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# Equitable and fair benefit sharing: A socio-legal imperative for a social safeguard misnomer

## Makweti Sishekanu

**Abstract**
Environmental and social safeguards are inherently socio-legal matters. But the deficiency of legal expertise in this area has left environmental and social safeguards issues and processes to the mercy of social science theory. Consequently, social safeguards like benefit sharing have become a social misnomer based on equity and fairness as social science theories rather than legal principles. As such, benefit sharing as a social safeguard grapples to fulfill its duo intended purpose; i.e. to generally contribute to environmental sustainability and specifically, to improve the socioeconomic well-being of the prospective beneficiaries. Therefore, this paper builds on international principles of Access and Benefit Sharing (ABS) to proffer a socio-legal approach to benefit sharing at program and project level in Zambia.

**Keywords:** Equity, fairness, benefit allocation and benefit sharing

## Introduction
In the course of establishing Zambia's first-ever Safeguards Information System, renowned forest expert in Zambia, the late Prof. Patrick Matakala once asserted that environmental and social safeguards are inherently legal matters but a lack of legal expertise in this area has left safeguards and safeguards processes to the mercy of social scientists. This observation postulated that safeguards and safeguards processes have predominantly been predicated on social theory and characteristically dominated by social thinking. As such, safeguards processes like benefit allocation, benefit distribution and benefit sharing have become a social misnomer based on equity and fairness commonly construed from social rather than legal theory. While benefit sharing is now an established principle of international law, there is a multiplicity of regulatory developments pending to give effect to these international principles in intra-state benefit sharing arrangements and let alone, at the community level in provider countries [1].

This paper proposes a socio-legal approach to benefit distribution, benefit allocation and benefit sharing. It seeks to highlight the legal underpinnings of benefit sharing arrangements to purposively draw attention away from the social orientation in which benefit sharing arrangements are traditionally steeped. The propositions made herein derive mainly from the author's experiences with benefit sharing arrangements in Zambia. But the paper also derives a lot of insights from Access and Benefit Sharing (ABS) in the context of the CBD without necessarily restricting the discussion to ABS in the context of bioprospecting and exploitation of genetic resources. The paper extends it thesis to environmental protection, natural resource management and use, biodiversity conservation as in wildlife and forestry, particularly, Reducing Emissions from Deforestation and Forest Degradation (REDD+).

Like many other African countries, much of the stock of natural resources to be managed, the wealth of biodiversity to be conserved, the expanse of the natural environment to be protected, and genetic resources to be exploited in Zambia are located on indigenous/tribal and communal lands under customary jurisdictions. But the irony of it all has been highlighted by many observers; that the benefits of such programs have failed to trickle down to the marginalized members of the resource-dependent indigenous people in local communities, the poor, the landless, the caste class, and women who bear the greatest cost of

[1] Elisa Morgera and Elsa Tsioumani, 'The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods' (2010) 19/2 Review of European Community and International Environmental Law 150-173,158.

conservation programs [2].

A significant part of this challenge was identified by Cullet - that while legal incentives have thus far been developed for the use of genetic resources in industrial applications, much less has been done with regards to protection of the rights and interests of the holders of genetic resources and associated knowledge concerning their useful characteristics [3]. But even with existing legal frameworks, as will be discussed in respect of the legal framework in Zambia, asymmetrical protection of local or traditional knowledge has raised questions regarding equity and distributive justice of the existing frameworks [4].

Challenges of benefit sharing at international level include inherent inequalities and inequities within the North/South divide which have also been cited as reasons for the world's failed ambitions such as the Millennium Development Goals (MDGs) [5]. At national level, there is overwhelming empirical evidence from wildlife and Reducing Emissions from Deforestation and Forest Degradation [REDD+] projects in Zambia attesting to the fact that benefit sharing arrangements grapple to fit their purpose. But tackling entrenched inequities and inequalities often requires working against national elites, challenging vested interests or dominant ideologies, or speaking on behalf of those who are systematically excluded or ignored by policy-makers [6]. This paper specifically challenges the dominant ideology underpinning benefit sharing whose caricatures and shortcomings are rooted in their conceptual designs and theoretical frameworks which affect implementation mechanisms in the allocation, distribution and sharing of benefits.

