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An Assessment of Intellectual Property Legislative Framework on Violations of Protected Goods

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Abstract

Infringement of intellectual property is a violation of protected rights. Intellectual property is an asset owned by businesses and forms part of a trade. In South Africa, the Constitution and other legislation guarantee ownership of property. The rights to ownership of protected property are affected when criminals misappropriate property. This abuse is evident when the protected property is divested from its lawful owners and sold at a profit to disadvantage the owners. This has the potential of devaluing protected property and contributes to the financial loss of the owners. The abuse ultimately discourages innovation and creativity in businesses. The government is responsible for protecting property rights; the positive spin-off is the taxes that benefit the country. Poor protection encourages free-riding behavior where unscrupulous criminals misuse the intellectual property for their benefit. This study assessed the effectiveness of various legislation that protects property interests. It further highlighted poor enforcement of the law.

Keywords: intellectual property, protected goods, copyright infringement, counterfeiting, terrorism, law enforcement.

1. Introduction

Inventions of the mind date back to the 1300s, so is the crime (Abbott & Sporn, 2002: 9; Harris, Stevens & Morris, 2009: 5). The crime of intellectual property theft was previously punished by severe capital punishment that was proportional to the crime committed (Abbott & Sporn, 2002: 9). There is not a single country in the world that is immune to intellectual property crime (United Nations Office on Drugs and Crime, 2014: 1). Inventions of the mind are just as profitable as physical goods, if not more. This is because mental creativity and innovation outlast the physical product, which can be adapted from time to time as the years progress. The goods that are produced can later be improved to become better in accordance with the needs that exist at the time.

In 2018, there were more than 10.9 million trademarks in the world, with over 15,000,000 classes of trademarks (WIPO, 2019: 74-75). A lack of or poor law enforcement affects businesses, people and government. The tax base will be eroded owing to taxes not being paid by legitimate businesses. This could result in workers being retrenched and governments failing their citizens by not delivering services in communities. The criminals divest the legitimate owners of their businesses and rake in huge profits from selling imitations of genuine goods. South Africa

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has promulgated legislation to fight intellectual property violations, such as the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993 and Patents Act 57 of 1978.

This study assessed the effectiveness of the intellectual property legislation in South Africa by considering its strengths and weaknesses to determine whether it is fit for purpose. This was done in order to assist the country in making improvements in enforcing the law in the country and capacitating law enforcement to uphold intellectual property rights.

2. Key concepts

Intellectual property is an invention of human-made works which comprise symbols, names and images that are registered by authorities and used in commerce (South African Institute of Intellectual Property Law, 2013: 16). It is divided into industrial property such as patents, trademarks, industrial designs and geographical indications, and copyright which covers literary works, films, music, artistic works, architectural designs as well as recordings (WIPO, 2014: 2).

A *trademark* is a distinctive name, symbol, word, picture or combination of these that is used by a business to identify its services or products (International Trademark Association, 2009: 1). It is designed to protect the good reputation of a business's services and/or goods. According to Ward (2011: 49), a sign is capable of being represented graphically and distinguishing goods or services of one business undertaking from those of other businesses. However, it differs from a *patent*, which covers a utility, design, plant or a design of machinery.

Copyright infringement is a violation of the protected rights of another person or institution (Adams, 2010: 201). Copyrights are unregistered rights that allow copyright owners to prevent the unauthorized reproduction of their goods. The fact that the owners of genuine goods do not have to register as legitimate owners does not justify the reproduction of their products without their permission (Lo, 2013: 109).

Counterfeiting denotes the unauthorized production of goods in relation to which the state confers upon legal entities a statutory monopoly to prevent their exploitation by unscrupulous people (WIPO, 2014: 2). Counterfeiting is the unlawful and intentional misrepresentation of goods that leads to actual or potential prejudice to another (Kinnes & Newman, 2012: 33). Moreover, counterfeiting is a routine and mundane form of organized crime that involves the copying of genuine goods to mislead people into thinking they are real. It boils down to the fraudulent manufacturing of goods.

A *brand* is a set of mental attachments and added perceptions held by consumers about the value associated with intellectual property rights (registered product or service) that is provided for at a cost (Kapferer, 2012: 8). A brand is a sign or set of signs certifying the origin of intellectual property rights (registered product or service) and differentiating it from competitors' products (Oosthuizen, 2013: 13).

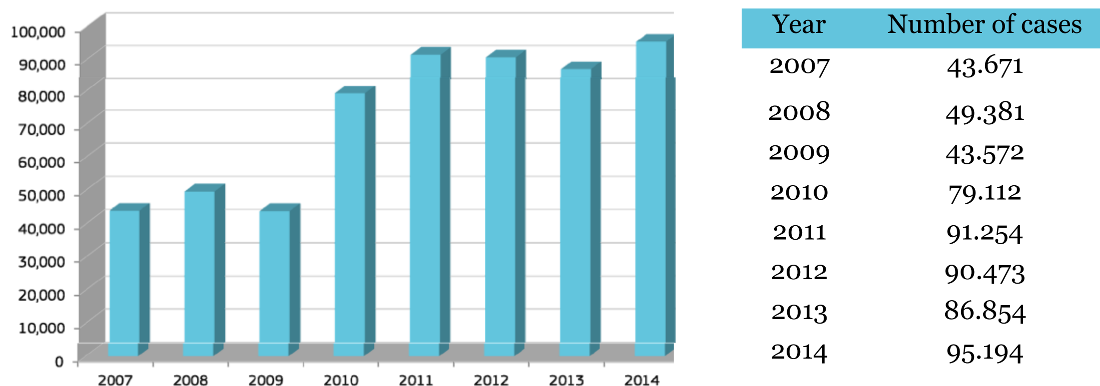
3. International instrument for enforcement of intellectual property rights

The World Trade Organisation (WTO) was set up in 1995 as the custodian of all member states regarding agreements in trade-related aspects. The Trade Related Aspects Agreement is part of the General Agreement on Tariffs and Trade and the DOHA Round Declaration (WTO's DOHA Development Round of 2016 Declaration) of trade negotiation among WTO members. Its objectives are to encourage free trade, reduce tariffs and ensure more equitable

and levelled playing fields achieved within the ambit of the law of various countries (WTO, 2015: 39). The Trade Related Aspects Agreement was created to enforce strong minimum standards of intellectual property protection in each of the areas associated with intellectual property rights, including copyrights, trademarks, patents and trade secrets (Adams, 2010: 201). The establishment of the WTO was seen as an important step towards the protection of intellectual property rights in member states. The main objective was to create international enforcement standards over and above the current intellectual property right protections under the World Intellectual Property Organisation and the Trade Related Aspects Agreement (Lo, 2013: 109). As one of the techniques used by countries to promote accountability, law enforcement agencies have to enforce the principles enshrined in the Trade Related Aspects Agreement, and they do so by making certain that people account for their infringement actions regarding intellectual property violations in the respective jurisdictions.

The Anti-Counterfeiting Trade Agreement is the latest intellectual property treaty that defines intellectual property to include all categories of intellectual property that are subject to the Trade Related Aspects Agreement, such as intellectual property violations. This makes the definition of intellectual property under the Anti-Counterfeiting Trade Agreement to overlap with that of intellectual property under the Trade Related Aspects Agreement. The narrow definition of counterfeiting under the Trade Related Aspects Agreement has made the policing of counterfeit crime problematic in many countries. After the adoption of the Anti-Counterfeiting Trade Agreement, the definition was extended to cover many elements of intellectual property infringements and this contributed to clarifying the uncertainties in identifying intellectual property violations, thereby making it easy for many countries to adapt their laws in line with the spirit of the Anti-Counterfeiting Trade Agreement's stipulations (Adams, 2010: 203). Article 23 of the Anti-Counterfeiting Trade Agreement makes provision for the punishment of intellectual property violators who import and export prohibited and protected goods. Moreover, Articles 25 and 26 of the Agreement also include specific rules of seizure, forfeiture and destruction of confiscated goods as well as the *ex officio* policing and criminal enforcement, which are elements that are in addition to Article 61 of the Trade Related Aspects Agreement. This has resulted in an increase in seizures of offending goods and the arrest of perpetrators.

BASCAP (2015: 1) argues that Internet infringements in country sales or indirect losses to governments and consumers that are included the global impact of these illegal activities could add up to more than US$1.77 trillion annually. Figure 1 below indicates the trend of intellectual property violations in the European Union (EU) from 2007 to 2014.



Year	Number of cases
2007	43.671
2008	49.381
2009	43.572
2010	79.112
2011	91.254
2012	90.473
2013	86.854
2014	95.194

Source: European Commission (2015: 11)

Figure 1. Intellectual property violation cases in the EU

The European Commission Taxation and Customs Union revealed that 103 million intellectual property infringement goods were seized in 2004 in the EU. This number increased to 128 million in 2006 and a similar incremental trend is noticed from 2007 up to 2014 (European Commission, 2014:11). Going by the above statistics, it is apparent that there is an increase in the seizure of intellectual property infringements every year in the EU.

4. Measures used in fighting intellectual property violation on the African continent

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa for the promotion of unity and solidarity of African states. Its main goal was the co-ordination and intensification of co-operation and efforts to achieve a better life for Africans. In addition, the OAU sought to defend sovereignty, territorial integrity and independence. It promoted international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. It advocated the co-ordination and harmonization of political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defense policies (Sakala, 2010: 28). Baimu (2001: 299) asserts that an extraordinary summit of the OAU held in Sirte, Libya on 9 September 1999 called for the establishment of an African Union in line with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty establishing the African Economic Community. Following this, the Constitutive Act of the African Union was adopted during the Lomé Summit of the OAU on 11 July 2000. The African Union has the following conventions that assist in the policing of counterfeit crime in Africa:

- Convention on the Prevention and Combating of Terrorism, adopted in 1999.
- Protocol to the OAU Convention on the Prevention and Combating of Terrorism of 2003.
- Convention on the Prevention and Combating of Corruption of 2003.
- Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa, adopted in 1991.
- African Regional Industrial Property Organisation (ARIPO), also called the Lusaka Agreement, of 1976 which caters for the regulation of implementing the Banjul Protocol on trademarks.

The above conventions and agreements make trading in intellectual property goods a punishable offence in all the African countries, and mandate law enforcement to combat it (Republic of Ghana, 2008: 10). The other instrumental organization in policing cross-border crimes in the southern part of Africa is the Southern African Regional Police Chief Co-operation (SARPCCO). It works in conjunction with the International Criminal Police Organisation (INTERPOL) to combine resources and expertise to fight transnational crimes such as intellectual property infringements.

5. Intellectual property violations: South African perspective

Article 51 of the WTO Agreement on the Trade Related Aspects of Intellectual Property Rights specifies and distinguishes between the concept of trademark goods and copyright goods. The concept of trademark concerns the protection of identifying product marks such as words, slogans, logos, shapes and colors. It indicates the origin of the product, guarantees quality to consumers and serves as the manufacturer's acceptance of responsibility on product defects (Ramara, 2006: 7). Intellectual property infringement such as trademark counterfeiting comes

into play when a person, without permission or authority, uses a trademark and falsely presents it as genuine. Conversely, copyright infringement refers to usurping goods, which are unauthorised copies of CDs, DVDs, online streaming contents and software products protected by intellectual property rights. Copyrights are unregistered rights that allow the copyright holder to prevent unauthorized reproduction of the products.

