

Traditional Medicines in Ethiopia: Challenges in Protection and Risks of Possible Loss

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Abstract

Traditional medicine has been widely practiced in Ethiopia. However, the extent of use and the number of medicinal products have been steadily declining due to gaps in legal and institutional protection. In the absence of an effective regulatory and institutional framework, traditional medicinal practitioners have been applying self-policing through secrecy in the sources of the medicinal products and their processes. These secretive methods are unreliable and hamper the transfer of the practices, processes and wisdom to future generations thereby causing steady regression and loss of traditional medicinal wisdom. This article examines possible legal solutions that could possibly elicit undisclosed traditional medicinal knowledge and products to enrich the public domain. The research method is doctrinal with some empirical data to support doctrinal findings.

Keywords:

Traditional medicine, patent, utility, model, certification, indigenous wisdom

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1. Background

Underdevelopment is a cumulative effect of diverse socio-economic, political and historic factors which include the failure to preserve ‘known wisdom,’ or recognize and reward creative talents. In the Ethiopian context, these factors have significantly contributed to the disruption of continuity in progress.¹

Operational Definitions:

Traditional Medicine (TM): Variety of products that are known and practiced by traditional medicinal practitioners. The products or processes have therapeutic effect to human or animals.

Traditional (indigenous) knowledge: Knowledge of local people that is passed from generation to generation. It includes traditional medicines and formula of crafting traditional medicines.

Hakim: Traditional medicinal practitioners who make and offer traditional medicinal products.

Regulatory Authority/Agency: Depending on the context, it can be Ethiopian Food and Drug Authority or Ethiopian Intellectual Property Office

‘Secretly Held’ Traditional Medicines: It refers undisclosed medicinal products and/or ‘processes’ that are not under public domain. Medicinal products may be offered for sale, or in use by the beneficiaries, but the chemical elements, the herbs or other sources from which the medicine was crafted, and the processes and procedures of making the product or therapeutic procedures are unknown to the public. Secret holding is a self-policing strategy that is meant to protect the property interest of the practitioner or holder.

¹ The effect of unending fight for political power and foreign invasions were the causes for the destruction of kingdoms, cities and disruption of the continuity of skilled labor. Moreover, negative reward to creative men had discouraging effect that did not attract further innovation. Development and intellectual property have direct relationship. Most developed nations have devised a highest level of intellectual property protection system. On the contrary, developing nations offer little protection. See Carlos A. Primo

Ethiopia's early 'civilization'² and its current state plausibly denote discontinuity of knowhow. A weak (or non-existent) regulatory framework cannot shield fruits of one's creative wisdom, and innovative knowhow 'dies' with the inventor as a result of which the public knowledge domain remains weak.

In the context of traditional medicinal knowledge, possessors of the wisdom keep the invention (product) or the processes of making the medicine secret. This possibly causes 'death' of the invention with the inventor, which has led pre-existing knowledge not to sustainably enrich the public memory and serve as a ladder for further creativity and innovation.³ Frequent 'new beginning, not only makes the invention very expensive, but also causes the progress of innovative acumen to remain at the very basic level thereby adversely affecting the nation's pace in the development threshold.

Braga *et al* (2000), "Intellectual Property Rights and Economic Development," *World Bank Discussion Paper* No. 412, Available at:

<https://documents1.worldbank.org/curated/en/724371467980542334/pdf/multi-page.pdf>

² We have live testimony regarding the early Ethiopia's civilization. The engineering intellect of the crafters of Obelisks of Axum, the architecture of Lalibela and the Emperor Fasilides Castle, among others, confirm Ethiopia's past technological and cultural progress.

³ The three cases that this author had experienced illustrate this point. There was a popular traditional medicinal practitioner in the village called Dangara, located in the current Sothorn Ethiopia, Wolaytta Zone, Boloso Sore Woreda, 10 Kms to the south east of the district town - Areka. Dangara was popularly known by the local people because of Kute's service. Kute, had curing medicine for almost all kinds of intestinal issues. Kute's medicines are termed as "*qachchaa Xalle*" (ቃቅ ጸላሌ). In Dangara no one knew how to make "*qachchaa Xalle*" other than Kute. As a traditional medicine provider, she served her people with curable herbal medicines but suddenly died. Today, there is no service, as no one is able to make and practice the medicine. No one knows how Kute prepared the medicine nor the herbs she used to collect or the formula she used to process variety of herbs or parts of herbs. With a view to collect the current empirical data this author has visited the location that Kute used to live and interviewed her kin and neighbors. A similar case happened in Ade Duguna, located in Sothorn Ethiopia Regional State, Wolaytta Zone, Bixxanaa Woreda – some 7 Kms from the zonal city – Soddo. A traditional *hakim* had good curing medicine for asthma. The lady never disclosed the herb and the formula for mingling various herbs. She also knew the processes and products for contraceptives but died without the wisdom transferred to the public domain. Similarly, there was a traditional medicine provider called Dargasso, who used to reside in Legama Kebele which is located in Southern Ethiopia, Wolaytta Zone, Boloso Sore Woreda for curing domestic animals from deadly diseases like anthrax. He is survived by no one and did not disclose the medicinal products and processes of making it.

Although it is gradually diminishing and largely unrecognized by law, substantial number of people in Ethiopia depend on indigenous wisdom that is still dominant in traditional medicine.⁴ Reliance on traditional medicinal practices is typical in developing nations. Asian nations, especially China and South Korea, have been integrating traditional medicines with conventional ones. In these nations, traditional medicines are significant in primary health care. In India, researchers have been working in modernization of traditional medicinal knowledge. Depending upon the availability of medicinal wisdom in the public domain, Asian nations (in compliance with the rules of Trade-Related Aspects of Intellectual Property Rights /TRIPS) offer legal protection to knowledge holders.⁵

Africa is blessed with traditional medicinal wisdom and traditional medical practitioners who claim to have curative remedies for various health care

⁴ About 80% of Ethiopians and 90% livestock in Ethiopia still depend on traditional medicines. See:

Negero Gemeda *et al* (ed.) (2015), “Ethiopian Traditional Medicine: Past, Current and Future, Workshop Proceedings,” *Ethiopian Public Health Institute*, Adama, Ethiopia, December 14 – 16;

Temesgen Assefa *et al*, (2002) “The Role of Medicinal Plants in Traditional Medicine in Adwa District, Tigray, Northern Ethiopia,” *Asian Plant Research Journal*, P. 1. Medicinal pluralism works in most developing nations;

Chidi Oguamanam (2003), “Between Reality and Rhetoric: The Epistemic Schism in the Recognition of Traditional Medicine in International Law” 16 *St. Thomas Law Review* Vol. 16, p. 61.

⁵ Thamizhoviya G. (2025), Global Integration of Traditional and Modern Medicine: Policy Developments, Regulatory Frameworks, and Clinical Integration Model. *Future Integr Med.*2025; 4(3):180 – 190 doi: 10/14218/FIM,2025,00033.

A documented Chinese traditional medicine practice goes back to 1,100 BCE. In China, traditional medicine practice is a comprehensive system that is recognized by law. See also Lin Peng (2022) Striking a Balance between Intellectual Property Protection of Traditional Chinese Medicine and Access to Knowledge, *Tinghua Law Review* Vol. 7 No. 2, p. 274; according to Wilder, “For developing countries, traditional medicine forms the basis for an important domestic industry and export.” See Richard Wilder (2000), “Protection of Traditional Medicine”, *Working Paper* 66, p. 9. Indian Council for Research on International Economic Relations. Available at: <https://www.icrier.org/pdf/wilder66.PDF>

In 1996 from total medicines transacted 43.8% were traditional medicines (Ibid). In South Korea Traditional Medicine are integrated into conventional medicines. Jieun Park, Eunhee Yi & Junhyeok Yi (2021), “The Provision and Utilization of Traditional Korean Medicine in South Korea: Implications on Integration of Traditional Medicine in a Developed Country”, *Healthcare* Vol. 9, p. 1379.

needs.⁶ Traditional medicine includes variety of products, processes and practices.⁷ Although traditional medicines are not published in scientific journals, people have been using them and rely on their curative potential for centuries.⁸ Traditional medicinal practitioners claim to have the wisdom to identify diseases by making spot evaluation of symptoms and physical diagnoses and craft medicines (products) from local resources (through undisclosed process).

