



## International Law

*Elixir Int. Law* 31 (2011) 1881-1886

**Elixir**  
ISSN: 2229-712X

# Distributive justice in context of traditional knowledge holders

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### ARTICLE INFO

#### Article history:

Received : 12 December 2010;

Received in revised form :  
30 December 2010;

Accepted : 1 February 2011;

#### Keywords

Distributive justice,  
Indigenous people.

### ABSTRACT

Any straightjacket formula, for a distributive justice in any given community or system is difficult to be evolved. And when the question is of international community, the task goes even more difficult, or at times nearly impossible. Any system to be fair and just has to work with the notion of 'universal equalities with fair distribution of resources' immaterial of the birth and power of the people in the society. But the inequalities between the developed and developing nations have given rise to different facets of distributive justice. When one talks about the problem of profit sharing of the Indigenous communities as to their Tradition Knowledge, this sounds to be an economic issue. But the reality is that it engulfs various social, cultural and political concerns of the distribution of 'materials'. To convert the traditional knowledge and cultural heritage of the indigenous people into definitions of patents, copyrights, trademarks, personality, and trade secrets is to ignore that traditional knowledge and cultural heritage that identify an indigenous people and makes a mockery of their struggle for freedom and self-determination. Their struggle for self-determination has the symbiotic benefits of maintaining cultural cohesion and the protection of the greater public welfare. So the paper concentrates upon the distribution of honours and materials in a justified manner especially in context of indigenous people.

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### Introduction

Justice is a term which has taken different forms with time and place. Rawls<sup>i</sup> argues that individuals will choose principles that guarantee them the maximum *social* primary goods possible (including liberty, opportunity, income, and wealth) if they happen to be born with the minimum distribution of *natural* primary goods.

Within liberalism, some experts<sup>ii</sup> select John Rawls' "Justice as Fairness" theory<sup>iii</sup> to justify and explain the moral obligation of rich countries to give certain preferences to developing countries.

In fact, no one knows what his or her distribution of *natural* primary goods (including intelligence, social status, and natural endowments) will eventually be.

In this paper also, 'Justice' has been taken in the form of fairness or equal distribution of advantages.

Although justice is not synonymous to equality, equity is one aspect of it. Justice [in a sense] is not a thing but a process.<sup>iv</sup>

Any straightjacket formula, for a distributive justice in any given community or system is difficult to be evolved. And when the question is of international community, the task goes even more difficult, or at times nearly impossible. Rawls himself steadfastly refuses to extend his argument to international distributive problems, limiting his analysis to what he defines as closed domestic societies.<sup>v</sup>

Any system to be fair and just has to work with the notion of 'universal equalities with fair distribution of resources' immaterial of the birth and power of the people in the society.<sup>vi</sup> But the inequalities between the developed and developing nations have given rise to different facets of distributive justice. When one talks about the problem of profit sharing of the Indigenous communities as to their Tradition Knowledge, this sounds to be an economic issue. But the reality is that it engulfs various social, cultural and political concerns of the distribution

of 'materials'.

Poverty and extreme poverty affected indigenous people more severely than the rest of the population. Their poverty indicators are generally above the national average. Educational services for indigenous children are generally below recommended minimum standards, and programmes are not tailored to those children's needs, leading to extremely high dropout rates. However, the Millennium Development Goals failed to take these factors into account in many cases.<sup>vii</sup>

Very often governments make decisions without consulting indigenous groups beforehand and failed to provide adequate protection of their rights, livelihoods and culture. The right of indigenous groups to prior consultation and informed consent must be introduced into public policy and be required before making decisions on investment and development projects, as well as enacting legislation that directly affects indigenous people.<sup>viii</sup>

Second International Decade of the World's Indigenous People that began 1 January 2005, also outlines<sup>ix</sup> an action programme for the Decade based on five key objectives. The objectives include promoting non-discriminatory laws, policies, resources and programmes; promoting full participation of indigenous groups in decisions that affect their lifestyles, traditional lands and territories and cultural integrity; altering development policies to ensure respect for indigenous peoples' cultural and linguistic diversity; adopting targeted policies, programmes and budgets for development of indigenous peoples, particularly children, women and youth; and creating strong mechanisms to monitor implementation of legal, policy and operational frameworks for protecting indigenous peoples and improving their lives.