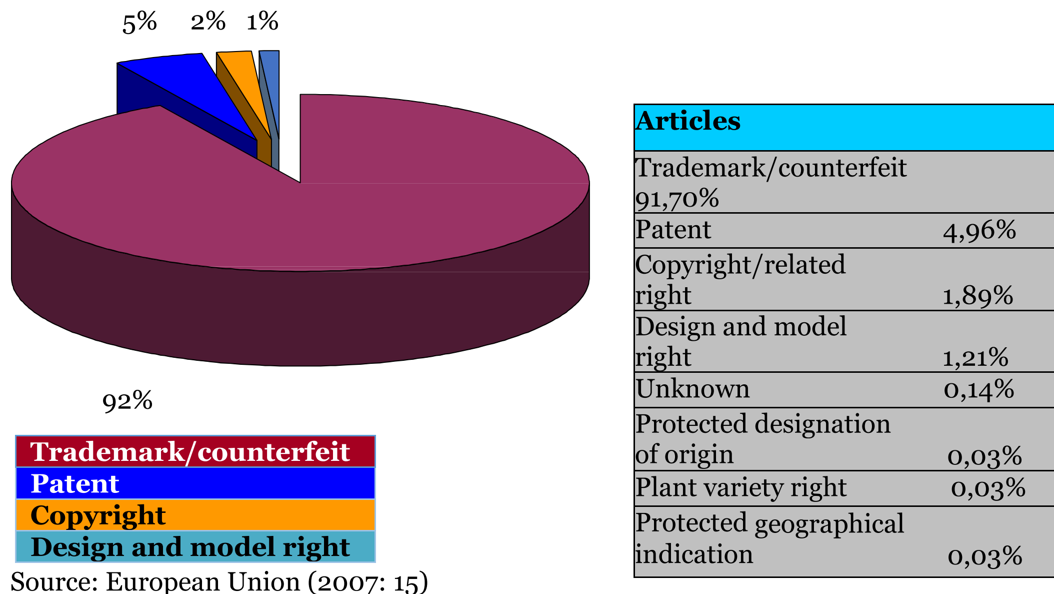
Draper and Scholvin (2012: 1-5) argue that criminals are interested in engaging in crimes that pay better with low levels of arrest, such as counterfeit and other intellectual property crimes. The copying of computer software, DVDs and CDs is one of most common copyright infringements in South Africa. Many of the goods are world-leading products that were created by developed countries such as the USA, Germany, France and the UK (IFPI, 2016: 3). To commit copyright violations, criminals make use of computers and electronic devices to copy the goods bearing famous brands. Some criminals steal not-yet-released information through hacking, as happened in the case of the first South African produced Oscar-award winning film "Tsotsi" directed by world-renowned film director Gavin Hood (Dovey, 2009: 91).

5.1 *South African intellectual property legislative landscape*

Counterfeit crime, piracy and other related intellectual property crimes are rampant in South Africa (South Africa, 2014b: 9). Inevitably, counterfeit crime and piracy are financially rewarding crimes that modern organized crime will not fail to exploit. Crime has also slowed South Africa's socio-economic development (Ampratwum, 2009: 74; South Africa, 2011: 386). Despite all of the above, South Africa has several pieces of legislation that criminalize intellectual property crime. These are grounded in the Constitution of the Republic of South Africa, which protects private property (South Africa, 1996). Legislation was promulgated to fight intellectual property violations such as the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993 and Patents Act 57 of 1978. Piracy, as the infringement of copyright and related intellectual property rights, is characterized by unauthorized duplication of copyrighted content that is passed off as the genuine item. Breaches of trademark and copyright laws overlap and the concepts are used synonymously in certain jurisdictions (Staake & Fleisch, 2008: 17). Spilsbury (2009: 4) emphasizes that counterfeiting and piracy are forms of fraud, while Treadwell (2011: 176) contextualizes them further by saying that they are forms of consumer fraud in which products are sold purporting to be what they are not, with the ultimate goal of making an exorbitant profit. The Counterfeit Goods Act 37 of 1997 criminalizes counterfeit crime in South Africa by empowering the police to arrest and facilitate the prosecution of counterfeiters. This means that counterfeit crime is a statutory crime punishable by law (South Africa, 1997). The Act protects and enforces intellectual property rights by providing civil and criminal remedies against counterfeiters who are caught by law enforcement agencies. Criminal proceedings are preferred in cases of deliberate infringements or infringements for commercial purposes which have resulted in a particular infringement or harm to the brand holder. Section 5(1) of the Counterfeit Goods Act 37 of 1997 empowers the police to collect evidence relating to suspected counterfeiting, conduct searches where necessary and take steps to terminate dealing in counterfeit goods. Among others, the Counterfeit Goods Act also makes diversion an illegal act. Diversion involves the distribution of a genuine product outside of its intended market, thereby violating the first sale doctrine. For example, goods that are to be sold in South Africa are diverted and sold in Kenya without following proper legal channels, thus avoiding tax payment in South Africa. Many of the goods that are counterfeited bear famous and known brand names, which violate the Trademarks, Merchandise Marks and Counterfeit Goods Acts simultaneously. The Trademarks Act 194 of 1993 criminalizes trademark infringement and grants the police powers to police trademarks. In general, counterfeit crimes impact negatively on the relationship that people have with the authentic branded products (De Chermatony, Mcdonald

& Wallace, 2011: 397). The OECD (1998:30) indicates that 67% of the world's counterfeit goods originate from China. Digitally pirated music, movies and software account for US$200 to 250 billion (OECD, 2016:69). A research study conducted by ICC (2010) indicates that in 2015, the impact of counterfeit and pirated protected goods exceeded US$1.77 trillion, with a possibility of more than 2.5 million jobs being at risk of being lost. The genuine goods producers will be forced to reduce their production levels based on less demand owing to the circulation in the market of goods that violate intellectual property laws.

Trademarks and geographical indications are exclusive rights that reduce inefficiencies resulting from a mismatch of information between buyers and sellers on certain attributes of goods. Nobel prize-winner economist, George Akerlof, points out that markets may fail when consumers have less information about the quality of goods than producers (Armbruster & Knutson, 2013: 351). Trademarks identify a product with its producer and reputation for quality that was generated through repeat purchases and word of mouth. They create an incentive for companies to invest in maintaining and improving the quality of their products. Geographical indication identifies the origin of a product, signaling its quality, which is associated with its region (Quian, 2014: 318). Should companies not prevent third parties from counterfeiting their products, then they will have little incentive to invest financial resources into such products because counterfeit crime encourages free-riding behavior (WIPO, 2009: 4).



Articles	
Trademark/counterfeit 91,70%	
Patent	4,96%
Copyright/related right	1,89%
Design and model right	1,21%
Unknown	0,14%
Protected designation of origin	0,03%
Plant variety right	0,03%
Protected geographical indication	0,03%

Source: European Union (2007: 15)

Figure 2. Breakdown by type of infringed right per seized article in the EU

Figure 2 above illustrates that in 2007, the majority of articles seized by customs infringed a trademark and covered a wide variety across all product sectors. With regard to patent infringements, the main products involved concerned electronic equipment. With regard to copyright infringements, CDs, DVDs, software and online streaming of contents were the products most affected, as well as a wide variety of products containing protected images such as well-known comic figures. In design rights, most infringements concerned toys and accessories for cellphones (Stoner & Wang, 2014: 205).

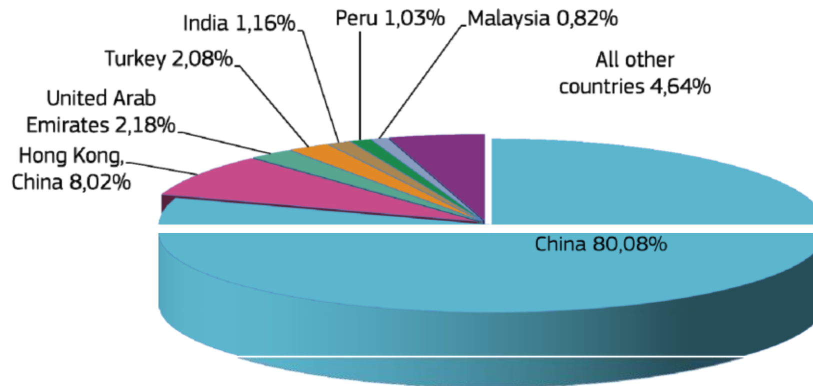
Through geographical indication, law enforcement agencies can track where the goods originate from and locate the owner. An additional advantage of trademarks is the fact that brand holders and producers can distinguish their goods from other competing goods (Welchy, 2010: 361), and the police rely on these identifying characteristics to investigate and police the infringement.

The Tobacco Product Control Act 83 of 1993 makes any deceptive or misleading packaging and the physical goods that do not meet certain specifications as contained in the Tobacco Product Control Act an offence and empowers the police to act on such violations. Owing to the sophistication of and the syndicate manner in which these crimes are committed, the police use traps and undercover operations to deal with this. This Act criminalizes dealing in unregistered and prohibited tobacco in the country. Similarly, the South African Bank Act 90 of 1989 criminalizes the copying and abuse of South African currency. In the USA paper money counterfeiters re-invest the proceeds of crime in legitimate business. Cummings (1997: 540) reveals that in 1990, the Secret Service discovered that 100 counterfeited US dollars were circulating internationally. They believed that the dollars were printed on a press machine that was similar to those used by the US Treasury that had been sold to Iran in the 1970s. In 2002, the police seized US$130 million in fraudulent US notes before they were circulated and detected more than US$44 million in spurious US currency after it had passed into criminals' hands. Companies were losing close to US$8.1 billion annually in overseas business owing to violations of intellectual property. Selling false drugs with cheap ingredients and high profit margins seems to be rife. An investment of just US$1,000 in raw material could net an amount of US$200,000 and above (INTERPOL, 2014: 52). In 1992, the USA passed the Counterfeit Deterrence Act of 1992 with the intention to increase penalties. This legislation also instructed the Treasury Department to redesign paper money in order to make it more difficult to reproduce. This resulted in the redesigned currency released in 1996. The US Treasury officials believed that the watermark and the use of color-shifting inks made the currency nearly impossible to reproduce with the current technologies (USA, 2002: 1). The Customs and Excise Act 91 of 1964 of South Africa authorizes customs officials to arrest criminals and confiscate contraband within the borders of the country. In an attempt to protect and enforce intellectual property rights, the legislation provides both civil and criminal remedies against counterfeiters.

6. International enforcement of anti-intellectual property violations

INTERPOL is the largest international police organization, with the vision to police for a safer world. Its mission is to prevent and fight crime through co-operation and innovation on police and security matters. INTERPOL established the INTERPOL Intellectual Property Crime Action Group in 2002 to fight intellectual property crime in the world. It was formed in collaboration with law enforcement agencies of different countries and this has facilitated international police actions against intellectual property crime (Council of Europe, 2007: 11250).

The Global Congress Steering Group comprising INTERPOL, the World Customs Organisation, the World Intellectual Property Organisation, Global Business Leaders Alliance against Counterfeiting and other global business sector representative bodies was formed in 2004 to implement a more effective collective response to counterfeiting worldwide (INTERPOL, 2014). Operation Jupiter targeted the Tri-border area, where Argentina, Brazil and Paraguay meet. It is an area where counterfeit goods of all types, including cigarettes, clothing, computers, CDs, DVDs, electrical goods and pharmaceuticals, are either manufactured or distributed on an industrialized scale. Most of these items are consumed in the Tri-border area of South America, although increasingly they are found in North America and beyond (Hudson, 2010:4). Often the size of the area and the challenging operating environment makes policing difficult. These difficulties enable organized and transnational criminal organizations to thrive, resulting in organized criminality and a wide range of intellectual property crimes. Figure 3 below shows the origins of intellectual property violations and it is clear that China is a leading country.



(Source: European Commission, 2015: 19)

Figure 3. Countries of origin of intellectual property violations

The above figure provides a picture of the extent of the intellectual property violation problem by country of origin. This knowledge will enable the planning, allocation and deployment of resources to enforce anti-intellectual property violations.

7. Organized crime and money-laundering activities

The motive for money laundering is monetary gain (Leff, 2012: 1). The laundering circumvents obstacles to procure and utilize money to fund acts such as terrorists' activities (Levi, 2015: 283). The International Monetary Fund (IMF) has hinted that the global amount of money laundering is equivalent to 2-5% of the world's GDP market. This money is often used to destabilise countries and corrupt nations (Antoniou & Sinha, 2012: 93).

International Anti-Money Laundering and Combating the Financing of Terrorism standards are set by the Financial Action Task Team that demands financial institutions to employ Know Your Customer rules. These rules apply to all accounts and cash transactions that go beyond a designated threshold in order to curtail money laundering (Soudijn, 2012: 150). This initiative by the Financial Action Task Team is intended to curb the misuse of the trade system as a method by which organized criminal organizations and terrorist financiers move money for the purpose of disguising its origin by introducing it into the formal economy (Financial Action Task Team Guidance, 2013: 52).

The Know Your Customer rules are a key element in fighting money laundering and terrorism financing as they require customers to present valid identification and financial institutions to verify the documents and store copies (Financial Action Task Team Guidance, 2013: 3). However, with all the measures in place, criminals still continue to launder their money through other dubious ways such as through the purchase of precious metals, as they earn high interest and can be stored and moved easily. Precious metals are liquid, transferrable and can be uniquely concealed. They can be described as having physical and commercial properties, which carry value in small quantities. They are valuable for money laundering and terrorism financing as ownership can be transferred quickly, often with a minimal audit trail (Financial Action Task Team Guidance, 2013: 48). Mitsilegas (2003: 117-119) points out the difficulty in tracing the audit trail to prove that the proceeds are from criminal conduct, as well as the need for circumstantial evidence which the police ordinarily would not possess for the successful conviction of the offenders in these cases.

