

***FOR DISCUSSION
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**"SUI GENERIS" SYSTEMS:
THE CASE OF THE "OAU MODEL LAW ON THE PROTECTION OF
THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS
AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL
RESOURCES"(1)**

BY

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1. INTRODUCTION

Africa is, economically, the least developed continent in the world, yet probably the most endowed in terms of natural resources. The continent is particularly rich in traditional knowledge associated with biological resources, a crop and medicinal plant diversity, the value of which is yet to be studied, discovered or quantified.

Africa has always maintained, conserved and nurtured its biological resources through generations of local and indigenous (traditional) communities – particularly through the activities of farmers, hunters, fishermen, women and local healers whose livelihood depends almost exclusively on these resources. They have cared for the critical balance of the ecosystem and their biological resource in their own self-interest to survive and live an appreciably satisfying life.

The Earth Summit in Rio (1992) was an important international effort to address major issues essential for the continued survival of local communities as it relates to the conservation of biological diversity. For the first time, there was a consensus among scientists, policy makers and civil society that humanity was in the process of unconsciously depleting an invaluable resource central to our food, health and economic security. The very earth on which our survival as a people depended was about to collapse from excessive demand. The traditional knowledge associated with these resources was at risk.

While there was a general agreement on the need to conserve and sustainably utilize available biological diversity and traditional knowledge for the benefit of all humanity, it is disheartening that there are countervailing forces bent on appropriating the rights of local communities, indigenous peoples and sovereign nations through Intellectual Property Rights (IPR) systems.

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These dimensions as endorsed in International Agreements, have major implications for national and regional food security, agricultural and rural development as well as health, environment and traditional knowledge. For Africa, “classical” intellectual property rights on biological diversity could have profound implications.

The new GATT accord which established the World Trade Organisation (W.T.O) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) obliges its member states to adopt either patent, a *sui generis* system or a combination of both to protect new plant varieties. TRIPs seem to formalise the trend in which intellectual property rights confers private, individual and exclusive ownership. On the other hand, the Convention on Biological diversity (CBD) recognises the role and achievement of local and indigenous communities in the conservation of biological diversity and considers biological resources as proper areas of establishing and ensuring collective community rights.

It has been suggested that current IPR regimes cannot protect traditional and indigenous knowledge and by extrapolation traditional knowledge, indigenous technologies, innovations and practices.

2. THE ORGANIZATION OF AFRICAN UNITY (OAU) INITIATIVE

The Organization of African Unity (OAU) was an active participant in the Uruguay Round as well as the Earth Summit in Rio (1992) which enunciated the Convention on Biological Diversity (CBD). Issues on the implementation of the convention and its protocols, the WTO and its Agreements are listed for discussion in the yearly agenda of the Sessions of Council of Ministers and Summit of Heads of States and Government of the OAU.

In more recent times, the OAU, through its Scientific, Technical and Research Commission identified the problem of ownership, conservation and utilization of Africa’s bio-resources as an important area of research and development. The concern for the conservation of and ownership rights over biological resources and traditional knowledge was first expressed in Kampala, Uganda, during the 5th OAU/STRC Meeting of Experts and Symposium of Traditional African Medicine and Medicinal Plants (1996). In April 1997, the Commission held a joint Workshop on Medicinal Plants Policy: Issues on Ownership, Access and Utilization³ in Nairobi, Kenya. The purpose of the workshop was to chart a course of action and follow-up to the issues raised in Kampala, Uganda. The workshop recommended among others that:

- The OAU/STRC should initiate and coordinate the process of drafting a model law on the protection of indigenous knowledge on medicinal plants.

The Commission moved very fast on these recommendations and convened a task force (Working Group of Experts) in Addis Ababa in April 1998. The task force produced:

- A draft Model Legislation on Community Right and Access to Biological Resources.
- A Draft Declaration on Community Rights and Access to Biological Resources and
- A Draft Convention for the Protection, Conservation and Sustainable use of African Biological Diversity, Genetic Resources and Related knowledge.