Today, it is easy to challenge the efficacy of traditional medicines and the methods of patient diagnoses, but failure to recognize the already known and tested practice can take us nowhere. The best scenario is to recognize traditional medicinal products, the processes of making them and reward (and encourage) the practitioners to further the wisdom. This would make traditional products, knowledge and processes serve as ‘development ladder’ that the current and future generation can ‘climb’ in order to progressively advance the wisdom.

Traditional medicines are affordable, accessible, and acceptable by the people who rely on their therapeutic remedy.⁹ If studied well and scientifically proven, traditional medicines can make immense contribution to unresolved issues in primary public health care. Some traditional medicinal practitioners grow medicinal plants and others harvest them from natural forests before processing them to medicinal products.¹⁰ Traditional medicine practitioners

⁶ Mmamoshedi E. Mothibe & Mncengeli Sibanda (2019), “African Traditional Medicine: South African Perspective,” in Congiz Mordeniz (ed) *Traditional and Complementary Medicine*, p. 31.

⁷ Fokunang CN *et al*, (2011), “Traditional medicine: Past, Present and Future Research and Development Prospects and Integration in the National Health System of Cameroon.” *African Journal of Traditional, Complementary and Alternative Medicines*, Vol. 8. No. 3, p. 284.

⁸ The World Health Organization estimates 80% of Africans use traditional medicines. In Ghana, over half of the children with malaria are first treated with herbs. Available at: <http://www1.voanews.com/english/news/africa/west/Ghana-traditional-health-care-part-two-voa-80335462.html>. See also Fekadu Fulas, (2007) “The Role of Indigenous Medicinal Plants in Ethiopian Health Care,” *African Renaissance* Vol. 4 No. 1 p. 76 – 80.

⁹ During field visit traditional medicinal practitioners in Addis Ababa and two regional states, the author observed patients waiting to get service. Especially, the clinic of Hakim Abraham Walelign in CMC, Addis Ababa is no different from clinics of modern medicine practitioners. Hakim Abraham’s clinic has waiting rooms with modern furniture, computers, examination rooms with full facility, and a pharmacy.

¹⁰ For example, Merigeta Belay has a garden of traditional herbs in the Debre Markos city. He also gathers some medicinal herbs from Abay Gorge (Interview with Firehiwot Teka, Director of Traditional and Modern Medicine Directorate of Ethiopian Public

blend parts of herb (leaf, root, or fiber), animals, organs of animals, or minerals. However, herbal medicine practitioners and dealers endeavor to keep the processes of making medicines secret. Secret holding is assumed to guard property interest of the practitioner or secret holder.¹¹ Even when gathering herbs, practitioners strive to avoid detection.¹² In the marketplaces, the practitioners venture to avoid formulaic piracy.¹³ Unless a given traditional medicine is publicly known or belongs to a given community, secretly held traditional medicinal products and processes belong to the possessor. Only holders of undisclosed medicinal products or process are

Health Institute, Gulele Addis Ababa February 2021). Similarly, a traditional medicine practitioner in Southern Ethiopia Regional State, Wolaytta Zone, Damot Gale Woreda, some 5Kms from the district city –Bodit. This practitioner is alive and has been actively practicing traditional medication. She collects healer herbs from uncultivated grazing area during wet seasons. (Interview with the traditional medicinal practitioner popularly known as “*Eyoba Aye*” (Eyob’s mother) at her home. Eyob has a modern pharmacy at Boditi town. He is a health officer, but supports his mother’s practice.

¹¹ Joana Mantey witnesses secretive holding of traditional medicinal plants of Ghana saying: “Knowledge of herbal medicine is a closely guarded secret... Often it is shrouded in mystery and may be accompanied by the performance of certain rituals.” Available at: <http://www1.voanews.com/english/news/africa/west/Ghana-traditional-health-care-part-two-voa-80335462.html>.

The expression “Secretly held” does not include communally known traditional knowledge, and bio piracy. If knowledge is owned by community, it may not be lost as far as the community exists. Though falls under traditional knowledge, secretly held knowledge is not community knowledge. It is possessed and owned by the secret holder – in most cases by individuals. See, Carlos M. Correa (2002), *Protection and Promotion of Traditional Medicine Implications for Public Health in Developing Countries*, University of Buenos Aires, (At introduction).

https://www.southcentre.int/wp-content/uploads/2019/02/Bk_2002_Protection-and-Promotion-of-Traditional-Medicine_EN.pdf. With regard to secretly held traditional medicines, the public gets the service whenever needed but there is no way to know the medicinal processes. This work attempts to find out possible legal solutions to preserve such an undisclosed medicinal wisdom.

¹² See, Tibebe Solomon (2013), “Assessment of Possible Intellectual Property Options of Traditional Knowledge System in Ethiopia”. African Technology Policy Studies, ATPS *Technopolicy Brief* No. 40, p. 8.

Available at <https://atpsnet.org/wp-content/uploads/2017/05/pb40.pdf>

¹³ For instance, traditional medicinal dealers decorate (with multiple colors) or reshape the medicines with a view to keep the nature and elements of the medicine unrecognized and make it hard to re-engineer.

aware of the curative herbs from which the therapeutic medicine was extracted, including its ingredients, methods of preservation, dose and use.¹⁴

It is this secretive method of holding that generates the right of ownership, and unless positive action is taken to elicit the formula, the danger is loss of the undisclosed invention upon the death of the inventor or possessor of the undisclosed creative wisdom.¹⁵ Customarily, it is believed that some traditional medicinal practitioners disclose their medicine to their kin and train them, but knowledge of techniques of identifying or producing the medicines and the kind of diseases which the medicine may cure, is not simple enough to master. Moreover, descendants of traditional *hakims* may not have interest to serve as traditional medicine practitioners.¹⁶ This would cause loss of the wisdom and skills.

The rationale for non-disclosure of the elements and processes of medication is usually related to loss of income.¹⁷ If the process of making a medicinal product is publicly known, everyone would make their own medicine or even compete with the original inventor or possessor by offering for sale. Currently, there is no reliable procedure to sell or license a secretly hold traditional medicine.

¹⁴ This characteristic of traditional *hakims* is true in almost all over Africa. See BBC's special reports about secrecy effort of traditional medicine providers of Ghana. <http://www1.voanews.com/english/news/africa/west/Ghana-traditional-health-care-part-two-voa-80335462.html>; see also Conserve Africa, Indigenous Knowledge and Environment, Available at: <http://www.conserveafrica.org.uk/sustainable-development-and-local-communities-in-africa/indigenous-knowledge-and-the-environment/>; though herb knowledge itself cannot be a protected right, it is an important step in inventing a curative product through a protectable process.

¹⁵ It was claimed that "... during the era of the Axumite kingdom (1st-8/10th C), about 8,000 plants were used as medicinal agents." This number considerably diminished during Zagwe dynasty (11th-13th C), (about 2,800 medicinal plants were recorded to have been used. Presently, there are between 650 and 1,000 medicinal plants). During the reign of Emperor Haile Selassie, it was believed that the number of known medicinal plants further diminished to the lowest level (700). Mulu T (2021). "Review on Phytochemical Studies of Ethiopian Medicinal Plants from 1970 – 2020 and the Potential as Modern Drug," *Adv. Pharmacoepidemiol Drug Saf*, Vol. 10 Issue 4 No. 1000 p. 757. This shows how public memory on traditional medicines has been fading.