The findings of a money-laundering report by BASCAP (2009: i) indicate that business people should lobby and educate government officials and policy makers about the value of intellectual property and emphasize how counterfeit and piracy affect economic growth,

employment and innovation. The engagement with government could produce policy measures that can be used to police counterfeiting effectively.

The link between intellectual property violations and terrorism has been demonstrated in cases of organizations such as Hezbollah, Hamas, Harakat al-Shabaab al-Mujahideen, Al-Qaeda, Revolutionary Armed Forces of Colombia and Islamic Jihad. These organizations are known to trade in goods that infringe intellectual property and to conduct illicit businesses such as dealing in piracy and counterfeiting to finance their terrorism activities (Choo & Smith, 2008: 39). They are classified as terrorist organizations by the US State Department on the list of Foreign Terrorist Organisations (US Department of State, 2017).

8. Research methodology

This study drew on experiences in South Africa, Africa, the USA and the EU and in other jurisdictions beyond. An array of secondary data sources was used, such as journal articles, textbooks, online sources and government and business publications. Primary sources were also used by drawing on the author's earlier scholarly work but adapted to suit the purpose. A qualitative approach and empirical design were followed in this study. Miles, Huberman and Saldana (2014: 11) describe this design as covering an array of interpretive techniques and seeking to describe, decode and translate information to find the meaning of a naturally occurring phenomenon in the social world. The design was appropriate for this study as there was little information in literature that could achieve the objective of this study. The following three research methods were used to collect data:

Purposive sampling was used to identify and interview Specialised Commercial Crime Unit participants who enforce the law against intellectual property violators. In total, 20 participants were interviewed. These respondents were selected for interviews based on their intimate knowledge of and experience in anti-intellectual property infringements. Purposive sampling was also used to identify and interview 14 prosecutors who prosecute intellectual property crimes.

Crime Prevention Unit members working at police stations next to Specialised Commercial Crime Units who enforce laws against intellectual property crimes by arresting vendors trading in protected goods and confiscating them were selected through snowball sampling. A total of 332 were interviewed.

Ten brand owners were identified through snowball sampling. Nine members of the Department of Trade and Industry (DTI) who enforce anti-intellectual property crimes were interviewed. A total of 21 legal representatives who, in most cases, legally represent their clients in intellectual property violations and others who are employed by brand owners or represent them in court cases were interviewed.

The researcher used this design to obtain credible data from respondents through the observation of raids. Permission was granted by the employers concerned to conduct observation without those being observed knowing that they were being observed. This would ensure that they did not modify their practice due to being observed, as this could have led to inaccurate findings. A video recorder was used in seven raids that were conducted in various places to record the conduct of police and suspects during searches and the seizure of counterfeit goods. Recordings were made in such a way that people were unaware that they were being observed.

The study was conducted from 1 April 1998 to 31 March 2018. This period is significant as a result of its association with the start of the democratic dispensation in South Africa. It was characterized by increased trade with the international community and increased migrant intake, as the country had opened its doors to the world.

8.1 *Data analysis*

The data collected from interviews and the observation data were transcribed to facilitate the process. It was analyzed methodically according to the thematic method by classification into themes, subthemes and categories. Data was analyzed using Tesch's eight-step data analysis method, which involved getting a sense of the whole, picking one of the transcribed interviews and reading it carefully, making a list of topics and clustering them, coding and classifying information, making a final decision and alphabetizing the codes, assembling same categories, doing a preliminary analysis and, finally, recording the data (Creswell, 2014: 198).

8.2 *Ethical considerations*

Ethical clearance was obtained from the College of Law at the University of South Africa before the commencement of this study. In this study, the researcher ensured confidentiality by not disclosing the personal details of the participants. Informed consent was obtained from all participants. The participants consented to be interviewed and were not coerced to participate in the study; hence participation was voluntary. All participants were informed that they were permitted to withdraw from the interviews. Participants were not allowed to discuss their individual responses among themselves. The information they provided was kept in a safe place. Participants were not remunerated for participating in the interviews. Video recordings of the raids were made with the consent of participants and their employers.

9. Findings and discussion

The interviews and observation results produced the themes and subthemes. Statements by participants were confirmed by the observations. The responses of 406 interviews were obtained by asking participants about their own understanding of an assessment of an intellectual property legislative framework on violations of protected goods in South Africa. This resulted in the following themes and subthemes:

10. Intellectual property crime resting on protected goods

The findings indicate that intellectual property is highly valued. Its theft is a crime that is growing in a great magnitude worldwide and there are no signs of it subsiding any time soon. This is indicated by shocking statistics on the number of seized articles that have infringed intellectual property rights worldwide, i.e., 60% of the total number of articles seized in the world in 2018. These articles included CDs, DVDs, software, online material and clothes and were confirmed to have originated in China (Chaudhry & Zimmerman, 2013: 12)., Some legitimate businesses in South Africa are also guilty of intellectual property violations as they mix their merchandise with goods that violate intellectual property. Many famous branded goods are in demand and are protected by intellectual property laws. Copyright and trademark infringements and counterfeiting are crimes against personal property. In South Africa, section 25 of the 1996 Constitution protects private property against appropriation. Some legitimate goods owners conceded that the war against intellectual property infringement was being undermined by the lack of collaborative effort among production houses since legitimate producers operate in secrecy in an attempt to protect their products against free-riding behavior by criminals. Legitimate goods owners are loathed to spend money on protecting their goods against copying as the cost of protecting the goods is prohibitive and further causes the selling price to increase. This has the potential of discouraging consumers from consuming the goods.

A member of the Specialised Commercial Crime Unit confirmed this: "The country that is leading in this trade of imitating original goods is China. The practice is hazardous as untested raw material are used and causes original goods dilution which ultimately has the potential of destroying original goods' sustainability."

Goods that are imitations of the original goods are produced en masse as cheap material is used. Most respondents stated that pirated and counterfeited goods that violated trademarks and merchandise marks are often produced in large quantities and sold at a lower price than that of the genuine goods. This explains why consumers are enticed to purchase them rather than the original goods that are seen as unaffordable. The profits of intellectual property goods are laundered and some are used to finance terrorism activities, as indicated by Soudijn (2012: 150).

11. International co-operation in fighting intellectual property violations

South Africa is a signatory to several international treaties and agreements intended to fight intellectual property crimes. It is a member of the United Nations and African Union. It is also a signatory of the World Intellectual Property Organisation and SARPCCO and co-operates in working relationships with INTERPOL, the EU, US law enforcement, the IMF, the WTO, the Anti-Counterfeiting Trade Agreement and Financial Action Task Force, among others.

12. Legislative measures to counter intellectual property violations

South Africa is a signatory to many international agreements on the protection of intellectual property such as WTO and TRIPS, and also works with INTERPOL. Its legislation is in compliance with international instruments. This legislation includes the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993, Patents Act 57 of 1978 and the Customs and Excise Act 91 of 1964.

12.1 *Counterfeit Goods Act, Copyright Act, Merchandise Marks Act, Trademarks Act and South African Bank Act*

The law enforcement agencies in South Africa make use of the above legislation to fight intellectual property crimes. All the legislation was passed some time ago and has loopholes. The Counterfeit Goods Act does not allow law enforcement members of the rank of constable to police counterfeiting in South Africa because they are regarded as inexperienced and in a position to commit errors while investigating intellectual property violations. It is important to note that this Act was promulgated in 1997 when members who had held the rank of constable for a long period were promoted. This left the rank of constable being occupied by a large number of newly recruited members who did not have much experience in policing. This situation has since changed and law enforcement members who now occupy this rank are very experienced and they constitute a large number of operational officers deployed to various units within the SAPS. They tend to be confronted with goods that infringe intellectual property rights more frequently. In other words, a rank structure should not be linked with experience, especially within the SAPS, because there are now many experienced members at lower rank structures such as constable.

The Counterfeit Goods Act is prescriptive on the processes that must be followed before premises and/or a suspect can be searched and goods confiscated to obtain evidence. Moreover, the police do not have the equipment to test if goods are counterfeit, as many products

are produced in many parts of the world with different materials that change over time. The situation is similar in other countries and this makes collaboration between the police and goods owners an essential element in the policing of counterfeiting. When law enforcement seizes goods that infringe intellectual property rights, they must store the goods in private storage as declared by government. The storage fees are paid by the brand owners and the cost can be very high, depending on how long the court trial against the accused takes. There is a need for the business and state to share responsibility for the storage costs for a successful and viable approach in dealing with this crime. The business should pay for the storage until the testing of the goods is done because the testing is actually within their realm. Once the testing has been done and there is still a need for the product to continue to be kept for court purposes, then the storage cost should be paid by the state as this is now within the government's realm. This will enhance the collaborative approach in the fight against this crime. A large number of law enforcement officials are not trained on the Counterfeit Goods Act and the Copyright Act.

The Copyright Act is old and fails on many occasions to deal with new crime trends. It does not cater for online policing of intellectual property violators. It also does not make provision for online selling of goods that infringe intellectual property rights. This means that websites and online applications that infringe intellectual property rights cannot be taken down and perpetrators arrested. Online advertising of products that infringe intellectual property rights cannot be policed effectively as this Act does not cater for this. A new Act needs to be written or the current Act needs to be amended considerably.

12.2 *South African Bank Act*

The police investigate counterfeit currency and any other violations in relation to the contravention of the South African Bank Act. This could involve fraudulent activities with regard to exchange controls.

12.3 *Customs and Excise Act and Tobacco Product Control Act*

The Customs and Excise Act authorizes customs officials to police intellectual property violations such as counterfeiting, piracy and trademark infringement. The members also enforce the law against any contravention of tobacco product controls.

12.4 *Patents Act and Designs Act*

The Patents Act and the Designs Act encourage innovation and creativity of products. Products are designed and registered under the Designs Act so that the product and its design can be registered under the name of the person or entity that owns the design. Once products are created, they are registered and given their identity number of ownerships with the authorities.

13. Corruption perpetrated by intellectual property law enforcers

Members of the Specialised Commercial Crime Units, Crime Prevention Units and the DTI indicated that traders of goods tainted by intellectual property infringement do not fear the police since some police members take bribes and abdicate their responsibility to confiscate these goods and/or arrest the traders. However, in areas where the working relationship between law enforcement and the community is cordial, there is sharing of critical information about criminal activities from community members. Here the fight against this crime tends to be more successful.

A member of the Specialised Commercial Crime Unit substantiated this by stating: “A significant number of law enforcers are participatory in crime and many take bribes from traders of goods that infringe on intellectual property and this causes law enforcement to lose respect from both the community and traders. As a consequence, community members hesitate to report crime.”

Many countries do not regard this crime as a top priority that needs concerted policing. Most of them, including South Africa, do not punish the buying of property that infringes intellectual property rights for private use. This means that only the sellers are prosecuted. In many African countries it is common that criminals in possession of some goods that infringe intellectual property rights for household use are not prosecuted.

A member of the Specialised Commercial Crime Unit vindicated this by stating: “It is not a crime to carry some goods that violate intellectual property for household use as long as they are not for selling to the public, and this makes enforcement difficult as people would use household use as a defense when they are arrested.”

13.1 *Ports of entry as hubs of corruption*

Corruption in the ports of entry is a national threat that fuels large-scale criminality. Customs and excise officials and the police allow goods that infringe intellectual property rights and violate the Trademarks and Counterfeit Goods Acts into the country (Meltzer, 2010: 46). This is tantamount to harboring criminals in their backyard. These goods are sold on the streets, in flea markets and at transport terminals. Often, law enforcement members do not confiscate them, but allow criminals to sell them to the public in return for a bribe. Law enforcement members with integrity are threatened by organized criminal gangs for refusing to comply and work with them. As a result, the lives of honest police members and their families are in constant danger.

One of the police members confirmed this: “Many police members are complicit and partake in criminal activities. Some law enforcement members are corrupt, and many communities do not trust the police.”

14. Testing of goods that violate intellectual property regime

Every good that is the subject of intellectual property infringement must be tested for law enforcement to have a valid case as the court needs scientific reports confirming that the goods infringe the intellectual property rights of registered genuine products. Owing to the shortage of experts in the country, goods have to be sent to foreign countries for testing so that cases can be brought before the courts. Every producer of protected goods has their own testers and they are not permanently in the country.