The dominant social orientation in which benefit allocation and sharing are framed is premised on social contract theory which is grounded in the justifiable belief that, since no man has natural authority over another, force creates no right [7]. This leaves men with agreements [or *conventions* as Rousseau referred to them] as the legitimate source of authority between, and over, men [8]. Conventional benefit sharing exemplifies such *conventions* but in a utilitarian social orientation. In such *conventions*, priority rules are formulated to designate unequal weight to conflicting considerations based on priority [9]. Therefore, the common rules of civilized morals and the dictates of obvious expediency would have to suffice for the needs of such *conventions* according to Pollock [10]. This paper questions the notions of equity and fairness used to create such social *conventions* as benefit allocation and sharing arrangements.

Much of the focus in socially-oriented benefit sharing arrangements is on the nature and type of benefits to be shared at the expense of the theoretical underpinnings informing such arrangements and especially how equity and fairness of benefit sharing are framed. If the process [benefit distribution and allocation] should be as good as the product [benefit sharing], attention must be paid to the conceptual and theoretical frameworks within which both the process and the product are framed. Without completely negating the social architecture of conventional benefit sharing, this paper proposes a socio-legal orientation to benefit allocation and benefit sharing based on equity and fairness as legal theoretical underpinnings.

That natural resource use and management, bioprospecting, access to, and use of, genetic resources, environmental protection and ecosystem conservation are locked up in a complex web of sociocultural, socioeconomic and socioecological matrices, this paper employs a socio-legal lens, through which, functions of the law, legal systems and structure should be related to society, social structure, individuals and groups in the society [11]. This is because the relationship of law, in its many facets, to a social institution, should be considered a necessary part of understanding the situation [12]. Therefore, the paper's entire argument revolves around the need for a socio-legal framework to strengthen a community's effectiveness in (i) negotiating an equitable and fair benefit allocation (ii) negotiating benefit sharing arrangements rather than receiving benefits through a pre-arranged mechanism imposed on the recipients (iii) sharing of benefits based on equity, fairness and access as substantive and procedural elements of justice rather than social misnomers and (iv) making legally justiciable claims for benefit allocation and sharing as a right and obligation rather than a social privilege.

The paper lays its foundation on equity and fairness as legal principles before proceeding to assess the role of equity and fairness in benefit sharing. The proposed equitability and fairness of benefit sharing will be justified mainly around the conceptual framework around which, and within which, benefit allocation [as a process] and benefit sharing [as a product] should be framed as a point of departure from the purely social construction of benefit sharing. The paper examines the foundational principles of benefit sharing in international law and how these principles coalesce to promote equity and fairness in benefit sharing. The paper will also examine existing national legal frameworks for benefit allocation and sharing in Zambia and the extent to which these frameworks institutionalize a social orientation to benefit sharing. The paper will then outline the proposed approach to a socio-legal orientation to benefit allocation and sharing before concluding with a restatement of its thesis – that the dominant social approach to benefit allocation as a process weakens the sharing of benefits in practice as a product as it creates no legal obligations to enforce its effectiveness at operational level.

## Equity, Fairness and access

Equity, from its original Latin root word, *aeguit*, means; suitability, justice, moderation and impartiality [13]. From the Roman perspective, equity is associated with *aeguitas*, a

[2] Sudeep Jana, 'Rights-based Approaches to Natural Resource Management in Buffer Zone Community Forests' in Jessica Campese and others (Eds), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN, 2009), 187.

[3] Philippe Cullet, 'Environmental Justice in the use, knowledge and exploitation of Genetic Resources' in Jonas Ebbesson and Phoebe Okowa (Eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), 371.

[4] ibid, 372.

[5] Harry Jones, Equity in Development: Why it is Important and How to Achieve it. Oversees Development Institute (ODI) Working Paper 311, November 2009, vi.

[6] ibid, viii.

[7] Jean-Jacques Rousseau, *The Social Contract* (Jonathan Bennet, 2017), 3.

[8] ibid, i.

[9] Joel Feinberg, 'Justice, Fairness and Rationality' (1972) 81 The Yale Law Journal 1004-1031, 1007.

[10] Frederick Pollock, 'Justice According to Law' (1895) 9/5 Harvard Law Review 295-308, 295.

[11] David Schiff, 'Socio-legal Theory: Social Structure and Law' (1976) 39 Modern Law Review 287-310, 290.

[12] ibid, 287.