¹⁶ Conversation with a Cameroonian witnessed that his grandmother who was a traditional medicine provider wanted to show him the herbs and the formula for making medicines. He refused to learn it. Now his grandmother is not alive, and no one had learned the processes of crafting the medicines.

¹⁷ See Tibebe Solomon, *supra* note 12.

Innovation and creativity can be effectively protected by a patent system, but for centuries, most developing nations, including Ethiopia, had no comprehensive patent law and exhibited weak or no enforcement mechanism.¹⁸ This, presumably, has caused inventors to apply self-policing mechanisms – maintaining a secretive atmosphere associated with their invention.

The existence of traditional medicinal practitioners and their medicine confers psychological confidence to the local people. Especially to the people with poor economic background, traditional medication is often preferred as a conventional option. It is exceedingly difficult or in some cases impossible to get an alternative.¹⁹ Thus there is the need for due attention to useful traditional medicinal practices and preserve them.

Preserving what we have now and advancing what preceding generations had been using for centuries can be a good beginning for sustaining development. This article discusses the significance of patent system (specifically, utility model certification) as a legal solution to sustain and enhance progress by protecting the economic and moral interest of traditional medicinal innovators and practitioners. The patent system, especially utility model certificate, can *possibly* circumvent loss of traditional medicines. A detailed discussion on procedural rules of application for legal protection (patent or utility model protection), and granting processes is beyond the scope of this article.

The research is qualitative and socio-legal. The relevant statutes, court cases, secondary sources are briefly examined. Empirical data was collected from purposely selected traditional medicinal practitioners and beneficiaries as insights to the discussion and analysis.

¹⁸ In Ethiopia, a relatively comprehensive patent proclamation (A Proclamation Concerning Inventions, Minor Invention, and Industrial Design Proclamation No. 123/1995 *Neg. Gaz. of the Trans. Gov. of Eth*, 54th Year, No. 25 (May 1995) (herein after Patent Proclamation) was promulgated in 1995. It is effective after the enactment of the Regulation in 1997, but the existence of this law is still unknown to most traditional inventors. The legislation was designed in line with developed systems.

See also Fikremarkos Merse (2012), “Ethiopia’s World Trade Organization Accession and Maintaining Policy Space in Intellectual Property Policy in the Agreement on Trade-Related Aspects of Intellectual Property Rights Era: ...” *Journal of World Intellectual Property*, Vol. 15 No. 3, pp. 172, 173.

¹⁹ Interview with Ato Bikamo Ukumo, a former customer of Kuta, Dangara Salata Kebele, Boloso Sore Woreda, Wolaytta Zone, Southern Ethiopia Regional State.

2. Overview of Views of Actual and Potential Beneficiaries of “Secretly Held” Traditional Medicines

The data collected from respondents with diverse background and socio-economic status reveal that substantial number of the respondents has had experience of using traditional medicines, and almost all of the traditional medicine practicing clinics suggested that legal protection should be accorded, and they underlined the need for positive action to be taken by the regulatory authority to preserve traditional medicinal knowledge and the practice.

The interviews included respondents from the Ethiopian Intellectual Property Office (EIPO), Directorate of Modern and Traditional Medicine Research Center of Ethiopian Public Health Institute (EPHI), ten traditional medicinal practitioners (from Addis Ababa,²⁰ Amhara Regional State²¹ and Southern Ethiopia Regional State).²² The views of respondents varied towards the use of traditional medicines.²³ While some of the respondents believe that the public has good impression to traditional medicines, others have expressed lack of confidence.²⁴

²⁰ Some traditional medicinal practitioners such as successors of Hakim Mamo, and others are current leaders of traditional medicinal practitioners, for instance, the owner and practitioner of Ethio-Mefte, Hakim Abraham Walelign of CMC Addis Ababa.

²¹ In Amhara National Regional State, there was widespread public discourse regarding traditional pest that was claimed to destroy invasive weed (water hyacinth, locally known “Enboch.” Water hyacinth or “Enboch” has been aggressively invading Lake Tana and other Ethiopian lakes.²¹ The alleged “traditional” pest was invented by Merigeta Belay Adamu, but dispute arose regarding its efficacy. The author attempted to reach Merigeta Belay, interviewed pertinent government offices in Amhara National Regional State and visited research sites developed in collaboration of a research student of Bahir Dar University and Merigeta Belay Adamu.

²² Visit to the regional state was needed because the original idea for this investigation arose from the prevailing situation in loss of traditional medication and the practice.

²³ Some of the causes include issues of spirituality which some do not believe, lack of scientific study on the healing quality, poor handling and apparent lack of hygiene of practitioners and containers of medicines, and lack of formal recognition by regulatory agencies.

²⁴ More empirical data on the significance of traditional medicines in Ethiopia is reported in Tibebu Solomon, *supra* note 12. The report deals with a survey of traditional medicines including community held traditional medicines. See also Gizachew Girma, *Protection of Traditional Knowledge under International and Ethiopian Law with particular Reference to Traditional Medical Knowledge: current Trends, Prospects and Challenges* (LL.M. Thesis, AAU (2011)).

In accordance with the empirical data collected from beneficiaries of ten traditional medicine clinics, traditional medicinal products are on continuous deterioration. The cause of deterioration ranges from absence of legal protection, climate change that wipes out medicinal herbs, non-awareness of the possibilities of getting legal protection, or lack of legal or administrative support, non-availability of research facilities, lack of cooperation from the traditional medicinal practitioners due to fear of piracy, and the conflation of traditional medicinal knowledge with spirituality and belief of practitioners.²⁵

Nearly half of the respondents believed that legal owners of the traditional medicine were practitioners,²⁶ and there were respondents who conferred ownership on local community and government. With regard to undisclosed traditional medicines, as the elements are secretly held and practiced by traditional healers, the local community or the regulatory agency is unaware of their nature, quality, or processes of preparation.

So far Ethiopia has lost a number of undisclosed traditional medicinal knowledge, and serious positive measures should be taken to save the wisdom. The measures are expected to include incentives that can encourage traditional medicinal owners and practitioners to disclose the process of crafting medicinal products by designing an effective and trustful legal mechanism that can guarantee current practitioners or possessors of the knowledge.²⁷ In this regard, a review of Ethiopian patent law and its adequacy to safeguard the interest of intellectual property right of holders/owners of secretly held traditional medicinal acumen appears pertinent.

²⁵ 67% of the respondents view that traditional medicinal practice is intertwined with spiritual belief of practitioners. Hakim Alemayehu Gebib expressly disclosed that in certain exceptional cases, he uses prayer to cure incurable diseases. Interview with Hakim Alemayehu Gebib.

²⁶ 45% of the respondents believe ownership of undisclosed traditions belong to the practitioners, 12% of the respondents believe traditional medicines belong to local community. The latter appears applicable to traditional medicines known to the local people. 11% responded the owner of traditional medicines is the government, and 17% of the respondents believe that traditional medicines belong to the whole mankind. This assertion may work only to traditional medicinal knowledge that is under public domain.

²⁷ 37.5 % of the respondents suggest the government to afford legal protection to TM and the traditional practices.

3. Exploring the Regulatory Framework

Before the enactment of Patent Proc. No. 123/1995 (on 10 May 1995), Ethiopia had no comprehensive patent legislation. In the absence of a law that can effectively guard the interest traditional medicinal practitioners, there was no meaningful protection. Mere duplication of an invention by a competitor did not satisfy the requirements of the unfair competition, and hence the real inventor remained with no institutional protection. Anyone who was able to duplicate a given invention did it without the need to “waste time” by endeavoring to create a novel one. As a result, inventors or owners of inventions had to take care of their wisdom privately. The usual measure of protection was to keep the invention secret, as far as possible.