Goods are tested by representatives of the legitimate goods owner at that owner’s expense. Because testing is not conducted by a neutral institution, the results could be biased. During an interview, one respondent stated: “The Copyright Act and Counterfeit goods Act grants the legitimate owner of goods the position of both player and referee of the game. This seems suspect. The complainants are the ones who test the alleged pirated goods and issue reports that confirm or dispute goods piracy.”

15. Law enforcement as enforcers of intellectual property regime

There is no sign of the proactive policing of intellectual property crimes. Often, law enforcement waits for complaints from genuine goods owners to report violators of intellectual

property. Legitimate owners of goods employ legal representatives who test and evaluate the purchased alleged offending goods. Proof of offending goods such as purchase receipts, copies or images are needed before a case can be reported to the law enforcers. One Specialised Commercial Crime Unit member declared: "The owners of goods hire legal practitioners who have no knowledge of investigation work to do test purchases at suspicious businesses, instead of forensic investigators who are experienced in investigation work."

There are three law enforcement agencies that are responsible for enforcing intellectual property rights. Customs and excise officials work at the port of entry to confiscate goods that contravene the law, DTI members work together with the customs and excise officials and inland to pursue suspicious cases, and the SAPS work inland to confiscate goods that have already entered through the ports of entry (sea, land and air ports of entry). There is no close collaboration in the fight against intellectual property violations. The computer systems of law enforcement are not linked. This may result in all three law enforcement agencies working on a single case but without any forewarning. This may result in a miscarriage of justice and help the suspect to evade justice. It is imperative that law enforcement's systems be integrated and system interfaces be implemented to speed up the investigation. A member of the DTI described the working relationship between different law enforcement as follows: "Every different law enforcement in the country works in isolation and what matters is achievement of yearly performance of each to impress the authorities."

16. Conclusion

This study assessed an intellectual property legislative framework regarding the violation of protected goods in South Africa. The country is a constitutional democracy and protects owners' private property rights in terms of the South African Constitution. Intellectual property rights are protected rights as influenced by international developments and various countries on different continents. South African intellectual property law is to a certain extent in line with international law and the country is a signatory to various conventions and agreements both internationally and on the continent.

Various loopholes in the Counterfeit Goods Act and the Copyright Act were highlighted that make enforcement of intellectual property rights in the country difficult for law enforcement agencies. The problem of uncoordinated law enforcement systems is exacerbated as the dealers are not easily identified and arrested in time. The failure of proactive enforcement of the law is evident from the presence of offending goods on the market. The issue of corruption is ongoing, and this causes lack of police legitimacy in the law enforcement in the country and could result in communities not providing tip-offs to law enforcement.

Intellectual property crimes have serious undesirable consequences for people, business and government. The failure of legitimate businesses results in job losses and reduces taxes, which ultimately results in no service delivery for the poor as the government will not have money to pay service providers. The profits made by unscrupulous infringers are enormous as they produce and sell goods in large quantities. The profits they make in the process are laundered and often used to fund terrorist organizations.

This paper has presented the empirical and literature findings on the assessment of intellectual property laws in South Africa and highlighted their strengths and weaknesses in enabling the fight against this crime. The study could assist law enforcement in the country to improve enforcement of these rights. The laws must be fit for purpose to enable law enforcement to execute their duties unhindered.

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A Critical Examination of Breeders' Monopoly Rights to the Detriment of Farmers' Rights Under the Ethiopian Plant Breeders' Rights Law

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Abstract

Ethiopia adopted plant breeders' rights proclamation in 2006 to provide recognition and economic reward for breeders for their effort and investment so as to encourage their involvement in the sector. At the same time, the proclamation aims to ensure that the farming and pastoral communities of Ethiopia, who have been conserving and continue to do so in the future the agro-biodiversity resource used to develop new plant varieties, continue to their centuries old customary practice of use and exchange of seed. This article aims at investigating the extent to which the proclamation accommodates its stated objective by giving adequate recognition to farmers' rights. The investigation adopts a qualitative method by analyzing both primary materials and secondary sources. The article concludes that the Ethiopian plant breeders' rights proclamation fails to adequately incorporate farmers' rights beyond its preamble.

Keywords: breeders' rights, farmers' rights, IPRs, monopoly rights, patent.

1. Introduction

Agricultural innovations have for long remained outside the domain of intellectual property rights (IPRs) owing to ethical and socioeconomic reasons. With the advent of modern agro-biotechnology, however, the sector began to be subjected to IPRs. Today, newly developed plant varieties are protected in some form of IPRs. Particularly, the TRIPPS agreement provides that plant varieties (PVP) shall be protected either through patent or an effective *sui generis* system, or a combination of the two. In this direction, Ethiopia adopted plant breeders' rights (PBRs) law for the first time in 2006. This proclamation mainly accords breeders of new plant varieties certain monopoly rights akin to patent. Even if the proclamation recognizes farmers' role in maintaining genetic diversity and conservation, it only paid one provision for farmers' exemption to use and exchange farm saved seeds. This article aims at evaluating the appropriateness of granting monopoly rights for private breeders with little attention to farmers' rights on the basis of various ethical and socioeconomic reasons.

The article, in terms of organization, consists of seven sections. While the first section is devoted for the introduction, the second section deals with the introduction of IPRs in the agricultural sector. Section three discusses plant variety protection (PVP) under the TRIPS agreement, along with the degree of flexibility available to members in designing the same. After a brief introduction of the Ethiopian PBRs law in section four, the pros and cons of PVP will be

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addressed under section five. Section six evaluates the extent of place given for farmers' rights under the Ethiopian PBRs law. Finally, the last section concludes the article.

2. The introduction of intellectual property rights (IPRs) in the agricultural sector

The agricultural sector had for long been exempted from the purview of intellectual property rights such as patent that grant monopoly rights to a private individual.[1] Granting intellectual property rights to an individual over life forms is equivalent to making mankind own nature which is very unacceptable from both ethical and religious perspectives. Agro-biotechnology, therefore, raises a number of ethical issues revolving around mans' interference with God and nature, respect for sacredness of nature, and ownership of life forms.[2] Patenting or the exclusive appropriation of life forms also contravenes human rights to life. This is so because the very existence of humankind is founded upon life forms.[3]

Intellectual property rights (IPRs) steadily began to make its way in to agricultural sector with the introduction of plant breeders' rights (PBRs') modeled on patent and the patenting of life forms in many developed countries.[4] IPRs in the form of *sui generis* system were for the first time extended to the agro-biological field in the United States under the 1930 US Plant Patent Act. A *sui generis* system (its own kind of protection) was designed because it was problematic to accord patent for plant varieties (PVP). Breeding activity simply involves discovery of genes that exist naturally. It is difficult to show novelty, inventive step, and produce written description of the invention in standard breeding activities as is the case with patentable inventions.[5] Protection was, however, given for breeders after analogizing biotechnological inventions with mechanical inventions which, in effect, blurred the demarcation between organisms and manufacture.[6] Though plants are products of nature, breeders were awarded for their artificial selection and reproduction of what exists in nature by reshuffling the concept of origination into discovery. The fact that "mechanical inventors are inventors at the beginning, and breeders are inventors after the fact" means that invention "became an inductive rather than originating act".[7] Furthermore, the requirement of written specification of was loosened owing to the incapability to reproduce plant innovations in writing unlike manufactures.

[1] Philippe Cullet (2001). Plant variety protection in Africa: Towards compliance with the TRIPS Agreement. *Journal of African law*, *45*(I), 97, p. 109.

[2] Jonathan Robinson (1999). Ethics and transgenic crops: A review. *Electronic Journal of Biotechnology*, *2*(2), 71, pp. 71 & 76-78.

[3] African model legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources (2000). OAU, Algeria, Preamble, par. 9 & art. 9(1).

[4] Philippe Cullet (2003). *Food security and intellectual property rights in developing countries*. IELRC Working paper 2003-3, International Environmental Law Research Center, Geneva, p. 8.

[5] Michael Blakeney (2007). Plant variety protection, international agricultural research, and exchange of germplasm. Legal aspects of sui generic and patent regimes. In A Krattiger et al. (Eds.), *Intellectual property management in health and agricultural innovation: A handbook of best practices*. MI H R, Oxford, pp. 401 & 407.

[6] Allan Pottage and Brand Sherman (2007). Organisms and manufactures: On the history of plant inventions. *Melbourne University Journal*, *31*(2), 539, pp. 543-44.

[7] Id at pp. 554-55, 558-59, & 561-65.

Nowadays, particularly with the adoption of the UPOV and TRIPS, intellectual property rights to breeders are a well-established system in many countries including developing nations.

3. Plant variety protection under the TRIPS Agreement and the sui generis option

Presently, agro-biological innovation is one field of activity that is subject to IPRs at the international level following the TRIPs agreement. It was the industrial associations of the West that stood behind the inclusion of agricultural innovations under the international regulatory regime.[8] Even if the TRIPs agreement exempts members from patenting plants and animals other than micro-organisms, and essentially biological processes, it still requires protection for plant varieties. According to the agreement, members are bound to give protection for plant varieties "either by patent or *sui generis* system or a combination thereof".[9]

The *sui generis* option under the TRIPS agreement, arguably, gives sufficient flexibility for developing countries to tailor make their own PVP laws in tune with their national interests rather than adopting monopoly rights like patent.[10] The TRIPs Agreement, for one thing, does not define what constitutes plant variety for the purpose of protection. Nor does it require the adoption of PVP laws parallel with the stronger Agreements for the Protection of New Varieties of Plants such as the UPOV. So, it is up to each countries choice to define what constitutes protectable plant varieties and the nature of right to be granted. Notwithstanding the claim that the *sui generis* option under the TRIPS Agreement implicitly requires the adoption of UPOV,[11] there is no binding obligation, in this regard, since none of the UPOV Conventions is referred to under TRIPS Agreement.[12] From this, it can be argued that countries retain considerable flexibility in designing their plant variety protection law although they often fail so to do in practice.

The problem, however, is that whatever the kind of *sui generis* system of protection countries might adopt; it must be effective for it to comply with the TRIPS agreement. Though the TRIPS Agreement does not define what constitutes an effective *sui generis* system, it can be understood from various provisions of the agreement that it should encompass the following requirements. First, it has to accord protection to all kinds of plant varieties in the form of IPRs, i.e exclusive rights and/or remuneration regarding the exploitation of protected varieties.[13] The provision dealing with *sui generis* system falls under one of the sections of TRIPS Agreement which is the subject of article 1(2) requiring the application of IPRs. This means a kind of protection in the form of monopoly property rights should be accorded to all plant species and genera.[14] In addition to this, any *sui generis* system should provide for an effective enforcement

[8] Michael Blakeney (2007). Supra note 5, p. 402.

[9] Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (1994). Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869, U.N.T.S. 229, 33 L.L.M. 1997, WTO, Art. 27(3)(b).

[10] Michael Blakeney (2007). Supra note 5, p. 413.

[11] Calestous Juma (1999). *Intellectual property rights and globalization: Implications for developing countries*. Science, Technology and Innovation Discussion Paper No. 4, Center for International Development, Harvard University, Cambridge, p. 9.

[12] Dan Leskien and Michael Flitner (1997). *Intellectual property rights and plant genetic resources. Options for a sui generis system*. Issues in Genetic Resources No. 6, International Plant Genetic Resources Institute, Italy, p. 27; and Philippe Cullet (2001). Supra note 1, pp. 100-103.

[13] Michael Blakeney (2007). Supra note 5, p. 412.

[14] Dan Leskien and Michael Flitner (1997). Supra note 12, p. 27-8.

mechanism, and comply with the principles of national treatment, and most-favored-nation treatment.[15]

From this, it can be strongly argued that member countries do not have as much sufficient flexibility as it might appear in designing their own system of law. Indeed, many developing countries even have taken the stronger UPOV system as a model in designing their national laws in an effort to meeting the requirement of an effective *sui generis* system of protection under the TRIPs.[16] This is the case due to strong pressure from the developed world which developing countries often find it hard to withstand. We must not, however, forget some countries that have managed to design their own *sui generis* system against all odds.[17]

4. Plant breeders' rights (PBRs) in Ethiopia

In 2006, Ethiopia adopted plant breeders' rights (PBRs') proclamation which was derived from the OAU model law.[18] The *sui generis system* under the OAU model law is, in turn, based on the UPOV, especially the one adopted in 1991.[19] For instance, the nature of breeders' rights and the duration thereof under the model law is parallel to the UPOV.[20] There is therefore a tendency, even if indirect, that the Ethiopian plant breeders' law is influenced by the UPOV system that provides for stronger protection to breeders' even if Ethiopia is not a party to the convention.

