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The Comprador Complex: Africa's IPRs Elite, Neo-Colonialism and the Enduring Control of African IPRs Agenda by External Interests

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Forthcoming

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Abstract:

Intellectual property rights (IPR) concern that branch of law dealing with the regulation of the creation, protection, ownership, transfer, use, and access to intangible and tangible creations of the human mind. From its modest origins in trademarks, IPRs today traverse the gamut of copyright, patents, industrial designs, trade secrets, integrated circuits and topography, plant breeders' rights, geographic indications, and other emerging categories of IPR including folklore. The vast majority of countries across the world have IPR laws on their statute books. Beyond statutory provisions, states have also created administrative and institutional organs to deal with the manifold aspects of IPR. Intellectual property rights are often promoted as useful for stimulating and encouraging creativity, economic development, innovation, and technology transfer. Yet, for more than a century, African states have participated in IPR regimes with little or nothing to show for it in terms of economic development and transfer of technology. Like a mirage, the wondrous proms of domestic innovation and technological development recede from grasp no matter how long African states tread on the hard paths of strong IPRs regimes. Beyond the meagre harvests from its long and expensive investments in IPR institutions, personnel and statutes, the most worrisome aspect of contemporary IPR issues in Africa is that the development of more progressive IPR regimes in the continent has been resisted, indeed stunted by local actors and institutions. In some of the contemporary debates on the content, structure, and processes of modern IPR regimes, the voices of African IPR administrators and practitioners have been muted or silent. If and when they speak, they tend to champion the interests of foreign business entities at the expense of domestic concerns. For instance, controversies over manifold IPR issues such as access to crucial patented drugs, compulsory licensing, fair use in copyright, the scope of rights given to rights holders and apparent inequities of international arrangements for IPR protection, have witnessed little or no critical intervention by African IPR experts and administrators. Considering the high levels of education and experience in IPR possessed by the leading lawyers and administrators on the continent, one would expect Africa's IPR practitioners and administrators to be at the forefront marshalling the need for progressive rebirth of IPRs in the continent. Yet, on some of the most important debates of the day, they have defended their clients and espoused the case for maintenance of the status quo even when their fellow citizens bear the brunt of the unrealized proms of robust IPR laws.

Keywords:

Intellectual property rights (IPR), African states, Law, Trademarks

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Part 1: Introduction

Intellectual property rights (IPR) concern that branch of law dealing with the regulation of the creation, protection, ownership, transfer, use, and access to intangible and tangible creations of the human mind.¹ From its modest origins in trademarks, IPRs today traverse the gamut of copyright, patents, industrial designs, trade secrets, integrated circuits and topography, plant breeders' rights, geographic indications, and other emerging categories of IPR² including folklore.³ The vast majority of countries across the world have IPR laws on their statute books. Beyond statutory provisions, states have also created administrative and institutional organs to deal with the manifold aspects of IPR.

Intellectual property rights are often promoted as useful for stimulating and encouraging creativity, economic development, innovation, and technology transfer. Yet, for more than a century, African states have participated in IPR regimes with little or nothing to show for it in terms of economic development and transfer of technology. Like a mirage, the wondrous proms of domestic innovation and technological development recede from grasp no matter how long African states tread on the hard paths of strong IPRs regimes. Beyond the meagre harvests from its long and expensive investments in IPR institutions, personnel and statutes, the most worrisome aspect of contemporary IPR issues in Africa is that the development of more progressive IPR regimes in the continent has been resisted, indeed stunted by local actors and institutions.

In some of the contemporary debates on the content, structure, and processes of modern IPR regimes, the voices of African IPR administrators and practitioners have been muted or silent. If and when they speak, they tend to champion the interests of foreign business entities at the expense of domestic concerns. For instance, controversies over manifold IPR issues such as access to crucial patented drugs, compulsory licensing, fair use in copyright, the scope of rights given to rights holders and apparent inequities of international arrangements for IPR protection, have witnessed little or no critical intervention by African IPR experts and administrators. Considering the high levels of education and experience in IPR possessed by the leading lawyers and administrators on the continent, one would expect Africa's IPR practitioners and administrators to be at the forefront marshalling the need for progressive rebirth of IPRs in the continent. Yet, on some of the most important debates of the day, they have defended their clients and espoused the case for maintenance of the status quo even when their fellow citizens bear the brunt of the unrealized proms of robust IPR laws.

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¹ Robert Merges, *Justifying Intellectual Property* (Harvard University Press, Cambridge, 2011)

² For a comprehensive overview, see, David Vaver, *Intellectual Property Law: Copyright, Patents, Trade Marks* (Irwin Law, Toronto, 2011)

³ Adebambo Adewopo, "Protection and Administration of Folklore in Nigeria", (2006) March Vol. 3 Issue 1 *Scripted* pages 1-16.

In this paper, I argue that a more ‘developmentally progressive’ rebirth of IPR regimes in Africa is highly unlikely unless the comprador complex which sustains contemporary IPR law practice and administration is interrogated and dismantled. By “comprador complex,” I mean the intimate, client-focused, economic and professional relationship between local African IPR elites and their foreign clients and international institutions. Africa’s IPR bar and administrators are too steeped in the defence of their clients, paymasters and foreign validators for any progressive ideas to be expected from them.

Notwithstanding the excellent academic pedigrees of individual IPR practitioners and administrators, deeply entrenched cultures of clientelism, coupled with an arid intellectual landscape have combined to frustrate an adaptation of IPR tools and regimes to promote developmental interests in the continent. The continued existence of a comprador complex can only be dismantled or checked by democratizing the sources of norm-creation in IPR matters in the continent. This could be achieved by wider teaching of IPR courses in African institutions and placing greater reliance on scholars, ordinary rights-holders and public-spirited activists rather than IPR practitioners and administrators. In sum, this paper charts avenues by which the comprador complex and clientelist structure of IPRs law in Africa may be dismantled.