Devoid of trade secret laws in Ethiopia, secretive holding cannot be effective in all cases and situations. In developing nations where weak law enforcement and uncertain regulatory frameworks are prevalent, secretive holding of a valuable inventive formula is hard to maintain.²⁸ In this scenario, it may not surprise an inventor to see his/her invention being extensively produced or traded.

Secret holding of an invention may not be desired at least for two reasons. First, the inventor may pass away without passing the inventive formula to others. Next, trade secret system by itself is not helpful to enrich the public domain. While the inventor’s property interest should be protected, such protection should meanwhile ensure benefits to the public by enriching public domain. Moreover, proof of piracy in trade secret law is very difficult and does not normally prevent independent creation and reverse engineering.

The advantage of trade secret is unlimited use of the right. This means, by maintaining secrecy, the innovator can use the creation until the secrecy is lost.²⁹ But in case the inventor dies without disclosing the formula to the next of kin or other “reliable” persons, the secret formula would “perish” upon the death of its holder. The patent system, on the other hand, can save innovation, by according innovators monopolistic holding for expressly delimited duration while enriching public knowledge domain.

²⁸ Gladstone Mills *et al* (2009). *Patent Law Fundamentals*, Lose leaf series, §4.

²⁹ For example, the formula of Coca Cola is never disclosed, and the Company enjoys the invention for unlimited period of time.

4. A Glimpse into Problems in Protecting Invisible Property Rights in Ethiopia

The Patent Proclamation³⁰ provides four kinds of protections: patent, patent of introduction of foreign issued patents, utility model certificates and certification of industrial designs. Although the time of protection varies, these privileges protect the interest of inventors and encourage them to disclose their invention to the regulatory agency – the Ethiopian Intellectual Property Office (EIPO).

In ancient and medieval societies, the property quality of intellectual property was hardly comprehensible.³¹ As intellectual property is an invisible property in such societies, it did not sound as protectable. The expression, “[...] intellectual property may seem, at first glance, self-contradictory because it combines the ephemeral products of the intellect – ideas and [...] with the concept of tangible property.”³² Moreover, unlimited number of people can use a given intellectual property at a given time, and the use cannot exhaust the property or diminish its number or quality. It was thus difficult to explain loss of a right that cannot deplete. This had negative effect in shielding rights in intangible properties including patent.³³

Needless to say, a creation of the mind is property because one has endeavored to generate and realize it, spent time and money in having their mental vision brought into the reality. John Locke’s labor theory of property justifies that a product of one’s labor belongs to the laborer. Therefore, it is fair to afford legal protection to fruits of the mind including secretly held traditional medicines.³⁴

³⁰ Patent Proclamation No. 123/1995, *supra* note 18.

³¹ In the absence of institutional protection, traditional people had to protect their economic interest. As Merges and Ginsburg noted “The legal safeguarding of rights in the product of creative thought was virtually ignored in ancient times.” Robert P. Merges, Jane C. Ginsburg (2004), *Foundations of Intellectual property*, Foundation Press, p. 269.

³² Bruce P. Keller and Jeffrey P. Cunard (2008) *Copyright Law, A practitioner Guide*, § 1.1. Practising Law Institute, pp. 1 – 2.

³³ Unless some form of visible property is taken, connotation of theft of a process may appear ridiculous. However, the information of the inventive process can enable others to make the same invention thereby putting the original inventor at risk. Loss of inventive information therefore is loss of property.

³⁴ John Locke, (1689) Second Treatise, §§ 25 – 51, 123 – 26; See §§ 138 – 40, in Ch. 17 No. 5; John Locke in his Treatises elaborated the relationship between one’s labor and property right. Locke argues that property right arises from the labor that is exerted to produce it. He stresses that the laborer owns his labor and its fruits.

Intellectual property has great economic value, and hence should have better protection. A right of property includes “the power to exclude” others and this element also applies to patent thereby entitling an owner of intellectual property to exclude others from unauthorized duplication or use of the products of his/her mind.³⁵ However, intellectual property is intrinsically intangible, and its possessor or owner is not visible in an ordinary sense.³⁶ Nonetheless, these features cannot justify piracy.

To maintain continuity and enhance progress, innovative talents should be recognized, rewarded and fruits of their intellect should be preserved for the future generations. Protection of intellectual property rights of innovators is believed to stimulate further creativity. As duly noted: “In the knowledge-driven economy of the 21st century, intellectual property plays increasingly important role as a tool for economic, cultural and social development.”³⁷ In this regard, the Director General of WIPO remarked:

“The increasing market value of knowledge-based creations and outputs, and the economic dynamism they can fuel, is generating new and broad-based opportunities for economies to create national wealth, as the basis for sustainable development, and to deliver more widespread welfare gains from technological development.”³⁸

The recognition and legal protection of the rights of inventors would usher potential creative intellect and investment. The inventor’s exclusive right can be best protected by an effective legal framework. In the context of traditional medicinal knowledge, the benefits of legal recognition and protection of owners of secretly held inventions include: saving undisclosed knowledge from possible loss, rewarding right holders for the disclosure, practicing hidden knowledge without fear of piracy, and stimulating interest of the generation to advance the knowledge through further investigation.³⁹

³⁵ Jay Dratler Jr & Stephen M. McJohn, (2009). *Intellectual property, commercial, creative and Industrial property* §1.01 Loose-leaf

³⁶ Ibid.

³⁷ Proposal by the United States of America to establish a Partnership Program in WIPO: An elaboration of Issues Raised in Document IIM/1/2 available at, http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_4.pdf.

³⁸ WIPO, *Proposed Program and Budget for 2006/07* p. 8. Available at: https://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_8/wo_pbc_8_3-part5.pdf

³⁹ Disclosure of secretly held knowledge can enable the future generation to use the shoulder of forefathers to see further and come up with scientifically studied and improved innovation.

5. Exploring Patentability of Secretly Held Traditional Medicines in Ethiopia

5.1 The balance between exclusive rights in patent and public benefits

A patent is a document that can be granted by a government agency evidencing that the inventor mentioned therein is authorized to make, use, sell or offer to sell a given product in exclusion of others.⁴⁰ This is a *negative right* that is conferred on the patentee. The right to exclude others from making, using, offering for sale, selling or importing the invention confers a right of monopoly to the patentee.⁴¹ A negative right is considered as an incentive to the disclosure of privately held or known wisdom. As invention necessarily entails cost and risk of loss, the exclusionary incentive thus is “[...] the fundamental purpose of the patent grant [...]”⁴²

The right to exclude others is an essential feature of real property right that patent law shares.⁴³ If anyone attempts to make, sell, or use a patented invention without permission of the patentee, s/he can stop the usurper. The patentee can institute lawsuit against any person who infringes protected rights.⁴⁴ However, use of a patented invention for non-commercial purposes, like use for scientific research, use with the consent of the patentee, or other purposes that can promote public interest is not viewed as infringement.⁴⁵ Undoubtedly, monopolistic holding of an invention is a privilege that the law bestows as a price for the disclosure. The restrictive monopoly is a temporary deprivation. In Ethiopia the duration for monopolistic holding is 15 years, with the possibility of extending it for five more years provided the invention properly works in Ethiopia.⁴⁶

Although monopolistic holding carries some societal cost as it stifles market competition, the long-term benefits of the invention outweigh its short run restriction. The rationale behind patent based monopolization is “[...] to encourage innovation and its fruits [...] into the public domain through disclosure.”⁴⁷

⁴⁰ Fred Warshofsky (1994), *The Patent Wars*, Wiley.

See also Patent Proclamation *supra* note 18. Art. 15, 22 (1).

⁴¹ This is the most important privilege of the patent holder. See Art. 22(2) of the Patent Proclamation *supra* note 18.

⁴² Sung and Schwartz, (2000), *Patent Law Hand Book*, p. 109.