The stated objective of the Ethiopian PBRs' proclamation is to incentivize investment in new plant varieties with the view to improving agricultural development.[21] According to the proclamation, plant varieties are worth protection if they are new,[22] distinct, stable and homogenous.[23] Having satisfied these criterions, plant breeders will have an exclusive right to sell, license and produce the seed or propagating material of protected varieties,[24] generally for 20 to 25 years.[25] As can be seen here both the nature of plant breeders' rights and its duration resembles that of patent in strength and duration. Any unauthorized use of a protected variety constitutes an

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[15] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994). Supra note 9, Arts. 3, 4 & 41(1).

[16] Philippe Cullet (2001). Supra note 1, p. 100.

[17] Phil Thorpe (2002). *Study on the implementation of the TRIPS Agreement by developing countries*. Study Paper 7, Commission on Intellectual Property Rights, p. 25.

[18] Philippe Cullet (2001). Supra note 1, p. 100.

[19] Michael Blakeney (2007). Supra note 5, p. 417.

[20] Philippe Cullet (2001). Supra note 1, p. 104. [cf. International Convention for the Protection of New Varieties of Plants (UPOV), (1978), Paris 2 December 196, as Revised at Geneva on November 10, 1972, and on October 23, 1978, UPOV Doc., Arts. 2, 5 & 8; and International Convention for the Protection of New Varieties of Plants (UPOV), (1978), Paris 2 December 196, as Revised at Geneva on 19 March 1991, UPOV Doc. 221(E), 1996, Arts. 3, 5, 14 & 19.].

[21] Plant Breeders' Rights Proclamation (2006), Proclamation No. 481/2006, *Federal Negarit Gazette,* 12'h Year No. 12, Addis Ababa, Ethiopia, Preamble, par. 1-3.

[22] Id at Arts. 3(1) &14(1).

[23] Id at Arts. 2(5)(a), (b) & (c).

[24] Id at Arts. 5(1) & (2).

[25] Id at Art. 9.

infringement and entails serious penalty under the law.[26] There are, though, few instances of exemptions and restrictions of PBRs' upon limited grounds provided for in the proclamation.[27]

The plant breeders' proclamation, in addition, aims at ensuring farmers to keep on using their customary seed use and exchange practices in view of their contribution to preserving agro-biodiversity.[28] Farmers are entitled to save, use, exchange and sell farm-saved seed or propagating material of both farmers' varieties and protected varieties.[29] But as for using protected varieties, farmers are allowed to use it only for noncommercial purposes, or they should be certified.[30] Farmers' right to use and exchange farm saved seed is only one component of the broader aspects of farmers' rights. Farmers' rights broadly consist of the rights to protection of farmers' traditional knowledge including protection of farmers' varieties, the right to equitable share benefits, and the right to participate in decision making. Unlike the breeders' rights sections, the proclamation comes to be somewhat loose when it comes to farmers' rights.

As a matter of principle at least, PBRs' is not different from the conventional monopoly rights such as patent in terms of its nature and duration.[31] The issue, then, is what is the benefit and cost of such kind of law in general and interplay between breeders and farmers rights in particular. This is briefly dealt with in the next section.

5. Arguments for and against plant variety protection (PVP)

It is said that IPRs offer a strong incentive to attract private investment in agro-biotechnological improvements. It motivates breeders to invest in new and improved plant varieties by assuring that they will recover the cost of their innovation.[32] This, in turn, leads to the release of new, high yielding, and disease resistant plant varieties that eventually contributes to agricultural development.[33] The TRIPS Agreement provides, in this regard, that "the underlying public policy objectives of national systems for the protection of intellectual property include developmental and technological progress".[34]

There is, none the less, no conclusive evidence so far about the role of IPRs in encouraging private engagement in plant breeding activities. Historically, private breeding industries flourished in the absence of PVP both in the North and South.[35] So, granting an

[26] Id at Arts. 5(2), 24 & 29.

[27] Id at Arts. 6 & 7.

[28] Id at Preamble, par. 4.

[29] Id at Arts. 28(1)(a) & (c). [cf. The Protection of Plant Varieties and Farmers' Rights Act (2001), No. 53/2001, *Gazette ofIndia,* Extraorodinary Part II-Section 1, Ministry of Law, Justice and Company Affairs, India, Art.39(1)(iv).

[30] Id at Art. 6. [also, Seed Proclamation (2000), Proclamation No. 206/2000, *Federal Negarit Gazette,* 6" Year No. 36, Addis Ababa, Ethiopia, Art. 3.

[31] Philippe Cullet (2001). Supra note 1, p. 109.

[32] Neil D. Hamilton (2001). Legal issues shaping society's acceptance of biotechnology and genetically modified organisms. *Drake Journal of Agricultural Law*, *6*(1), 81, p. 88.

[33] Sachin Chaturvedi (2002). Agricultural biotechnology and new trends in IPRs regime: Challenges before developing countries. *Economic & Political Weekly*, *37*(13), 1212, p. 1213.

[34] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994). Supra note 9, preamble par. 5.

[35] Philippe Cullet (2001). Supra note 1, pp. 355-56.

intellectual property rights is not necessarily an incentive for breeders. Though granting temporary monopoly rights for inventors is said to enhance socioeconomic development,[36] they do not, however, fit with the conventional agricultural management practices because the latter depends and promotes different knowledge, and identifies and rewards innovations in a different way than the former.[37] Traditional agricultural management practices do not exclusively rely on financial schemes as opposed to monopoly rights.

Contrary to laboratory generated knowledge, farmers' knowledge is less-individualistic in that it involves the contributions of different individuals thereto. Granting monopoly rights to a single inventor not only, therefore undermines the contributions of other individuals but also impedes the free accessibility of inventions.[38] The agricultural system of developing countries, particularly sub-Saharan Africa, significantly relies on farmers' varieties and free exchange of germplasm. Conversely, the use of commercial varieties is very limited in the continent.[39] In Ethiopia, for instance, farmers' varieties account for 94% of germplasm.[40] It follows that there seems to be little justification in championing private breeders' rights over farmers' rights.

It is also inappropriate to commercialize the agricultural sector because of its key significance for the economy of developing countries. Unlike the West, agriculture is a key sector in Africa, particularly in Sub-Sahara, that constitutes the livelihood of the majority of the population and substantially contributes to their GDP.[41] When it comes to Ethiopia, Agriculture is the backbone of the country's economy since it holds 50% of the entire GDP and 85% of the total employment in the country.[42] This indicates that the sector requires due attention, especially the farmers, more than any other thing.

On the other side, it is held that IPRs' enables to strengthen the inventive capacity of local industries of developing countries.[43] With this kind of only one-sided view many developing countries, including Ethiopia, tend to justify the adoption of plant variety protection legislation. But the introduction of PBRs' in developing countries without strong local seed industry results in the domination of the seed trade by developed countries' transnational seed companies. In this context, it is the giant transnational corporations that would be the most profitable over local industries.[44] In reality, PBRs' are unlikely to contribute for the enhancement of local research capacity of developing countries. For instance, foreign industries held 91% of the application for

[36] Dwijen Rangnekar (2001). *Access to genetic resources, gene-based inventions and agriculture*. Study Paper 3a, Commission on Intellectual Property Rights, p. 9.

[37] Philippe Cullet (2001). Supra note 1, p. 109.

[38] Id at pp. 109-110.

[39] Id at p. 106.

[40] Regassa Feyissa (2006). *Farmers' rights in Ethiopia: A case study*. Background Study 5, FNI Report 7/2006, The Farmers Rights Project, p. 1.

[41] Philippe Cullet (2003). Supra note 4, p. 8

[42] Regassa Feyissa (2006). Supra note 40, p. 1.

[43] Anitha Ramanna (2002). Policy implications of India's patent reforms: Patent applications in the post-1995 era. *Economic & Political Weekly*, *37*(21), 2065, pp. 2070-73.

[44] David Godden (1984). Plant Breeders Rights and International Agricultural Research. *Food Policy*, 9(3), 206, p. 213.

PBRs' in Kenya between 1997 and 1999.[45] It seems that plant variety protection in developing countries is more about the interests of Western private breeders than about local farmers and breeders.

The other argument for the adoption of plant variety protection holds that the promotion of Agro-biotechnology helps to realize food security.[46] The argument is that granting rights to private breeders leads to the development of better varieties that in turn increase food productivity. Privatization of the agricultural sector, however, raises serious concern about the degree to which private companies focus on Southern food priorities and the affordability of their research outputs to the local community.[47] The best alternative for developing countries seems to be advancing public research on agriculture and promotion of farmers' traditional knowledge and farmers' varieties instead of relying on private breeders.

Studies indicate that research by public institutions that concentrate on staple food plants plays a key role in realizing national goals such as food security in developing countries.[48] Ethiopia, for instance, relies mostly on state-funded public institutions for plant variety deve1opment.[49] Contrary to this, private breeders focus on consumer foods instead of food security issues to maximize their profits.[50] Owing to the difference in the motives of commercial and public agricultural institutions of developing countries, the propertisation of technologies and germplasm by private industries threatens public policy to realize national goals. For instance, the introduction of plant variety protection in Kenya and Zimbabwe did not bring investment in new food plants.[51] Therefore, economic policies and agreements such as the TRIPS should not be implemented in a manner detrimental to the realization of human rights, which includes the right to food.[52]

It is doubtful whether modern biotechnology can bring food security in developing countries, especially, given the reluctance of commercial seed industries to focus on the priorities of developing countries.[53] Food insecurity in developing countries is associated with the meager attention given to staple food production.[54] It is worth mentioning, at this juncture, the impact of

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[45] Genetic Resource Action International (GRAIN) (1999). *Plant variety protection to feed Africa? Rhetoric versus reality*, p. 3 [Available at http://www.grain.org/article/entries/13-plant-varietv-protection-to-feed-africa-rhetoric-versus-reality] [Accessed on 20 September 2012].

[46] N. Borlaug. (1997). Feeding a world of 10 billion people: The miracle ahead. *Plant Tissue Culture and Biotechnology,* V. 3, 119-127 cited in Jonathan Robinson. (1999). Supra note 2, p. 72.

[47] Julian M. Alston et al. (1998). Financing agricultural research: International investment patterns and policy perspectives. *World Development*, *26*(6), 1057, pp. 1066-67; and Michael Blakeney (2007). Supra note 5, p. 4l 1.

[48] Srividhya Ragavan (2005). *To sow or not to sow. Dilemmas in creating new rights in food*. University of Oklahoma, p. 10 [Available at http://papers.ssrn.com/sol3/papers.cfm?abstract id=79l 666] [Accessed on 5 September 2012].

[49] Regassa Feyissa (2006). Supra note 40, p. 10.

[50] Srividhya Ragavan (2005). Supra note 48, p. 10.

[51] Philippe Cullet (2001). Supra note 1, pp. 106-07, and David Godden (1984). Supra note 44, p. 210.

[52] United Nations Sub-Commission on Human Rights (2001). *Intellectual property and human rights*, Resolution 2001/21, UN Doc. E/CN.4/Sub.2/RES/200l/21, UN, par. 3 &5.

[53] Philippe Cullet (2003). Supra note 4, p. 5.

[54] Food and Agriculture Organization (FAO) (2000). *The state of food and agriculture*. Agricultural and Development Economics Working Papers, Version 32, FAO, pp. 216-18 [Available at http://www.fao.ore/docrep/x4400e/x4400e00.htm] [Accessed on 1 September 2012].

the Green Revolution as experienced in Asia. Though the revolution has been associated with increased yield, it has resulted in increased seed prices, diminished farmers' ability to save seed, failed to alleviate hunger, and resulted in loss of biodiversity.[55] Rather than concentrating on increasing yield alone; therefore, it is pressing to distribute existing food supplies, consolidate farmers' control over their resources and preserving natural resources. Particularly, strengthening farmers' rights is a key factor to realizing food security in Ethiopia.[56] The loss of biodiversity as a result of gradual displacement of local varieties is also a serious concern. The ongoing biodiversity erosion is a compelling reason to strengthen local farmers.[57]

In addition, monopoly rights also tend to commercialize agricultural inputs which, in effect, raise seed prices and renders farmers dependent on private seeds and agro-chemicals. The fact that the yield from farm saved seeds tend to drop in subsequent years causes farmers to yearly buy new seeds though they are not technically compelled so to do.[58] It is, therefore, not wise to adopt monopoly rights, particularly PBRs', in the agricultural sector of Ethiopia. The wider socioeconomic significance of agriculture for the country and its predominant reliance on farmers' varieties are compelling reason to strengthen farmers' rights. The following section deals with farmers' rights in Ethiopia.

