karenga, 2012:368 -370)

Reciprocity is thus a “concrete form of recognition, protection and respect for humanity” (Ramose, 1999:120) and a foundation where “mutual care for one another as human beings precedes the accumulation of wealth” (Ramose, 1999: 142-143). This realisation should be complemented by the aptitude of restraining from evil, as using conflict and violence (retributive justice) to solve conflictions; will plunge society in an unending cycle of violence.

Resisting crime or wrong doing is a fundamental expression of reciprocity because it aids community solidarity and justice (Karenga, 2012b). It should be noted that conflict in society is as a result of the existence of unequal power relations and class struggles (Williams & McShane, 1994). Therefore, through solidarity and equality, reciprocity permits the reduction or elimination of conflict (Becker, 1986). In that regard, when conflict erupts in society, its becomes the obligation of the community to adopt corrective responses so to allow the restoration and sustaining productive reciprocal relationships (Becker, 2005), which will consequently facilitate the adequate protection of traditional knowledge.

5.4.4. Futuristic obligations

The relational obligations as propounded in Ubuntu, do not only refer to present existent community individuals but it also includes those who are in the future. This expansive concern includes the rightful and respectful obligations for future generations who shall occupy the community that current communities exist. However, that does not mean addressing the current ameliorations to benefit existent generations but it means to pass “a beneficial legacy to future

generations” (Karenga, 2012b:402). That is to say, traditional knowledge is historical which benefits the present generations and therefore it must be preserved and protected for future generations to profit from its invaluable wisdom. Therefore, the protection of traditional knowledge should

Speak to the people who will come into being and those currently on earth, to the great and small saying come let me lead you on the way of life (Lefebvre, 1924: 1-3).

Hence, traditional knowledge protection that speaks to the future will not destroy the notions of Ubuntu in a communitarian context as it self-consciously protects the present cultural context. This approach is additional as it allows traditional knowledge to remain relevant to the particular interests that might be existing in the community. It permits it to evolve responding to the needs of traditional communities while at the same time it is grounded in the tradition that built it.

Therefore, the misappropriation and destruction of traditional knowledge affects the rights of future generations, which will in turn distort the harmonious balance that is already conceptually existent in the future. Therefore, justice becomes not a requisite for present generations but one that should be applicable to future generations. In that light it becomes imperative that,

When we can reasonable predict that our actions will have a significant impact upon the interests of others, then we should take due account of that impact (Warren, 1992: 149 cited in Karenga, 2012b: 405)

The person-affecting principle is intrinsically linked to the traditional knowledge affecting principle. It is unjustifiable to disregard the predictable effects of irresponsible destruction and peripherisation of traditional knowledge and future generations. The existence of future generations and traditional knowledge depends on the rightful humane approaches to such knowledge by present generations. Therefore, it becomes morally and scientifically compelling within an African context to strive to “limit damage to traditional knowledge, curtail wasteful knowledge consumerism and respect claims of traditional knowledge through the animate and inanimate on humankind” (Karenga, 2012b: 406).

5.4.5. Shared heritage

It is important to note that knowledge within the global environment is a shared cultural heritage in the sense that it is a divine gift for all humans to enjoy equal benefit from it (Karenga, 2012b). Secondly, it is a shared heritage for it imposes a filial responsibility in its preservation and protection. Based on the notions of equality of *Maat* namely “I made the four winds so that everyone might breathe therefrom in his time and place” (Breasted, 1933: 221) can be interpreted as that knowledge is a shared heritage for the equal benefit and responsibility for all (Karenga, 2012b). These notions complemented by the communitarian ethics of Ubuntu emphasises that the denigration or marginalisation of traditional knowledge is detrimental to general well-being of humanity in total. For actions that affect the “rights of others to the shared heritage of knowledge represents individualistic and self-centred concerns which are in direct violation of communitarian ethics” (Karenga, 2012b:395). The plunder, marginalisation and misappropriation of traditional knowledge as a shared heritage does not only affect future generations, but the very existence of the world (Bookchin, 1991). Therefore, from the reverberations of *Maat* and Ubuntu, one would realise that these African philosophical principles are dedicated to a just and harmonious realm. A realm that facilitates the preservation and promotion of human life and development based on the non-committal of actions that are likely to diminish the chances of fulfilling the lives of the present generation and future generations (Karenga, 2012b).