The paper is divided into five parts including the introductory section. Part 2 briefly introduces the comprador complex as a metaphor and framework of analysis of the alienation of African IPR practitioners from the concerns of the continent. Part 3 relates the comprador metaphor to the historical under-development of African IPR regimes and practices. Part 4 analyses some of the current debates in IPR regimes vis-à-vis the silence of African IPR practitioners and administrators. Part 5 summarizes the essay and provides possible options for breaking the comprador complex.

Part 2: Africa’s IPRs Comprador Complex

The comprador phenomenon, as a metaphor, is useful in explaining the relationship between Africa’s local IPR elite and the international IPR system. The key operators of IPR regimes in African states are very much like the Asian compradors of the nineteenth century. During the 19th century, foreign business enterprers in China’s coastal ports employed local Chinese to act as their middlemen and agents in dealing with customers and employees.⁴ These local Chinese commercial elites owed their privileged position to the imperial structure of commerce. While the goods and merchand they traded in were manufactured overseas, they retailed domestically at huge profits. They frequently amassed great wealth,⁵ attaining social and political pre-eminence in the process. These affluent agents of imperial producers, compradors as they were called, acted not only as “agents, employees, informants, and customers of foreign business, but also provided large amounts of investment capital in foreign and Chinese controlled shipping, insurance, and mining enterprers.”⁶

⁴ Yen-Ping Hao, *The Comprador in Nineteenth Century China: Bridge Between East and West* (Cambridge, Harvard University Press, 1970).

⁵ Many of the individual compradors were millionaires.

⁶ Thomas Rawskin, “The Comprador” (1971) Vol. 45 Issue 01 *Business History Review* 96-97.

The symbiotic relationship between empire and the commercial elites in the colonies blinkered the latter from critical engagement with the colonial project. As a mechanism for subjugation and exploitation, the colonial project despite its inherent perversity, was economically and socially useful to the select local elite. Thus, regardless of the wider damage wrought by the colonial project on the general population, its sustenance largely rested on the enabling contributions of a fraction of the populace committed to the project. It was in the best interest of the compradors to protect the colonial structure. In consequence, even though they were locals by birth, skin colour and appearance, their political and economic interests were more aligned with the colonial project. In the anti-colonial stance of Chinese nationalists, the compradors were often accused of “traitorously abetting the economic exploitation of China”.⁷

The comprador phenomenon was not limited to British China. Indeed, evidence of comprador systems abound in virtually all the coastal towns of Asia in pre-industrial Japan, Korea, and colonial India.⁸The Indian compradors, as the Bombay Chamber of Commerce wrote, were “either agents for or constituent branches of other firms at home, which again are frequently connected with other parts of the world, their transactions which often influence the orders they transact here.”⁹

Another characteristic of the comprador was the near exclusive class they created and sustained. In many senses, the compradors became a business community of sorts, a kind of ecosystem seizing upon available business opportunities; in many cases, setting up hurdles for new entrants but protecting their members from perceived external threats to their business interests. Their markets brought them together on the same platform, both for organization and agitation for special privileges. The distortion here is the profit-making from a perverse situation and the fact that the compradors had the best of it regardless of the pervasive suffering outside their charmed circles. This class of bourgeoisie consolidated their privileges and deployed it to the fullest for purposes of making profit. As the next section demonstrates, Africa’s elite IPR practitioners and administrators are by history, habit and vested interests similar to Asia’s colonial compradors.

3: The Enduring Colonial Structure of Contemporary African IPR Regimes

It must be noted at the outset that despite appearances of modernity, contemporary African IPR regimes are continuities of the colonial order. Consider the Nigerian Trademarks and Patents Office: It was established in 1901 through the Trademarks Ordinance, predating the amalgamation of the North and South Protectorates of Nigeria by Lord Lugard in 1914. The patent system was extended across the territory now known as Nigeria through conquest and amalgamation of the constitutive units of Nigeria. The various laws provided for the recognition, registration and protection in Nigeria of patents already granted in the UK. The Nigerian law itself was modelled on the draft law prepared by the United International Bureau for the Protection of Intellectual Property (BIRPI), the precursor of the World Intellectual Property Organization (WIPO).

⁷ *Ibid.* In some cases, the compradors actually made more money than the foreign principals.

⁸ Amalendu Guha, “The Comprador Role of Parsi Seths, 1750-1850” (1970) Vol. 5 No. 48 *Economic and Political Weekly* 1933-1936.

⁹ *Ibid.* See also, Amalendu Guha, “More About the Parsi Seths: Their Roots, Entrepreneurship and Comprador Role, 1650-1918) (1984) Vol. 19. No. 3 *Economic and Political Weekly* 117-119.