6. Farmers' rights in Ethiopia

As discussed in the above sections, a number of ethical and socioeconomic reasons militate against the adoption of PBRs' in developing countries, particularly in sub-Saharan Africa. In any case, though, countries that prefer to adopt PBRs' should also accord adequate protection for their farmers. Farmers' right is a broad concept that includes the right to protection of their traditional knowledge, the right to share benefits from the utilization of their resources, the right to participate in decision making. In addition, it also includes farmers' privilege to use and exchange farm saved seeds.[59] Protection of traditional knowledge consists of offering ownership status to farmers with the right to act against misappropriation and to decide over the use of their knowledge and related resources. Measures to ensure equitable benefit sharing would mandate the development of direct or indirect benefit sharing schemes in which monetary and/or non-monetary benefits would be shared directly or indirectly between the owners (farmers) and users of the genetic resource based on prior informed consent and mutually agreed terms. Any legislation for the protection of plant varieties must incorporate these rights in a comprehensive manner.

When it comes to Ethiopia, even if the PBRs' proclamation recognizes farmers' contribution in its preamble,[60] it does not provide for the details about how framers can be awarded and their rights be protected. The proclamation contains a single provision on the rights of farmers to freely use and exchange farm saved seed.[61] This provision is more about the

[55] Philippe Cullet (2001). Supra note 1, pp. 107-09.

[56] Regassa Feyissa (2006). Supra note 40, p. 17; Philippe Cullet. (2001). Supra note 1, p. 109; and Philippe Cullet. (2003). Supra note 4, p. 5.

[57] Philippe Cullet (2001). Supra note 1, p. 111; and Regassa Feyissa (2006). Supra note 40, p. 17.

[58] Philippe Cullet (2001). Supra note 1, pp. 109-110.

[59] FAO (2001). International treaty on plant genetic resources for food and agriculture. Art. 9(2)(3)

[60] Plant Breeders' Rights Proclamation (2006). Supra note 21, preamble, par. 4.

[61] Id at Art. 28.

conditions under which farmers are to be allowed to use protected varieties[62] than to provide for comprehensive farmers' rights. In deed the preamble of the proclamation, unlike the OAU model law, eschews the necessity to award farmers despite recognizing their contributions.[63] There must be a fair recognition of farmers' rights since farmers varieties is the predominant feature of the Ethiopian agriculture. To strike a balance between farmers and breeders' rights, intellectual property rights should also be given to farmers as well. Particularly, farmers, varieties should be certified provided that they exhibit specified characteristics in a given community though they are not distinct, stable and homogenous. This entitles farmers with exclusive rights in respect of the exploitation of their varieties.[64]

Ethiopia had adopted a benefit sharing legislation with the view to equitable sharing of benefits arising out of the utilization of genetic resources. Accordingly, farmers are entitled with 50% of the benefits obtained from the exploitation of genetic resources.[65] Central to the benefit-sharing scheme is the dichotomy between beneficiaries and non-beneficiaries of property rights. In a situation where private breeders are granted with exclusive rights and farmers' varieties remain in the public domain, the benefit-sharing scheme is meant only to compensate the farmers' deprivation of property rights.[66] The existing farmers' rights such as entitlement in benefit sharing that fall short of intellectual property rights are in adequate to protecting farmers.

7. Conclusion

The introduction of IPRs in agro-biotechnology is held to motivate private breeders to invest in improved varieties and enhance agricultural development in addition to boosting domestic research capacity. In this connection, Ethiopia has adopted PBRs' proclamation which gives monopoly rights for private breeders. Conversely, meager attention is given for farmers rights. While private breeders have IPRs, farmers' knowledge and varieties remain in the public domain and is easily appropriated subject to payment of compensation.

Not only is the idea of invention on products of nature questionable but also IPRs does not fit with agricultural system. The agricultural system relies on farmers' varieties and free exchange of seeds. The adoption of PVP in developing countries negatively affects developing countries and their farmers. Particularly, it limits the capacity of developing countries to meet national goals and exposes farmers to depend on expensive commercial seeds. It also leads to the erosion of agro-biodiversity.

Given the fact that agriculture is the backbone of developing countries it is imperative to strengthen farmers, rights. It is not appropriate to introduce monopoly rights in plant varieties. If not, farmers should also be given intellectual property rights parallel with private breeders.

[62] Regassa Feyissa (2006). Supra note 40, pp. 6-7.

[63] African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000). Supra note 3, preamble, par. 4 & Art. 24.

[64] Regassa Feyissa (2006). Supra note 40, pp. 3, 15 & 24-5; and African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000). Supra note 3, Art. 25(2).

[65] Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation (2006), Proclamation No. 482 /2006, *Federal Negarit Gazette,* 13th Year, No. 13, Addis Ababa, Ethiopia, Art. 9(2).

[66] Philippe Cullet (2001). Supra note 1, pp. 105-06.

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Towards Safeguarding Rural Communities' Social and Economic Interests Through Communal Property Law

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Abstract

South Africa's incessant Corporate Law Reforms do offer vast opportunities for rural communities to be actively involved in their own social and economic development. This article discusses the practicability of using a private company to promote and develop social and economic interests of rural communities. The fundamental question is: what constitute proper administration and socio-economic development in a rural context? It takes into account, the fact that the post-1994 democratic dispensation has made some effort to develop and strengthen the constitutional property rights, and the social and economic development of the previously disadvantaged rural communities. This encompassed the idea of, somewhat, relying on civil society institutions to manage and develop property rights of rural communities. Nonetheless, it should be noted that the success thereof is dubious since the development and operation of civil society institutions in these communities are constantly under threat and undermined by the tenacity of conflicts between administrators and the traditional leadership. It is asserted that there is an incessant need to resolve fundamental aspects relating to law, application of legal norms and achievement of social justice in a rural context.

Keywords: communal property interests, corporate law reform, socio-economic development, rural development, constitutional transformation.

1. Introduction

Although underutilized in a rural community context, South Africa's corporate law has evolved so tremendously that it is unavoidably necessary to explore the possibility of relying on a private company to promote and develop socio-economic property interests of rural communities. This is particularly significant in the context of advancing such constitutional transformative ideals that emanated from corporate law reform, which amongst others, sought to inculcate improved governance, accountability and sustainability in the corporate world. Despite all the above mentioned constitutional, corporate and property law developments, many problems still prevail in the management of property of rural communities, necessitating the exploration of alternatives. One such a possibility is the use of a private company to promote and develop the economic and property interests of rural communities as an alternative institution to enhance transparency, higher standards, democracy and the protection of human rights in communal context.

Section 7 of the Companies Act 71 of 2008 provides that the Companies Act seeks to encourage the growth of the South African economy by encouraging private enterprise and

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business efficiency, by also generating suppleness and simplicity in the creation and preservation of companies. However, it should be noted that there has been an increasing resistance against Western developmental theories which were employed during the early developmental phases of African democracies. Therefore, within this context, we posit the question whether the counter-modernist approach could have a positive impact on the development of rural development, in an African democratic context. This article explores this question in relation to the development of property law which safeguards the social and economic interests of rural communities, and more precisely the concept of *property in common*, as referred to in South Africa's Communal Property Associations Act 28 of 1996 or *community property*, as referred to in the Communal Property Associations Amendment Bill, as published in Government Gazette No. 40772 of 7 April 2017.

2. Problem statement, rationale and methodology

Disputes and internal conflict as well as conflicting interest amongst Communal Property Association (CPA) members, Communal Property Association Committees and their members, Communal Property Associations and Traditional Authorities and Communal Property Associations and the rural communities have been prevalent over the years (Dept. of Rural Development and Land Reform, 2012). It has been argued that these problems arose from maladministration by CPA executive committees, poor governance, misappropriation of funds and property (Pienaar, 2009: 24).

Against the above backdrop, this article is aimed at illustrating that private companies may be used to develop and improve the effective management of properties of rural communities, and thus foster sustainable social and economic development of such communities. At the center of attention, the article describes shareholders as community members who should accordingly contribute towards the development of the field of property law and the general protection of the constitutional rights of rural communities in South Africa. The article proffers a new scope of new thinking in law in as far as it deals with a novel doctrine suggesting new thinking in the application of company law to enhance the property interests of rural communities, specifically as a result of constitutional development of property rights and company law developments in general.

The ultimate objective of this article is to illustrate that the traditional model of relying on community representatives in the form of traditional leaders of the community has not yielded the desired outcomes. Further that although the Communal Property Associations Act 28 of 1996 endeavors to create "appropriate legal institutions" for disadvantaged communities to acquire and manage common property, there are still challenges. Therefore, to ensure the protection of members amongst themselves from abuse of power, these institutions should be managed in a non-discriminatory, equitable and democratic way with accountability to their members as stipulated in its preamble, an ideal which is practicably achievable using a private company. A combination of both doctrinal approach and theory based analysis were adopted as methodological tools. This method is best suited because normative doctrines, founded in the Constitution of the Republic of South Africa, 1996 (hereinafter, the Constitution) and Companies Act 71 of 2008 provides guidance in terms of what is legally and constitutionally reasonable and justiciable, and can be used to best explain social and economic circumstances that inform social and legal policies. In the main, the article shall demonstrate why a private company is best suited for serving the developmental social and economic interests of rural communities.

3. Theoretical framework

The need for order and efficiency caused a shift from the prominence on Western-style democracy, as the wisdom for development, to a counter-modernist approach in development in the late 1960s. It was believed by scholars, that the problems faced by poorer countries were less

their traditional attitudes and more the imprudent mixing of political participation with established weakness, in accumulation of the decadent waste of resources. Political participation also remained a laudatory objective. Regardless of copious foreign aid, and, even in rapidly growing industrialized states, such as South Africa, rates of economic growth remained unimpressive and long-term prospects for social equality appeared deplorable. This forced an internal re-evaluation of the concepts and theories contained within the existing modernization framework, which resulted in the counter-modernist developmental theory (Manzo, 1991: 27). The assumption that poorer countries are interested in procuring Western qualities such as independence, progress, political involvement, judiciousness and modern presumptuousness, was stated as a fact. Hence, the "Participatory Action Research" philosophy emerged as a result of the rethinking by academics, social movements and leading practitioners of development projects.

3.1 *Participatory action research philosophy*

During the 1970s, the questions on how to create widely held control, instead of economic growth and how to empower people to obtain control over the powers that determine their lives, was central to the Participatory Action Research philosophy. The Participatory Action Research philosophy merge techniques of political involvement, adult education and research in social science, with a foundation of denunciation of the Western abstract of "top to down" development plans, which endeavor to universalize experience. It further inspires local grassroots ingenuities, with emphasis on the necessity for economic processes that are both endowed in the needs of particular communities and fitting for the local ecologies. Prominence is sited to probe into what development denotes to poor and marginalized people. Consequently, development should cease to be done to people and should rather be done by the people, developing into a participating process where people are empowered to determine the making of their own communities. Development theory should become more an exchange of ideas between researcher and subject rather than a prologue from subject to object. As an alternative of telling people in poorer countries what it is and how to get it, researchers should rather listen to what the people say about their own development (Manzo, 1991: 28).

As a result, the partitions between subject and object, research and practice, and the empiricist social science and Western philosophy, dictating what is acceptable and what is not, should be rejected. Science will be considered as the result of a process in which theory-building and the prevalent civil service for change are combined and become part of the same historical progression. It will endeavor to exceed the boundaries of present philosophy by acknowledging the differences, without being internally obliged to define most differences as forms of dissimilarity to be conquered or assimilated (*Ibid.*). Richard Peet and Michael Watts (1993) argue that the post-structural theory, which obtained its popularity in the deconstruction of the Western mythologies of science, truth, and rationality, has also constructed a mythology about the contention and has taken the "dialectic of Stalin's iron laws of history" as its fundamental model. It is depicted as an "idealist device in which thesis incorporates anti-thesis to an already-given synthesis, allowing no room for contingency, difference, or, for that matter, the new." It is their opinion that "dialectical analysis", as an alternative, offers the opportunity of conjuring up a system of relations that does not consume the independence of the specific, and in which various vibrant trends, in moving categorized measures, are frequently upset by a new series of diverse actions. A dynamic with "pattern, order, and determination without being teleological, a theory of totalities which, because it values their unique aspects, is not totalizing". This prolonged conception of discussions provides a way of comprehending the compound forms of environmental inconsistencies and social engagements (Peet & Watts, 1993: 248-249). Manzo (1991: 30) expresses his opinion as follows: "What is needed now is for social theory to take seriously the ideas of those who argue for grounding knowledge in local histories and experiences,

rather than building theory through the use of general conceptual categories and Western assumptions."

