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REASSESSING TRADITIONAL KNOWLEDGE: RETHINKING PROPERTY CLAIMS AND COMPENSATORY JUSTICE IN BENEFIT SHARING.

AUTHORED BY - DAVID JOHNSON

ABSTRACT

This paper questions compensatory justice in benefit sharing, asserting that traditional knowledge, though unique, lacks a property basis. It advocates for a distributive justice model, emphasizing shared humanity. Analyzing traditional knowledge, it suggests multi-lateral negotiations for distributive justice in global agreements.

Keywords: benefit sharing, compensatory justice, distributive justice, global agreements, traditional knowledge.

INTRODUCTION

Global Welfare Inequities

The elimination of persistent inequalities in global health, food security, and environmental quality poses a significant challenge for humanity. Scientific discovery and technological innovation are crucial in addressing these disparities, with genomics and biotechnology potential drivers of progress. These advancements have the potential to contribute significantly to health, food, and environmental development on a global scale by introducing groundbreaking technologies and tailoring solutions to local challenges.[1]

However, optimistic predictions about the positive impact of biotechnology must be grounded in realistic perspectives on technological development, actual products and services, and an understanding of the social factors influencing the acceptance of new technology. These social factors play a crucial role in determining the ability of new technology to address welfare inequities.

[1] Ecology AI Synergy: How Ecology and Artificial Intelligence are Intertwined - FeedSee. https://feedsee.com/ecology/

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This paper focuses on a prevalent aspect of the discourse on traditional knowledge and welfare inequities, asserting that the current lack of sharing financial and other benefits derived from biotechnologies based on traditional knowledge is akin to theft and warrants compensation. Two key elements shape this assertion: the belief that traditional knowledge is a unique form of knowledge that can be owned and protected, and the idea that the exploitation of traditional knowledge by non-owners is inherently unjust and requires a remedy, often framed as compensatory justice.

In this paper, we challenge the conventional notions of traditional knowledge and compensatory justice in the context of benefit sharing. We argue that traditional knowledge, despite its special provenance, is fundamentally similar to any other form of knowledge. This challenges the basis for property claims in traditional knowledge. While traditional knowledge may have historical roots within specific ethnic or geopolitical groups, we contend that this alone does not justify its protection through property rights. Consequently, if there is no property right in traditional knowledge, then there can be no wrongful taking by a third party, rendering a compensatory justice claim invalid.

We acknowledge the separation of proprietary rights in traditional knowledge and compensation for its use but argue against modeling benefit sharing on compensatory justice. Instead, we propose that distributive justice provides a more robust foundation for conceptualizing the sharing of benefits arising from biotechnological innovation. Distributive justice suggests allocating these benefits based on our shared humanity rather than relying on compensatory measures.

Distributive justice provides key advantages over a compensatory scheme. First, it does not depend on proprietary claims. Rather, it relies on fundamental principles underlying liberal democracies about fairness and access to fundamental resources. Second, because it does not rely on property claims, it does not require proof of past wrongdoing, thus liberating claims to share benefits from long discussions of past conduct. Third, it is not historically contingent, it calls for the sharing of benefits with all of the world's poor countries and not simply those rich in traditional knowledge.

We undertake our analysis and discussion in the following order. First, we define traditional knowledge and how it is wrongfully exploited which in turn gives rise to the call for benefit

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sharing. We then consider benefit sharing as compensatory justice and discuss the problems that arise with this approach. Finally, we present an alternative model of benefit sharing that is consistent with a formal theory of distributive justice. This position, we argue, indicates that benefit-sharing agreements must be negotiated on a multi-lateral basis.

Traditional Knowledge and its Wrongful Exploitation

The World Intellectual Property Office (WIPO) defines traditional knowledge very broadly as follows:

"… tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields…"[2]

To share benefits from scientific and biotechnological innovation, WIPO has confined this definition to "knowledge about products or processes, natural or artificial, that are relevant to biotechnology innovation, and known by some people but not all." This definition is consistent with the Convention on Biological Diversity (CBD) that explicitly relates traditional knowledge to benefit sharing:

Article 1: The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Art. 8(j): Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such

[2] 'The WIPO IGC' (2017) *Protecting Traditional Knowledge*, pp. 265–276. doi:10.4324/9781315666358-16.