There were amendments to the ordinance in 1910 and 1914,¹⁰ all modelled after the laws and preferences of imperial Britain.¹¹ Nigerians or other applicants had first to apply to the UK Patent Office to be granted a patent for an invention before proceeding to Nigeria to have it registered. As Kent Nnadozie observed,

“this state of affairs persisted until 1992. The re-registration system could be said to have worked adversely for patents in the country because it primarily shows the low value placed on patents and IP issues generally. A system where local inventors obtain local protection by first obtaining a UK patent can hardly encourage local innovation or research and development, which is a key rationale for intellectual property rights protection.”¹²

As Shafiu Yauri equally observed,

“the introduction of patent law in the colonies was never intended to encourage indigenous inventive activities, or local research and development, but rather to assist the protection of relevant technology for the exploitation of minerals and other resources of interest and value to the colonial system administration.”¹³ To date, “despite attracting [a] large number of foreign patents, the Nigerian Patent system does not positively encourage domestic inventive and innovative activities.”¹⁴

For South Africa, IPR statutes were guided by the equivalent British and European Convention legislation.¹⁵ The same pattern is repeated in Uganda. In the same vein, the patent system was introduced to Ghana by the British colonial authorities in 1899. Patents granted in Britain were entitled to automatic re-registration in Ghana. No laws to limit the scope of these rights were passed, except for the provision in the 1972 amendment act precluding patents over chemicals. The Copyright Ordinance of 1911 extended all laws in the UK to the colony of Ghana (Gold Coast, as it was then called).¹⁶ Outside these developments, as some commentators observed, “IPRs laws, except for copyrights, have remained largely static in Ghana.”¹⁷

Again, IPRs laws in Kenya, like most other laws, are a colonial heritage¹⁸ It is important to point out that “copyright laws applied to Kenya by the colonial authorities were designed to protect the monopoly rights of British publishers in the country, provide censorship for publications that

¹⁰ See, The Laws of the Colony of Southern Nigeria, 1908 at 675; Osita Eze ‘Trade marks in Nigeria’ (1979) *World Development* 727 at 727-736.

¹¹ Shafiu Yauri, “The Patent System in Nigeria” (2012) 34 *World Patent Information* 213-215.

¹² Kent Nnadozie, “Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Ghana and Nigeria” (2004) at 8-9.

¹³ Yauri, *ibid.* See also, G.S. Yankey, *International Patents and Transfer of Technology to Less Developed Countries: The Case of Ghana and Nigeria* (Avebury Press, Aldershot, 1987)

¹⁴ Yauri, *ibid.*

¹⁵ R. Wolson, *Towards TRIPs Compliance: South Africa’s Experience and Legislative Reforms* (ICTSD, ACTS & QUNO, 2001)

¹⁶ B. Mould-Idrissu, “Copyright Protection and the Journalist” in K. Kwame & Kumando, eds., *The Law and the Media in Ghana* (University of Ghana Press, Legon, 2001) at 18-21.

¹⁷ George Sikoyo, *et al.*, *Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda*, (2006) ACTS Ecopolicy Series no. 16 at 11.

¹⁸ P. Kameri-Mbote, “Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Ghana and Nigeria” (2004) at 1.

colonialists termed seditious, blasphemous, immoral or contrary to government policy and propagate the ideology of colonial superiority among the natives.”¹⁹ Amendments to the Copyright Act of Kenya have not unyoked the colonial substance of the law. As Chege argues, “the main thrust of these amendments were to make Kenya law more aligned to emerging international treaties (especially, TRIPs) on subject-matter of coverage, enhancing penal sanctions for copyright infringement and providing civil remedies for infringement.”²⁰ The time-consuming and expensive patent system in Kenya was equally designed to cater to foreign interests.²¹ Worse still, the colonial IPR regimes were structured to be intellectually incurious, clerical in temperament, and client-focused.

Contemporary African engagement with the global IPR regimes was on the basis of colonial fiat. Under the principle of state succession to treaties,²² Nigeria and other former colonies have since the celebration of independence remained signatories to the Paris Convention. As Jackson argued, “Africa became an overseas extension of European sovereignty.”²³

However, the real problem with the IPR regimes in Africa was not their colonial origins per se, but the creation and sustenance of an IPR elite economically wedded to the huge financial gains accruable from IPR transactions with overseas rights-holders. Matters have not been helped by the incurious and clerical nature of IPR law and practice in the continent which creates enormous wealth for individual IPR lawyers and administrators for work that is largely clerical in nature.

On the latter, African IPR offices were statutorily and procedurally designed to be mere receptacles for foreign applications with little or no intellectual interventions by domestic IPR practitioners and administrators. For example, in the granting of patents, there was no requirement for domestic examination in the processes leading to the grant of patents. Most Patent Offices in Africa are merely engaged in the mechanical stamping and sealing of foreign applications without ever questioning whether the application for patent is meritorious or not.

Most of Africa’s IPR laws did not require special training or qualification for lawyers in patent drafting or prosecution. A brief survey of the number of patent applications filed in Africa shows that local inventors hardly file for patent protection in Africa.²⁴ Even if they tried to, they would be hard put to find an African lawyer who can draft the requisite application. The reason why few African lawyers practising in African States may not draft patent claims is largely because Africa’s patent laws do not provide for domestic input or substantive examination of patents. There is no virtually no institution in the continent where patent agents can be trained in the techniques of claims drafting.

¹⁹ J.W. Chege, *Copyright Law and Publishing in Kenya* (Kenya Literature Bureau, Nairobi, 1978)

²⁰ *Ibid.*

²¹ J. Kingarui, “Towards a National Patent Law for Kenya” in Calestous Juma & J.B. Ojwang, eds, *Innovation & Sovereignty: The Patent Debate in African Development* (ACTS Press, Nairobi, 1989) .

²² Article 7, Vienna Convention on Succession of State in Respect of Treaties, Vienna, August 1978.

²³ R. Jackson, “Sub-Saharan Africa” in, R. Jackson & A. James, eds., *States in a Changing World: A Contemporary Analysis* (Clarendon: OUP, 1993)

²⁴ R.S. Eckaus, “Notes on Invention and Innovation in Less Developed Countries.” (1996) Vol. 56 *The American Economic Review Papers & Proceedings* 98-109.

The bulk of the work was done overseas and the end products were mailed to local lawyers in Africa for filing. Indeed, virtually all of the Patent Cooperation Treaty (PCT) applications filed in African states are drafted by foreign patent lawyers and mailed to lawyers in African States for entry into the National Phase. Local IPR lawyers were glorified clerks tasked with filing and registering foreign applications and for which they were handsomely (relative to local salaries) remunerated.