Actions that diminish the chances of future generations affect the guardianship and responsible fiduciary duties of the ontological principle of the unity of being (Callicott, 1984). Therefore, it becomes imperative to adopt responsive approaches that share accountability with other cultures to decline and reject the superficial want to misappropriate traditional knowledge for consumerism (See Chapter 4.3) while impinging the vital necessities of traditional knowledge communities. This approach would militate against treating knowledge as private property but as a “truly human heritage to be shared through just distribution and realistic use of knowledge resources” (Karenga, 2012b, 396). The derivative notions of such an approach are that traditional knowledge is not only a gift for

the present generations but is an ancestral heritage, which was preserved and passed for the benefit of future generations.

In addition to the foregoing, Ubuntu through the concept of shared heritage can be used to rescue Africans from their loss of identity, let them gain their cultural, societal values and let themselves as human beings with dignity (Venter, 2004:151). Therefore, the benefit of Ubuntu to traditional knowledge is that it is truly indigenous to African traditional communities. This is by virtue of the fact that “African world views are uniquely African grounded in African experience” (Higgs & Smith, 2008: 58). As such, by virtue that African victimology constitutes invaluable aspects of African heritage, it becomes conceptually possible to harmonise Africa’s broken past of development with the modern realities of globalisation (Nashon, Anderson & Wright, 2008)

The following discussion shall focus on how African human security shall complement African victimology the protection and promotion of traditional knowledge together with its holders. Such a comprehensive approach towards the protection of traditional knowledge is imperative as it largely enriches victimological approaches through the incorporation of human security measures.

5.5. AFRICAN HUMAN SECURITY

The challenges affecting the legitimacy of traditional knowledge protection frameworks in Africa is largely based on their non-cultural rootedness in African traditions. In other words, the solutions they proffer largely do not secure the human security of traditional knowledge holders within their existential conditions. Furthermore, the top down approach towards the protection of traditional knowledge is devoid of any representation of reality within traditional communities as:

From a community’s subjective point of view, the community is the observer of its actions, evaluates them in terms of its own actions, for the purpose it gives them. This point of view is abundantly free to define its life aspiration and needs. It understands its life regulated by the purpose it gives to its actions as opposed to their cause. This view is obviously private and exclusive, no other person outside the community can never behold it.

The community's view is subjective, individual and therefore it is closed to the universe (Kamalu, 1990: 135).

Based on this assertion a person or institution who/which is not culturally rooted in the community cannot assess the latter's actions in terms of the purpose, which it gives them, for he or she is ever closed from the community. Tomaselli (2015), confirms this assessment by affirming that indigenous communities tend to provide information which very different from the real local conditions on the ground.

Indigenous communities exactly know what researchers want to find out and they engage in subversive games that sell back to the researchers what they already 'know' and deliberately contaminate the data. More often than not most researchers leave the field non-the-wiser and contribute to the very popularly held myth-making that the academic enterprise is meant to deconstruct. (Tomaselli, 2015: 2).

Based on these reasons, allowing traditional communities to determine their own matters enhances the management of traditional knowledge within a context that truly embellishes its value and existence. Traditional communities value their knowledge system and hence they design systems for its distribution, acquisition, use and dissemination within and beyond the community (Magaisa, 2007). Indeed, "all societies have had to devise norms for regulating the ownership and, use of different kinds of information . . . one can thus identify customary equivalents [in indigenous communities] of intellectual property" (Draho 2000: 248). Heller (2008:674) has further argued that by removing 'property' from the principles of private property allows the encroachment of "efficient and stable informal norms that promote communitarian values". As such the community will develop and adapt to locally generated innovation, alter and adjust to natural circumstances and communitarian ideologies (Howard, 2005), to meet the goals and perspective of the community.