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knowledge, innovations and practices. [3]

From these definitions of traditional knowledge, one can notice two types of traditional knowledge that relate to biodiversity and innovation. First, there is knowledge about the use of biological resources in health or agriculture based on previous exploitation (e.g. the medicinal uses of the neem tree and turmeric).[4] Second, there is the information about the existence of particular plants or animals with characteristics that may interest a pharmaceutical company. A good example is Costa Rica's establishment of the Instituto Nacional de Biodiversidad (INBio) which enters into partnerships with companies wishing to explore the country's biodiversity.

Calls for the equitable sharing of benefits arising from utilizing the aforementioned traditional knowledge types often draw inspiration from a scenario characterized by unjust exploitation.[5] In this scenario, an indigenous group possesses traditional knowledge, and another group, often from an industrialized nation but not exclusively, recognizes the knowledge's potential utility and exploits it. As a consequence, the exploiting group gains exclusive access to and control over the benefits derived from the knowledge, to the detriment of the indigenous group. This outcome is deemed inequitable, and it is asserted that it would be preferable if all parties involved could benefit from the knowledge exploitation and have equal access to its advantages. The situation becomes more objectionable when the industrialized party demands compensation from consumers in developing countries for goods and services that incorporate the exploited knowledge, resembling a form of extortion.

At least since the negotiation of the CBD in 1992, the international community has recognized wrongful exploitation and struggled to conceive of how to allocate both access to and the benefits derived from traditional knowledge. Article 8(j) of the convention aspires to protect this knowledge in some form without giving substantive content to the form of protection required. Subsequent work has led to developing Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization [6] setting out voluntary guidelines on access to genetic resources which state that "mutually agreed terms could cover the conditions, obligations, procedures, types, timing, distribution and mechanisms of benefits to be

[3] Chiwenga, Emson F. "The Role of IPR on Maize Output in Zimbabwe." 2010, https://core.ac.uk/download/213935938.pdf.

[4] Bhandari, Avantika. "Traditional Knowledge, Genetic Resources, Patent Law and Its Protection: A Legal Analysis of Africa, Latin America, and India. How India Can Protect It Fiercely." 2021, https://core.ac.uk/download/479050324.pdf.

[5] Navigating the Final Frontier: An In-Depth Exploration of Space Exploration Law - Techienodes. https://techienodes.com/navigating-the-final-frontier-an-in-depth-exploration-of-space-exploration-law/

[6] (No date a) *COP decisions - convention on biological diversity*. Available at: https://www.cbd.int/decisions/default.asp?lg=0&dec=VI/7 (Accessed: 10 November 2023).

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shared."

The meaning of 'traditional' often simply locates knowledge in a set of historical and geographical contingencies – where the knowledge was used and by whom. Yet, however banal these contingencies might seem from an epistemological standpoint, they constitute the strongest evidence for the wrongful exploitation of traditional knowledge. The agglomeration of modern seed banks in industrialized countries drawing on resources from the developing world, for example, can be seen as a modern outgrowth of traditional colonial practices of bio-geographical exploitation[7] . Place and practice are likewise implicit in terms like 'ethnobiology' and 'bioprospecting' currently used to describe the study of people's local knowledge in the first case, and utility interests in that knowledge in the second case.

Benefit sharing as compensatory justice is premised on the belief that traditional knowledge gives rise to special property rights. There are two primary arguments put forward that justify treating traditional knowledge as property. First, there is the frequently adopted position that traditional knowledge is knowable by certain distinct groups but not necessarily by all people and so, traditional knowledge demarcates a way of knowing. This unique way of knowing gives rise to a property claim that should be compensated for if wrongfully exploited. For example, Vandana Shiva states that people in developing countries understand nature differently than do people in the West[8]. She finds evidence for the different epistemological outlooks on the vulnerability of Eastern cultures to biopiracy.

Since individuals in these cultures do not typically view nature as a source for technological extraction or subject to intellectual property protection, they become vulnerable to exploitation. Shiva emphasizes a stark distinction between Eastern and Western knowledge systems to advocate for restrictions on utilizing genetic resources from developing countries in Western biotechnological advancements. Additionally, she contends that the distinctive ways of knowing in the East establish a proprietary claim over traditional knowledge. By conceptualizing traditional knowledge as a form of property, it becomes possible to mitigate the intrusion of Western biotechnology in Eastern contexts. Thus, variations in epistemological perspectives contribute to safeguarding Eastern proprietary knowledge.

[7] Unit, B. (no date) *Conference of the parties (COP), Convention on Biological Diversity*. Available at: https://www.cbd.int/cop/ (Accessed: 10 November 2023).

