


RESEARCH ARTICLE

# Rethinking Ownership, Power and Policy in Drug Patents: The Case for an Ubuntu-Infused Approach

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(Accepted 18 January 2024; first published online 13 November 2024)

## Abstract

The conceptualization of a proper approach to patent law, as it relates to drug patents and access to medicines, remains contested. This article joins the discourse by positing that an application of the communitarian approach of *ubuntu* to the might of human rights is a useful framing for normalizing equity-based interventions and would help tilt the balance of power from a narrow profit-seeking imperative to one that prioritizes the public good. It contends that, while private entity *ubuntu*, corporate social responsibility or charity yield some positive results, they are inadequate and must be buttressed by the right to health, which entails access to the necessary diagnostics, therapeutics and medicine for all. The article argues against the predominant hegemony of current thought, which has so far not yielded meaningful and timely access, and advocates for a rethink of the possibilities of more just outcomes through more just processes.

**Keywords:** Ubuntu; patents; human rights; access to medicines

## Introduction

The manufacturing and distribution of life-saving medication across the globe is regulated by the current overarching capitalist global economic system, which places a premium on the maximization of profits.<sup>1</sup> This economic system is in turn protected and preserved by a system of international legal regimes. The Paris Convention of 1883<sup>2</sup> marked the first critical step in the international legal protection of intellectual property (IP), broadly conceived to include “patents,

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The authors acknowledge the funding support of the Open African Innovation Research (OpenAIR) partnership and OpenAIR partners across Africa as well as OpenAIR's funding agencies, including the International Development Research Centre, and Social Sciences and Humanities Research Council of Canada and other in-kind institutional supporters. This work is based on research supported in part by the National Research Foundation (NRF) of South Africa (grant numbers 115716 and 132090). Any opinion, finding, conclusion or recommendation expressed in this material is that of the authors and the NRF accepts no liability in this regard.

1 D Woodley *Globalization and Capitalist Geopolitics: Sovereignty and State Power in a Multipolar World* (2015, Routledge) at 13.

2 Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference (20 March 1883) 828 UNTS 305.

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trademarks, industrial designs, utility models [a kind of ‘small-scale patent’ provided for by the laws of some countries], service marks, geographical indications and the repression of unfair competition”<sup>3</sup>.

The overarching principle in the legal protection of IP is that innovation should be protected and rewarded by granting exclusive ownership of a creation or invention to its creator or inventor, from which the creator or inventor can, in turn, profit.<sup>4</sup> This underlying premise is fair and justified at face value as it guarantees that one can be both recognized for one’s creations and inventions, and rewarded for the labour that went into them.<sup>5</sup> As such, baked into the ideology for the creation of exclusivity through IP, is implied prestige from the recognition of the creator or inventor and their work, and also protection of their right to profit from their creation, invention or innovation.<sup>6</sup> Importantly, they also have the right to profit exclusively or as they so choose.<sup>7</sup> This international framework, entrenched by the Agreement on Trade-Related Aspects of IP Rights (TRIPS),<sup>8</sup> is binding on the member states of the World Trade Organization (WTO), which espouses and protects this understanding of IP and its protection. By extension, since WTO membership is extensive, it also represents near-universal acceptance of this approach to recognizing creation, innovation, ownership and the management of IP, particularly drug patents.

Patent protection is granted, upon application, to inventions that meet the criteria of: being new or novel; having industrial applicability; and having an inventive step, which means the invention must not be obvious to a person with ordinary skill in the art. The invention has to be adequately disclosed in the patent application. National patent legislation sets out inventions that are eligible for patent protection, which include pharmaceutical compounds, referred to here as “drug patents”. A patent holder has exclusive economic rights in the protected invention, including production and distribution. Patent holders may license their protected inventions, on terms they deem fit. Any unauthorized exploitation of the protected invention would constitute infringement and entitle the patent holder to seek recourse through litigation. In some cases, the patent holder may elect to license the infringing use to legitimize it. Patent law contains provisions that enable use or other exploitation of the patented invention without the necessity of seeking the patent holder’s authorization in certain circumstances. These provisions are public-interest mechanisms that enable states to meet national needs. For example, compulsory licences may be provided for, which may be relied upon in a health crisis.

The preservation and maximization of the exclusionary edge in IP is encapsulated in the provisions of TRIPS, which is the overarching international regulatory framework for IP, in which drug patents (which remain a significant regulatory topic)<sup>9</sup> are an important element. The preamble to the agreement sets out clearly that it recognizes that “intellectual property rights are private rights”. This assertion at the beginning of the critical agreement governing IP rules clarifies the priorities being sought. However, this also immediately alerts one to a strong counterpoint that can be raised,

3 “Paris Convention for the Protection of Industrial Property”, available at: <<https://www.wipo.int/treaties/en/ip/paris/>> (last accessed 27 May 2024). See also M Seckelmann “From the Paris Convention (1883) to the TRIPS Agreement (1994): The history of the international patent agreements as a history of propertisation?” (2013) 14/1 *Jahrbuch der Juristischen Zeitgeschichte* 38 at 38.

4 KE Maskus *Intellectual Property Rights in the Global Economy* (2000, Peterson Institute) at 31. See also JC Fromer “A psychology of intellectual property” (2010) 104 *Northwestern University Law Review* 1441.

5 Fromer, id at 1446.

6 W Fisher “Theories of intellectual property” in S Munzer (ed) *New Essays in the Legal and Political Theory of Property* (2001, Cambridge University Press) 168 at 174. See also MA Lemley “The economics of improvement in intellectual property law” (1997) 75 *Texas Law Review* 989.

7 Lemley, id at 993–94.

8 15 April 1994, annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 3; 33 ILM 1197 (1994), as amended.

9 See, for example, P Adusei “Regulatory diversity as key to the ‘myth’ of drug patenting in sub-Saharan Africa” (2010) 54/1 *Journal of African Law* 26, Doi:10.1017/S0021855309990155.

namely the public interest. This is seen in the preamble's dual recognition of "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives" and "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". This is further underscored by the objectives and principles set out in articles 7 and 8 of the agreement respectively, which emphasize the same elements.