Such an approach dissuades the infiltration of political or state interference into the general governance of communities as community leaders in African communities are not political animals. They are "the real *maa* (real king), a divine and spiritual leader concerned divine principles that governing the world, upholding the laws of the universe and human society within which *Maat* is embodied in the cosmic order, truth, justice, harmony and protection" (Obenga, 2004: 47). Adopting an African approach to human security therefore dissuades

African States from being adjusted out of existence as nation states through globalisation (Tandon, 2012). African human security takes into account the voices of traditional knowledge communities that have normally been excluded from decision-making as solutions are sought through human agency of those who are affected by the problem in a collective mode. This process deciphers the best solution to the problem based on the nature and extent of the problem; in the absence of repressive or coercive state ideologies that seek to protect the interests of the few at the prejudice of the majority.

From the foregoing, one can deconstruct the applicable philosophical doctrine that is applied within the governance domain of political issues that affect the community. Real authority is derived from a household level (symbolic expression of social space within a community set up), therefore higher authority does not in any way dictate the processes that happens at a community level (Komakech, 2014). This authority is deliberated at through a communicative process, not only through other community members but with the ordered whole of the universe. Such an approach represents a significant paradigm shift from reliance on institutions and structures as a source of authority to the recognition of human agency in the process that determines the formation of a social formation.

Therefore a social space, “is a value and the social sphere is a public space of visibility, interaction and plurality of voices” (Komakech, 2014: 31). In other words, there is nothing-called governance of social space in African philosophy but the nurturing of space that allows all forms of life to flourish within it. Hence, social interdependence becomes the basis of social relationships and decision-making is an aggregate social process rather than a determination.

This approach emphasises the notion of personal justice rather than impersonal law. Within this realm, *Maat* is a moral right to protest against the abuse of power, as it is applies to personal rule of conduct not through that of a political government. Thus, the negation of political relationships in favour of community or group democracy promotes the ethos of self-determination, which is founded in solidarity. As such, the human security of African communities that hold traditional knowledge will be determined by a culture that is grounded in African philosophy. In that light there will be a greater possibility of addressing community problems

with a community oriented approach which is a significant step towards the emancipation of traditional knowledge communities.

Diversity needs not be cause for friction or tension but rather for complementary activity in harmony created by mutual understanding. This harmony means the clear recognition of individual deficiencies of the different groups and the full acceptance of mutual complementariness. In other words, it is the recognition of human interdependence and solidarity. One of the conditions for fruitful co-operation is that each group should know what values the other groups contribute or can contribute to the universal cultural treasure (Mabona, 1967: 3)

Furthermore, humanness in African philosophy is important especially when focused on human needs, interests and dignity. When these basic needs and interests are located within the African human security framework, traditional knowledge holders become relevant as their cultural, spiritual, political and social beliefs and it will create an identity grounded in African philosophy shared by all. In that realm, African victimology appropriates African culture to develop a more nuanced approach to victimisation. Despite the multiplicity of African cultures; the overriding concrete principle of humanity will assists in transcending such diversity.

Therefore the African Human security is paradigm is

Sine quo non in the construction and development of society and its institutions as it embodies Ubuntu an inherent value that is within all humans, which goes a long way towards alleviating most humanely created vestitutes of life (Teffo, 1998: 4)

Lastly, the question of the non-concern of African governments failing to protect the interests of traditional knowledge holders is factor that affects the human security of traditional knowledge holders. African governments recognise the challenges that are affecting traditional knowledge communities, by virtue of their participation in the protection of traditional knowledge discourse at an international level. However, “no one can present something to someone as a problem and at the same time remain a spectator to the process” (Okigbo, 1996: 48).

Therefore, there is need for the development of an organic state, which is subservient to the interests of traditional communities that will facilitate the protection of traditional knowledge protection through participation.