[13] Camelia Ignătescu, 'Equity, the value of Law' (2013) 4/4 Postmodern Opening Journal 25-33, 26.

confounded derivative of *ius civile* – the civil right of all citizens [14]. The combined etymology of these terminologies narrows down to *ius est ars boni et aequi* – law as the science of what is useful and equitable [15]. In a free society, this reflects the role of law as advanced by Mr. Justice Lord Denning; to protect and not only restrict, and only restrict insofar as it is necessary for the protection of those who need it, even if it means protecting people from themselves [16]. Lord Denning is renowned for having laid his judicial career foundation on the *dictum*;

"Where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail" [17].

Equity is an important bridge linking the freedoms and rights of weak or 'humblest' individuals against interests of the powerful. But while it has become prominent on the agenda of multilateral development organizations and international NGOs, 'equity' is a buzzword in empirical development discourse [18]. It is also observed that policies promoting equity have been low on the agenda for many Southern governments [19]. For those that have adopted equity policies on their agendas, the social orientation of equity is predicated on the socially-accepted norm that no absolute equality exists in society but a relative one created by social position, the different qualifications of people, income inequalities and social stratification [20]. This is inequity perpetuated in the name of negative equality – a form of discrimination which occurs when laws, policies and practices appearing neutral *prima facie* have an actual disproportionate impact on the exercise of rights [21].

In essence, this position is analogous with Rawls utilitarian analysis of justice; that utility, while different from justice, is nevertheless superior to it [22]. Based on this moral philosophy, pure social theory of equity has advanced the justification of relationship between the exploiter and the exploited; the rich and the poor; the slave and the slave master - from their position in relation to the economic means of production, their role in production and socioeconomic standings [23]. As an element of social conscience and social utility in this case, equity can inform the perpetuation of oppression and exploitation of man by man, especially, as Camelia notes - when it is used to promote economic interests and social stratification [24].

Social theory in contemporary free society depicts equity and fairness as elements of justice being a social virtue which makes society internally harmonious and good, creating in each member of society, a sense of duty [25]. Contrary, Marxism views such notion of equity as an instrument of coercion and class domination which denatures the true human essence of equity [26]. It derogates from the fact that the purported social harmony is itself built on, and bereft with, social inequalities and socioeconomic imbalances which are, by design, caricatures of a society with entrenched inherent inequities. Therefore, a socio-legal approach to benefit allocation and sharing proposed here is premised on two propositions: firstly, that a demonstration of policy, mechanism or practice as just does not necessarily settle the question of 'balanced rightness' with finality [27]. and secondly, that an exercise of merely capricious power, however great in relation to that which it acts upon, does not satisfy the general conception of law [28].

Social scientists, including Marxists, do concede that society as a social organism has an inherent struggle of the opposites [29]. Equity as the substantive element of justice is meant to keep each of the opposite forces from overstepping their boundaries [30]. This is a 'balance of rightness', which rightness must be safeguarded when the law has, in the words of Camelia; equity at the beginning, equity at the end and equity at the bottom [31]. In this legal sense, equity is a precursor of fairness applied to attenuate inherent social inequalities, that all may be treated the same and stand equal before the law [32]. Such equal treatment accorded to people translates into elimination of favoritism or discrimination. This is fairness according to the Victorian Law Foundation [33]. In effect of fairness, one party cannot be accorded unequal advantage over the other, and the different treatment accorded to different parties must derive from the law and not from their personal characteristics or attributes [34].

However, this must be understood from the fact that not every rule can apply equally to all citizens - an unmarried man is not subject to duties of a husband nor a trader to army rules [35]. But every rule must have equal application to a class of citizens and be binding upon or in respect to that class of members of society [36]. In short, the law cannot make all men equal but all men are equal before the law because their rights are equally subject of the same legal protection and their duties of enforcement [37]. Dispensing from this rule, two parties that enter into a benefit-sharing arrangement are automatically made equal partners to the agreement by virtue of that arrangement irrespective of their individual characteristics [for respect of persons is not compatible with justice] [38] and without prejudice to social stratification or the socioeconomic standing of the parties. This presupposes the fact that law does not aim at perfecting the individual character of men, but at regulating their relationships [39].