The Draft Model Legislation was sponsored by the government of Ethiopia at the 34th Summit of Heads of State and Government in Ouagadougou, Burkina Faso (June/July 1998) at which it was decided that Governments of Member States should:

- Give due attention as a matter of priority to the need for regulating access to biological resources, community knowledge and technologies and their implication for IPRs as entrenched in the international trade regime of the TRIPs Agreement;
- Adopt the OAU Draft Model Legislation on Access to Biological Resources and call on Member State to initiate the process at national level, involving all stakeholders in accordance with their national interest and enacted into law.
- Initiate a process of negotiation among African Countries to formulate and adopt an African Convention on Biological Diversity (Revised Algiers Convention of 1968) with emphasis on conditions for access to biological resources and protection of community rights.
- Develop an African Common Position to safeguard the sovereign rights of Member State, the vital interests of their local communities and forge alliance with other countries of the South on the review of the TRIPs Agreement.

The decision and recommendation of the Council of Ministers of the OAU put the TRIPs Agreement in general, and its Article 27.3(b) and matters related to traditional knowledge in particular on the national agenda of most Member States. It also legitimized the mandate of the OAU/STRC to proceed with the development of a full-blown legislative instrument on the protection of community rights and new plant varieties.

3. TRIPS, BIODIVERSITY AND TRADITIONAL KNOWLEDGE: ANTECEDENT TO THE OAU MODEL LAW

The WTO TRIPs Agreement and the imperatives of contemporary jurisprudence have thrown into focus the distinction between the creativity of local communities and indigenous people and the creativity of corporate interest. Only the latter has been accorded value, global recognition and reward through the patent system. This inequity does not only derogate and threaten the validity of the biological resources and knowledge system of local communities and indigenous people, but the value of their technologies, innovation and practices. It is sometimes argued that local biological diversity and knowledge is a universal heritage and resource. For Africa, it represents both a national heritage and resource. It should therefore be protected, developed, promoted and where appropriate conserved. This is because traditional knowledge and biodiversity anywhere is a resource held in trust by the present generation for the service of the present and future generations. The distinction referred to above is therefore inappropriate, irrelevant and spurious.

The biological diversity and knowledge system of local communities, their technologies and practices have sustained them long before the advent of modern science. The world community of today has built on the knowledge and technology base of local communities to achieve current levels of development. The recourse to global trade concepts, setting minimum standards for international commerce on biological resources and associated traditional knowledge without regard to valued recognition of the rights of local communities and indigenous people could be interpreted as killing the goose that lays the golden egg.

Perhaps one of the most significant problems in these discussions is the contradiction between the CBD, which recognized the sovereign right of State (local communities) over their biological diversity, and TRIPs, which confers monopoly rights through IPRs (Article 27.3(b)). The definitional constructs of this Article precludes recognition of traditional knowledge, local technologies, innovations and practices as well as their collective ownership by local communities for common social good. The obvious implication is that the creativity of local communities as represented by indigenous peoples knowledge cannot be protected and rewarded under the TRIPs Agreement.

It is this anomaly inherent in the new concept of the world, in trade terms and the IPR system that the OAU Model Legislation attempts to address through a “*sui generis*” system.

4. SO WHAT IS THE ISSUE AT STAKE?

The issue at stake is the appropriation of the traditional knowledge, innovation, technologies and practices of local communities associated with their biodiversity as well as equitable sharing of benefits associated with the sustainable use of these resources.

What is needed as a matter of urgency is an appropriate system to legally secure the rights of local communities and people – especially farmers and traditional medicine practitioners-rights

over their germplasm. This will enable ownership of the physical resource and the traditional knowledge associated with it.

5. THE OAU MODEL LAW

The OAU Model Law was developed as a direct response to the decision taken and the directive given by the OAU Council of Minister in 1988. The principal objective was to “ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources as well as associated indigenous knowledge in order to improve their diversity as a means of sustaining the "life support systems”. Let me indicate here that the model law was developed with specific reference to the CBD and Article 27.3(b) of the TRIPs Agreement. It does not address the various other contentious issues of the TRIPs Agreement. Consequently, it was formulated to:

- Recognized, protect and support the inalienable rights of local communities, including farming communities, over their biological resources, crop varieties, medicinal plants, knowledge, technologies and practices.
- Recognize and protect the rights of breeders over varieties developed by them.
- Provide a mutually acceptable system of access to biological resources, community knowledge, technologies and practices subject to the prior informed consent (PIC) of the State and the concerned local communities.
- Provide and promote appropriate mechanisms for the enforcement of the rights of local communities, including farming communities, and breeders and the conditions essential for access to biological resources, community knowledge, technologies and practices.
- Ensure and promote the supply of good quality seed and planting material to farmers and
- Ensure that plant genetic resources are utilized in a sustainable and equitable manner so as to guarantee national food security.