The audience has to be brought in the process of producing the message otherwise their own point of view is likely to be neglected in one way or another, impairing much of the productions of effect. The convention of peoples ways of knowing have to be respected (Raseroka, 2008: 244)

Therefore, any solution for the protection of traditional knowledge, which is alienated from the views of traditional knowledge communities, amounts to an imposition of an ideology. When the state comprehends the interests of traditional knowledge holders through dialogue it will be capable to understand the interests and needs of traditional knowledge communities. Thus, allowing the process for the protection of traditional knowledge to be truthful while contributing to the positive actions based on communitarian reflections. Therefore, a process that creates alternatives towards the protection of traditional knowledge is in itself liberating as it connects with the geographic, linguistic and cultural status, which is always in a state of constant change and transformation.

5.6. CONCLUSION

In conclusion, it is important to recognise that the suffering of traditional knowledge holders is not a coincidence of globalisation but a deliberate act of oppression and marginalisation that has been reproduced from the past. In a bid to address such a nemesis, African Victimology assigns reason for a communal oriented framework for the protection of victims of traditional knowledge misappropriation while ridding traditional communities from the shackles that have committed the latter to servitude.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

Who hasn't heard of the six blind men of Indostan encircled around an elephant? The six—one a political scientist, one a librarian, one an economist, one a law professor, one a computer scientist, and one an anthropologist—discover, based on their own investigations, that the object before them is a wall, spear, a snake, a tree, a fan, and a rope. The story fits well with the question that propelled this chapter: how can an interdisciplinary group of scholars best analyse a highly complex, rapidly evolving, elephantine resource such as knowledge? Trying to get one's hands around knowledge as a shared resource is even more challenging when we factor in the economic, legal, technological, political, social and psychological components—each complex in their own right—that make up this global commons (Hess & Ostrom, 2005: 1)

6.1. INTRODUCTION

This study set to investigate and examine historical factors, which contributed to the victimisation and marginalisation of traditional knowledge communities in Africa. In doing so, the study analysed the victimisation of traditional knowledge communities in a broader multifaceted context of colonialism, institutional and structural violence, abuse of power and conflict (Peacock, 2013b). The general theoretical literature on this subject, specifically in Africa is inadequate regarding the victimisation of traditional knowledge communities. For instance, are the historical conditions that contributed to the victimisation of traditional knowledge reproduced in the current traditional knowledge protection framework in Africa?

The findings of this thesis highlight that contradictions and contestations within the traditional knowledge protection framework are “sharpest in the peripheries” (Tomaselli, 2009: 9). African traditional knowledge communities have principally been on the receiving end of power contestations largely fuelled by a hegemonic intellectual property discourse endowed with oppression and subjugation. The outcomes of these contestations create silent or forgotten victims with African traditional communities. The African framework for the protection of traditional knowledge further complicates the apprehensions faced by traditional knowledge communities; as it primarily reproduces the ghosts of knowledge imperialism,

marginalisation and commoditisation (See Chapter 4). Based on the findings, this thesis developed an alternative African victimology framework, which seeks to promote the emancipation of traditional communities from the structural and institutional vestiges of knowledge imperialism.

6.2. GENERAL FINDINGS

The general findings of this thesis are chapter specific and were summarised in the respective chapters (See Chapter 3 and Chapter 4). The following discussion shall synthesise these findings *vis a vis* the objectives of this thesis.

6.2.1. Factors that contributed to the marginalisation and victimisation of traditional knowledge and its owners in Africa

Cumulatively a number of factors have facilitated the victimisation of traditional knowledge communities in Africa. Firstly, knowledge imperialism underwrote the misappropriation and marginalisation of traditional knowledge in Africa. Through cultural domination, traditional knowledge in Africa was subjugated into the peripheries of western knowledge. The cultural hegemony established by the dominant western knowledge regime was supported by a discriminatory knowledge infrastructure which reinforced perspectives of intellectual property that benefited a few at the expense of traditional communities. For instance, intellectual property protects economically relevant and scientifically produced knowledge to the exclusion of other knowledge systems, which contain the spiritual and cultural attributes of a community (See Chapter, 3.3). Consequently, the domination and exclusion of traditional knowledge by the intellectual property system prompted the enclosure and misappropriation of subordinated knowledge resources. The established cultural hegemony turned Africa into a laboratory of caprice that caused untold suffering to traditional communities, whose effects remain visible in present day (Wanda, 2010).