The system created by the colonial forces for the re-registration of foreign patents in African States without any examination or questions asked by the African municipal offices has barely changed more than fifty years after the formal end of colonialism in Africa.²⁵ Africa is largely a dumping ground for foreign patents. The immediate consequence of this regime was a professional class cocooned and sheltered from the demands of intellectual exertions and curious inquiries. There is only “minimal academic or research oriented practice as most activities are focused on routine procedural aspect and negotiated settlement of disputes. The lack of a robust and litigious constituency leads to a very sluggish development of IPRs law and practice.”²⁶

In terms of quality of IPR administration, the system was shielded from public gaze. Since the emergence of Trademarks Offices in colonized African territories more than a century ago, the current administrative processes at the Trademarks Registries have barely changed. Records of filings in African IPR offices are often kept in dog-eared files. Important data are often stored in pieces of cardboard paper.²⁷ Due to administrative bungling, it is not uncommon for files to disappear or become unavailable when needed.²⁸ It is not uncommon for files to be ruined by the elements such as rain, excessive exposure to sunlight, *et cetera*. As Harms JA, of South Africa’s Court of Appeal recently observed, “the lost-file epidemic, moving through our legal landscape like the bubonic plague and sweeping us back into the Middle-Ages, has also, it seems, infected the (Trademarks) Registry.”²⁹ Searches are still conducted today in the same manner as they were done a century ago.

The structure and processes of Africa’s IPR practice was from the beginning premised on close economic relationships between African IPR lawyers and their foreign clients. The first generation of IPR lawyers in Africa were Europeans. Interestingly, the Africanization of legal practice which swept through the decolonization process in Africa in the 1950s and 1960s changed little as regards IPR practice.

Not surprisingly, IPR practice in Africa was perhaps the last bastion of European control of legal practice in Africa. In the heated anti-colonial rage and rhetoric, focus was largely placed on constitutional issues and land law. To many African States, regaining political control over the continent and reclaiming land hitherto occupied by European colonialists were the most pressing issues of the laws. IPR regimes were not on the radar. It is therefore not a coincidence that the

²⁵ Peter Drahos, *The Global Governance of Knowledge-Patent Offices and their Clients* (Cambridge University Press, Cambridge 2010)

²⁶ Sikoyo, note 17 at 29.

²⁷ See for example the lamentations of Harms, JA, in the South African case of, *SAFA v. Stanton Ltd & Registrar of Trademarks* (2002) ZASCA 142.

²⁸ *Weltevrede Nursery Ltd v. Keith Kirsten Ltd & Anor*, (2003) ZASCA 136.

²⁹ *Ibid.* See also, *Levi Strauss & Co. vs Coconut Trouser Manufacturers Ltd* (2001) ZASCA 60.

vast majority of newly trained African lawyers were versed in constitutional law and land law issues rather than IPR.

IPR legal practice was arguably the last field of law practice to witness significant African numbers. A cursory look at the IPR law firms in Kenya, Nigeria, Ghana, South Africa confirms this fact. The leading IPR law firms were largely European, even at a time when African lawyers had become expert in constitutional law, land law, chieftaincy law, and administrative law.

The second generation of IPRs in the 1960s and 1970s were well-trained African lawyers who had returned from Europe and worked in European-owned IPR law firms. This generation of lawyers, as noted in the preceding pages, inherited a lucrative but intellectually dull practice. Like their European bosses, the vast majority of their briefs and instructions emanated from overseas. This created a privileged class of lawyers more attuned to the protection of foreign interests at the detriment of a critical and progressive engagement with modern IPRs. Till date, the vast majority of IPR work done in Africa from Europe and North America are routed through South African law firms.

Like the compradors of Asia, Africa's IPR practitioners became deeply embedded in international clientelist groups such as International Trademark Association (INTA), International Association of Industrial Property Attorneys (AIPPI), and other networks devoted to the sourcing of clients and promotion of the client's interests. These clientelist networks are often replicated at the domestic level where they act like an echo-chamber for foreign commercial interests. As an official of Nigeria's Trade Marks registry observed, "Nigeria has robust professional IP associations existing side by side with the national bar association. These are: the Intellectual Property Law Association (IPLAN), with about 100 law firms as members, and the International Association of Industrial Property Attorneys (AIPPI), with over 75 law firms as members."³⁰

These associations are often committed to the protection of foreign interests, the economic interests of their clients.³¹ The ability of international NGOs' on IPRs to champion progressive and developmental objectives in Africa and elsewhere is constrained by the fact that such organizations are largely the creation of global capitalism.³² The elitist opportunism inherent in international IPR international NGOs such as INTA, AIPPI, *et cetera* is beyond debate.³³ This phenomenon has given r to what David Kennedy has characterized as the "professional assimilation and intellectual invisibility"³⁴ of modern IPR practitioners in Africa.

Perhaps, the most disturbing aspect of the colonial capture and detention of Africa's IPR regimes is the colonial mind-set of IPR administrators in the continent.³⁵ Since the nineteenth century, the

³⁰ Yauri, *supra*.

³¹ J. Kraus, "Capital, Power and Business Associations in the African Political Economy: A Tale of two Countries, Ghana and Nigeria" 92002) Vol. 40 Issue 3 *Journal of Modern African Studies* 395-436.

³² R. Joseph, "Affluence and Underdevelopment: The Nigerian Experience" (1978) Vol. 16 Issue 2 *Journal of Modern African Studies* 221.

³³ Eghosa F. Osaghae, "The State of Africa's Second Liberation" (2005) Vol 7 Issue 1 *Interventions*: 1-15.