Since the 1960s several counter-modernist developmental theories have seen the light and it is not a new phenomenon. Ruth Jebe (1993) focuses on the practices that produce reporting structures, rather than the reporting frameworks and reason that the South African New Governance process offer a better methodical framework for generating added vigorous sustainability reporting systems than those of the traditional regulatory approaches. She argues that the New Governance Theory (NGT) postulates situations where traditional government regulations are less effective as a means to achieve public objectives (Jebe, 2015: 238). NGT identifies situations where other forms of regulation, including increased civilian contributions and decentralized policymaking, are more likely to accomplish the expected result (Lester, 2002). Dissatisfaction with government commanded reporting requirements inspired many countries to investigate alternative methods for fashioning corporate reporting regimes. South Africa is recognized as a world leader in moving forward in the discipline of sustainability reporting, which is a direct result of a counter-modernist approach to development. Since 2009, listed companies on the Johannesburg Securities Exchange (JSE), are required by the JSE to produce an annual "integrated" sustainability report. This requirement serves as a condition for listing on the JSE. In line with the requirements of The King Code of Corporate Governance Principles for South Africa, listed companies are compelled to produce an integrated report for financial years beginning on or after 2010. Although it may seem unexpected that this innovation in sustainability reporting come from South Africa, rather than from developed countries, such as the European Union or the United States. Evidently the exploiting of NGT's in South Africa's diminishes the role of top-down government regulation (Jebe, 2002).

The 1980's signaled a new chapter in the discourse on means of governing, when the precincts of command-and-control regulation became progressively more ostensible. The bureaucratic, hierarchical, top-down, state-centric, regulatory administrative state, was founded on the supposition of exclusive knowledge and proficiency of the expert policymakers. Oblivious from public demand and pressure governments established administrative agencies to enhance their command and control. Government prescribed prescriptive standards (commanded) and their administrative agencies monitored and enforced the standards (controlled) to attend to the private and organized welfare of bureaucrats (Salmon, 2002).

The Corporate Communal Development Theory (CCDT), as a social development theory, which considered the acknowledged wisdom of those who reason for basic knowledge in local histories and practices without comparison to colonial hegemony was introduced in the discussion of the Communal Property Associations Act and the Companies Act in the discourse on the use of a private company to promote and develop the property interests of rural communities (Schoeman, 2018). It is argued that the Communal Property Associations Act is an example of a counter-modernist approach that has acknowledged the resident antiquities of communities desiring to own and manage communal property without association to the Western concept of private property and that the development of the Companies Act was a result of the requisite for legislation to comply with the country's Constitution.

4. Deconstruction of the Western mythologies of science, truth and rationality in Property Law

When South Africa became a democratic state in 1994, a new dispensation was born in developmentalism, coerced by the Constitution. Before 1994, any development in law and society, was driven by Western philosophies, engrained with colonialism. Improvement and prosperity were measured by the success in achieving or not achieving Western objectives. The criticism of Western science as wisdom in its pure and entire essence, opens the door for a better

appreciation of the diverse methods to grasp the development-environment relationship. Exploration commences with concrete criticism on the destructive environmental corollaries of modernity and contend for context-reliant and considerably dissimilar indigenous discourses about development. The post-structural criticism of the cogent, pinpoints the links between natural science and imperialism. It allows for a recovery of country-dweller and ethnic discourses on land use and management, which enhances the prospect for an exchange of information (Peet & Watts, 1993).

4.1 *Ownership in land in South Africa's context*

Section 1 of the Communal Property Association Act 28 of 1996 defines property as, "property" includes movable and immovable property and any right or interest in and to movable or immovable property or any part thereof. Judge Yacoob stated in Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) para 22, that the comprehension of rights to property should be done within the sociological and historical perspective. It follows that in order to understand ownership in land or any other right or concern in and to either movable or immovable property in the correct context, reflection should first be given to the historical development of ownership in South Africa. In the South African law, the perception of ownership originates primarily from the Roman Dutch law. The Roman Dutch law constitutes ownership as a real right in property with acknowledgment of certain restrictive conditions that may be registered against the title of the property. These registered conditions will place a perimeter on the enforcement of the real right in the property by the owner (Van der Merwe, 1989). Ownership in property has developed in the South African law to be concomitant with real rights, which in broad terms inaugurates an absolute and exclusive right in property (Pienaar, 1986:1). Such right in property is superior to any other rights.

Property legislation of the past was based on racial discrimination. The result was that majority of South African communities were excluded to own property rights in land. More than a century ago oppressive legislation embarked with the Natives Land Act 27 of 1913 shadowed by the Native Trust and Land Act 18 of 1936 and crowned with the Group Areas Act 41 of 1950. This was trailed by the Group Areas Act 36 of 1966, which completed the Group Areas Act 41 of 1950. The intention of the government of the day was to consolidate the law relating to the establishment of group areas with the aspiration of regulating the control over and the acquisition of immovable property. This also included the regulation of occupation of land.

It was obligatory to repeal these oppressive acts in order to generate fair and equal opportunities for all South African citizens to acquire ownership in land, and to accomplish more equality in the distribution of land ownership (Kloppers & Pienaar, 2014). Eventually the Abolition of Racially Based Land Measures Act 108 of 1991 was promulgated to revoke or modify laws to eradicate constraints based on race diversity for the acquisition and utilization of various rights to land and to arrange for the phasing out of institutions founded on race. Section 12 of the Abolition of Racially Based Land Measures Act 108 of 1991 contained transitional measures to phase out the South African Development Trust. This Trust was the registered owner of the majority of communal land, which needed to be transferred back to the rural communities from whom this land was unjustly dispossessed off.

Consequently, it was followed by the introduction of the Reconstruction and Development Programme with the aim of:

> "... eradicating the legacies of the past through the redress of inequalities and building a vibrant and democratic South Africa...acknowledged that land represented the most basic need for the rural population, a need that resulted from the discriminatory practices of the past regime. In order to effectively address the issues of inequality, poverty and landlessness caused by the "injustices of forced

> removals and the historical denial of access to land" the program identified the need for the establishment of a comprehensive national land reform program" (Kloppers & Pienaar, 2014: 688-89).

In 1997, the purpose of the White Paper on Land Policy was to create a land reform policy and addressing the historical injustices (Dept. of Land Affairs White Paper on Land Policy, 1997). Its purpose is further described "…to provide an overall platform for land reform consisting of three principal components: restitution, redistribution and tenure reform," which were the matching pillars, identified in the Reconstruction and Development Programme.

5. The constitutional property clause

Although it is not the aim of this study to investigate the constitutionality of property rights, acknowledgment should be given to the current status of property. For the sake of completeness, it is necessary to consider the recent developments in constitutional property rights since it affects *all* property, which will of course also include any property or interest in property of rural communities

Van der Walt (2004) considers the question whether certain interests will qualify as property and then extensively compares the property clause, as contained in section 25 of the Constitution, with the German private law. He examines property being the object of property rights, property as property rights and property as a restricted right and then summarizes the German position regarding non-proprietary rights as follows (Van der Walt, 2000):

> "In accepting that non-proprietary rights can also qualify as property for purposes of the constitutional guarantee, the German courts rely on the fundamental guideline mentioned earlier: a right will be in- or excluded from the property concept according to the question whether the in- or exclusion will serve the creation of the sphere of personal freedom which will allow the individual person to take responsibility for the development and management of her own affairs within the social context. On the basis of this test, certain non-proprietary rights (and particularly the socially extremely important land-use rights of residential lessees and lessees of garden allotments, as well as the participatory rights of employees in a large firm, and the claim rights of beneficiaries of a socially important compensation fund for victims of a pregnancy drug) has been included in the property guarantee, while others (especially some social participatory rights and some claim rights) have been excluded."

This functional and purposive approach requires that a court will have to apply a balancing of interests in each individual case. In analyzing the Port Elizabeth Municipality v Various Occupiers case 2005 (1) SA 217 (CC) para 8-23, Van der Walt (2011) concludes that there is a shift in the thinking of property rights in general, as being abstract and rights-based to a contextual, non-ranked philosophy about property rights. Pienaar has as far back as 1986 already resolved that: Although the South African concept of ownership is basically derived from the Roman and Roman Dutch concepts, it is not in every way comparable to the latter because of changed social, political, economic, religious and philosophical factors. The said factors often make it necessary to introduce new developments, which influence the concept of ownership.

In Van der Walt's (2011) discussion of the First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), he confirmed that the Constitutional Court has repeatedly indicated that a purposive approach is appropriate when the Bill of Rights should be interpreted. Van der Walt observed that since n 1997, the Constitutional Court has indicated that the property clause will definitely be approached from a purposive perspective and that the clause needs to be construed with due regard to its constitutional devotion and historical perspective. This approach has been confirmed in the recent Bakgatla-Ba-Kgafela Communal Property

Association case.[1] Whether the law should be changed and non-proprietary rights treated equally, being absolute rights, together with vested real rights in property, or whether the court should apply a balancing act between property and non-proprietary rights, does not fall within the scope of this study, except to note that despite the Roman Dutch inheritance, the courts have recognized and applied the principle that there is no fixed number of real rights and have found that non-real rights, which burden real rights should be registered against the property because of its intimate connection with the property concerned (Carey Millar, 2000). It is further clear from section 25(4)(b) of the Constitution that for purposes of section 25, property is not limited to land, as also unanimously confirmed by Jafta J in the Bakgatla-Ba-Kgafela Communal Property Association case, where he states that: In section 25(7), the Constitution recognizes and protects rights in land which go beyond registered ownership. Van der Walt (2011) shares this opinion in his discussion of eviction from property, where he points out three matters to be considered when interpreting property legislation and the common law development of property. Firstly, an order should be justified in light of the circumstances. Secondly, a balancing exercise, between the rights of the landowner and interests of the occupiers should be done, despite the fact that the interests of the occupiers do not amount to property, as historically understood. Thirdly, a balancing exercise should be done between the permanent and continuing effects of the historical background and the current situation.

Van der Walt concludes that it could be argued that the contextualized-balancing principle could be expanded beyond the scope of eviction, resulting in punier rights not being hypothetically oppressed by stronger rights. The constitutional property concept has developed to include interests in property that would not have been recognized as property, prior to the Constitution and these interests may now compete on the same level with conflicting property rights. It is thus evident that rights in land go further than real rights and will also include non-real rights or interests associated with land or the use of land. This opens the door for the long overdue recognition of traditional values in the interpretation, applying and enforcing of traditional rural communal rights. Consideration should likewise be given to the exceptional limitation of rights, as contained in section 36(1) of the Constitution, which allow for rights in the Bill of rights to "be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between delimitation and each purpose; and (e) less restrictive means to achieve the purpose."

6. Traditional ownership

Pienaar (1986) compares the concept of ownership in a socialist community with those in a traditional primitive communal society and differentiate the two from each other, on the basis of control and ownership or absence of control and ownership by the state, as well as the existence or absence of the profit motive. The main distinction lies in the fact that in a traditional community communal property ownership vest in a particular family while in a socialist's community, communal property belongs to the state. The Rural Women's Action Research Programme at the Centre for Law & Society of the University of Cape Town refers to this concept of communal ownership as African freehold and states that valuable lessons need to be learned from the practice of African freehold ownership. They recommend that the customary values and

[1] The full citation and details of the case are thus, Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25 para 35; Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

understanding and practices of African freehold ownership should, rather be adhered to than following Western legislation, which is based on exclusive ownership. This will ensure that family interests of rural communities are protected. Ironically, it is then suggested that: "Urgent additions are that protected rights must be recorded and registered, so that they cannot be sold from under people, and people have the security of written proof of their rights." Thus, creating an anomaly, since the formal act of registration of ownership in land originates from Western tradition of registering rights in property.