The caprice of knowledge imperialism is not a new phenomenon. It is one reproduced from the history of knowledge development; facilitated by the state, dominant capital and the church. The state created rules, systems and procedures of exclusion, which protected certain forms of knowledge based on the economic

functionality of the state. However, because the power to award knowledge protection was abrogated to the state; it was abused as knowledge protection was granted at the vagaries of political power and personal relationships (May & Sell, 2007). The inventive genius of knowledge producers was hardly recognised as the expansion of the mode of production determined the knowledge that was protected (May & Sell, 2006). Therefore, the protection of knowledge found its expression in class powers articulated by a proto-capitalist accumulation strategy (May, 2007). Consequently, the laws promulgated by the state became an instrument of power, which frequently altered the rules of the game by defining winners and losers based on which knowledge was recognised as property at the exclusion of others.

Subsequently, the knowledge protection framework created knowledge cartels that forged an alliance with the state and the church, to police seditious and libellous materials while in turn they received unfettered control of knowledge resources (Patterson, 2002). It became complex for knowledge producers to claim ownership over their knowledge products because of the functional alliance between the cartels, state and church. The echoes of such a system are evident in the current traditional knowledge domain. Global conglomerates (knowledge cartels) misappropriate traditional knowledge and retain the commercial monopoly of the knowledge at the exclusion traditional knowledge producers. These victimisation patterns are embedded in the structural and institutional conditions of knowledge production, supported by an unequal intellectual property discursive practice that frustrates the commonwealth of knowledge producers (Masoff, 2001).

Religion and education, justified the marginalisation and exclusion of traditional knowledge by labelling it as old, archaic and superstitious (Trosper, 2011). A ritualised colonial historical enterprise vilified and demonised traditional knowledge as witchcraft because it represented power and resistance to European imperialism. These pre-meditated axioms of religion developed into laws and processes that violently repressed the practice and use of traditional knowledge.

The colonial and post-colonial education discourse largely supplanted African traditional ways of knowing by replacing them with western curricula (Magaisa, 2007). Education imported western constructs of knowledge, which created a false

consciousness that African ways of knowing were inferior to western knowledge. This discourse consequently destroyed the spiritual and cultural bonds that yield traditional knowledge as power while systematically subordinating and stigmatising traditional ways of knowing (Proggler, 1999). Therefore, African cultural and linguistic objects were subjected to cultural violence and linguistic imperialism. Such an approach largely, delegitimised the significance of traditional knowledge in African communities. The suppression of African culture and language negatively affected the definitional foundations and values of traditional knowledge (Shiva, 1993; Ngugi, 1986).

The assimilation of the politically independent African state into an international intellectual property regime, without negotiating their terms of participation extended the interests of industrialised countries (net exporters of knowledge resources used in Africa) at the prejudice of African traditional knowledge. Such integration provided minimum opportunities for the recognition of traditional knowledge as a legitimate form of knowledge, because the intellectual property system became the determinant of legitimate knowledge in post-colonial Africa.

The post-colonial integration of African states into the international intellectual property system was structured around the ideological prejudices of an oppressive colonial past. For instance, the political independence of African states substantially exchanged state power, but it did not transform the socio-economic conditions that contained colonial dispositions (Crabb, 1970). So, the post-colonial African state reproduced the historical conditions that facilitated the victimisation and disenfranchisement of traditional communities.

Having established the factors that have contributed to the victimisation and marginalisation of traditional knowledge communities; it is imperative to examine the efficacy of the traditional knowledge frameworks in Africa. The following discussion shall examine whether or not the traditional knowledge protection frameworks in Africa reproduced the material and ideological conditions that historically facilitated the victimisation and marginalisation of traditional knowledge communities.