⁴³ *Id.*

⁴⁴ Patent Proclamation, *supra* note 18. Art. 24.

⁴⁵ *Id.*, Art. 25.

⁴⁶ *Id.*, Art. 16.

⁴⁷ I Miller *et al* (2009), *Patent Law Fundaments*, § 1:2 (2nd ed.) p. 1 – 6.

To counter the side effects of patent, monopolistic right can only be granted to inventions that pass the rigors of patentability thresholds. Patentability requirements and processes are very strict. By implication, therefore, patent protection cannot be granted without good reason. It should be granted to worthy inventions “[...] for the achievements of genius.”⁴⁸ In the words of Maureen, patent laws that promote progress need “...an appropriate balance between the grant of exclusive rights to encourage innovation and the maintenance of viable public domain from which further progress may result.”⁴⁹ A patent, is thus an incentive to the disclosure, and it cannot be granted unless the disclosure *teaches*.⁵⁰

Disclosure of inventive elements is viewed as *quid pro quo* between the government and the inventor. The disclosure should be sufficiently clear thereby enabling experts in the field to remake the invention without further research.⁵¹ Concealment of material information would cause denial of the protection. If the concealment of best mode is proved, even a granted patent may be invalidated or if it is under the process of prosecution, the application will be denied.⁵² Each *claim* should demonstrate how the invention works.

The disclosure serves various functions: first, the inventor vividly limits the scope of the invention, and the patent monopoly cannot be extended beyond the contours of disclosure. The other advantage is that third parties will have fair notice of a given invention and would not waste time and resource by working to reach at a wisdom that is already known. Disclosure thus avoids duplication of effort.

5.2 Requirements for patentability: Novelty, non-obviousness and applicability

5.2.1 Novelty

As patent protection extends to the whole world, patentability requirements of Ethiopian patent law mirrors the enumerations of advanced patent systems.⁵³

⁴⁸ Merges and Ginsburg (*supra* note 31) 102.

⁴⁹ Maureen A. O Rourke (2000), “Toward a Doctrine of Fair use in Patent Law”, *Columbia Law Review*, Vol. 100 No 5, p.1177.

⁵⁰ Mills *et al*, *supra* note 28

⁵¹ 35 U.S.C. §112 (1994); See also Patent Proc. *Supra* note 19. Art. 9(4) (b) (c).

⁵² See Donald S. Chisum (1997), “Best Mode Concealments and Inequitable Conduct in Patent: A Nutshell of Review of Recent Federal Circuit Cases and a Plea for Modest Reform,” *Santa Clara High Tech. L. J.* Vol. 13, No. 2, p. 278.

⁵³ Apart from patenting a novel idea, patentability requirements in Ethiopia and the United States patent law are almost identical: These are: novelty (newness (Art. 3), non-obviousness, publication in scientific journals, use for more than a year etc. Though

In Ethiopia, too, an invention may be patented if it is "...new, [and] involves an inventive step and is industrially applicable."⁵⁴ The most important method of proof of novelty (newness) is describing a prior art and revelation of special features of the claimed product in comparison with the qualities of prior art. However, the Patent Proclamation does not require inventors to prove distinctive qualities of the claimed invention *vis-à-vis* prior art. An applicant is required simply to describe features of his/her invention in a way others can make the invention simply following the disclosure.

The invention need not be absolutely new, having no features of the existing product. Nowadays, it is hardly possible to innovate a thing completely new (never envisioned before) without holding some features of prior art. In this regard, Isaac Newton (1643-1727) had remarked how prior inventions accelerated his own novel discoveries: "If I have seen far, it is by standing on the shoulders of giants."⁵⁵

In accordance with the Ethiopian patent law (that is crafted in line with the global patent system), a prior art comprises of "[...] everything disclosed to the public, anywhere in the world, by publication in tangible form or by oral disclosure, by use or in any other way [...]"⁵⁶ An applicant for patent protection therefore should provide sufficient description of the claimed invention to enable patent examination effective. On the basis of the disclosure, patent examiners will consider global database and determine whether the claimed invention is a novel one (new) or not.⁵⁷

expressed in different terminology, the basic tenets of patentability in Ethiopia are almost similar to the patentability requirements of US patent law. This fit for all criteria of intellectual property system does not suit developing economies. Some argue for a *sui generis* intellectual property regime. See J. Janewa Osei-Tutu (2011), "A Sui Generis for Traditional Knowledge: The Cultural Divide in Intellectual Property Law" *Marquette Intellectual Property L. Rev* Vol. 15, p. 150.

⁵⁴ Patent Proclamation, *supra* note 18, Art. 3(1).

⁵⁵ Merges and Ginsburg (*supra* note 31) 165 (quoted from Suzanne Scotchmer, (1991) "Standing on the Shoulders of Giants: Cumulative Research and the Patent Law" 5 *The Journal of Economic Perspectives*, p.1.

⁵⁶ *Ibid.*

⁵⁷ In the case of traditional medicine, the inventor who secretly holds the invention, should describe the qualities of the medicine. The claimant should also sufficiently prove how his/her invention is different from known similar invention. An issue arises whether a poorly trained traditional medicinal practitioner can discharge the obligation of proving newness test. Given the current scenario, it appears unlikely. The requirement to prove novelty of traditional medicines appears very hard, if not impossible. This would discourage potential traditional inventors to disclose their intention or does not encourage them to engage in inventive ventures. The Ethiopian law prohibits issue of

With regard to traditional medicinal invention, description of the best mode of invention necessarily requires laboratory test and description of chemical components of the claimed medicine. Empirical data and the reality on the ground reveal that Ethiopian traditional medicinal practitioners are not in a position to test their invention by themselves, or may not be willing to offer the claimed medicine for testing.⁵⁸ Laboratory test certainly requires traditional practitioners to show the invention, the herbs from which the claimed invention was extracted, and the chemistry of the medicine. According to a respondent, traditional medicinal practitioners do not usually cooperate with research centers, unless assurance is given from the highest public authorities,⁵⁹ and there are traditional medicinal practitioners who do not trust the law in its current form, and agencies that have research facilities.⁶⁰

patent if similar invention is already known anywhere in the world. In Ethiopia, the applicant for patent need not prove the non-existence of a similar item or how the invention is completely different from the prior art, but the applicant should sufficiently describe the qualities of the invention. It is up to the patent examiners to search for similar inventions anywhere in globe in light of the description provided.

⁵⁸ The attempt of Ethiopian Public Health Institute to convince Merigeta Belay signifies this fact. The Research Directorate of EPHI attempted to work with the traditional medicinal practitioner but all possibilities to convince him to continue working together failed. (Interview with Firehiwot Tekla, *supra* note 10). Moreover, Merigeta Belay refused to provide the alleged traditional medicine that had dried up the invasive weed in research pods developed by the PhD student of Bahir Dar University for laboratory test. Initially Merigeta Belay claimed to have a traditional medicine that can wipe out the weed to the Bahir Dar University. A regional government body that was entrusted with mandate of coordinating removal of the invasive weed had aligned Merigeta Belay with the research student. The student prepared two ponds near Abay River that can grow the weed for research purposes. This author observed both of the ponds. According to Ayalew Wondie (PhD), Merigeta Belay poured the claimed medicine on to the weed that was picked from the pond. The weed dried up within 24 hours. The PhD student researcher was so happy and asked Merigeta Belay to give her the alleged traditional pest for laboratory testing. He denied the request alleging piracy. (Interview with Ayalew Wondie (PhD), Associate Professor of Aquatic Wetland Science at Bahir Dar University and Coordinator of the regional government agency that was set up to oversee removing the invasive weed known as water hyacinth, *Eichhornia Crassipes*, locally known as “Enboch”). Merigeta Belay initially applied to get patent of the claimed invention at the Ethiopian Patent Office, but later he abandoned it. (The initial application record is available at the Ethiopian Patent Office in Addis Ababa).