Indigenous Peoples regard their very existence as linked or related to other life-systems, yet this relatedness is not considered alienable. Lindsey explains that because self-

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determination is about 'a peoples' controlling their own destiny, essential to the exercise of the right to self-determination is, according to him, the right [of Indigenous Peoples] . . . to control, develop, and protect [their] sciences, technologies, and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing art.

To convert the traditional knowledge and cultural heritage of the indigenous people into definitions of patents, copyrights, trademarks, personality, and trade secrets is to ignore that traditional knowledge and cultural heritage that identify an indigenous people and makes a mockery of their struggle for freedom and self-determination. Their struggle for self-determination has the symbiotic benefits of maintaining cultural cohesion and the protection of the greater public welfare.

Biological samples are being transferred, traded, bought, and sold without the agreement or consent of indigenous peoples, in violation of their inherent human rights. Globalization necessarily seeks to homogenize all law, not just intellectual property law, and that law's application. Issues surrounding sovereignty, political status, and self-determination are critical questions to consider, as they will necessarily determine bargaining power and positions, standing to negotiate. These political, economic, and social concerns are ignored by multinational corporations, which seek in every instance the promotion of capitalism, profit, and power for private industry actors. In this era of privatization, the phenomena of placing democratic decisions in the hands of private entities acting in the capacity of de facto government policymakers will continue to diminish and degrade indigenous peoples' efforts to protect their traditional knowledge and cultural heritage from misappropriation, exploitation, and commoditisation.

Unfortunately, so many individuals taking part in the conversation from the Western intellectual property regime perspective view the questions of safeguarding culture from commoditisation as an interesting dilemma, something to be balanced between the rights to free trade in a globalizing world on the one hand and a desire to preserve and maintain a traditional culture on the other hand. This attitude will lead to the assimilation of entire society into a system that idolizes individual wealth, money, greed, and the power to certain private Western industries. With the passage of the TRIPs agreement, member states legitimised the global proliferation of the principle of "cultural commoditisation," to the delight of private industry but equally to the dismay of developing countries and, more saliently, Indigenous Peoples.

The analysis fails without a historical and contextual discussion of the conflicts between capitalism and trade on the one hand and domestic, centrist policies and ideologies on the other hand. It is also disconcerting as some experts observe that Indigenous Peoples are pitted against each other by Western regimes in their respective attempts to safeguard cultural treasures. For example, the United States continues to erect arguments premised on fine distinctions and, oftentimes, disingenuous rationales with respect to the question of recognizing the political status of Native Americans without recognizing the political status of other indigenous communities. Western intellectual property concepts and principles, as many authors have stated, do not just differ from the beliefs of Indigenous Peoples because of surface characteristics like communal land-holding versus individual ownership, or oral traditions as protectable versus fixed expression as protectable, or charting the need for perpetual protection versus limited

protections. Rather, Western intellectual property paradigms are opposed to Indigenous Peoples' protection paradigms governing the respect of traditional knowledge and cultural heritage because these living entities symbiotically and simultaneously guarantee the very existence and survival of the collective.

In all cases, if the issue is taken from a Western thought, the same unmistakable message coming out of all these various deals is that:

1. Traditional knowledge is a trade issue.
2. Traditional knowledge is property or should be property.
3. Traditional knowledge is suitable subject matter for intellectual property law or its commercial use should be regulated under what is commonly known as intellectual property law.
4. Protection of traditional knowledge can be achieved through the enforcement of existing IPR rules such as those on patents, copyrights, trademarks, geographical indications. Alternatively, it might be achieved through the adoption of special, separate provisions on traditional knowledge, within those same intellectual property regimes.

#### **Examining the present IPR regime for the purpose of Traditional Knowledge**

How far the present IPR's are able to create a justifiable distribution of resources is the next question to be examined. The TRIPS agreement obliges WTO member countries to adopt standards of intellectual property rights protection along the lines of the developed countries. So the issue is how do these global responsibilities tie with national rights and obligations? An ideal regime of intellectual property rights strikes a balance between private incentives for innovators and the public interest of maximizing access to the fruits of innovation. This balance is reflected in article 27 of the 1948 Universal Declaration of Human Rights, which recognizes both that 'Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author [and that] Everyone has the right to share in scientific advancement and its benefits'.