There are, thus, counterviews both within the internal logic of the IP regime and from external viewpoints, which oppose the seemingly hegemonic acceptance of the framing of IP principles in the context of drug patents. Within the IP regime there is, for example, acknowledgement that exclusive ownership of a drug patent may be jettisoned under specific circumstances that form the basis of compulsory licensing and other exceptions, acting as public interest mechanisms to secure access in those specific circumstances.<sup>10</sup> In other words, a compulsory licence can be granted to grant access to the patented drug. In addition, fields of legal research, such as human rights, have over the years made a strong case for the human right to health to be understood as requiring access to medicines.<sup>11</sup> However, it is important to note that these two approaches operate from the underlying premise of being exceptions to the accepted rule of exclusionary ownership. They are thus intended as interventions to mitigate the strict rules and provide for exigencies in situations where there are "emergencies" that place human need, especially when of a global nature, over the profit incentive protected by exclusivity.

The utility of these exceptions in yielding the favourable material outcomes for which they were intended has, however, been called into question by what has arguably been the world's most dire health crisis in recent years. The COVID-19 pandemic and the varied responses to it (particularly regarding the manufacture and distribution of the eventual vaccines, therapeutics and diagnostics) has again called into question the current IP regime in its formulation and application. Importantly, it also exposed the inefficiency of the exceptions that were baked into the current IP framework, to serve in times like this. The attempt at a successful balancing act has thus been unsuccessful and has revealed the predominance of the private ownership and control paradigm. This apparent failure<sup>12</sup> of the existing rules and their exceptions has shown that the real problem lies at the root of our framing of intellectual property, particularly in the context of drug patents. While the status quo on the underlying principles of IP has largely been assumed as the "logical" starting point for any subsequent interventions, this article challenges that assumption and seeks to contribute to

10 For example, TRIPS, arts 30–31.

11 For example, see: E Oke *Patents, Human Rights, and Access to Medicines* (2022, Cambridge University Press); CB Ncube "Limiting access to life-saving medications: Three South African case studies" in E Bonadio and A O'Connell (eds) *Intellectual Property Excesses: Exploring the Boundaries of IP Protection* (2022, Hart) 163; CB Ncube "South Africa's three decades of access to medicine discourse: Blight or benefit" in S Ragavan and A Vanni (eds) *Intellectual Property Law and Access to Medicines TRIPS Agreement, Health, and Pharmaceuticals* (2021, Routledge) 235; G Velásquez, CM Correa and V Ido *Intellectual Property, Human Rights and Access to Medicines: A Selected and Annotated Bibliography* (3rd ed, 2020, South Centre); "Access to medicines: A fundamental element of the right to health" (Office of the UN High Commissioner for Human Rights), available at: <<https://www.ohchr.org/en/development/access-medicines-fundamental-element-right-health#:~:text=From%20a%20human%20rights%20perspective,strengthen%20their%20national%20health%20systems>> (last accessed 27 May 2024); HV Hogerzeil et al "Is access to essential medicines a part of the fulfillment of the right to health enforceable through the courts?" in M Grodin et al (eds) *Health and Human Rights in a Changing World* (3rd ed, 2013, Routledge) 139; SP Marks "Access to essential medicines as a component of the right to health" in A Clapman and M Robinson (eds) *Realizing the Right to Health* (2009, Rüffer & Rub) 82.

12 The assertion that there is in fact a failure depends on the lens through which one looks at it. If one sees profit as the goal, there is no failure; if one sees access as the goal, maybe there is. Failure here is in the context that only 70.6% of the world has been vaccinated thus far, with only 32.8% of people in low-income countries having received at least one dose: "Coronavirus (COVID-19) vaccinations" (Our World in Data), available at: <<https://ourworldindata.org/covid-vaccinations>> (last accessed 27 May 2024).

the emerging rethinking of the possibilities in our framing of intellectual property ownership and the distribution of the proceeds that flow from it. Building on the previous work of Ncube, where she makes a case for reimagining copyright law with an *ubuntu* approach,<sup>13</sup> this article explores the possibilities of an *ubuntu* approach to drug patents as an alternative framing, and what such an approach would mean for our understanding of patent ownership and subsequent manufacturing. These two foundational points are underscored to delineate the focus of the article. The article began with a general overview of patent law, because patents are an important tool in the commercialization of health. However, this article is not about patent law per se. Patents, as tools of commercialization, should be addressed in national health policy. However, an examination of health policy lies beyond the article's scope.

This article explores what a more humane and people-centred approach to patents would look like, without the present conflation of charity with the underlying ethic of *ubuntu* and the rights and duties that flow from it. To do this, it engages with the nature of *ubuntu* as a nuanced expression of a similar underlying and more ubiquitous concept of the communitarian ethic that is encapsulated by various cultures through varying names. The article subsequently engages with some of the salient criticisms of the communitarian ethic as an underlying principle for norm-setting in law, and then explores the possibilities of its application to drug patents, addressing some of the possible problems with such an application that the authors currently envisage. In doing this, the article engages with some of the concerns that may be raised in the implementation of this ethic that would appear seemingly at odds with the predominant neoliberal hegemony of the maximization of individual gain over all else. While the article does not presume to have all the answers to all the pressing questions that need to be addressed, it seeks to be a useful contribution to the important larger conversation exploring other ways of thinking about the perennial problems caused by the current world view that appears calcified in the framing of the possibilities. As such, this article seeks first to invite the reimagining of new possibilities, which itself is an important task in solving the problem, by proposing that the current way that things are being done is not the best way, but importantly, is also not the only way. It then explores what some of those new possibilities may be.