³⁴ David Kennedy 'The TWAAIL Conference: Keynote Address, Albany, New York, April 2007' (2007) 9 *International Community Law Review* 333 at 335.

³⁵ But see, B.S. Lundvall et al, *National Systems of Production, Innovation and Competence Building* (2002) 31 *Research Policy* 213-231.

vast majority of international treaties and agreements on IPR have the WIPO office in Geneva as their administrative headquarters. Geneva therefore is a metaphor for the centrifugal pull of international IPR administration and norm-making. As a result of the colonial set up of African IPR administration, too often, Africa's IPR policies are designed to impress Geneva.

The Geneva-centric orientation of IPR laws administration in Africa partly accounts for the failure of Africa's IPR administrators to design and implement IPR laws and policies tailored³⁶ to meet the needs and aspirations of Africans and the cultural heritage of Africa. Scarce resources are deployed by our IPR administrators in defence of foreign IPR³⁷ while African IPRs languish in the doldrums.³⁸ Great pride is often shown in how many trips to Geneva an administrator has undertaken in his/her career.

This Geneva-centric approach to IPR administration fails to take into account the historical contingencies of IPRs and the lessons immanent in the histories of States such as the United States of America, India, Italy, Brazil, and China. In brief, the problem with enthrallment to foreign influence, as two commentators recently observed, "is that it rests on a misplaced need for external validation, and the concomitant reliance on ways of addressing life through law that have not been put through the crucible of one's own local experience."³⁹

From the foregoing, the vast comprador complex on which the structure and processes of IPR practice and administration are currently premised requires a rethink. The colonial roots of IPR law and practice are alive and strong largely because the current operators of the system see nothing wrong with the system itself. Indeed, most stakeholders in the domestic IPR regime in Africa are quite happy with the status quo. As two recent commentators presciently observed,

"colonization works surreptitiously because colonized institutions either do not realize their subservient status, or they relish the thought of acceptance by the dominating off-shore institutions. Its success also depends not just on a belief in its inevitability, but on the presumption of its necessity -- a presumption often grounded in a sense of inferiority."⁴⁰

Indeed, with the recent conclusion of several TRIPs-plus treaties, the subordination of African needs to imperial IPR dictates has intensified.⁴¹

Part 4: Missing in Action: African States and Modern IPRs regimes

The consequences of the vast comprador complex underpinning IPR norm-making and administration are all obvious to see. While African countries have invested in establishing IPR

³⁶ Kilian Bizer, *et al.*, "Sui Generis Rights for the Protection of Traditional Cultural Expressions (2011) *Journal of JIPITEC* 114.

³⁷ Peter Yu 'The TRIPs Enforcement Dispute' (2011) 89 *Nebraska Law Review* 1046-1131; Peter Yu, 'Enforcement, Economic and Estimates', 2010 No. 6, *Occasional Papers in Intellectual Property Law* 1-20

³⁸ W. Kingston, "Innovation Needs Patents Reform" (2001) 30 *Research Policy* 403-423.

³⁹ Ron Macdonald & Thomas McMorow, "Decolonizing Law School" Paper presented at the University of Alberta, 2013 at a conference on "The Future of Law Schools", on file with the author.

⁴⁰ *Ibid.*

⁴¹ Peter Yu, 'Trips Enforcement and Developing Countries' (2011) 26:3 *American University International Law Review* 727-778.

regimes, there is little evidence that the investments made in IPR administration have impacted the economic and technological development of African states.⁴² As Sikoyo, *et al* observe, “the argument that intellectual property contributes to development has not been proved in most African countries which have had IPR regimes dating back to the early 1900s.”⁴³ The proms of IPRs in terms of spurring technological development in Africa have largely been illusory.⁴⁴ The unfulfilled proms of IPRs regimes in Africa are particularly acute in the context of the minimal pharmaceutical industry base in Africa,⁴⁵ lack of industrial manufacturing capacity, heavy dependence on subsistence agriculture, inadequate physical infrastructure, and near-total dependency on foreign technology.⁴⁶

From most indices, nothing has changed in terms of enhanced public access to technological information which ought to have enlarged and enriched the African public domain through the instrumentalities of IPR regimes. The vast majority of intellectual property rights which are afforded protection in African states originate from Europe, North America, South America and Asia. As recently confirmed, “[the] statistics available indicate that most patent applications emanate from North America and Europe⁴⁷ while Africa accounts for less than two per cent of the total patent applications.” This raises the question of whether the investments that African countries have made in establishing intellectual property protection systems are justified.⁴⁸

Beyond the unrealized proms of IPR regimes, perhaps most problematic is Africa’s minimal intellectual and policy contributions to the pressing issues in current IPR regimes. Consider the issue of traditional knowledge in the context of IPRs.⁴⁹ Although Africa’s wealth in biological resources and traditional knowledge make the application of IPRs to these resources an important issue for discussion and resolution, there is little push by policy makers and African IPR practitioners and administrators to articulate responsive and workable IPR policies.⁵⁰

In contrast to Africa’s minimal contributions to the debate on such important issues, Asian and Latin American states have made significant policy interventions in the field of protection of bio-cultural resources through innovative IPR regimes.⁵¹ For example, Peru,⁵² Brazil, Costa Rica,⁵³

⁴² Peter Drahos *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge University Press, Cambridge, UK, 2010).

⁴³ at 8.

⁴⁴ Peter Drahos, “‘Trust me’: Patent Offices in Developing Countries”, (2008) Vol. 34 *American Journal of Law and Medicine*, 151-70.

⁴⁵ F.M. Abbott, “The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference” (2002) 5.1 *Journal of World Intellectual Property* 15-52

⁴⁶ C. May “The World Intellectual Property Organization and the development agenda”, (2008) Vol. 11 No. 22 *Global Society* 97-130.