[8] 'Vandana Shiva (2000), "the hijacking of the Global Food Supply", in stolen harvest: The hijacking of the Global Food Supply, Cambridge, MA: South End Press, pp. 5-20.' (2017b) Environmental Justice, pp. 449–464. doi:10.4324/9781315256306-32.

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Another justification for treating traditional knowledge as property is recognizing the unique nature of 'traditional' knowledge, endowing a special status upon its possessor.

The emphasis on the special status of 'traditional' knowledge revolves around investigating whether the term 'traditional' imparts a specific standing to the knowledge or its holder, thereby giving rise to a property right. This approach aims to reconcile the tension between the push to safeguard proprietary interests in traditional knowledge and the underlying cultures that have yet to acknowledge this knowledge as 'ownable' or exploitable.

Standpoint epistemology, of the kind advanced by Sandra Harding, has lent credibility to the idea that there are different ways of knowing attributable to groups of people with unique socio-economic circumstances[9]. How one relates to one's world may be subject to interpretations nuanced by place and culture. One can further claim that localized knowledge constitutes not a different set of knowledge but a different way of knowing. This seems to be a good starting point for explaining why 'traditional' knowledge is special. Unfortunately, it does not get us very far in the case of traditional knowledge.

Benefit Sharing

Benefit Sharing and Compensatory Justice

Benefit sharing represents a policy-level decision on appropriately managing traditional biotechnology-related knowledge acquisition and utilization. It lacks an inherent normative foundation but is seen as a mechanism to implement externally-determined obligations. As previously mentioned, benefit sharing is often asserted to derive its normative basis from the intrinsic value of traditional knowledge. It establishes a framework to allocate this value between those who possess the knowledge and those who exploit it, providing international organizations like the Food and to the Agriculture Organization and the World Intellectual Property Organization with benchmarks for distributing financial and other benefits based on the contribution of material or samples.[10]

[9] 'The science question in feminism. Sandra Harding. 1986. Cornell University Press. 271 pages, index. ISBN: 0-8014-9363-3. soft cover $9.95' (1986a) *Bulletin of Science, Technology & Society*, 6(4), pp. 400–400. doi:10.1177/027046768600600481.

[10] About this blog | It must be said!. https://jusharma.wordpress.com/2013/01/23/about-this-blog/

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The nature of the obligation to share benefits is contingent on the conceptualization of traditional knowledge. If traditional knowledge is considered proprietary, benefit-sharing is a claim for compensation for the unauthorized or wrongful use of that knowledge. Conversely, if traditional knowledge is not seen as proprietary, benefit sharing must seek its normative basis elsewhere, divorced from any inherent special nature of traditional knowledge.

Despite this, international agreements acknowledge the connection between benefit sharing and proprietary claims to traditional knowledge. This connection can be traced back to at least the 1992 Convention on Biological Diversity, which, upon taking effect in 1994, recognized each state's sovereign right over genetic resources within its territory. Benefit sharing gained prominence at the fourth Conference of the Parties, which called for developing an international framework to fulfill Article 15 of the CBD, addressing international access to genetic resources under national control.

Expanding beyond traditional knowledge, we see a similar compensatory link between benefit sharing and human genetic information. Perhaps the clearest articulation of the compensatory approach arises in the Human Genome Organization's[11]. In that statement, HUGO endorsed a model of benefit sharing substantively based on compensatory justice defined as "meaning that the individual, group, or community, should receive recompense in return for [a] contribution…"[12].

While HUGO's *Statement* refers most clearly to human genetic information, its compensatory approach to benefit sharing has become paradigmatic for not only human genetic information but also traditional knowledge about biodiversity. It is also worth noting that there is a strong current of compensatory justice thinking throughout the literature on ethnobotany, biopiracy, and benefits sharing[13].

[11] Ucl (2020) *HGNC gene annotation*, *UCL Institute of Cardiovascular Science*. Available at: https://www.ucl.ac.uk/cardiovascular/research/pre-clinical-and-fundamental-science/functional-gene-annotation/hgnc-gene-annotation (Accessed: 10 November 2023).

[12] 'Decision adopted by the conference of the parties to the Convention on Biological Diversity at its twelfth meeting: XII/20. biodiversity and climate change and disaster risk reduction' (no date) *Human Rights Documents online* [Preprint]. doi:10.1163/2210-7975_hrd-9813-2014005.

[13] 'Downes, William, First Baron downes (1752–1826)' (2017) *Oxford Dictionary of National Biography* [Preprint]. doi:10.1093/odnb/9780192683120.013.7976.