### The nature of *ubuntu*

*Ubuntu* as a moral philosophy is encapsulated in the expression “A person is a person through other persons”.<sup>14</sup> Another variant of this expression is “I am because we are”. These expressions convey the ideology that humanity is most expressed by acts performed in relation to, and for the good of, others. The underlying principle here is that, for one to be a “full” person, one's conduct must be such that decision making has consideration for the wellbeing of the whole and, most ideally, one makes decisions based on what will best serve the good of the whole and not simply oneself alone.<sup>15</sup> This understanding of the human condition seeks to bring a sense of equilibrium to navigating personhood and autonomy along with humanness and the recognition of duty to others and respect for others' rights.<sup>16</sup> While *ubuntu* and its other phonological variants largely draw from Southern African societies and their philosophical thought, the underlying principles are replicated in many other parts of Africa. Among the Yoruba of West Africa, the *ubuntu*

13 CB Ncube “Calibrating copyright for creators and consumers: Promoting distributive justice and ubuntu” in R Giblin and K Weatherall (eds) *What if We Could Reimagine Copyright?* (2017, ANU Press) 253. The South African Constitutional Court characterized *ubuntu* in *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, para 237, as: “a concept that permeates the Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human rights. The concept carries in it the ideas of *humaneness, social justice and fairness*” (emphasis added).

14 T Metz “Ubuntu as a moral theory and human rights in South Africa” (2011) 11/2 *African Human Rights Law Journal* 532.

15 T Metz “An African theory of dignity and a relational conception of poverty” in J de Gruchy (ed) *The Humanist Imperative in South Africa* (2011, African Sun Media) 233.

16 Metz “Ubuntu as a moral theory”, above at note 14.

sentiment is conveyed in the description of an individual as an *omoluwabi* [good person].<sup>17</sup> Similarly, in Igbo culture, also of West Africa, the saying goes that “[w]hen an animal needs to scratch its back, it runs to a tree and scratches its back against it; but when humans need to scratch their back, they run to fellow humans”,<sup>18</sup> to depict the interdependence of people for human flourishing. In the Zimbabwean tradition, the concept of *ubuntu* is known by that name to Ndebele-speaking peoples and is directly translated to *unhu* or *hunhu* in Shona. All these various concepts and terms represent an overarching communitarian ethic that is present in those various communities. The communitarian ethic is often wrongly viewed as a uniquely African concept, in contradistinction to the more “Western” ethic that is more individualistic in approach.<sup>19</sup> Even where parallels are drawn to similar concepts in the Latin American<sup>20</sup> or Asian traditions, they are still framed as relativist distinctions on the fringes, which are separate and opposite to the Western position, which is posited as the “centre”. As such, the concept of *ubuntu* and its variants are often dismissed as being a peculiarity akin to nativist, pre-modern society.<sup>21</sup> In this sense, it is misconceived as an archaic value that no longer keeps in step with modern sensibilities, even in the places it is still recognized. In a sense, it is then more easily relegated to the same realm of being an open ended, catch-all aspirational notion, as other concepts like dignity, which are also dismissed as insufficiently defined and vague.

All of this makes it easier to dismiss the communitarian approach to social ordering as impractical, vague and outdated.<sup>22</sup> Such a position, however, does not resonate with reality. This is because, contrary to the position that the communitarian ethic is intrinsically non-Western, the history of Western thought and philosophy is deeply steeped in a recognition of human solidarity. Whether drawing from Greco-Roman philosophical traditions<sup>23</sup> or the more recent “Judeo-Christian” traditions many ascribe as being foundational to modern Western society, the overarching concept of being “one’s brother’s keeper” is foundational to anecdotes that serve as a simplification of similar sentiments with the communitarian ethic. As Etzioni points out, the communitarian ethic is more ubiquitous than is usually acknowledged.<sup>24</sup>

These examples show that, contrary to the predominant narrative that societies are either totally self-effacingly communitarian or callously individualistic, human society and social ordering is more nuanced, with a recognition of the need for constant balancing of private and personal agency with social cohesion and the collective good. In this sense, the oft-quoted position of Hobbes that human life is “solitary, poor, nasty, brutish, and short”,<sup>25</sup> should in fact be read as a call for an overarching centralizing ethos of society that is transcendental and able to mitigate the misfortune that comes from an individualizing approach to human life.<sup>26</sup>

17 AK Fayemi “Human personality and the Yoruba worldview: An ethico-sociological interpretation” (2009) 2/9 *The Journal of Pan African Studies* 166.

18 UP Obioha “Radical communitarian idea of the human person in African philosophical thought: A critique” (2014) 38/1 *Western Journal of Black Studies* 13 at 13.

19 TC Kohler “Individualism and communitarianism at work (1993) 2/1 *Brigham Young University Law Review* 727. See also T Metz “African communitarianism and difference” in E Imafidon *Handbook of African Philosophy of Difference* (2020, Springer) 31. M Walzer “The communitarian critique of liberalism” (1990) 18/1 *Political Theory* 6.

20 LA Ytrehus “Making sense of communitarianism: The Bolivian experience” (2019) 40/6 *Third World Quarterly* 1089.

21 P Mwipikeni “Ubuntu and the modern society” (2018) 37/3 *South African Journal of Philosophy* 322.

22 See examples of such criticism in J Jurová “On Etzioni’s concept of a responsive community” (2016) 12/3 *European Journal of Science and Theology* 71. See also R Robertson and K White “Values and globalization: Communitarianism and globality” (2003) 4 *Globalization: Critical Concepts in Sociology* 69.

23 S Amin and N Finkelstein “The class struggle in the ancient world” (1984) 36 *Monthly Review* 51.

24 A Etzioni “Communitarianism revisited” (2014) 19/3 *Journal of Political Ideologies* 241.

25 T Hobbes *The Leviathan* (1651).

26 A more robust engagement with the positionality of Hobbes vis-à-vis individualism and its communitarian critics is given in BS Hadaway “Hobbesian individualism and the self: Bringing Hobbes to bear on the communitarian critique of liberalism” (2001, PhD thesis, Florida State University).