6.2.2. Whether the African traditional knowledge framework reproduces historical conditions that victimise traditional communities

Three regional frameworks namely, the Swakopmund Protocol, the OAPI framework and the AU Model law, constitute the traditional knowledge protection structure in Africa. Collectively, these frameworks hardly ameliorate traditional knowledge communities from the chains of knowledge imperialism. On the contrary, they reproduce the historical conditions, which facilitated the marginalisation and victimisation of traditional knowledge communities in Africa. The intellectual property regime with the influence of global capital mediated and structured the operational ambit of the regional instruments. Resultantly, the protectionist appetites of the powerful captured its legislative components while holding the interests of traditional knowledge community's hostage to the oligopolistic caprices of capital (Reichman, 1997). Hence, the African regional framework is diametrically opposed to the local conditions of traditional communities; a phenomenon that separates traditional knowledge from the cultural spiritual values that established its collective ownership (Swiderska, 2007). The failure by the regional instruments to circumscribe the jurisprudential divergence between traditional knowledge and intellectual property, entrenched the dominance of intellectual property over traditional knowledge resources. Therefore, grounding traditional knowledge protection within the intellectual property system reproduces exclusionary procedures and ideologies that victimise traditional knowledge communities.

The failure to consult or incorporate the views and interests of traditional knowledge communities in the regional frameworks created a framework abstracted from the political, cultural and spiritual context that sustains traditional knowledge. This process is similar to the colonial conditions that muted the interests of traditional communities in favour of a pro-capitalist knowledge regime, which facilitated knowledge accumulation and knowledge segregation. Accordingly, the traditional knowledge frameworks in Africa enhanced the historical 'positional superiority' of intellectual property over traditional knowledge. In the process the frameworks have relegated customary laws and principles that govern and administer traditional knowledge into the periphery.

In that light, the traditional knowledge framework in Africa sufficiently facilitates the victimisation of traditional communities because it seeks to locate the oppressor and subjugators of traditional communities outside the body politic of intellectual property. While on the converse, it has created a complicated political image that is laden with internal oppressors. In other words, the African regional frameworks created a false consciousness, which in the name of protecting traditional knowledge “embodied ideas, values and language which justify social and economic inequalities in traditional communities” (Augoustinos, 1999: 298). The picture presented by this phenomenon, creates a victimisation mode of adaption that resulted from colonialism, recurrent indignities and multiple deprivations associated with capitalism and class struggles (Peacock, 2013a)

Furthermore, the transitional property model provided by the regional instruments raises a number of complexities. The communitarian model established by the regional frameworks largely creates an environment that facilitates the ‘tragedy of the anti-commons’. That is to say, multiple members of the community are permitted to hold multiple rights against the external use of traditional knowledge. Therefore, the use of traditional knowledge outside the community’s context would require the collective consent of all members. However, if one community member opposes its use, he or she interdicts the community from pursuing that option. This legal smog is highly likely to routinise informal and corrupt norms in place of legal transactions because knowledge entrepreneurs will pressure individual community members to waive their rights for a fee to avoid such complexities (Heller, 1998). The consequent practical framework that will emerge, is a system constituted by a combination of badly specified legal rights together with a rearrangement of corrupt and illegal norms (De Soto, 1990). Therefore, instead of empowering traditional knowledge communities from the vestiges of colonial capitalism, the framework facilitates the further disenfranchisement of traditional knowledge communities.

The institutionalisation and administration of justice for traditional communities in in criminal law and civil law by the regional instruments cements the civilisation of conflict (Peacock, 2008). This process assimilates victims of traditional knowledge misappropriation into the broader context of mainstream of justice, despite the

fact that these solutions are significantly different from the conditions of their victimisation. Such an approach relegates traditional communities to observers rather than participants and agents in the justice process. Therefore, the application of an alien legal regime exposes traditional knowledge to a new information capitalism which repackages traditional knowledge as a legal concept without examining the lived and existential conditions within which traditional communities find themselves.