The burning question seems to be balancing the interest of the inventor and that of the society in an optimum way. Here it will be inevitable to distinguish the mainstream IPRs and the Traditional Knowledge Systems. Mainstream IPR's focus upon individual ownership but Traditional Knowledge Systems emphasise upon communal ownership. IPR system protects the particular right for a specified number of years whereas TK protection is for the past, present and future. IPR protection is dependant upon legal sanction, whereas TK is protected through social and religious sanctions.

#### **IPR plus Models**

IPR Plus Models here refers to the models based on the existing IPR's but with some improvements, specially designed to meet the needs of traditional rights holders. Two main options for the protection of traditional knowledge need to be discussed: the application of existing intellectual property rights to traditional knowledge, and the possible creation of new rights adapted to the specific characteristics of traditional knowledge, be they related to intellectual property or not. Proposals have also been made for current intellectual property systems to recognise traditional knowledge more effectively.

While recognizing the market-based nature of IPRs, other non-market-based rights could be useful in developing models for a right to protect traditional knowledge, innovations and practices. To date, debate on IPRs and biodiversity has focused on patents and plant breeders' rights. Provisions under undisclosed information or trade secrets could be invoked to

protect traditional knowledge not available in the public domain. Geographical indications and trademarks, or *sui generis* analogies, could also be the alternative tools for indigenous and local communities seeking to gain economic benefits from their traditional knowledge. The potential value of geographical indications and trademarks is in protecting plants and germplasm that are specific and unique to geographical regions. They could protect and reward traditions while allowing innovation. They will emphasize the relationships between human cultures and their local land and environment. They are not freely transferable from one owner to another. They can be maintained as long as the collective tradition is maintained.

Shortcomings of IPR plus model within some indigenous groups, traditional knowledge is systematized and regulated by certain members of the group. Frequently, however, traditional knowledge is not "owned" by anyone, in a Western sense of the word. It is used and developed for the benefit of the entire community, and the idea of exclusive proprietary use of such knowledge for individual profit is objectionable to many traditional knowledge holders. Further, opponents of patent protection for traditional knowledge have argued that such protection will ultimately undermine the processes by which the knowledge has historically been acquired, preserved and used in the indigenous community. That is, the historical basis for development of traditional knowledge was an understanding that it would be used for the community's benefit. The concepts of individual profit and exclusive ownership may erode that understanding, resulting in the arrested development of the knowledge base. The same concern has been raised with respect to the protection of traditional knowledge through copyright and trademarks.

Any intellectual property protection must recognise these close and continuing links to the cultural heritage. Our knowledge:

Firstly, unites communities and recognises the creativity of previous generations'

Secondly, releases cultural tensions and ambivalence, educates and entertains.

Thirdly, is the social cement - provides the cohesion which enhances quality of life and assists in the development and articulation of cultural identity.

Fourthly, reflects on the past and is the foundation for the future

Fifthly, sets the national legal, moral and cultural values.

Traditional knowledge is documented and conserved in a unique way, passed on in a particular way and at a particular time to specific people. Often those with specialised knowledge cannot explain this in logical, sequential or teachable way. But they know what to do.

In the fast growing multicultural societies of most Western nations of the world, the protection of expressions of culture is important in creating/ maintaining identity, in promoting self-confidence and pride and, to social survival. Vandana Shiva challenges with the words that 'ethics and values are distinct elements of our cultural identity and our pluralistic civilization' Not only must we understand the role of traditional knowledge in a society there must also be public discussion about which traditional knowledge can be shared, and which should not be shared (i.e. are central to our national identity) and how this should be done. This is a personal (family) community and national debate. The decision to 'share' requires concerted research of the chemical properties and use of traditional medicines as well as decisions on how best to trade these.

So main benefits for the protection of traditional knowledge:

Protection of traditional knowledge could give to custodians of such knowledge some recognition for the contribution of the knowledge to new developments, and some control over how it is used. Benefits that could flow from this include:

1. Prevention of use of knowledge in a way objectionable to the originators (e.g. publication of details of sacred rites);
2. Greater recognition of the value of traditional knowledge, and respect for those who have preserved it;
3. More resources for the custodians, raising standards of living and degrees of development, in particular in the developing world;
4. Wider application of traditional knowledge throughout the world;
5. Preservation of traditional lifestyles (as promoted by article 8j of the Convention on Biological Diversity)
6. Protection or preservation of the environment.