As such, fairness as a legal principle cannot be effective in practice without equal access to resources, i.e. the legal system must provide access to legal resources, procedures

[14] ibid, 26.
[15] ibid, 26.
[16] Justice Lord Denning in Sir Norman Anderson, *Liberty, Law and Justice: The Hamlyn Lectures, Thirtieth Series* (Stevens and Sons, 1978), 6-7.
[17] ibid, 4.
[18] Harry Jones (n 5), 1.
[19] ibid, 1.
[20] Camelia Ignătescu (n 13), 30.
[21] Raymond A. Atuguba, 'Equality, Non-discrimination and Fair Distribution of Benefits of Development' Chapter 7 in *Realizing the Right to Development*, pg 110-111.
[22] Joel Feinberg (n 9), 1006.
[23] Camelia (n 13), 28.
[24] ibid, 29.
[25] Leif Erikson and others, On Justice, Fairness and Equity in Gothenburg (Mistra Urban Futures 2016), 6.
[26] Camelia (n 13), 29-30.
[27] Joel Freiburg (n 9), 1005.
[28] Frederick Pollock (n 11), 297.
[29] Leif Erikson and others (n 16), 6.
[30] ibid, 6.
[31] Camelia (n 7), 30.
[32] ibid, 32.
[33] Victoria Law Foundation, the principles of justice: Equality, Fairness and Access; A Collection of Case Studies (VLF, 2019), 4.
[34] ibid, 4.
[35] Frederick Pollock (n 11), 298.
[36] ibid, 299.
[37] ibid, 300.
[38] ibid, 299.
[39] ibid, 303.

and institutions available to the people to guarantee public acquiescence to the legal/regulatory system. In the ultimate flow of this logic, equity and fairness are enablers of equitable and fair access to legal resources and benefits. But equity and fairness in conventional benefit sharing conceals a semantic misnomer which, according to Atuguba, represents a monumental emptiness that vaguely carries positive connotations of the term 'development' [40].

**Equity, Fairness and Access in Benefit sharing**

Why is equity important in benefit allocation and benefit sharing especially at community program/project level of operation? Harry Jones provides what I find to be the most appropriate conspectus of the answer;

"Equity helps us to decide how to distribute goods and services across society, holding the state responsible for its influence over how goods and services across are distributed in society, and using this influence to ensure fair treatment of all citizens" [41].

From Harry Jones' notion of equity and Prof. H.L.A Hart's thinking, the dominant social orientation of benefit sharing agreements reflect choices made and consent given without adequate reflection on, or appreciation of, the consequences and in pursuit of merely transitory desires [42]. But flowing from the logic of equity and fairness as legal principles, benefit allocation and sharing is only equitable if it is based on law which empowers parties to choose what is suitable, just, moderate and impartial inherent with the civil right of the parties to a benefit allocation and benefit sharing arrangement.

This is pertinent as Morgera rightly observes that benefit sharing is always established in relational operations and is often characterized by *de facto* power asymmetries [43]. In such operations, good governance and equity are compounded by the context of societies in which natural resource management and biodiversity conservation are undertaken - characterized by unjust social structures, hierarchically stratified systems and asymmetrical power relations [44]. Elite capture, for instance, has been identified as one of the major problems in REDD+ benefit-sharing arrangements [45], inexorably because of unequal power relations in society. As such, benefit sharing is directly and/or indirectly affected by intra-communal social relations and extra-communal power relations both at the design of benefit sharing arrangements and at the operational level of sharing benefits.

As such, it is pertinent to ruminate the notion of equity retrospectively to its original etymology. The idea of equity emerged as a creative process of positive law which had to adjust to the interests of the dominant social elite class in society [46]. In practice, therefore, equity takes into consideration the contradictions and imperfections of a human world which systematically creates imbalances in proportional equality and distributional justice – imbalances which favor one party and overwhelms the other [47].

From legal theory, therefore, it can be argued that reference to what is equitable and fair in benefit allocation and sharing serves to make explicit the substantive dimensions of justice (equity) and procedural dimensions of justice (fairness). Without the two at play, access to [negotiating benefit allocation arrangements] and access to the actual benefits, cannot be regarded as equitable and fair. While fairness is akin to clear procedures within a stable legal system, equity is linked to the respect and realization of rights of parties to a benefit allocation and sharing arrangement. In such an arrangement, equity focuses on what constitutes a just distribution [at the initial level of benefit allocation] and equality focuses on the actual distribution in practice [48] [at the terminal level of sharing the benefits]. But this is often hindered by mutually-reinforcing societal inequities and societal inequalities [49]. often entrenched into chronic inequalities through intergenerational transmission between groups [50]. Because law and policy are formulated within the fabrics of chronically unequal societies, they inadvertently tend to reinforce and perpetuate the inequalities and inequities.