A better understanding of rural communities' interpretation and enforcing of rights are well illustrated in the case study done by Michael Schnegg and Theresa Linke at the University of Hamburg in Germany (Schnegg and Linke, 2015):

> "In sum, the case studies indicate that social networks hinder formal sanctioning and at the same time adjust and substitute enforcement rules. Since they are substituted, institutions work, and water is provided. It is difficult to say whether the causal relationships observed here will also hold true for the management of other common-pool resources, like pastures, forests or fisheries. From what we observe, we would assume that under similarly high levels of density, connectedness will always be challenging to execute specific sanctions in small face-to-face communities."

A much more tolerant approach and gradual intensifying of social pressure to enforce the community's rights against an individual who does not comply with the rules and expectations of the community, exists in rural communities. This approach differs considerably from the less tolerant Western approach to the immediate enforcement of social or individual rights against offenders.

7. Communal ownership

Section 1 of the Communal Property Association Act defines the holding of property in common to mean the acquisition, holding and management of property by an association on behalf of its members, in accordance with the terms of a constitution. This definition implies a representative relationship, and the relationship is confirmed to be a fiduciary relationship in terms of section 8(7), section 9(e)(vi) and section 14(1)(b) of the Communal Property Association Act. In terms of section 8(2)(a), one of the qualification requirements for the registration of a Communal Property Association, obliges the adopted constitution to dispense with the issues stated in the Schedule. Item 4 of the Schedule refers to "land or property to be owned by the association" and item 7 only refers to members' rights to use the association's property.

Although property is defined, as being movable and immovable property, specific reference to the acquiring of land is made on only three occasions in the act, of which one is by way of implication. The provisions of the Communal Property Association Act apply to communities that are eligible for restoration of land, legalized by the Restitution of Land Rights Act 22 of 1994 where the Land Claims Court has made an order of restitution on condition that a Communal Property Association be established. Secondly, reference is made, in section 2(1)(b) CPA Act, to disadvantaged communities approved by the Minister of Rural Development and Land Reform who acquired land or rights to land and who desires to form a Communal Property Association. Thirdly, reference is made to identified land or the right to land to be acquired by a provisional association when it applies for registration.

The only reference made to the registration of land in the name of a Communal Property Association, is where the Minister of Rural Development and Land Reform is authorized to determine that the provisions of laws ruling the establishing of towns and the Subdivision of Agricultural Land Act 70 of 1970 will not be applicable to land which is registered in the name of

a Communal Property Association. This is concurrent with the concept of a Communal Property Association being a juristic person, existing apart from its members. Members of the association therefore do not become the registered owners of land but are only entitled to the use of land owned by the Communal Property Association. In slight contradiction to the above mentioned, item 9 of the Schedule alludes to rights and property of a member on termination of membership and item 10 outlines the purposes for which property may be used, the physical partition thereof, and apportionment of property to different members. This may create the impression that members individually become owners of parts of the communal property. It is imperative that traditional and communal ownership should be defined properly without changing the original concept thereof. Without this comprehension all attempts to regulate traditional or communal ownership, in terms of western regulation legislation will dwindle, since current legislation do not provide for proper recognition and implementation of traditional ownership.

In contradiction to the findings of Van der Walt, Pienaar (2008, 1) compares the South African Rictersveld Case with the Delgamuukw cases in Canada and focus on the elementary differences, being embedded in the range of inclusivity or the exclusivity of land tenure, also referred to as a discourse of exclusion and in the dissimilarity between the idea of property urged by individualism and the institution of property engrossed with concession, rationality and the strain between the individual and communal interests. Pienaar chooses Canada to compare the inclusivity or exclusivity of property since both countries have fused communal land tenure in their property law. In South Africa the property law is primarily of civilian nature while Canada mainly follows a common law approach. Civil law and common law principles are recognized by both countries respectively, which includes the Roman-Dutch concept of exclusivity of ownership, being a comprehensive real right a person can have, in relation to property within the limitations of the law in general. Although private ownership is constitutionally protected in our law, the case First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 4 SA 768 (CC) para 51. See also President of the RSA v Modderklip Boerdery (Pty) Ltd 2005 SA 3 (CC), has ascertained that it is limited in the public interest.

According to Pienaar (2008), the common law principle on land tenure followed in Canada is considered to be less complete and is suppler than the strict Roman-Dutch concept. The Crown holds supreme ownership of all the immovable property in the country while the tenants only have land tenure rights in the form of interests, tenures and estates. Different land tenure rights can therefore be exercised by several people in respect of the same property. This modest form of ownership or freehold ownership found in Canada is often observed as absolute ownership of the land, or at least, as close to being absolute owner as English common law permits. To a large degree, land tenure rights in Canada also appear to be exclusive in nature, excluding other persons from the rights of usage and possession of land.

Communal land rights are exercised by indigenous communities and presents qualities of social relationships (household and kinship networks with different forms of community membership); inclusive, rather than exclusive in character, are shared and relative but in general secured (in one particular community rights can be individualized, communal like grazing and fishing or mixed like seasonal cropping events); the community's land ethos gives certain access to land (The norms and values of the communities determine social rights, rather than authoritative and administrative structures to control access to land); rights originates from putative membership (membership from of a particular social unit and is attained through birth, allegiance, relationship or dealings); Social and political boundaries (mark out the use of resources and are generally straight forward, frequently malleable and negotiable but also a cause for strain and skirmish); bendable balance of power (amongst gender role, contending communities, tenures, land administration authorities and traditional authorities); intrinsic negotiability and flexibility of land tenure rights (allows for rights to adapt to changing conditions but also make it

vulnerable to acquisition by dominant external forces like the government or susceptible to capital investors).

The invariable goes for attempts to regulate rural communities with existing traditional authorities descending from the apartheid era. As long as there is resistance from communities against established authorities, none of the rules and regulations implemented by these authorities will be honored by community members. For any attainment, the land reform program has to be elongate and feasible. The constant ignorance towards both economic and social sustainability in the redistribution and the restitution pillars of the land reform programs contributed considerably to most of the envisioned agricultural land being unproductive (Kloppers & Pienaar, 2014).

8. Diverging economic interests

Internal conflicts and struggles for control and management of Communal Property Association's is a result of pre-existing tribal authorities which are referred to as traditional councils in terms of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009. Section 3(2)(b) of this Act requires pre-existing tribal authorities to comply with two transformation measures. The first, is that forty percent of traditional council members have to be democratically elected and secondly, that one third of traditional council's members must be women. The time frame for meeting these requirements, which was one year, had to be extended several times. It is now clear that pre-existing tribal authorities are not willing to share their power, especially not with woman. According to the Rural Women's Action Research Programme at the University of Cape Town, many councils still do not comply with the women's quota and where elections were held it was mostly flawed. Even 10 years later, there has not been traditional council elections in Limpopo. The situation is so out of hand that the new Traditional Affairs Bill was supposed to come to the rescue by repealing the Traditional Leadership and Governance Framework Amendment Act and thereby introduce new provisions to contend with the consequences of non-compliance of traditional councils. It is however unlikely that the bill will ever be implemented due to constitutional issues. Disputes and internal conflict, as well as conflicting interest amongst Communal Property Association members, Communal Property Association Committees and their members, Communal Property Associations and Traditional Authorities and Communal Property Associations and the rural communities seems to be the order of the day. Top this with maladministration by Communal Property Association executive committees, poor governance, misappropriation of funds and property and the parties will indefinitely end up with litigation where the conflicts have been protracted.

And indeed, it ensued in a classic example, illustrated in the Bakgatla-case, where the members of the community favored a Communal Property Association, while the tribal authority and the traditional leader, Kgosi Pilane, preferred a trust to advance the community's property rights. Even after referral of their dispute to the Minister of Rural Development and Land Reform, who suggested the registration of a provisional Communal Property Association to enable the parties to decide the issue within the period of twelve months, being the time, as allowed by the Communal Property Association Act, the dispute could not be resolved. Neither was the Bakgatla-Ba-Kgafela Communal Property Association registered as a permanent Communal Property Association.

The diversity of duties and responsibilities of the Director-General cannot be over emphasized. Save to say that the Communal Property Association Act not only empowers but requires the Director-General to play an active role in solving disputes between the leaders and the community. In the Bakgatla-case, the Director-General did not attend to the registration process in the spirit, as expected by the Communal Property Association Act. He resisted the Communal Property Association's registration without attempting to assist the community, and

his conduct was capricious with the recommendation made by his own delegate. The Director-General showed an indecorous reaction to the community's lawful request for registration of a Communal Property Association. Not only did the Director-General obstruct the Bakgatla-Ba-Kgafela community's endeavors to register a Communal Property Association but also, collectively with the Minister of Rural Development and Land Reform, opposed the relief sought by the community.

The fact that the legislature gave recognition to traditional councils does not remove the communities' view and resistance towards traditional leaders, who are seen as an extension of the British colonialist's dictatorship. Customary systems of land rights do not comprise of property rights for their members, but allow for misuse by the autocratic power of traditional leaders. Evidently the non-compliance with the Traditional Leadership and Governance Framework Amendment Act raises doubt over traditional leaders' legal capacity to own the land that belongs to the rural community. Consequently, most traditional councils are not legally constituted and therefore have not acquired the legal capacity to own or transfer land. For the same reason, traditional councils do not have the legal status to procure investment transactions. Traditional leaders, on the other hand, are concerned about the wearing down of their seat of power by communities who refuse to further recognize their traditional councils (Pienaar, 2009).

In an application for leave to appeal against a decision of the Supreme Court of Appeal, the legality of a decision of the Department of Mineral Resources to award Genorah Resources (Pty) Ltd prospecting rights on the Bengwenyama community's land was decided.[2] The Bengwenyama community was dispossessed of their land during apartheid but successfully instituted a land claim and the land was subsequently returned to the Bengwenyama community. During the same time that the respondent, Genorah Resources (Pty) Ltd, applied for a prospecting right on the same land. The Bengwenyama community, making use of a company called Bengwenyama Minerals (Pty) Ltd also applied for a prospecting right. The company was specifically registered for the purpose of acquiring the prospecting rights on behalf of the Bengwenyama community. Despite the initial concern of the Department of Mineral Resources, and their advice to the community to procure better protection in the investment agreement, the community's application was simply ignored by the department. The court found that the Department of Mineral Resources failed to comply with the requisites for consultation and with its duty to give Bengwenyama Minerals (Pty) Ltd an opportunity to apply for a preferent prospecting right.

The Mineral and Petroleum Resources Development Act 28 of 2002 was promulgated not only to give effect to the constitutional norms of equality, dignity and freedom, but also to substantially impact on individual and communal ownership of land and the empowerment of previously disadvantaged persons to gain access to mineral resources. Consequently, section 104 of the act allows previously disadvantaged communities to apply for and be granted a preferential prospecting right in relation to other applicants. It is perplexing that the second respondent was the Minister for Mineral Resources, the third respondent the Director-General of Mineral Resources, the fourth respondent the regional manager of the department of Mineral Resources, Limpopo Region, and the fifth respondent was the deputy Director-General of the department of Mineral Resources. All are representatives of the government of South Africa opposing an application brought by a previous disadvantaged rural community seeking justice against an unlawful decision by the Department of Mineral Resources. Mostert (2014) resolved that:

> "The problem is that no land reform venture of the scale embarked on in South Africa can even remotely hope to meet the targets set within one generation, let alone a few

[2] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) A par 3.

> election cycles. Although land reform is highly politicized, it is, unfortunately, not an area in which real solutions fit political expediency."

9. Conclusion

This article has illustrated that various reasons may exist to justify the believe that Communal Property Associations (CPAs) are not progressively suitable as entities that can best manage communal property and socio-economic interests of rural communities. However, the reality is that more than one thousand and two hundred communities are aligned with this concept of property management, which confirms their trust in the management style, as proposed by the Communal Property Associations Act. It has been noted that much of the denunciation for the critics against Communal Property Associations can be laid at the door of the Department of Rural Development and Land Reform. Much of the frustration experienced by communities is directly linked to lack of knowledge and incapacity of government institutions, including the legislature's inadequate capabilities to draft properly guided legislation. Therefore, this article concludes that indeed the emphasis should, rather be on the administrative measures to establish tenure security for communities and groups in a transparent and an accountable way (Pienaar, 2009: 28). Apposite legislation, which is akin to the codification of management regulations, as found in the Companies Act is essential to empower and assist communities to take command of the management of their property to the advantage of every member of the community. This approach is consistent with the counter-modernist approach and could have a positive impact on the social and economic development of rural communities in an African democratic setting.

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