⁴⁷ International Centre for Trade and Sustainable Development & UNCTAD, *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Geneva (2003)

⁴⁸ R. Acharya, *The Emergence and Growth of Biotechnology: Experiences in Industrialised and Developing Countries* (Edward Elgar, Cheltenham, 1999)

⁴⁹ David Lea, *Property Rights, Indigenous People and the Developing World: Issues from Aboriginal Entitlement to Intellectual Ownership Rights* (Martinus Nijhoff, Leiden, 2008)

⁵⁰ Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity* (Earthscan, London, 2000)

⁵¹ *Supra*.

⁵² Manuel Ruiz, *et al*, “The Protection of Traditional knowledge in Peru” A Comparative Perspective” (2004) 3 *Washington University Global Studies Law Review* 755.

Bolivia and other countries have developed legal regimes for the protection of bio-cultural knowledge. In these countries, domestic legal regimes, inter alia, now require that patents on bio-cultural resources cannot be granted unless the applicant presents a Certificate of Origin. These requirements often require the applicant to demonstrate that the materials were sourced in a legal and ethical manner. In contrast, there are few adequate domestic provisions regulating access to and exploitation of African bio-cultural knowledge. The lack of adequate legal regulation of access to bio-cultural resources enables unscrupulous and foreign entities to profit from African bio-cultural knowledge. Many African research institutes are far too excited to be seen “collaborating” with foreign bio-prospectors while little regard is paid to the legal and economic ramifications of such “collaboration”.⁵⁴ Sadly, African IPR laws and institutions remain tools and mechanisms for the colonial capture of African bio-cultural knowledge.⁵⁵

As in Latin America, India has in the past decade created an impressive database of medicinal bio-cultural knowledge which has been used as a bulwark against biopiracy and appropriation of Indian traditional knowledge. India has a comprehensive database of bio-cultural knowledge collated by a team of science graduates most of whom hold doctorate degrees in such fields as pharmacy, botany, pharmacology, *et cetera*. The Traditional Knowledge Digital Library (TKDL) seeks to document in digitized format the *Ayurveda*, *Unani Tib*, and other medical systems, based on documents that are already in the public domain. The TKDL is a classification system based on the International Patent Classification structure and is designed to assist patent examiners in their search for novelty and inventiveness in patent classifications.⁵⁶

In addition, India’s drug regulatory agency has been focused on the efficacy of herbal medicine sold in India rather than compelling Indian herbalists to disclose the secrets of their herbal remedies. These developments stand in contrast to the situation in several African States where little or no initiatives have been seized by the IPR administrators in Africa to tailor the operational mechanisms of IPRs enforcement in ways that reflect national priorities and concerns.⁵⁷

Given Africa’s wealth in biological diversity and bio-cultural knowledge,⁵⁸ one would have thought that coherent efforts should have been geared towards adapting some of the amenable

⁵³ Michael Miller, “Biodiversity Policy Making in Costa Rica: Pursuing Indigenous and Peasant Rights” (2006) Vol. 15 No. 4 *The Journal of Environment & Development* 359-381. Costa Rica’s Biodiversity law of 1998 is arguably the most comprehensive legislation implementing the Convention on Biological Diversity. Much of Costa Rica’s success owes to the role of NGOs, social movements in spite of opposition from traditional political powers.

⁵⁴ *WIPO Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, Study No. 3* (2002)

⁵⁵ Bankole Sodipo, *Piracy and Counterfeiting: GATT, TRIPs and Developing Countries* (Kluwer Law International, London, 1997)

⁵⁶ Anil Gupta, “The Honey Bee Network: Transforming the Paradigm of Benefit Sharing” in, Sarah Laird., ed *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (2002, SRISTI, India)

⁵⁷ But see, Johnson Ekpere, “The African Union Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and the Regulation of Access to Biological Resources” in Christophe Bellman, *et al*, eds, *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability* (2003)

⁵⁸ *Convention on Biological Diversity*, entered into force on December 19, 1993, reprinted in (1992) 31 *International Law Materials* 813.

IPR regimes including Certification Marks, Geographical Indications,⁵⁹ and Indications of Origin to promote and protect such bio-cultural knowledge including the medicinal and industrial uses of various species of yams, the Shea butter tree, palm oil trees, bitter-kola, alligator pepper, *et cetera*.⁶⁰

While other regions of the world have taken important steps towards the regulation of access to bio-cultural knowledge⁶¹ as demonstrated in the Nagoya Protocol,⁶² African IPR administrators are more like pedestrian bystanders, apparently more interested in watching events unfold rather than participate actively and decisively.⁶³ On the occasions when government officials entrusted with administration of IPRs attend conferences, meetings, *et cetera*, there is rarely an organized intellectual engagement with the issues. It is hard to read the transcripts of official meetings on IPR issues and find any substantive and serious contributions made by African delegates.⁶⁴

Of particular note is the lack of engagement by African countries in international IPR arrangements such as TRIPs.⁶⁵ As the African Union lamented, “a smaller part of humanity, represented by 40 States concluded the negotiations for the creation of the World Trade Organization (WTO) in 1994. African countries had negligible or no inputs into the negotiations.”⁶⁶ Delegates from “smaller” but better organized States have been known to make notable and important contributions towards international policy instruments in IPRs. There is simply too much “ad-hocry” in the African approach to IPRs governance.