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Critique of the Compensatory Approach

If international agreements, guidelines, and existing literature acknowledge that benefit sharing is rooted in a compensatory assertion related to the unauthorized appropriation of proprietary traditional knowledge, one might assume that articulating the reasons behind the proprietary nature of this knowledge would be straightforward. However, it becomes apparent that these reasons are more illusory than substantive. One might be inclined to argue, starting with the premise that 'traditional' identifies knowledge based on place, history, or culture, that this specific origin inherently leads to a proprietary interest for those who share the same place, history, and culture. As discussed earlier, such an argument is unsustainable. In other words, it is not logical coherent to assert that traditional knowledge, once exploited and comprehensible to others, is epistemologically so distinct from other forms of knowledge that it justifies the creation of a property right. Therefore, if traditional knowledge is to be subject to property rights, the justification for this must be sought elsewhere, not in its purported special nature.

This assumption is subject to disagreement, even though it serves as the foundation for the aspirational aspect of international agreements on benefit sharing. This is particularly evident in the context of intangible goods such as non-rivalrous knowledge, and even more so for global public goods. Property rights challenge this assumed state of freedom and, as a result, must be justified on a normative basis. Therefore, if traditional knowledge does not inherently lead to a proprietary claim due to its unique nature, those advocating for a property interest in such knowledge bear the responsibility of persuading others of the validity of their claim. The typical rationale for such arguments is rooted in a labor theory of property or follows a utilitarian perspective. Those in favor of asserting proprietary claims to traditional knowledge frequently rely on the Lockean argument that posits the right to property where one has exerted labor.
Locating this natural property right in traditional knowledge follows the Lockean model: Those who have property in themselves and mix labor with the natural resources and thus have dominion over the property, thereby have the right to prevent appropriation of their property by others. Once we accept that traditional knowledge gives rise to a natural property right, benefit sharing gains a very specific normative underpinning associated with property rights. In the paradigmatic scenario described earlier, appropriation and exploitation of traditional knowledge by third parties violates the property holder’s right to exclude all others from that knowledge and so constitutes theft. Although ‘biopiracy’ may sound metaphorical, in these cases, it is meant literally.

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Unfortunately for proponents of this argument, not only is there contention surrounding the general Lockean argument, but its application to traditional knowledge presents significant challenges for two main reasons. Firstly, traditional knowledge, by its inherent nature, has existed for an extended period. Consequently, individuals using it today did not labor to create it (as they would already possess a claim to traditional knowledge based on standard legal grounds if they had). Therefore, these individuals lack a direct claim rooted in the expenditure of their labor. Secondly, depending on the labor of one's ancestors and subsequently assigning the property right to the present generation is similarly unconvincing. This argument has historically not found favor, even concerning inventions and artistic works, as we do not grant absolute rights to ideas or artistic creations beyond a limited time period. Given that all creative works receive relatively limited rights, those rights would have long expired for the vast majority of traditional knowledge. Consequently, a compelling Lockean argument for property in traditional knowledge is lacking.

If we cannot justify a property right in traditional knowledge based on labour, another justification to consider is utilitarianism. According to utilitarianism, the granting of a property right is justified so long as it increases the benefit to society. The property system covering intangibles most associated with utilitarianism is the patent system. The central justification for the award of patent rights is the utilitarian argument that patents lead to the creation and dissemination of knowledge [14]. In particular, patents provide a financial lure to would-be inventors to invent new things. Without this lure, inventors may not undertake the risk and expense of developing such knowledge. As Gold and Caulfield have pointed out, no such arguments exist with respect to traditional knowledge[15]. By its very nature, traditional knowledge has been around for a long time, having been built up over many years. Granting a property right will provide no incentive to invent as the invention has already occurred. Patent systems have long recognized this. The English Crown's failure to accept it led to the passage of the Statute of Monopolies. Patent systems thus apply only to 'new' knowledge, thus excluding what was previously known.

The conclusion is therefore that neither natural property rights nor utilitarian arguments justify a property right in traditional knowledge *per se*. This does not mean that no traditional knowledge may become subject to intellectual property rights on the same basis as other knowledge; it simply means that the mere fact that knowledge is traditional is insufficient in itself to justify the granting

[14] 'The early evolution of the United States law: Antecedents (part 3)' (1996) *World Patent Information*, 18(1), p. 47. doi:10.1016/0172-2190(96)84634-5.

[15] Caulfield, T., Gold, E.R. and Cho, M.K. (2000) 'Patenting human genetic material: Refocusing the debate', *Nature Reviews Genetics*, 1(3), pp. 227–231. doi:10.1038/35042087.