In terms of scope, the OAU Law applies to:

- Biological resources both in-situ and ex-situ conditions including plant varieties.
- The derivatives of the biological resource
- Community Traditional knowledge, innovations, technologies and practices
- Local and indigenous farming communities and farmers and
- Plant breeders.

It was developed with a view to:

- Prevent the disruption of African rural life and food production which could result from loss of:
 - ◆ Seed and other planting materials which are the foundation of all agricultural production.
 - ◆ Traditional medicinal plants and knowledge, the basis of health care delivery service for majority of African people.
 - ◆ Natural fibre and dyes; the basis of African art and crafts etc.
- Promote and ensure the sharing of benefits that biodiversity, traditional knowledge, technologies, innovations and practices of African communities provide to Multi-National corporations, mostly from the north.
- Safeguard the vital interests of Africa from some of the consequences of globalization and trade liberalization.
- Assist OAU Member States who are members of the World Trade Organization (WTO) fulfill their obligations – especially that of Article 27.3(b) of the TRIPs Agreement through a “*sui generis*” system of protection.

Most African countries have opted for a “*Sui Generis*” system instead of patent. They argue that other forms of protection (patent or UPOV) is very similar to that of industrial set up for countries where the agricultural and/or local community represents less than 1.5 percent of the population. In these (industrialized) countries, the selection and development of new plant varieties is undertaken by private firms and privately financed. The system of protection is based entirely on the logic of an industrial economy in which the investment and interest of large seed companies with their professional breeders must be rewarded and protected through patents. In developing countries (Africa) where the small farmers hold a capital role, the system is completely alien. It is the small farmer who selects crosses and develops new varieties of plants and exchanges them with other farmers. Generally, it is this pre-selected plant material that the plant breeders use in their crop (plant) improvement programme. All these activities are undertaken by public institutions, supported with taxpayer money. They belong in the public domain and therefore should not be subject to monopoly ownership through patent.

6. KEY ELEMENTS OF THE OAU MODEL LAW

The core peculiarities of the OAU Model Law can be found in the following basic principles as enunciated in the text.

- I. **Food Security:** Africa’s access to food at all times for an active and healthy life is currently provided through small farmers who practice customary rainfed farming of multiple cropping with farm saved seeds and on – farm crop selection. For most communities, locally produced biological resources provided over 95% of their

requirement for survival. The argument and need for change may be logical and necessary, but such change must be appropriately by planned and carefully implemented consistent with local capacity to absorb it. Biological diversity is essential for sustainable food production and food security. Therefore, the loss of diversity could make the local environment more ecologically unstable, adversely affect sustainable food production, local community control and access to genetic resources.

The Model Law aims at promoting the conservation of local biodiversity – related technologies, innovations and practices, food security as well as community rights over their biological resources and traditional knowledge. It recognizes farmers rights, as counter-balance to breeders rights and thus ensures farmers tradition to save and exchange seeds and where necessary produce farmer certified seed. The model legislation acknowledges seed security as the foundation for food security in order to improve the region's long term food and livelihood security.

- II. **Sovereign and Inalienable Rights:** Both the Rio Declaration and CBD recognize the sovereign rights of state, responsibility to sustainably use their biological resources as well as access and equitable sharing of benefits derivable from them. National legislation needs to define and guarantee community rights and responsibility over their biological heritage and related traditions. This guarantee is in consonance with the relevant Article of the CBD and the revised section of FAO-IU. It also protects local communities from the vagueness of TRIPs.

The OAU Model Law is based on the principle that the knowledge, technologies and biological resources of local communities are as result of the tried and tested practices of several past generations. They are held in trust by present generations for future generations and no one has the right to create exclusive monopoly rights over them. Community rights are inalienable. The State has a responsibility to protect such rights.

- III. **Community Rights:** Human existence and development has throughout history been defined in the context of the community. The individual – based system is alien to African culture and lifestyle. Local communities are the custodians of their biological resources, innovations, practices, knowledge and technologies which are governed completely or partially by their own customary laws, written or orally transmitted.

The United Nation has recognized community rights and recommended that States do so. It is in this respect that some countries are incorporating collective rights into their national legislation.

The OAU Model Law includes a special section on community rights where the rights of local communities are recognized. These rights are particularly important to protect Africa's abundant multi-ethnic character, rich culture, biological heritage and traditional knowledge.