While the importance of showing the existence and validity of the communitarian ethic in Western thought and social ordering is fundamental to the authors' attempt to create a unifying global intellectual property regime outside the current conception, a decolonial lens may balk at such an attempt. This is based on the underlying premise that, however well meaning, the co-opting of Western accession is not necessary for legitimacy and that what is actually needed is a counter-narrative that prioritizes other forms of "meaning-making"<sup>27</sup> and norm setting.<sup>28</sup> The validity of this counter point is crucial. However, a utilitarian approach that is "pragmatic" may be more inclined to make the case for a universal common ground, which is the approach taken in this article, especially when considering the realities of the current concentration of legal, economic and political might in those Western "centres".

At the heart of the diverse expressions of the ideal socialized member of society, lies a communitarian view that the existence of human dignity and personhood is dependent upon its recognition by others and in relationship to others, if it is to be expressed in its fullest form.<sup>29</sup> The rights, responsibilities and relationships that flow from being a fully functional human in society, therefore, should be used in ways that validate the mutually affirming recognition of the human and the societal context within which they operate. In this sense, human dignity is reaffirmed by acting in ways that are worthy of that dignity.<sup>30</sup> Here, an individual is not only valuable because of their inherent dignity, but also because of how that dignity spurs them to act for the collective good. In this manner, action for the collective good is the highest societal value. This is because action for the good of the person alone is limited by the acquiescence of others who recognize the existence of their right to act as such. In this relational framing, action not merely for the good of the right holder but also for the good of those that have acquiesced to that right is the *optimal*<sup>31</sup> outcome. Therefore, the optimal utilization of human agency is not simply for self-realization but is rather geared towards the larger goal of optimization for the good and benefit of others, ie the collective good / in the public interest. The determination of the collective good itself would be context specific, but determined by what is the optimal utilization of the agency, capacity and ability inherent in the individual for collective flourishing.<sup>32</sup> As Ncube notes, the guiding principle for a communitarian approach would be "the public interest".<sup>33</sup> This would mean first defining the "public", a subject that Ncube addressed, noting that, while the public is often an amorphous construct, determining what it is, is largely context specific and often requires the balancing of seemingly opposing interests.<sup>34</sup>

Broadly speaking, communitarian thought places human relationships and their maximization at the core of social ordering.<sup>35</sup> Here, the emphasis is on groupness, sameness, cohesion and commonality, rather than survival of the fittest and the glorification of control over nature. The general guiding principle of this frame of thought is the survival of the entire community, guided by a sense of interdependence, cooperation, collective responsibility and a duty to live in harmony *with*<sup>36</sup>

27 "Robert Kegan's theory of meaning-making development is a conceptualization of how human beings make meaning of themselves, of others, and of their experiences throughout the life span": M Ignelzi "Meaning-making in the learning and teaching process" (2000) *New Directions for Teaching and Learning* 5 at 6.

28 AJ Pitts "Decolonial praxis and epistemic injustice" in IJ Kidd (ed) *The Routledge Handbook of Epistemic Injustice* (2017, Routledge) 149.

29 Metz "Ubuntu as a moral theory", above at note 14.

30 Metz "An African theory of dignity", above at note 15.

31 Emphasis added. "Optimal" is used to connote that there is no compulsion, rather more social capital in the said action.

32 Ncube "Calibrating copyright", above at note 13.

33 Ibid.

34 Ibid.

35 Metz "An African theory of dignity", above at note 15; K Wiredu "Social philosophy in postcolonial Africa: Some preliminaries concerning communalism and communitarianism" (2008) *27/4 South African Journal of Philosophy* 332.

36 Living "with" nature is in contrast to seeking to live "over" nature and to subjugate and exploit it for maximal, often individual gain.

nature.<sup>37</sup> As such, in the communitarian ethic, there is an underlying social contract where, in exchange for recognition of an individual's sense of dignity and personhood, there is a reasonable expectation of the individual that they will reciprocate by acting in ways that optimize the realization of the common good of all. As such, while one's personhood grants them their autonomy, it is also that personhood that compels them to "self-regulate" the exercise of their autonomy in their societal context.

### The communitarian ethic as a basis for norm setting

*Ubuntu*, and the communitarian ethic it embodies, is, however, not limited to philosophical explorations of human nature. It can serve as the basis for framing the social contract of a people with each other and with their state, as well as serving as the ethical imperative of their subsequent laws.<sup>38</sup> One such example is the South African Constitution, which sets out to promote human dignity and equality, and recognizes the value of *ubuntu*.<sup>39</sup> In this instance, the underlying constitutional ethic recognizes individual rights while engendering the aspiration to fulfil and realize them for the betterment of the whole. This distinction, while being subtle, is important, especially when bearing in mind the critique that communitarianism unduly erases personal agency and subsumes the will of the individual under that of the often amorphous collective whole.<sup>40</sup> Invariably, questions on how, when and why there is a need to balance the rights of the individual against the good of the whole, lie at the heart of the push and pull in the discourse for and against communitarianism. Its opponents level various criticisms against the practicality, utility and feasibility of its operationalization as an overarching ethos for social ordering. This article now examines some of these criticisms.

### Criticisms of the communitarian ethic

The communitarian ethic, especially as exemplified in the notion of *ubuntu*, has been criticized as being unduly vague, collectivistic and archaic.<sup>41</sup> Proponents of the communitarian ethic have conversely countered that *ubuntu* and its variants are not vague, but are rather a representation of an ever evolving concept, able to be refined to accommodate the ever changing ways of being a fully functioning and contributing member of society.<sup>42</sup> There is also pushback against the criticism that *ubuntu* is collectivist, and compulsive in its conscription to the assumed collectivist outlook. Metz, for example, has argued that, rather than compel cohesion, the communitarian ethic incentivizes voluntary accession to its ideals, knowing that the true strength of collective action for the collective good draws from voluntary accession.<sup>43</sup> Metz counters the critique of *ubuntu* being an anachronism that has no place in the modern world by asserting that morality is invariably a timeless construct that ensures the continuation of right action, failing which there is no basis for its continuance.<sup>44</sup>

Despite the strong defence of communitarianism as a legitimate framework for effective social ordering, scholars like Oyowe have argued that communitarianism at its core is antithetical to our modern universal accession to the concept of individual human rights and the autonomy

37 JAM Cobbah "African values and the human rights debate: An African perspective" (1987) 9 *Human Rights Quarterly* 309.