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of a proprietary interest. Without a justification to limit freedom, we can only conclude that we can use traditional knowledge as we wish.

Furthermore, the attempt to justify proprietary rights in traditional knowledge only perpetuates an ideology of proprietarianism that restricts access to other forms of knowledge, such as that embodied in medications and agricultural research. This is because the proprietary claim to traditional knowledge mirrors the strongest form of the argument in favor of intellectual property rights including patents. Increasingly, international discourse over intellectual property has taken on the tone of this property being the natural right of its holder with any limitation on this right being *prima facie* illegitimate[16]. By reiterating this argument, even in relation to traditional knowledge, we not only condone but lend support to the creeping proprietarianism at the international level. As whatever practical benefits developing countries may derive from treating traditional knowledge as property will be far outweighed by a further entrenchment of proprietarianism with respect to patents, the move to argue that traditional knowledge is property can only be viewed as dangerous.

As previously discussed, asserting a property right over traditional knowledge forms the basis for compensatory justice benefit-sharing frameworks. However, the inherent incoherence of the property right claim in the case of traditional knowledge removes the grounds for seeking compensation. Consequently, in this context, bioprospecting cannot be deemed as biopiracy. Following its internal logic, a benefit-sharing mechanism should offer no recourse for a third party's use of traditional knowledge, as no harm is inflicted upon the alleged holders of a non-existent property right.

Nevertheless, it is crucial not to disregard the influence of the discourse linking 'traditional' knowledge as property with benefit sharing. However, recognizing the strength of this discourse is distinct from wholeheartedly accepting it. Examining the traditional knowledge debate further reveals different argument forms. The proprietary argument, discussed earlier, is one form, while another fundamentally centers on credit rather than property.

A foundational acknowledgment is that the dispute over the value of traditional knowledge stems

[16] van Caenegem, W. (1996, January 1). 'A Philosophy of Intellectual Property' by Peter Drahos, Applied Legal Philosophy Series, Dartmouth, 1996, 257 Pages. *Bond Law Review*, *8*(2). https://doi.org/10.53300/001c.5288

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from its exploitable nature. Discussions about benefit sharing arise due to the recognition that traditional knowledge is valuable in providing access to genetic resources. Biopiracy occurs when a bio prospector acts as if the traditional knowledge, which was instrumental in identifying the genetic resource, either does not exist or was not exploited before the prospector's actions. Distinctions between bioprospecting and biopiracy are evident in disputes over whether countries recognizing traditional knowledge consider it "foreign prior art."

In the United States, recognizing traditional knowledge as prior art is variable, leading to instances where patents have been revoked. However, U.S. law does not explicitly require the consideration of foreign prior art, potentially allowing patents to be filed, enabling the exploitation of traditional knowledge regardless of whether the patent withstands a novelty challenge. The remedy to the issue of credit-taking is not the grant of property rights over traditional knowledge but the absence of property rights over the claimed invention by the prospector. This argument is not related to benefit sharing but aims to ensure the robustness of the public domain.

In summary, it can be deduced that if the intention was to offer compensation for the utilization of traditional knowledge by establishing a benefit-sharing scheme rooted in a property framework, the outcome is that not only will no compensation be directed to those holding such knowledge, but access to other knowledge, medicines, and goods may become even more challenging to attain. Strangely, we find ourselves in a situation where the seemingly commendable objective of benefit sharing is compromised by the strategy employed to achieve it.

Conclusion

The rationales supporting benefit sharing cannot be based on claims to property rights in traditional knowledge, either because natural property rights are inherently problematic or because property is typically considered free unless there is a normative justification for restricting access, especially in the context of knowledge assets. However, this paper is less focused on these considerations and more on their challenges. Adopting a right to property in traditional knowledge as the foundation for a compensatory justice approach to bioprospecting and biopiracy can perpetuate unequal distributions, particularly when compensation is primarily contingent on factors such as the location of biological resources and the presence of alternative

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potential sources. Institutions aiming to acknowledge the value of traditional knowledge and establish a framework for benefit sharing must endorse a new distribution method. Although this paper does not delve into the intricate task of determining equitable distribution, it is important to note that developing countries with valuable genetic resources have a better chance of negotiating favorable terms within the WTO framework then seek compensation after resource exploitation. Furthermore, a compensatory scheme may reinforce a proprietary conception of knowledge, inadvertently strengthening arguments favoring patent rights over critical goods like essential medicines.