- IV. **The Importance of Community Knowledge and Technology:** The CBD recognized biodiversity as the basis of the livelihood of millions of people around the world. Damage, monopoly ownership and erosion of biodiversity threaten the very life support system of all human lives and the phenomenon, which provides the ingredients for food, medicine, shelter and comfort.

The TRIPs Agreement does not recognize the traditional knowledge, technologies, innovations and practices of local communities as subjects for protection under IPRs. However, CBD specifies that innovations and practices of local communities are essential for the conservation of biodiversity and should be so recognized and protected.

- V. **Participation in Decision-Making:** The International Labour Organization (ILO) Convention 169 adopted June 26, 1989 recognizes the right of indigenous peoples to decide their own development priorities. Interpreted in the context of the local communities of Africa, the model law ensures the effective participation of affected communities in the regulation of access and sharing of benefits accruing from the utilization of their biological resources; knowledge, technologies and practices.

- VI. **Regulation of Access to Biological Resources:** The current trend towards privatization, commercialization, bioprospecting and biotrade promoted through TRIPs could erode the local livelihood systems based on biological resources. In the absence of appropriate regulation, local communities will forever be on the losing end. The Model Law provides for a system to regulate access subject to prior informed consent of the State and the concerned local community. They include the requirements to be fulfilled, when applying for access, the information to be provided by the applicant to the National Competent Authority, the procedure for granting access, the types of permits, etc. These conditions are consistent with those prescribed by CBD and the Biosafety Protocol.

- VII. **Prior Informed Consent:** The CBD and the Protocol on Biosafety both require prior informed consent as a condition for granting access. Consequently, the Model Law requires the prior informed consent of both the State and the Local Community before granting access to biological resources. It specifies provision for consultation with the concerned communities on applications being made for access. The responsibility to ensure appropriate consultation rests with the National Competent Authority.

- VIII. **Fair and Equitable Sharing of Benefits:** The Model Law recognizes benefit sharing as a right of local communities consistent with the basic tenets of CBD. The Model Law stipulates that a specific percentage of any financial or non-financial benefit be shared with the local community.

One of the proposed mechanism for benefit sharing is the establishment of a community gene fund. The fund shall be used to finance development projects in the local community.

The legislation is unique in terms of its enunciation and amplification of the African Common Position of “No Patents on Life Form”. It acknowledges the pivotal role of women in the conservation of biological diversity and gender equality in decision making.

7. **THE CHALLENGES AND OPPORTUNITIES OF THE "SUI GENERIS" SYSTEM.**

Perhaps the most important challenge of the *sui generis* system resides in the ability of its proponents and implementers to show proof that it provides an “effective” system of protection. This is because Article 27.3(b) of the TRIPs Agreement prescribes an “effective” *sui generis*. The challenge is even made more substantial by the absence of a concrete conception of what constitutes “effectiveness”. The burden of proof, therefore seem to rest on the *sui generis* options that it is or can be “effective”.

There are very few *sui generis* typologies within the system. At the time that the OAU Model Law was being crafted, there was the erroneous belief that “UPOV” was the only existing and acceptable “*sui generis*” regulation. Any new initiative was viewed as a misconceived aberration. Even though the concept “*sui generis*” confers uniqueness (of its own kind), the operators of the formal systems of protection were hardly prepared to accept any incursions into the single model with which they were familiar. Breaking this conceptual and intellectual barrier was and still is a major challenge.

The implementation of any “*sui generis*” could pose new issues and challenges. Because of its uniqueness, some of the parameters in the typical systems of protection may require modification and redefinition with implications for criteria and parameters of measurement. While this paper is not about determining such parameters, suffice it say that operators of a specific “*sui generis*” option should be aware of the challenge of “equivalence” of terms and parameters within the system.

Notwithstanding the challenges, the “*sui generis*” system provides developing countries an opportunity to protect their biological resources, traditional knowledge and cultural belief heritage. It enables sovereign States to formulate and enact laws that are relevant to their unique levels of economic development and consistent with their implementation capacity and expertise. It facilitates National Governments, which are members of the World’s Trading System, the opportunity to take advantage of whatever benefits are associated with the global system of protection. It provides a basis for regional cooperation and integration among like minded States in the search for a more just and equitable system of protection. The current seminar is one evidence of this opportunity. The “*sui generis*” system provides an acceptable option to the “once” only existing *sui generis* system.