The lack of critical engagement with contemporary developments on IPRs content and regimes is further evidenced by the paucity of domestic regulations on patent disclosure requirements. African IPR administrators visit World Intellectual Property Organization (WIPO) offices in Geneva as frequently as they can source the funds for their trips. As I have argued elsewhere, the administration of patent systems in Africa leaves too much to be desired.⁶⁷

In the area of copyright law, the situation is equally parlous. Progressive provisions on fair use, user-generated content, and access to educational materials have been removed or tightened. Meanwhile, what limited resources the state has are often deployed to apprehend, prosecute and

⁵⁹ Jo Recht, “Intellectual Property in Indigenous Societies: Culture, Context, Politics and Law” (2006) 6 *Dartmouth Law Journal* 277-298.

⁶⁰ See for example, Chidi Oguamanam ‘Genetic Resources & Access and Benefit Sharing: Politics, Prospects, and Opportunities for Canada after Nagoya’ (2011) 22 *Journal of Environmental Law and Practice* 87.

⁶¹ Traci McClellan ‘The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples’ (2001) 19 *Wisconsin International Law Journal* 249.

⁶² ‘Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization’ (Tenth Meeting Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18-29 October 2010).

⁶³ See for example, *African Model Legislation for the Protection of the Rights of Local Communities, Framers, and Breeders, and for the Regulation of Biological Resources*, OAU Model Law, 2000, (on file with the author).

⁶⁴ S. Wiessner & M. Battiste ‘The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous Knowledge’ (2000) 13 *St. Thomas Law Review* 383.

⁶⁵ See, Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 1197.

⁶⁶ Michelle Gravelle & John Whalley, “Africa and the Uruguay Round” (1996) 6 *Transnational Law and Contemporary Problems* 123.

⁶⁷ Ikechi Mgbeoji, “Patent Offices in Africa Not Fit For Purpose” in De Beer, J., Armstrong, C., Oguamanam, C. and Schonwetter, T. (Eds.) *Innovation and Intellectual Property: Collaborative Dynamics in Africa*, (UCT Press, Cape Town, 2013).

jail copyright infringers. Copyright administrators in the African continent, at the behest of foreign entities, often show great zeal in arresting illegal copiers and making public bonfires of their seizures. Ironically, Africa has some of the highest levels of adult and childhood illiteracy stemming partly from limited access to books.

In the area of folklore where contemporary copyright regimes have proven inadequate to protect African interests, there is little initiative from the IPR establishment in the continent. African folklore bears eloquent testimony to the civilization and culture flourishing in Africa before the colonial era.⁶⁸ Yet, this patrimony of states face existential threats. As one commentator lamented, “this aspect of African cultural heritage has, for some time now, suffered from the syndrome of cultural atrophy and opportunistic invasion. It grieves the heart to learn that Nigerian folklore is fast becoming extinct and anachronistic –no thanks to the school system, particularly the primary school curricula.”⁶⁹ Commenting further, Olueze laments that, “the illegal exportation of folklore materials and antiquities to Europe has dealt a severe blow to Nigerian cultural development. The result is that a great number of folk arts, particularly drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textiles, are hidden away in museums across Europe and America.”⁷⁰ In fact, there is more African art in cities like New York than in African cities.⁷¹ African art is ubiquitous in many malls in the United States and Europe.⁷² The incompetence IPR administrators in respect of folklore in Africa are well-documented.⁷³ The protection of folklore in Africa has simply stagnated.⁷⁴

Little African case law on IPRs has been important or seminal enough to command the scholarly attention or judicial notice of courts outside the continent. In countries with a functional and responsive IPR regime, the vast majority of IPR disputes ar from contested decisions of administrative tribunals and/or industrial disputes between two or more users/creators of IPRs. Given that African laws do not promote an intellectual intervention by African lawyers in the practice of IPRs, it should surprise no one that IPR practice in Africa is rarely animated by serious intellectual debates.⁷⁵ Obviously, the environment in which IPR law practice and administration are undertaken in most African States is largely devoid of serious intellectual exertions. Consequently, the vast majority of what passes for IPR practice and administration in

⁶⁸ N. Okigbo, “Promotion of Indigenous Technologies in Sustainable Development in Africa” in Johnson, *et al*, *Role of Indigenous Technology in the Socio-Economic Development of Africa* (Nigeria: OAU/STRC, 1998) at 16-64.

⁶⁹ Ikechukwu Magnus Olueze, *Protection of Expressions of Folkore as a Vehicle for Cultural Dissemination Under Nigerian Law* (2000) 25 *International Legal Practitioner* 64.

⁷⁰ *Ibid.*

⁷¹ Babacar Ndoeye, ‘Protection of Expressions of Folkore in Senegal’ (1989) 25 *Copyright:Monthly Rev. World Intell. Prop. Org* 374-375.

⁷² Paul Kuruk, ‘Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States’ (1999) Vol. 48, Issue 4 *American University Law Review* 769-850.

⁷³ Ayoyemi Lawal Arowolo, *Copyright Law and the Recognition of “Folkloric Creations” and “Folk Medicine” in Africa* (2011) Vol. 5 No. 1 *Journal of Black and African Arts and Civilization* 33.

⁷⁴ Olalere Oladitan, “Of Folklore and the Law in Nigeria: The Copyright Decree 1988” (1995) *Journal of Nigerian Folklore* 19.

⁷⁵ B. Michael, “Constitutional Fair Use” in *Copyright Law Symposium*, No. 28 (New York, Columbia University Press) 144.

Africa is an exercise in clerical drudgery; little more than running errands for the major law firms and business entities of Europe and North America.