38 Y Mokgoro "Ubuntu and the law in South Africa" (1998) 4/1 *Buffalo Human Rights Law Review* 15.

39 Ibid.

40 SO Ilesanmi "Human rights discourse in modern Africa: A comparative religious ethical perspective" (1995) 23 *The Journal of Religious Ethics* 293.

41 Metz states that these are the three major flaws that Oyowe highlights in Metz's argument for *ubuntu* being the moral basis for the African reading of rights: T Metz "African values and human rights as two sides of the same coin: A reply to Oyowe" (2014) 14/2 *African Human Rights Law Journal* 307.

42 Id at 318–19.

43 Id at 315–16.

44 Id at 309–10.

that flows from those inalienable rights.<sup>45</sup> The argument is that, if human rights are by their intrinsic nature applicable to every individual as an autonomous free agent, the intended nature of human rights is to be individualistic and should be understood as such.<sup>46</sup> Based on this assertion, adopting a communitarian framing of human nature and the rights that flow from it would, therefore, be an attempt to subvert the fundamental nature of rights and, worse still, would open the door to further subversions of human autonomy through the justification of a vague notion of the greater good. The counter that has been made to this critique is that it conflates the nature of human rights with its ends. The counter point asserts that the goal of the communitarian reading of human rights is rather to protect personhood while seeking to optimize its utility for the greatest good of the greatest number.<sup>47</sup> In this sense, *ubuntu* primarily serves as a means to an end and is an interpretative lens for reaching the goal of optimal human flourishing.

Another common critique of the communitarian approach is that it also legitimizes relativist readings of rights,<sup>48</sup> thus threatening the foundational premise of rights as being universal and inalienable.<sup>49</sup> The rationale underlying this critique is that, in the communitarian framing, rights may only be recognized to the extent that they conform to the prevailing socio-cultural perception of what is right and acceptable, whether real, imagined or contrived. The argument is therefore that the possibility of legitimizing undue affronts to autonomy in the name of a lack of widespread social acceptance is fundamentally antithetical to the nature of rights and the agency they guarantee. According to critiques that make this assertion, once rights are not grounded on the universality and inalienability that makes them sacrosanct, any and all subsequent whittling of rights may be justified by self-appointed custodians of the communal ethos, leading to the slippery slope of dictatorship.<sup>50</sup> They argue that what is mistaken as relativism is rather a contextual framing of rights and a recognition that human rights are enjoyed within society and not in a vacuum. In this sense, liberty must be understood in context, ie in relation to others in society, but also in relation to the subject matter to which it is applied. If this is the case, it is imperative to explore how to apply the communitarian ethic to drug patents.

### Applying the communitarian ethic to the laws and principles of drug patents

To be an effective alternative approach to addressing the challenges of how and why drugs are patented, a communitarian approach would have to be applied to our rethinking of the creation and innovation process upon which recognition of ownership is based. The authors apply this rethinking to the formulation of vaccines and how the discoveries are made and funded and examine how such an approach may lead to more equitable outcomes. This shows that, contrary to the predominantly individualizing narratives upon which private ownership is based and justified, there is significant public input in the formulation of vaccines and makes the case that, while not

45 AO Oyowe "Strange bedfellows: Rethinking ubuntu and human rights in South Africa" (2013) 13/1 *African Human Rights Law Journal* 1.

46 Id at 124.

47 Metz "African values and human rights", above at note 41.

48 Clamour for a relativist interpretation of rights by some has been criticized as an excuse to push political agendas and perpetuate patriarchal authority: AF Bayefsky "Cultural sovereignty, relativism, and international human rights: New excuses for old strategies" (1996) 9/1 *Ratio Juris* 42. See also FR Tesón "International human rights and cultural relativism" (1984) 25 *Virginia Journal of International Law* 869.

49 WE Parmet "Liberalism, communitarianism, and public health: Comments on Lawrence O Gostin's lecture" (2003) 55 *Florida Law Review* 1221. See also LO Gostin "When terrorism threatens health: How far are limitations on human rights justified" (2003) 31/4 *The Journal of Law, Medicine & Ethics* 524.

50 The German Third Reich under Adolf Hitler was initially given socio-political legitimacy by claiming to represent the collective ethos of the people, and seeking to reclaim the "lost" cultural heritage and national pride: W Brugger "Communitarianism as the social and legal theory behind the German Constitution" (2004) 2 *International Journal of Constitutional Law* 431.



currently understood as such, the communitarian approach is already being applied, without the commensurate benefits. This is apparent in the formulation of vaccines, to which this article now turns.

### *Adopting the communitarian sentiment in the formulation and subsequent ownership of patents*

The process of creating a vaccine is the first point of a legitimate claim to ownership. Vaccine production and drug production more broadly are significantly resource-intensive endeavours.<sup>51</sup> Considerable sums are often needed to engage in the kind of cutting-edge research, driven by exceptional expertise in the relevant field of enquiry.<sup>52</sup> In this sense, the formulation of life-saving medication is based on two key factors, without which the endeavour is unlikely to succeed: intellectual input and material input. Regarding intellectual input, science (as with all other fields of knowledge) is built on an accretion of knowledge,<sup>53</sup> much of which is publicly available.<sup>54</sup> Significant leaps in knowledge and our understanding of the human genome, virology and the immune system have all contributed to modern vaccine production.<sup>55</sup> However, it is also important to know that, unlike a cookery recipe, where only a few changes are necessary to personalize the dish, the process of vaccine formulation for a new virus, which may be significantly less understood, is significantly more cumbersome and specific. While the foundational processes for vaccine production in general may be known, specific case formulation of disease-specific vaccines requires scientific ingenuity, by sufficiently skilled experts, with the necessary resources.<sup>56</sup>

Much of this innovation is also resource dependent. Laboratories with modern cutting-edge technology are often needed for the kind of research required to produce effective vaccines, especially in a timely manner. This has mostly necessitated millions of dollars in research and development, with a legitimate expectation that there will be a return on that capital-intensive investment once the product of the research is patented and distributed to the market. However, while significant resources are used by the private sector for this kind of research, in certain instances, rich states have provided significant resources; for example, Operation Warp Speed (OWS) was a partnership between the US government and the pharmaceutical industry to deliver 300 million doses of a safe and effective COVID-19 vaccine in record time.<sup>57</sup> This significant state intervention provides a useful blueprint for the kind of action that is geared towards the public interest.