8. PROGRESS MADE IN DEVELOPING MODEL LAWS

I am aware that substantial progress has made in Asia (Philippines, India, Malaysia) and Latin America (Brazil, Colombia etc) in the development of appropriate legislation for the protection of biological resources and traditional knowledge. In Africa, the OAU Model Law represents the most ambitious and single most important effort at the development of a Model Law which Member States can adapt in the formulation of their national “protection” laws. It provides the framework for the development of national laws for:

- Protection of community rights, access to biological resources and equitable sharing of benefits.
- Protection of farmers rights
- Protection of breeders rights
- Protection of plant varieties compliant with Article 27.3 (b) of the TRIPs Agreement of the World Trade Organization (WTO). etc.

However, the development of National Laws based on the Model Law has been slow. A review of African countries which have or are planning “*sui generis*” systems suggest that they may be classified into four categories:

- a. Countries with several variants of “*sui generis*” and internal capacity for their implementation e.g. South Africa, Egypt, Namibia and Zimbabwe.
- b. Countries with enabling legislation pending in parliament e.g. Kenya and Uganda.
- c. Countries with no legislation and are only now contemplating the possibility of developing a “*sui generis*” system of protection. Majority of African countries belong to this group.
- d. The fourth category consists of the group of fifteen (15) Francophone West and Central African countries of the Organisation Africaine de la Propriete Intellectuelle (OAPI) who through a revision and ratification of the Bangui Accord acceded to a Union for the Protection of Varieties of Plants (UPOV) type “*sui generis*”.

It is relevant to mention here that Africa through the organization of African Unity and the Trade Missions to the World Trade Organization (WTO) in Geneva are committed to the African Common Position and the “*sui generis*” option. Most countries in the continent are currently in the process of adopting and adapting the OAU model law in crafting their national law.

9. CONSTRAINTS IN DESIGN AND IMPLEMENTATION OF SUI GENERIS SYSTEMS.

The concept and practice of “*sui generis*” as a form of protection in the new world order of trade and commerce is new to most African States. Consequently, perhaps the most important constraint to the design and implementation of an effective “*sui generis*”

system is that of skill and expertise in legal drafting and full knowledge of its implication in national development and international cooperation.

Most countries have had problems with adapting various Articles of the Model Law (*sui generis*) to national priority objectives and directive principles of development. There are problems of definitional equivalence of terms, common meaning and interpretation of the provisions of the law. For example, the World Intellectual Property Organisation (WIPO) is still struggling to provide a better understanding of traditional knowledge and how best it should be protected. Nation states are not well informed on the utility of protection of traditional knowledge even they now recognize that their traditional heritage is being misappropriated. There are several intangible constraints that impede an objective debate of “*sui generis*” as an important factor in national development.

There are problems of scope of the “*sui generis*” systems. There are arguments in support of mega-laws to cover all components of traditional knowledge – ranging from plant varieties, biological resources, to the rights of local communities and traditional knowledge. Others suggest the development of separate laws for specific components to which “*sui generis*” legislation is applicable.

There are constraints of implementation capacity (professional/technical competence and funding), public enlightenment, advocacy and civil society participation to ensure action.

10. POSSIBLE EFFECTIVENESS OF “SUI GENERIS” SYSTEMS OF PROTECTION

There is evidence that “*sui generis*” systems of protection can be effective if they are conceived to be relevant in time, specific to the subject matter to be protected and adaptable to the socio-economic environment in which they are to be implemented.

The UPOV system of protection has been widely acclaimed as an effective “*sui generis*” system. It is currently being promoted world-wide because of its purported impact. Therefore, the issue is not whether a “*sui generis*” system can be effective. It can.

The question of how effective existing “*sui generis*” systems have been in... avoiding misappropriation and encouraging benefit sharing is another issue.

In the Africa Context, the “*sui generis*” facility is a recent institution. There are very few case studies and direct evaluative assessments to empirically determine the extent to which it has prevented misappropriation or encouraged benefit sharing. The degree of effectiveness has been projected through a vicarious evaluation believing that the benefits of a “*sui generis*” option are substantial (high) in any third world developing country. Its preference is predicated on the fact that it facilitates the evolution of a system that is more adaptable to a society with a rich traditional knowledge heritage. The assumption is that in the long run, its effectiveness will manifest.

Opinion expressed in this paper are those of the author and do not represent the views of the organisation of African unity.