Given the superior-inferior relationship between the colonial order and the colonized peoples, the foundation of early IPR regimes, especially, patents and copyrights, was not designed to acknowledge and protect the staggering achievements of pre-colonial Africa,⁷⁶ in the areas of folk lore,⁷⁷ music, sculpting, bronze-work, and agriculture. For centuries therefore, traditional knowledge frameworks and its credentialing mechanisms were denied legitimacy, scholarly recognition, and legal protection.⁷⁸

5: Charting Escape Routes

The question that arises from this depressing state of affairs is what are the pathways to a break-out? In order to chart the way forward, we should, as Chinua Achebe once counselled, determine from whence the rain started to beat us. The first and most important task is the teaching of IPR courses in Africa's institutions. There is a crying need for the teaching of IPR courses in Africa's universities and tertiary institutions of learning. For nearly one hundred years, the branch of law known as IPRs has been treated by many African universities as an after-thought, an appendage to other disciplines of law such as real property. In this digital age, the significant divide between Africa and the rest of the world can be bridged through information technology. There are hundreds of tertiary institutions in Europe and North America willing, via information technology, to teach IPR courses in Africa's tertiary institutions. Existing curriculum in universities has yet to adopt critical approaches to IPRs.

Unless the pool of IPRs scholars and activists in Africa is increased, the hegemony of Africa's IPR elites will continue. Many African States have complained about the lack of adequate personnel who have in-depth knowledge and grasp of the various issues at stake. IPRs are technical and require people who know and understand their intricacies. Regrettably, negotiators from most African states are civil service officials lacking technical knowledge of the issues. Scarcity of human and material resources is compounded by absence of consistent and progressive IPR policy. Countries often attend negotiating summits without a clear idea of what their national IPR policy is or should be, "leaving countries vulnerable to positions taken by developed countries; this was clearly evidenced at the Uruguay Rounds."⁷⁹

This second task is for IPR administrators in African States to recognize the need for a critical engagement with the structure and process of global IPR regimes.⁸⁰ Historically, all states with strong stakes in IPRs have been known to adapt their IPR regimes, especially, the administrative

⁷⁶ Basil Davidson, *The African Past: Chronicles from Antiquity to Modern Times* (Grosset & Dunlap, New York 1967); Cheikh Anta Diop, *Precolonial Black Africa* (Lawrence Hill Books, Brooklyn 1987)

⁷⁷ Isidore Okpewho, *The Epic in Africa: Toward a Poetics of the Oral Performance* (Columbia University Press, New York 1975)

⁷⁸ Martha Johnson (ed), *Lore-Capturing Traditional Environmental Knowledge*, (IDRC, Ottawa 1992).

⁷⁹ Sikoyo, at 25.

⁸⁰ Peter Yu 'TRIPs and Its Achilles' Heels' (2011)18 *Journal of Intellectual Property Law* 481-530.

component of IPR regimes, to suit and serve their domestic industrial needs depending on their domestic imperatives and stages of industrial prowess.⁸¹

Although African States have treaty obligations in the realm of IPRs, the margins of discretion in the areas of administration have been left fallow. While most states may have similar statutory provisions in IPR laws, the real difference often resides in the way and manner in which IPR laws are administered. There is enormous room for discretion and policy initiatives in the area of administration. The lamentable rot in Africa's IPR regimes is largely a direct result of uninspired manner in which IPR laws have been administered in the post-colonial era.⁸² Unlike other former colonies such as India and Brazil which have exercised their discretion in the domestic administration of IPR treaties and conventions to advance domestic agendas, little has changed in the metropolis-colony relationship between the imperial powers and the African IPR landscape. A business-as-usual approach, in which IPR administration in African States is no more than filing and registering all manners of IPR application is simply antiquated and counter-productive.

In addition, it is high time the neo-colonial⁸³ orientation of Africa's IPR administrative bodies was addressed. For too long, our IPR administrative institutions have operated as extensions of imperial states by devoting substantial resources to projects and issues that are of interest to foreign states and interests while ignoring or failing to adapt IPR laws and procedures to matters of importance to Africa.⁸⁴ Too often, Africa's IPR administrators adopt a servile attitude towards the West. They often go cap-in-hand begging Western corporations for funds and legitimacy. IPRs are inescapable in the current global context. The real issue is that "African countries need a consideration of their historical, cultural, and socio-economic as well as resource endowment with a view to having alternate approaches to IPRs rather than the current regime that constrains them."⁸⁵ Much can be achieved by building meaningful coalitions with countries that have successfully broken the yoke of colonial agenda-setting on IPR issues.⁸⁶

Third, African States need a clear industrial policy which should articulate precisely what it is they intend to achieve from their engagement with IPRs regimes. It is very hard, perhaps impossible to have a responsible and responsive IPRs regime without a credible industrial policy. It is not for nothing that some forms of IPRs are described as industrial property. An industrial policy must of necessity determine and locate the roles which IPRs are expected to play in the various sectors including healthcare, agriculture, industrial production and manufacture, environmental protection, education, *et cetera*.

Fourth, Africa needs a home-grown civil society presence in matters pertaining to IPR governance. All over the world, significant developments in IPRs have been animated or even

⁸¹ Peter Yu, *The Global Intellectual Property Order and its Undetermined Future*, *Occasional Papers in Intellectual Property Law*, Number 4. 2009.

⁸² K.J Arrow, *Economic Welfare and Allocation of Resources for Invention* (New York, National Bureau of Economic Research) 609-625.

⁸³ Grace Woo, *Ghost Dancing with Colonialism* (UBC Press, Vancouver 2011)

⁸⁴ Sungjoon Cho 'The Demise of Development in the Doha Round Agreements' (2010) 45 *Texas International Law Journal* 573.

⁸⁵ Sikoyo, note 17 at 28.

⁸⁶ Peter Yu, *Building Intellectual Property Coalitions for Development*, *Occasional Papers in Intellectual Property Law*, No. 3 (2009)

originated from the insights, pressures, and agitations of civil society groups. These organizations possess the expert, global connections, and resources to help improve IPRs regimes.