Based on the internal logic of patent ownership, the ability to enjoy an interest draws from ownership, which in turn draws from commensurate effort and input in the intellectual and material aspects. It therefore follows that, if a drug is created and owned by a private entity, the interest is that of the private entities to do with as they see fit. In the same vein, public interest must draw from public input. As in the case of OWS, where significant state funds were ploughed into funding and developing the COVID-19 vaccine,<sup>58</sup> a communitarian approach must involve rethinking the source of intellectual and material input. It must be drawn from public input, whether through consortia of experts or through publicly funded research labs. Significant funding, whether through the

51 S Plotkin et al “The complexity and cost of vaccine manufacturing: An overview” (2017) 35/3 *Vaccine* 4064.

52 RT Mahoney and JE Maynard “The introduction of new vaccines into developing countries” (1999) 17/7–8 *Vaccine* 646.

53 SA Plotkin and SL Plotkin “The development of vaccines: How the past led to the future” (2011) 9/12 *Nature Reviews Microbiology* 889.

54 SL Knobler et al “Vaccines: Research, development, production, and procurement issues” in Knobler et al (eds) *Biological Threats and Terrorism: Assessing the Science and Response Capabilities: Workshop Summary* (2002, National Academy Press) 85.

55 *Ibid.*

56 Plotkin et al “The complexity and cost”, above at note 51.

57 KP O’Callaghan, AM Blatz and PA Offit “Developing a SARS-CoV-2 vaccine at warp speed” (2020) 324/5 *Jama* 437.

58 OWS provided USD18 billion in funding for the development of vaccines: JH Kim et al “Operation Warp Speed: Implications for global vaccine security” (2021) 9/7 *The Lancet Global Health* e1017.

state as a trustee of the public purse or through more direct public funding, must also be at the forefront of resource contributions. However, this is not enough. For, as OWS also showed, even with public funding, private ownership can still be prioritized. Most of the COVID-19 therapeutic and vaccine clinical trials were funded by public sources (1,144 or 57.9 per cent), followed by industry (540 or 27.3 per cent) and public / private partnerships (293 or 14.8 per cent).<sup>59</sup> The large percentage of public funding calls into question the rationale for private ownership of the patent. The prioritization of the individualizing profit-centred motive (as encapsulated in the socio-economic outlook of the US) has meant that, even though the state has been largely responsible for the production of the vaccine, it has taken a narrow or limited definition of the scale of the contribution made by the state or of who constitutes the “public” in whose interest it acted. The initial choice to limit its framing of the public for which it was acting to its local population<sup>60</sup> is logical in the context of the domestic social contract and the justifications for taxation and its usage. However, it is problematic in the context of international geopolitics, especially when considering the predominant rhetoric of international solidarity, chaired by the US when in pursuit of its own global interests.<sup>61</sup>

While this example shows how the public’s contribution is inadequately recognized, reframing this approach as a necessary communitarian intervention in the face of global health crises is a key step towards normalizing and scaling such interventions. As shown above, one practical intervention based on a communitarian approach to vaccine formulation is the concerted effort at publicly funded and executed research through public health bodies. Importantly, this approach is helpful for reframing drug production from being largely individual and private sector driven. Working within the internal logic of the patent regime as it is, this approach ensures public ownership, arising from public input. Admittedly, the prioritization of publicly funded and produced drugs comes up against the prevalent perception of private efficiency over public bureaucracy. However, there is the persuasive contradictory evidence that this is a false dichotomy built on a faulty premise, itself driven by the individualizing capitalist motive.<sup>62</sup>

While the communitarian ethic is useful for rethinking how innovation is funded and produced, as shown above, it still operates within the established parameters of ownership, drawn from contribution. However, the application of the communitarian ethic has the potential for even greater emancipatory approaches to patents and how access is prioritized. For one, it unsettles the underlying notion that one’s actions can and should only be driven by the ability to benefit from those actions exclusively. Flowing from this, applying the communitarian ethic disrupts the notion that those who have the ability to compensate the “owner” must be prioritized in obtaining access. More importantly, it calls us to envisage alternatives already rooted in the communitarian ethic, where it is central, and not an internal workaround within a system that is intrinsically self-serving in nature, even if those alternatives may not currently be understood or framed as communitarian in outlook. The authors argue that, while being communitarian in form, these interventions would be even better served if they were recognized as viable frameworks to the current individualistic hegemony and can be important in the normalization of alternative “meaning-making”, ultimately

59 A Angelis et al “Funding sources of therapeutic and vaccine clinical trials for COVID-19 vs non-COVID-19 indications, 2020–2021” (2022) 5/8 *JAMA Network Open* e2226892, available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9382437/>> (last accessed 11 September 2024).

60 The authors deduce this from the fact that the USA purchased initial batches and made the vaccine available free for everyone in the country. The notion that the state had to purchase the vaccine after funding it itself is problematic, for reasons discussed in this article.

61 V Gupta and S Nambodiri “America and the TRIPS waiver: You can talk the talk, but will you walk the walk?” (13 July 2021) *Health Affairs Forefront*, available at: <<https://www.healthaffairs.org/content/forefront/america-and-trips-waiver-you-can-talk-talk-but-you-walk-walk>> (last accessed 27 May 2024).

62 SR Letza, C Smallman and X Sun “Reframing privatisation: Deconstructing the myth of efficiency” (2004) 37 *Policy Sciences* 159.

mainstreaming it as a viable alternative for how innovation is created, rewarded and distributed. The article now engages with these propositions.