No doubt there are others, and views will certainly differ widely about their respective importance or relevance.

Some alternative models providing justice to the traditional knowledge holders

There are many balancing issues for a nation such as government responsibility to their people and the requirements of an international system; growth with protection of its cultural heritage; the protection of indigenous knowledge in a way that augurs well with WTO obligations and ensuring global systems respect the different priorities of countries at various stages of development.

But still some countries have evolved the systems which are more suitable for protecting the tradition knowledge. The Local and Indigenous Knowledge Systems (LINKS) programme seeks to empower local communities in biodiversity governance by highlighting the central role that their knowledge, practices and worldviews play, alongside science, in sustainable development. One example is the field project with the Mayangna of Nicaragua's Bosawas Biosphere Reserve. A rigorous recording of indigenous knowledge of aquatic resources demonstrates its multiple facets and provides a first basis for Traditional knowledge and intercultural education.

Traditional forms of transmission are interlinked with the knowledge itself. While local language is a vehicle for the transmission of traditional knowledge within a linguistic community, a wider language of communication, that may be a national or official language allows for knowledge sharing with other cultural groups. Mutual consultation and dialogue between bearers of traditional knowledge and non bearers using both local and mainstream languages is a prerequisite for the promotion and preservation of traditional/local know-ledge.

The kava growing countries in the Pacific region could: ban the export of kava cuttings, except for purposes such as intra-regional cooperation; search databases for claims on existing varieties, chemicals genes etc - taken out by individuals or companies and determine their authenticity; get a definitive opinion to the effect that all existing kava varieties are ineligible for IPR protection; support and keep informed on MTAs regarding kava germplasm in gene banks and ex-situ collections and insist that accessions are the property of the country or region of births.

In another example, Vanuatu has a Cultural Research Policy covering consultation with local communities, chief's councils and women's groups as well as foreign researcher. This ensures a process of using knowledge to the benefit of all parties and a respect for indigenous methods of controlling knowledge.

Vanuatu is also promoting a Traditional Property Rights Policy, referred to in the Kastom Policy of the National Council of Chiefs, the Malvatumauri.

Under the Traditional Property Rights Policy, traditional copyright is defined as the traditional right of individuals, families or communities to control the ways the information they provide is used and accessed... the issue of traditional copyright arises when individual families or communities either own or are the custodians of specialised knowledge and its communications. This knowledge can include names, designs or forms, oral tradition, practices and skills... These belong to the ni-Vanuatu, who have a priority right to this knowledge and that research is a cooperative venture intimately involving indigenous communities and their knowledge. The bottom line is no research without community agreement

Promoting and supporting regional moves at consolidating and facilitating the setting up of a coordinated system with sui generis or special protective law will also catalyze local/national development of policies and regimes.

Governments must have a clear perception of national interest, complemented by ongoing collaboration with civil society.

As the preceding sections show, existing discussions regarding the protection of traditional knowledge are taking place in various forums but lacking a reasoned setting.

A further element of fragmentation is added to the picture when one becomes aware, that these discussions – and the academic literature analyzing it – are still incomplete since they do not sufficiently include linkages with recent initiatives to protect cultural diversity on the international level.

By coupling traditional knowledge with folklore, WIPO's IGC since 2000 has been emphasizing the necessity to include cultural aspects in the concept of traditional knowledge and has thus made a first step in the direction of a holistic view of the subject matter.

However, the integration of the cultural dimension into reflections on efficient methods for protecting traditional knowledge proves to be particularly difficult. In this regard, three points should be considered:

First, the value of traditional knowledge must not be reduced to its potential use for pharmaceutical or agricultural application, including methods of medical diagnosis and treatment or farming and plant breeding, etc. The translation of such knowledge between generations within a local community is usually based on a social and ritual matrix.

Anthropologists have shown that acquiring traditional knowledge may presuppose a special relationship of trust and close collaboration. Whereas such conditions of knowledge translation involve "culture" in the broad sense of the term, examples of a sacred dance in Santo Domingo and folklore music in Ethiopia or experiences with aboriginal art in Australia demonstrate that traditional knowledge may also consist of a variety of artistic expressions including dances, drawings, paintings, sculptures or music.