**Legal frameworks for benefit sharing in Zambia**

**The Folklore Act**

The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No.16, 2016, [truncated here as the Folklore Act] was enacted to provide a transparent legal framework for the protection of, access to, and use of, traditional knowledge, genetic resources and expressions of folklore [51]. Integral to this protection, and to the preservation, conservation, wider application and development of traditional knowledge, genetic resources and expressions of folklore within the object of the law, is the legal recognition and protection of the inalienable rights of traditional communities, individuals and groups over their traditional knowledge, genetic resources and expressions of folklore [52]. The legal framework also provides for the promotion of fair and equitable distribution of benefits derived from the exploitation of traditional knowledge, genetic resources and expressions of folklore for the benefit of traditional communities, the country and mankind in general [53].

The law defines 'benefit' as the value, privileges, consideration, profit or gain derived from the use of traditional knowledge, genetic resources and expressions of folklore, while 'benefit sharing' is defined in terms of the equitable and just sharing of benefits, whether monetary or non-monetary, from the utilization of traditional knowledge, genetic resources and expressions of folklore [54]. A holder of traditional knowledge, genetic resource or folklore is defined as a traditional community, individual or group, irrespective of the pattern of ownership, and who is the

[40] Raymond A. Atuguba, 'Equality, Non-Discrimination and Fair Distribution of the benefits of Development' in UN Human Rights, *Realizing the Right to Development* (The United Nations 2013), 110.
[41] Harry Jones (n 8), vi.
[42] Prof. H.L.A Hart cited in Sir Norman Anderson (n 17), 7.
[43] Elisa Morgera, 'Fair and Equitable Benefit-Sharing in a New International Instrument on Marine Biodiversity: A Principled Approach towards Partnership Building' (2018) 5/19 Marine Safety and Security Law Journal – Special Issue on Ocean Commons 48-77, 58.
[44] Sudeep Jana (n 1), 199.
[45] Sophie Chapman and Martijn Wilder AM, Defining the Legal Elements of Benefit Sharing in the Context of REDD+: REDD+ Law Project Working Paper, July 2014 (Cambridge Center for Climate Change Mitigation Research, Cambridge University, 2014), 13.
[46] Camelia (n 4), 26.
[47] ibid, 28.
[48] ibid, 9.
[49] Camelia (n 4), 9.
[50] Harry Jones (n 8), vi.
[51] The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No.16, 2016, preamble.
[52] ibid, preamble.
[53] ibid, preamble.
[54] ibid, s2.

owner of traditional knowledge, genetic resource or expressions of folklore in a traditional and intergenerational context who has a right over or to whom traditional knowledge, genetic resource or expression of folklore belongs to in accordance with customary laws and practices [55]. 'Access' is defined as collection, acquisition, transfer or use of traditional knowledge, genetic resources and expressions of folklore [56].

Essentially, the Folklore Act is an intellectual property rights instrument as evinced from three perspectives: Firstly, it generally gives effect to the African Regional Intellectual Property Rights Organization (ARIPO)'s Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 and the WTO Trade-Related Intellectual Property Rights Agreement (TRIPS), 1994. Secondly, the application of the law is explicitly not designed to cover the access, use and exchange of traditional knowledge, genetic resources and expressions of folklore by an owner or among traditional communities, as the case may be [57]. but only applicable to the extent that an interested user is involved. The application of the law equally exempts the sale of produce of biological resources for direct consumption that do not involve the use of genetic resources [58]. and thirdly: the law is centrally administered by the Patents and Companies Registration Agency [59]. being the registration authority for intellectual property rights in Zambia.

The law sets prior informed consent as a legal link bridging, on the one hand, the inalienable rights of traditional communities or holders of traditional knowledge, genetic resources and expressions of folklore, and on the other hand, the intellectual property interests of potential users of traditional knowledge, genetic resources and expressions of folklore [60]. Section *four* provides for equity as the legal principle underpinning the relationship between holders and users of traditional knowledge, genetic resources and expressions of folklore through prior informed consent, while benefit sharing is the holders' protective right which may be determined in an access agreement signed between holders and users [61].