⁵⁹ Interview with Hakim Alemayehu Gibeb, Alpha Traditional Medicine Centre, Addis Ababa.

⁶⁰ The actions and reactions of Merigeta Belay Adamu are examples for the reluctance of Ethiopian traditional medicine practitioners to cooperate with research centres and researchers.

These challenges not only cause further deterioration of traditional knowledge but, also adversely affect scientific research that gears toward improving traditional inventions, including traditional medicines.

Even where laboratory test is not a requirement, traditional medicinal practitioners are not usually willing to describe the best mode of making the invention. They are reluctant to deal with third parties in fear of piracy.⁶¹ Thus unless the secretive tendency of traditional practitioners is changed the chance of getting patent protection is doubtful.

In addition to novelty, newness of an invention inherently holds time element. An inventor seeking patent should file as early as possible. The term 'new' intuitively does not support unwarranted delay in seeking protection or disregards old innovations that have been in use. Expeditious disclosure serves public interest as it would avoid or lessen the chance of loss of the already acquired knowledge. The inventor should seek patent grant as soon as s/he is sure that the invention deserves patent protection. Any unwarranted delay would affect patentability.⁶²

The Proclamation prohibits patent protection to an invention if it has been in use or offered for sale for a period exceeding one year.⁶³ Arguably, therefore if an invention is not offered for sale, or not used in any way, the one-year period of limitation will not run. It can be suggested that an undisclosed invention that is not in use or offered to the public in any way can be patented at any time whenever the inventor wishes protection. The newness requirement does not suggest non-disclosure for all purposes and in all cases. For instance, disclosure of an invention for the purpose of trial cannot affect the newness requirement. Further, the inventor may offer the thing invented to the public for promotion or mass trial. If the inventor files for patent protection within 12 months of such disclosure, the disclosure cannot affect newness.⁶⁴

Regarding secretly held traditional medicines, it is not easy to comprehend an exact time in which the invention was discovered.⁶⁵ In some cases,

⁶¹ Id.

⁶² In the United States, an inventor is expected to apply for patent within a year of the completion of testing of the invention.

⁶³ Legislative lacunae are filled by US courts; some of the cardinal rules of patent law are stipulated by the judiciary.

⁶⁴ Id. Patent Proc., *supra* note 18, Art. 3 Sub-art. 3.

⁶⁵ For instance, an interview respondent at Alpha Traditional Medicine Center informed that he learned the practice and curing herbs from his uncle long time ago. He never disclosed the curing herbs and the methods of preparation of the medicines to anyone

practitioners themselves may not be aware of an exact time in which the idea of medicine was realized.⁶⁶ Substantial numbers of traditional medicinal practitioners have inherited the knowledge from their parents or close relatives. Despite the possibility of use or sale, the public has no clue about the nature or the herbs from which the medicines were derived and the chemistry of making. Thus, the availability of the medicines to the public does not mean availability of the wisdom.⁶⁷ It is to be noted that unless the inventive formula (processes and procedures of making) is known by using carefully designed patent system or unless the formula is sold to someone else, the undisclosed chemistry in making critical medicinal knowledge (and product) cannot be preserved to the future generation.

5.2.2 Non-obviousness

There is a requirement of proving *non-obviousness*⁶⁸ for the patentability of a given invention because the new invention should involve inventive step.⁶⁹

so for. He gathers medicinal herbs from Awash area and North Shoa but has no garden of his own. He got a letter of cooperation from the head of medicinal plant section of the chairman of Ethiopian Traditional medicine Association. (Interview with Hakim Alemayehu Gebib –Alpha Traditional Medicine Center, Addis Ababa.

⁶⁶ For example, a traditional *hakim* in Boditi town, Wolaytta Zone, S/N/N/R/S informed that it took several years to practice medication. She knew the medicine would work but afraid of intimating the same to the public. She consulted some of her friends who encourage her to operate the practice. This took several years from the moment of discovery of the medicine and the practice. (Interview with Eyoba Aye, Boditi, Wolaytta)

⁶⁷ Inventors of the traditional medicine often withhold the inventive formula and the kind of herb from which the medicines invented secret. They change the color, odor or other identifiable features. Thus, use or offer for use of the medicines simply cannot teach for remaking. Denying patent protection for the sole reason of use appears contrary to the cherished goals of patent. However, if the traditional medicine is offered to the public in a way the user or experts in the field can identify the source of the medicine and remake it, after lapse of one year, patent protection cannot be granted. This rule also works to community held traditional medicines. As the very purpose of patent system is to save loss of the already known wisdom and everybody is aware of the wisdom, it is assumed that the knowledge is in the public domain. Yet, the “use requirement” cannot obstruct granting utility model certificate (discussed in later sections). The Ethiopian Patent Office has already granted utility certificate to three community known medicinal wisdom after through laboratory test by the Research Directorate of Ethiopian Public Health Institute.

⁶⁸ *Graham v. John Deere Co*, 383 U.S. (1996) p.1; Non-obviousness requirement is the most significant obstacle that a patent applicant faces. It has been called the “final gatekeeper of the patent system.”

⁶⁹ Patent Proclamation, *supra* note 18, Arts. 3(1), and 4(2).

The *non-obviousness* requirement constitutes the core element of the patent system that justifies patent grants.⁷⁰ It is “a condition in which an invention cannot receive a valid patent because a person with ordinary skill in that technology can readily deduce it from publicly available information.”⁷¹ The non-obviousness requirement seems an extension of novelty. While novelty focuses on the newness of the invention, non-obviousness is about non-implication of the already invented discovery or the already existing and known invention.

Almost all patent laws require non-obviousness for patentability.⁷² The inventor must exert innovative acumen to come up with a new thing because s/he cannot enjoy monopoly over an item that is already in the public domain or that makes no contribution to the public. Things in the public domain are the property of everyone and should not fall under the exclusive use of a single person. A trivial contribution thus cannot allow a person to have the benefit of patent monopoly.

5.2.3 Usefulness (applicability)

A patentable product should have features of applicability. The invention should have significance “[...] in handicraft, agriculture, fishery social services and any other sector.”⁷³ This list in the domains of applicability is not exhaustive,⁷⁴ and a traditional medicine practitioner can prove how the claimed invention can heal or serve the claimed purpose. In other words, the invention should be useful. Usefulness is gauged based on the product’s quality in tackling societal problem. Thus, the applicant for patent should prove how the invention would address a current or future problem.

The foregoing discussion indicates that traditional medicinal inventions may not pass through the complexities of patentability yardsticks that make patent protection out of reach for traditional medicinal practitioners.⁷⁵

⁷⁰ See, Merges and Ginsburg (*supra* note 31) 91

⁷¹ Garder-Shafran Rachel, (2004). *Intellectual Property Law Dictionary*, Loose-leaf Series.

⁷² The expression “Non-obviousness” appears equivalent to the phrases, “inventive step” as used by some jurisdictions, including Ethiopia. See Patent Proc. *supra* note 18, Art. 3(4).

⁷³ Patent Proclamation, *supra* note 18. Art 3(5).

⁷⁴ The United States patent law simply expresses usefulness as a requirement for patentability.

⁷⁵ For detailed discussion on troubled relationship between traditional knowledge and intellectual property see Chidi Ogumanam, (2008), “Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialects of Knowledge Transformation,” *Indiana J. Global L. Stud* Vol. 15 No. 2 p. 489.

Consequently, traditional inventors would tend to ignore the law and sustain *self-help* method of protection. In the absence of protection and incentives through viable options, it thus seems unlikely for a traditional inventor (who secretly holds therapeutic formula of crafting a traditional medicinal product or process) to disclose composition of the medicine. In effect, undisclosed inventions have the tendency to stay in secret holding, which may not enrich public domain.