### *Unsettling the presumption of profit as the central incentive for innovation*

In the individualizing capitalist framing of human endeavour, the profit incentive is prioritized as the predominant motivation for action and innovation. As such, the converse is also often posited as being the case: without the possibility of being able to make a profit, no human endeavour is worthwhile or would be undertaken. So, while a desire for profit is in itself not necessarily an ethical wrong and can often be a primary motivator, the normalization of the profit incentive over all else can become essentializing and reductive, leading to a crude utilitarian approach to all human endeavours, including those that are more central to human flourishing. In fact, this problem is at the heart of the critique of the capitalist logic. It is not so much that a profit is sought in human endeavours, but that it *must* be sought in order for a human endeavour to be worthwhile, therefore reducing the motivation for innovation and creativity to more “crude” motivations.

This approach to creativity and innovation is both inherently wrong and faulty, as it is at variance with the communitarian ethic that prioritizes the public good and interest over profit. The communitarian ethic nudges a different path whereby the fruits of innovation are, in a sense, its own reward and that, even where things are originally created for narrow and limited use, there is great value in granting public access without an expectation of immediate material profit. History bears out this understanding of human endeavour. Several key inventions, like the internet, show that the theory that the profit incentive over all else is essential is inaccurate. These inventions show that great leaps in technology are both possible and adequately motivated by the human desire to make life easier, better, safer and healthier.

The infusion and normalization of the communitarian ethic as a viable and importantly “natural”, approach to human creativity, ingenuity and innovation is crucial for a paradigm shift in the reward systems that are prioritized and encouraged. Here, the focus is on the preservation and optimization of the collective good over narrow, individualizing private interests. The application of the communitarian ethic here is to validate and amplify the benefits of acting for the common good and, in so doing, create a value system where action beyond narrow individual interest is beneficial. The aim here is still to encourage innovation but to do so with the express buy-in of the innovator to act not for just themselves, but to go ahead in doing so having being convinced that such action is the best course of action on the basis of guarantees of benefit that transcend the individual. In this sense, it is not so much that individual interest is inherently bad, but rather that it is not the only way to approach innovation and problem solving, and it should also not be normalized as such. It is its normalization and centralization over all else that has led to alternative approaches being dismissed as untenable because they run contrary to “human nature”, which is implied to be inherently selfish and self-serving; views that see human nature as being more about collective human flourishing are regarded as sentimental, altruistic and unrealistic. In this sense, it is not simply the practice of this individualizing lens that is problematic, but it is also the normalization and valorization of the values it extols, propagates and rewards that are at the root of the problem.

However, the reality of corporations shows this view of motivation and subsequent action to be unduly narrow and limiting. The increasing normalization of corporate social responsibility and corporations acting as “ethical citizens” shows a clear demand for the determination of value beyond simple commercial viability. In some states, corporate social responsibility is a core consideration of stock exchange listing requirements.<sup>63</sup> While a more cynical reading of this gradual shift

63 For example, the listing requirements of South Africa’s Johannesburg Stock Exchange require compliance with the principles and mandatory practices outlined in the *King IV Report on Corporate Governance for South Africa*: <<https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> (last accessed 27 May 2024).

may see it as mere posturing, the fact that corporate social responsibility is seen as having non-monetary value that adds to the bottom line is proof of both the desire to see even private companies act for the public good and to reward such action with bottom lines that still align with their profit-making goals. Where companies have failed to act for the public good, social pressure has served as an effective tool for civil society. Such pressure may be exerted by civil society working with shareholders and other corporate stakeholders. Examples of this include campaigns to disinvest in energy sources that have a harmful effect on environmental sustainability.

*The communitarian ethic as a philosophical rebuttal of the primacy of capitalist logic and price-based access.*

The existing normalization of the notion of innovation for narrow individual interests is also rooted in the capitalist logic and the maximization of profit,<sup>64</sup> which commodify all goods and services and confine access to those able to afford it. Due to the predominant imperative to maximize profit, which lies at the heart of capitalism, access is restricted to those able to pay the ever-increasing prices set by the owner, which may have no real bearing on the actual costs of innovation, manufacturing and production. In this climate, the goods or service go to the highest bidder. This phenomenon played out during the scramble to vaccinate populations around the world at the height of the COVID-19 pandemic

However, the assumption of access to the highest bidder, as normalized as it has become, is problematic and falls foul of the principles of equitable access, which the communitarian ethic encapsulates and to which frequent calls for global solidarity appeal, without delivering. The pushback against the seeming lip service to the public interest / public good, without the necessary material outcomes, is analysed here. The normalization of the capitalist logic for prioritizing profit and confining access to those who can guarantee that profit can be critiqued in two major ways. First, it elevates the most hedonistic version of the ends of capitalism, which in turn sets it on the path to eventual self-cannibalization and unsustainability. As Kapur elegantly puts it, modern capitalism is a product of two opposing and paradoxical value systems: the puritan ethics of hard work, temperance, thriftiness and sobriety on one hand, which motivate the desire to apply human intellect and time to an otherwise impossible task and to see it to a logical conclusion, and the opposing value of hedonism, which glorifies immediate gratification, greed and narrow pecuniary interest above all else.<sup>65</sup> With these varying motivations in mind, the question then is, what lies at the heart of the decision to invest significant numbers of people and resources in finding cures to the ailments of society? Is the hope and expectation of eventual astronomical financial gain the primary motivator of years of hard work and dedication? While the authors do not presume to have an answer to these questions, which only companies and their shareholders can answer, they believe that, particularly in the specific case of vaccine manufacturing, the answer should not simply be the desire to turn as large a profit as possible to the detriment of all else.

If, however, that were the case, it would raise the second challenge of being a short-sighted approach that ultimately leads to its own demise. In the case of vaccines, the point of their creation is to give whole populations a fighting chance. To prioritize profit and as a result place a premium on serving only those that can afford to pay at the price determined to guarantee maximal profit for the manufacturer, would be to practise public health and economic Darwinism. While large portions of low- and middle-income countries would be adversely affected now by this decision,

64 While a major recommendation of this article is that ownership should be expanded by redefining how intellectual and material input are ascribed, the authors acknowledge that, at present, the definition of ownership is still restrictive and largely limited to private ownership.