Lastly, the traditional knowledge framework in Africa hardly recognises the historical injustices suffered by traditional communities. These historical conditions have contributed to the marginalisation and victimisation of traditional holders in Africa. The frameworks barely take into account the factors that have victimised traditional knowledge communities; while imposing notions of intellectual property on traditional knowledge without taking their peculiarities into account. The consequent effect of this framework is that it is highly likely to destroy fragile and subordinated knowledge regimes (Boyle, 1997). Having noted that the African framework on the protection of traditional knowledge reproduces the conditions that facilitate the victimisation of traditional communities, the following section shall discuss the theoretical implications of these research findings.

6.3. THEORETICAL IMPLICATIONS

The expansion of the victimological theoretical framework is imperative to understand how historical patterns and cultures of victimisation have contributed to the marginalisation of traditional communities in Africa. The radical and critical victimological theories, which locate victimisation within the interrelationship between state and the law examine the experiences suffered by victims through the arbitrary application of the law or the abuse of power (Walklate, 2012; Elias, 1985; Quinney, 1972). It is however, noted from this study that such an approach hardly identifies and examines how historical factors facilitate victimisation within a set of complex structures and institutions in society. As a result, the implications of the historical reproduction of victimisation cultures and patterns are hardly investigated within the current context of multiple victimisations and deprivations, specifically in Africa (Peacock, 2013). The findings of the study, identify that victimisation is facilitated through contestations created by the historical imposition of a dominant mode of production over the subordinate relations of production. Such a phenomenon creates subordinate gradations that disenfranchise and oppress those who do not control the means or mode of production. In understanding the historical oppressive conditions and relations, one is capable to appreciate the subordinated interests of the victims, while constantly analysing the viability of the victim support structures in society. Such an approach permits the identification of historical factors and conditions that plunge generations of victims within an unending cycle of victimisation.

This analysis is similar with that presented by Marx (1906, 1937), Weber (1930, 1949) and Althusser (1968, 2006) who locate oppression and subjugation within contestations that exist between capitalist mode of production and the relations of production. Hence, one would understand how the historical structures institutions of the colonial and imperial capitalist mode of production; misappropriated and marginalised traditional knowledge for the purposes of knowledge accumulation.

Furthermore, radical victimological theories, measure victimisation by assessing the extent to which harmful actions and procedures contravene human rights

conventions (Elias, 1996). Such a theoretical framework has been critiqued, on the basis of its non-ability to identify the historical factors that contributed to the creation human rights conventions (Mawby & Walklate, 1994). The findings of the study highlight that international human rights frameworks hardly ameliorate the historical conditions that contribute to victimisation. In the name of protecting victims, these international conventions or regional instruments reproduce the conditions that facilitated the oppression and marginalisation of victims. The thesis confirmed Marx's (1937:4) assertion that *"when men appear engaged in revolutionising things and themselves, they anxiously conjure up into their service the spirits of the past, assume their names, their battle cries, their costumes to enact a new historic scene in such time-honoured disguise and with such borrowed language"*. Peacock (2013b) corroborated such assertions by arguing that victimology in Africa frequently omits the impact of how colonial and imperial capitalism facilitates the victimisation of African communities. Having noted that the current victimology approaches towards the protection of traditional knowledge hardly address the interests of traditional knowledge communities, this thesis affirmed Peacock's (2013b) position by developing an African victimology framework that restores, reframes and theorises African existential experience, from African lived experiences.

A harmonious cosmos of co-existence sustained by the philosophical principles of *Maat*, Ubuntu and Afrikology; define the conceptual boundaries of African victimology. Its approach is more contextual because context informs, transforms or complicates the legitimacy of victimological approaches especially if individuals and communities are accustomed to responding to the signs that define their being. The cultural and historical context creates material and spiritual objects that belong to a systematic language, which has a purposeful relationship to the community at large. Therefore, African victimology understands and responds to the contextual historical injustices that contribute to victimisation based on shared experiences that are mutually understood (Karsher, 2011). Hence, African victimology solutions are not influenced but are rather informed by the brutal historical vestiges that contribute to the victimisation of traditional communities in Africa.