6. Utility Model Certification *vis-à-vis* Secretly Held Traditional Medicinal Products

6.1. Utility model certification: Nature and significance

International patent norms that emerged in developed economies to address the needs of the advanced nations may not suit to traditional and minor inventions.⁷⁶ Traditional inventors cannot fairly compete with big innovators that have extensive experience and strong financial power. The consideration of global standards can become uphill thresholds to minor inventors. This would discourage traditional inventors and force them to pursue a greater level of secrecy. Variation in standards of development may thus need a *sui generis* form of intellectual property regime.⁷⁷ With a view to address the need for protection, most developing, and some developed nations have devised alternatives of patent system that can possibly safeguard the interest of traditional innovators.

A minor invention is a useful innovation in local communities even though it may not be absolutely novel in global standards. It may not also meet the inventive step (non-obviousness) criterion, as required in patent law. With a view to attract and encourage traditional innovators, nations have devised the *utility model certification*.⁷⁸ In this model, the requirements and procedures of

⁷⁶ Id., Forward by Ortiz at vii.

⁷⁷ Consequently, according to Ruth Okediji, “Despite a multilateral impasse at the World Intellectual Property Organization (WIPO), formal *sue generis* regime for the protection of TK [Traditional Knowledge] are on rise globally.” See Ruth Okediji, (2021), “Grafting Traditional Knowledge onto a Common Law System,” *Georgetown L. J.* Vol. 110 p. 77.

⁷⁸ According to Ortiz, utility model may “[...] serve as a useful tool for promoting the type of innovation generated in developing countries.” See Uma Suthersanen (2006), “Utility Models and Innovation in Developing Countries,” *UNCTAD-ICTSD*, forward by Ricardo Menéndez, Ortiz p. vii, Available at: https://unctad.org/system/files/official-document/iteipc20066_en.pdf Nations are not uniform in use of the connotation “utility model.” Use of the terms denoting utility model reflect the purpose and interest of nations. Australia captions the terms “utility

getting certificate of protection can be shaped in consideration of local realities. Therefore, a developing nation can relax the requirements for getting legal protection by setting its own standards, which may consider the volume of available minor inventions, the need for further invention and the extent of motivation needed to attract potential innovators. Therefore, in developing nations where minor inventions are frequent, the utility model system has paramount importance.

Recognition of the utility model enables owners of minor inventions to enjoy monopolistic use of an invention.⁷⁹ Ethiopian law authorizes owners of minor inventions to enjoy utility model certification provided that the invention meets the standards of novelty and industrial applicability.⁸⁰ It is to be noted that a simple change in the shape of an item, proportions, or material of a patented object or (one that is under public domain) cannot be protected.⁸¹ However, if the change in shape improves the quality of the item or elevates the quality of use or suppresses problems in use of the item, utility model protection can be granted.⁸²

Likewise, where an inventive knowledge, which is under public domain, has been improved either in quality or function, it can be protected on account of a new and useful improvement.⁸³ But "... mere replacement of elements in a known combination by other known elements having an equivalent function, which does not produce [..some kind of] improvement in its use or the effect of its intended functions," cannot be protected.⁸⁴ The utility model certificate holder can enjoy all the benefits until the lapse of the duration stated in the utility model certificate. In Ethiopia, such time is five years with the possibility of extension to five more years depending upon the function and

model as innovational patent, while Malaysia use the words, "utility innovation," France applies the expression, "utility certificate," and in Belgium it is "short term patent." Id, at 1.

⁷⁹ The World Intellectual Property Office attests this fact stating: "While the requirement of "novelty" is always to be met, albeit some countries only on a local level, that of "inventive step" or "non-obviousness" may be lower or absent or absent altogether." See WIPO, Utility Model. Available at:

https://www.wipo.int/patents/en/topics/utility_models.html

⁸⁰ Patent Proc. *supra* note 18, Art. 38.

⁸¹ Id., Art. 39(1).

⁸² Ibid.

⁸³ Id., Art, 40.

⁸⁴ Id., Sub Art. 2.

significance of the invention.⁸⁵ The possibility of getting utility model certificate for traditional medicines is briefly discussed below.

6.2. Can undisclosed traditional medicine be protected under Utility Model Certification?

Unlike patent which is international in standard and universal in content, the *utility model* system allows due consideration of national situation (*sui generis*) in affording protection. The good side of this standard is the possibility of gauging the scope of the newness in local standards. This is one of the relaxations that a minor inventor can enjoy. Accordingly, a nation can craft its utility model law in a way it can attract emerging minor innovators. In Ethiopia, “[a] minor invention that possesses novelty and industrial applicability [can be protected through utility model.]”⁸⁶

The expression, ‘minor invention’ denotes that the invention is not a ground-breaking novel, but it has a better quality that is different from the existing similar items (prior art), either in terms of quality or function. Traditional medicines, as minor inventions, could be protected under the utility model, provided that the requirements of novelty and industrial applicability are met.⁸⁷ Utility model is suitable to traditional medicinal products because there is a possibility for further localization of standards. This aligns with the legislative rationale as indicated in the preamble of Proclamation No. 123/1995 which aims at encouraging local creativity – advancing local creativity.⁸⁸

In determining newness (novelty) and industrial applicability, the scope of comparison is narrow –only prior arts available in Ethiopia will be used as a standard of comparison. In Ethiopia, an applicant for utility model certification is required to describe the best mode of his/her product, but need not describe qualities of prior art. However, examination of distinctive features of the invention in comparison with prior art is highly strategic to expedite the process. One can still question the meaning and scope of prior art in the case of traditional medicines, and the methods of comparison. The claimant of utility model certificate is required to prove how his/her invention alleviates a problem that no prior art does. In this regard, the claimant shall describe the new qualities that the claimed invention possesses. Description

⁸⁵ Id., Art. 44.

⁸⁶ Patent Proclamation, *supra* note 18. Art. 38.

⁸⁷ Id., Art. 38(1).

⁸⁸ The first statement of Proc. No. 123/1995 states, “[...] in order to encourage local inventive and related activities thereby building national technological capability.”

of the best mode would disclose how the new invention is pragmatically different from similar products.

However, to an Ethiopian traditional medicinal practitioner description of distinctive qualities of their medicine may not be easy. The practitioner is required to sufficiently describe the qualities and nature of the claimed invention, and the adequacy of the description depends upon the way it would teach other professionals (inventors of traditional medicine or holders of inventive formula) by explaining the processes of making the claimed invention, how it works (how it cures), the nature of disease that the medicine actually has cured (either in test period or during secret holding), the dose, its side effect, if any, etc., including the herb, parts of her, animals, parts of animal, or mineral from which the raw material was extracted.

In addition to the proof of newness, an applicant for utility model certificate should show industrial applicability medicinal product or process. Monopolistic use of a claimed invention cannot be granted to something that is so obvious or trivial. If a medicinal product or process is already in public domain or where it is possible to make it, or where the process of making the product is already known to the professionals in the field, there is no need to permit exclusive use. Therapeutic qualities of traditional medicinal product or process, its distinctive characteristics, components, actual or potentials problems that the medicine tackles or the possibility product could tackle, or would suppress potential diseases etc., shall be sufficiently described. As briefly indicated above, descriptions of medicinal qualities of traditional medicine necessarily calls for scientific study and laboratory test. The proof would enable practitioners to get approval from the regulatory agency – Food and Drugs Authority and later on utility model certification.