In principle, traditional knowledge in the sense of folklore can take any form of artistic expression. Second, such expressions of folklore often have been practiced by indigenous communities for centuries without being formally protected within a framework of intellectual property rights. In a globalizing world, differences between modern law and legal systems of indigenous peoples have become one of the major challenges for an effective protection of folklore. Whereas modern copyright law is based on the concept of individual

exclusive rights, indigenous peoples conceive expressions of folklore within a concept of collective ownership.

An aboriginal artist, for example, may not become the author of the paintings he creates, since the depicted sacred stories belong not to him but to the tribe or local community he is a member of. He is merely entrusted to use the sacred symbols and stories for certain precisely defined applications, and this only after having passed a process of initiation according to the rules of the tribe.

Aboriginal law strictly prescribes the content as well as techniques of such paintings, and the community may perceive errors as violating their religious feelings.

Third, although commercialization of certain aspects of traditional knowledge may create new economic opportunities, certain indigenous peoples may conceive appropriation or commoditisation of intangible cultural heritage as deeply offensive.

Thus, the value of traditional cultural expressions should not be reduced to its capacity of generating economic gain. On the other hand, pleading that indigenous peoples should not be 'polluted' with monetary issues would be scornful, since such abstention would simply mean to accept the inevitability of a continuing loss of cultural resources, languages and life-forms. So the monetary issue needs to go alongside. Finding the right balance between the respect for religious feelings of indigenous communities on the one hand and endeavours fostering poor people's ability to use their cultural heritage as a source of income on the other hand, proves to be very difficult. Moreover, sensitivities regarding the fear of commercialization may vary considerably among different groups.

So it has rightly been observed that it must be taken into account that the knowledge of indigenous peoples encompasses also a very important cultural dimension, which exceeds any utilitarian understanding and poses questions which may not be resolved within existing concepts of modern copyright law, notwithstanding a close analogy between many forms of folklore and literary and artistic works.

The hindrances which come in the way of providing justice to the indigenous communities and protecting their knowledge are so many.

1. Due to the inability of statutory and contractual law to recognise communal property, the problem of vesting authority to contract by structuring roles and responsibilities into custodianship concepts of customary traditions remains unsolved. For this reason, it is difficult for marginalised indigenous local communities to influence policy planning and implementation on these issues of vital significance to them unless they can participate.
2. A sui generis system which places a higher value on respect for life, biological diversity, developmental rights, human rights, community rights and cultural heritage than on individual property rights may be required. This may result in establishing an international order.
3. Priority could not be given to holders of knowledge over technical aspects of ownership such as who holds title to forest land on which a holder of knowledge may be located and claims to ownership of source materials by nationally mandated custodians of prior art.
4. Ownership of natural resources and the knowledge held may be in different hands. A focus on ownership could alienate members of indigenous cultures or cause bickering over competing claims for prior informed consent and equitable benefit sharing. Group relations in a community may be better

determined from within their own membership than by conferred recognition on selected individuals by outsiders.

5. The areas of greatest biodiversity are also areas of the greatest linguistic and ethnic plurality.

#### Suggestions

Here are some suggestions to reconcile existing IPRs with the Traditional Knowledge Systems in order to devise them in accordance with the idea of Distributive Justice.

1. Patents on genetic resources and TK should not be allowed on ethical, social and economic grounds.

2. Existing IPR (like trademarks and certification) should be used to protect TK only when unambiguous protection can be granted to the community.

3. The concept of public domain must be maintained in the IPR system where anyone who restricts access to material in the public domain has to pay into a common conservation fund. Conservation of TK and bio-resources has to be taken up on a priority basis. Strategy for protection should take into account the fact that genetic resources and TK are inextricably linked.

4. Documentation of (oral) TK of communities and their legal protection is urgently needed in view of the rapid erosion of this knowledge base. Special attention needs to be paid to thousands of anonymous manuscripts.

5. Legally protected databases with suitable contractual agreements based on CBD principles should be set up. The herbal drug industry should be allowed to use plants only from cultivated sources. Collections from nature should only be permissible for local communities and traditional healers and monitored for sustainability.

6. Disclosure, informed consent and equitable benefit sharing should be mandatory for any commercial use of TK and genetic resources. Concrete and specific methods of sharing benefits should be worked out in the event of commercialisation.

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