Reclamation, the restorative and transformative aspect of African victimology largely seeks to emancipate victims from the vestiges of structural and institutional victimisation and knowledge imperialism. Its ideational basis strives to restore the disrupted harmonious balance guided by humanitarian and relational obligations of related rightness in the cosmic universe. Victims should be empowered to self-assert and affirm dialogue with apprehensions affecting their humanity. In that regard, justice is not the procedural and substantial administration of legal rules but the just and proper relational obligations reflective of the cultural conditions, affinities and connections (Finnestad, 1986).

6.5. POLICY IMPLICATIONS

The traditional knowledge policy in Africa has been recognised as a progressive step in addressing the needs, interests and aspirations of traditional communities in Africa (ARIPO, 2010). However, evidence from this thesis shows that the policy framework generally reproduces historical conditions that facilitated the victimisation of traditional communities. This study shows that it is highly improbable for the current policy on the protection of traditional knowledge to attain legitimacy within traditional communities in Africa. Based on this assessment, there is need for a policy review that will facilitate the protection traditional knowledge within its socio-cultural settings. Not only would the policy framework address the legal challenges faced by traditional communities but also it will address and advance the political, socio-economic, cultural and spiritual aspirations of traditional communities.

Therefore, it becomes imperative to develop policy frameworks that embody the cosmic order of truth, justice and harmony of traditional communities. Such an approach dissuades the infiltration of state interference into the general governance of communities. In that regard, governance becomes a process that is not only people driven but also one that is determined by human affairs (Komakech, 2014). This process is not mediated by institutions or structures but is expressed within a deliberative communication zone, in which community members resolve problems and challenges within a non-hierarchical model (Komakech, 2014). Such an approach represents a significant paradigm shift from

reliance of institutions and structures as a source of authority to the recognition of human agency and human security.

The operational scope of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power should broaden its scope to include victims of historical injustices, marginalisation, colonialism and imperialism. Article 1 of the stated declaration delineates the study of victimisation to include either persons who have suffered harm through acts or omission that are in contravention of criminal law. Such an assertion is problematic because criminal law is an instrument of power; once captured it can be used to oppress and subjugate marginalised communities thus creating victims that are not seen

6.6. RESEARCH IMPLICATIONS

The traditional knowledge debate is multifaceted. To generate achievable policy strategies and development targets concerning traditional knowledge protection, there is need for more information rich case studies at the local level. This will allow the further exploration and assessment of the local dimensions of traditional knowledge protection. Adopting the latter as a future research strategy allows researchers to have a deeper understanding of the gaps that the separate cultural meaning of traditional knowledge with other forms of knowledge, in a framework of competing epistemologies and practices. Furthermore, there is need to objectively understand the extent to which traditional communities embrace the concepts of African victimology, to appropriately develop victimological remedies that respond to the cultural conditions of traditional communities. Such an approach permits the formulation of how individuals, groups and communities subjectively create their own reality within a socio-historical context.

6.7. CONCLUSION

The traditional knowledge frameworks in Africa largely superordinate the law over a variety of social phenomena that influence and facilitate the victimisation of traditional communities in Africa. Rather than mitigating or extinguishing the conditions that victimise traditional knowledge communities, the framework reproduces the victimisation that traditional communities have suffered in the

past. This form of fundamentalism largely mischaracterises the unresolved and complex religious, ideological, political and socio economic historical exigencies that neglect and victimises traditional knowledge producers in Africa. Such an approach relegates the interests of traditional communities to the periphery, deletes the memories of historical injustices, legitimises the perpetrators of victimisations and disempowers traditional communities in redressing the wrongs of the past. Given the spiritual and cultural value of traditional knowledge in Africa, an African victimology could be the new horizon in ameliorating the injustices.

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ETHICAL CLEARANCE

TURN IT IN REPORT