65 BK Kapur "Harmonization between communitarian ethics and market economics" (1999) 2/1 *Journal of Markets & Morality* 35.

with each new public health crisis, the number of those who can afford to access life-saving medication at the price that guarantees maximal profit will shrink, until the system is no longer tenable.

Communitarianism calls the free-market agent to lean more towards the puritanical motivations of its actions and choose to balance its desire for profit with the satisfaction of true societal impact as a contributing, fully functioning member of its society. It calls the capitalist to acknowledge that, while they are not required to live like an ascetic, eschewing all imperative to seek reward for their hard work, they should accept that they indeed have a wider responsibility to the population they serve, and to which they provide their products and services. As Kapur notes in his quote from Japanese entrepreneur Konotsuke Matsushita, “[p]rofits should not be a reflection of corporate greed”, but are useful as “a vote of confidence from society that what is offered by the firm is valued”.<sup>66</sup>

However, beyond the philosophical appeal to our better selves, practical steps that actualize the promise of protecting the common good are possible. While international human rights law has over time done considerable work to normalize the prioritization of access based on need through the right to equitable access to medicines, the events of the COVID-19 pandemic have shown that, while lip service is being paid to global solidarity and the protection of society’s most vulnerable, the tangible steps regarding TRIPS waivers and the realization of state party obligations are being left unmet. In the face of this, this article now looks at possible interventions that are in tandem with the communitarian ethic and can produce the desired result of equitable and equity-based access to vaccines in the interest of the public good.

### *Practical application of a reimagined ubuntu approach to drug patents*

Consideration of a communitarian-based approach for a capital-intensive project like drug production raises several questions around viability, sustainability and, in the case of private corporations, profitability, which was also examined above.

One key intervention that shows the promise of delivering equitable outcomes is that of a form of barter system where states trade their knowledge for resources, exclusionary markets or tax breaks, for instance. It is of great importance to recognize and promote the duality of interests in making determinations on the diseases to be given TRIPS waivers, so that in future more prompt and appropriate action can be taken. For instance, it could be agreed that whatever the World Health Organization determines to be a global health emergency deserves such a response. If such a position is taken, it raises the risk that the process of making the determination will become more politicized. Another consideration is whether such an approach would deter private entities from working on a vaccine that they already know would be subject to a waiver. A supporting strategy may be to establish a global vaccine fund to which states contribute, based on their socio-economic standing, at agreed ratios, and, the moment a global emergency is declared, have that fund made available to help fund entities, organizations and companies that are making the necessary diagnostics, therapeutics and vaccines. Once the pharmaceutical compositions and other necessary elements are developed, they would then be given to all member states to initiate local production at scale. This would be contingent on the requisite manufacturing capacity being developed in the meantime. States could then also negotiate purchasing arrangements, should they be unable to produce the drugs locally, with the necessary support from the global fund. Whichever configuration of options is chosen or is workable, ultimately the issue is that *ubuntu* and human rights must force states to acknowledge that every disease cannot be left to the whims of the free market or the prevailing economic order. The application of the communitarian ethic in framing the problems as well as the possible solutions most compel state parties to do more, while enjoining private actors to work for their considered self-interest as social citizens. In the most ideal scenario,

<sup>66</sup> Id at 48.

collaboration from both for the public good is best. It allows for the maximization of resources, expertise and existing structures and mechanisms. As warp speed and the multisector collaborations on technology transfer show, this kind of collaboration is both possible and productive. It is, however, important that these interventions are not misrepresented as charity or as one-off expedience-based actions, but rather as templates for rethinking what is possible and how we achieve what is possible.

### Conclusion: *Ubuntu* and human rights – equity not charity

While private entity *ubuntu*, corporate social responsibility or charity may yield some positive results, they do not go far enough; the world has not yet seen these values and practices resolve crises, as was most recently the case with the COVID-19 pandemic.<sup>67</sup> Hence the global call for “equity not charity”, sounded as long ago as 1977 by President Nyerere<sup>68</sup> and more recently by several civil society groups, such as Health Equity (in relation to the COVID-19 pandemic) and the Treatment Action Campaign (in relation to the HIV / AIDS epidemic).<sup>69</sup> The point is that there is a binding legal obligation, clearly found in human rights, which requires the granting of access to drugs. The right to health entails access to the necessary diagnostics, therapeutics and medicine. More than the solutions proposed thus far, the primary takeaway is that we must not be stuck in the predominant hegemony of current thought that presumes that the current way of thinking about the problems and possible solutions to them is the only way. We must rethink the possibilities of more just outcomes through more just processes. It must force us to rethink what is possible, a challenge posed eloquently and compellingly, almost two generations ago by President Nyerere:

“For people are dying unnecessarily because they do not have clean water, enough good food, or basic medical care - which is what economic development means to us. The most basic human right of all is the right to life itself, and a life which is not made miserable by hunger, ignorance or preventable disease. The present economic order governing international production, development, and exchange does not in practice ensure progress towards meeting those basic needs for all people, all over the world. The plea of the poor is a new international economic order ‘which embraces for its objective the happiness of mankind’.”<sup>70</sup>

**Competing interests.** None

67 CB Ncube “Moving from mirages to miracles: Intellectual property, human rights and the global partnership for sustainable development” (2023) 72/7 *GRUR International* 629.

68 JK Nyerere “The plea of the poor new economic order needed for the world community” (address given at Howard University, 5 August 1977), published in (1978) 5/1 *New Directions* 16 at 19.

69 See, for example, M Heywood “South Africa’s Treatment Action Campaign: Combining law and social mobilization to realize the right to health” (2009) 1/1 *Journal of Human Rights Practice* 14.

70 Nyerere “The plea of the poor”, above at note 68 at 21.