A question arises whether Ethiopian traditional healers can pass through all these hurdles and get legal protection. Although it may appear unlikely, it is not impossible. If socio-economic conditions and interest of traditional medicinal practitioners is appreciated by the regulatory agency and research centers, the current discouraging scenario could be altered. Currently Ethiopian traditional medicinal practitioners are not only in the position to meet the tough requirements of the law, but substantial numbers of traditional medical practitioners are not willing to offer their invention for scientific scrutiny. They usually hesitate and suspect the potential loss of secret holding in fear of piracy. Moreover, some consider that the curative efficacy of the

traditional medicine would be diluted if all of the components of a product and the procedures of making the medicine are disclosed to the public.⁸⁹

Thus, attitudinal challenges (lack of trust) is among the problems that hinder legal protection to traditional medicinal inventions. This is a big problem to the regulatory agencies and researchers.⁹⁰ In some cases, the lack of trust is attributable to strong spiritual belief that the medicine works in a highly secretive environment.⁹¹

In spite of these challenges, some traditional medicine practitioners have expressed willingness to cooperate with researchers if the government or an accredited agency offers recognition of the medicinal product and assures legal protection. For example, Abraham Walelign of Ethio-Mefteh Traditional Medicine Center, and President of the Ethiopian Traditional Medicine Practitioners Association expressed interest to work with researchers and cooperate with the regulatory agency.⁹² Another traditional medicine practitioner expressed distrust and wishes to continue a secretive holding. When asked how to save the traditional medicinal knowledge and the practice for the future generation, he expressed his plan to train his son from his young age. A traditional hakim in Boditi town, expressed her interest to train anyone willing to get training and show the herbs and the processes of making the medicine. However, when asked if she could show at the time of interview, she responded herbs do not grow in dry season and it takes three to four hours travel to collect the herbs.

Beneficiaries of traditional medicine suggest that the government should take measures of awareness creation campaign thereby helping traditional medicine practitioners to get acquainted with the procedures of application for the protection.⁹³ As summarized above, the traditional medicine practitioners

⁸⁹ Interview with Hakim Alemayehu Gebib, Alpha Traditional Medicine Centre, Addis Ababa. Also see the problem encountered with Merigeta Belay *supra* note 58.

⁹⁰ According to Firehiwot Teka, director of the Modern and Traditional Medicine Research Directorate of Ethiopian Public Health Institute (EPHI), Merigeta Belay started to work with the Research Center but disappeared or turned his phone off after the relationship reached to the level of disclosure of the herb and therapeutic procedure for laboratory testing.

⁹¹ Interview with Hakim Alemahyehu Gebib, of Alpha Traditional Medicine Centre; interview with Firehiwot Teka, Director of Modern and Traditional Medicine and Research Directorate also disclosed the same point.

⁹² Interview with Abraham Walelign, traditional medicine practitioner and President of Ethiopian Traditional Medicine Practitioners Association in Addis Ababa.

⁹³ 76% of the respondents (to questionnaires) view that the government should strengthen community awareness towards the importance of traditional medicines.

and persons who have participated in focused group discussion, and respondents of questionnaire suggested that the government should provide incentive measures that can motivate traditional medicine practitioners to cooperate with the regulatory agency and researchers in the field.

Attitudinal changes cannot be gained overnight; it takes time and positive action. Awareness creation through teaching and provision of incentives would encourage traditional medicinal practitioners to seek legal protection and disclose the wisdom. Moreover, the government should offer an unequivocal assurance that a disclosed traditional medicinal wisdom cannot be pirated. Moreover, traditional medicine practitioners should be convinced that the date of disclosure through registration in the Patent Office is considered in setting the priority, and no one can get priority over the invention under scrutiny.

Fear of piracy, unproven assumptions, and the secretive tendency of traditional medicinal practitioners can be changed through training, provision of incentives, and reliable guarantee system stemming from trusted sources which can be legislative or administrative. The way forward envisages the alignment of traditional medicine practitioners with research centers and patent lawyers that can assist them. In the absence of awareness enhancement and motivating factors that can change the behavioral hurdles, traditional medicinal practitioners are likely to continue being attracted by the financial gain they would make through their secretive practices.

Financial incentives would attract all concerned to take part in researching and documenting the invention thereby saving loss of privately held undisclosed traditional medicinal wisdom. Thus, the alliance and meaningful research-assisted innovation call for allocation of research fund and incentives. Lessons can be drawn from Indian researchers who collectively worked in modernizing traditional medicines and got patent protection.⁹⁴ In China, before adoption of TRIPS, patent was granted to certain traditional medicines.⁹⁵ South Korea has been working to integrate traditional medicines with conventional medicines.⁹⁶ The integration of traditional medicines with conventional ones through research and incentive measures maximizes primary health care system.

The possibility of granting utility model protection to traditional medicinal knowledge is practically proven, and it can indeed be effective if various factors including incentives and harmonized interventions are addressed. The

⁹⁴ Wilder, *supra* note 5.

⁹⁵ Thamizhoviya G. *supra* note 5; See also Lin Peng. *supra* note 5

⁹⁶ Park J et al, *supra* note 5

Research Directorate of Modern and Traditional Medicine at the Ethiopian Public Health Institute, after scientific verification of the efficacy of community-held traditional medicines, has acquired utility model certificates.⁹⁷ This plausibly exhibits that secretly held traditional medicines can be protected by utility model certification in Ethiopia.

7. Conclusion and the Way Forward

While several factors have caused the steady decline in traditional medicinal products and wisdom, the major factor is attributable to the absence of meaningful, legal and institutional protection. To safeguard the property interest of their innovation, traditional medicine practitioners apply secretive methods of self-policing. Such secretive holding cannot enrich public domain of knowledge unlike the patent system that is believed to balance the interest of innovators and the public by offering possibilities for monopolistic use of the invention and disclosure. As discussed in the preceding sections, the patent system, not only shields innovators in using fruits of their labor, but also safeguards public interest by enriching public domain through disclosure.⁹⁸

The patent shield encourages innovators to disclose their invention without the fear of piracy.⁹⁹ The disclosure will make secretly held medicinal knowledge available to researchers and potential innovators that wish to use the disclosed information as stepping stone for further innovation. However, the current standards of gauging patentability requirements easily disqualify ‘secretly held’ traditional medicines from protection. This calls for the application of a mechanism that is relatively more effective. The utility model certification can be appropriate for the protection of innovation that may not meet elevated standards of patent.

⁹⁷ Interview with Firehiwot Teka, the Director of the Directorate of Modern and Traditional Medicine Research Directorate of Ethiopian Public Health Institute (EPHI), *supra* note 10. The Directorate has got utility model certificate *Damacase* and *Shiferaw* (Mornga). It is publicly known for the medicinal value of these herbs, but the actual nutrients other chemical components were not scientifically proven by the community. The scientific proof and study of the chemical elements was taken as some think novel and protection was given.

⁹⁸ Fusco Stefania, (2008- 2009), “Is the use of Patents Promoting the Creation of New Types of Securities?” 25 *Santa Clara Computer & High Tech L. J.* p.243

⁹⁹ The disclosure would help innovators to practice their creation openly hiring unlimited number of employees or assistants without fear of piracy. This would also protect parallel creation or reverse engineering.

As the utility model certification can be crafted in contemplation of local realities, it can be modified with a view to ushering undisclosed (secretly held) traditional medicinal products to light. This disclosure will save the innovation for future generations. However, unless positive supportive measures are offered by the regulatory agency, the poorly trained Ethiopian traditional medicinal practitioners are not in a position to prove novelty and industrial applicability of medicinal products.

Moreover, there are attitudinal challenges because most traditional practitioners in Ethiopia are either reluctant to twin with researchers, or they hesitate to disclose the curative medicines in fear of piracy or on spiritual grounds. Therefore, the way forward envisages that the regulatory agencies should aggressively work on awareness creation, provision of incentives and revision of the Proclamation to accommodate the interest of traditional medicinal product holders. The utility model section of the Patent Proclamation should thus be modified to include incentive measures such as training, alignment of research centers and patent attorneys, and other positive actions that can be determined in consultation with traditional medicinal practitioners. In the absence of such reform and measures, the practitioners will continue to apply the self-regulation method that cannot spare the steady decline and loss of traditional medicinal wisdom in Ethiopia. _____■

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