However, the right of traditional holders over genetic resources, in particular, is not absolute. It is alienable insofar as the Minister may deem it fit, in public security interest or public health, grant a compulsory license to fulfil a national need [62]. This ministerial discretion gives effect to the holding and vestment of ownership of genetic resources in the President, for and on behalf of, the Zambian people [63]. The rights of Zambian traditional communities being protected by the state under the Presidential vestment are stipulated in section *twenty seven* as (i) the exclusive right to regulate access to its genetic resources (ii) an inalienable right to use its genetic resources (iii) the exclusive right to share benefits arising from the utilization of its genetic resources, and (iv) the right to assign and conclude access agreements.

While the Folklore Act sets benefit sharing as a right, it does not outline the legal principles upon which the distribution, allocation and sharing of benefits shall be based. As such, the legal framework still leaves the empirical process of benefit distribution, allocation and sharing to discretionary arrangements between holders and users in a manner that ultimately reinforces a social approach to benefit sharing.

**The Forest Carbon Management Regulations (REDD+)**

The Forests (Carbon Stock Management) Regulations (Statutory Instrument No.66 of 2021) enforce section *one hundred five* of the Forests Act, 2015, i.e. the provisions giving the Minister power to prescribe, by statutory instrument [SI], anything which by the Forests Act is either required to be prescribed or necessary to enforce provisions of the Act. With a rise of REDD+ projects in the country, it was deemed both a requirement and a necessity for the minister to promulgate the Carbon SI No.66 in order to regulate carbon stock management in all carbon trade enterprises under REDD+ projects. That much of the carbon stock which the Carbon SI seeks to regulate is in rural and traditional community forest areas, the instrument rightly requires holders of a forest carbon stock management permit to incorporate social, environmental and financial safeguards in the design and implementation of a forest carbon management project/program [64]. Integral to this safeguards requirement is the incorporation of a BSM for the Director's approval [65].

Specific dictates for BSM include (i) the imperative for a benefit sharing agreement to be executed by all interested parties [66] (ii) the imperative for developing a BSM jointly with all interested parties[ [67] (iii) the imperative for a BSM to contain auditable but undefined benchmarks [68] and (iv) the imperative for a BSM to derive from the gross revenue of carbon credits sold [69]. yet holders of a carbon stock management permit are under no obligation to disclose their gross revenues of carbon credits sold on the international carbon markets. From the perspective of equity and fairness, there are two lacunas associated with benefit sharing in the Carbon Stock Management Regulations;

Firstly, the requirement for safeguarding local community interests through a BSM is *ex-post*, i.e. it is required of a proponent of a carbon stock management project after they have already been permitted rather than *ex-ante*, i.e. required at application stage before the proponents are issued with a permit. Under such an ethos, and unlike the spirit of the Folklore Act, benefit sharing is not a protective right of the local communities but a mere enabler of carbon stock management processes – which enabler must be determined through a negotiated agreement between parties. There is no regulatory guarantee that these rules can forestall the high likelihood of an asymmetrical benefit sharing arrangement.

Secondly, the permitted carbon stock management project proponent is under no legal obligation to disclose their gross carbon revenues from the sale of carbon credits on the international carbon markets. The local community parties to a BSM can, in no ways, know of what total carbon sales

[55] ibid, s2.
[56] ibid, s2.
[57] ibid, s3 (1) a.
[58] ibid, s3 (1) b.
[59] ibid, s5 (1).
[60] ibid, s18 (1).
[61] ibid, s20.
[62] ibid, s23 (2).
[63] ibid s26.
[64] The Forests (Carbon Stock Management) Regulations, SI No.66 of 2021, regulation 22.
[65] ibid, regulation 23(1).
[66] ibid, regulation 23(2) a.
[67] ibid, regulation 23(2) b.
[68] ibid, regulation 23(2) c.
[69] ibid, regulation 23(2) d.

is the percentage share of benefits accruing to them. This ethos of benefit sharing, although required by law, puts the proponents of a carbon stock management project in a philanthropist's position – to distribute benefits of carbon stock management to the local communities [being custodians of the local forests] based on social discretion and not on equity and fairness as legal principles.

**The Wildlife (Community Resource Board) Regulations**

The Zambia Wildlife (Community Resources Boards) Regulations, SI No.89 of 2004 mandates the Department of National Parks and Wildlife [the Authority] to pay into a fund established by the Community Resource Boards (CRB) fifty per centum of the total revenue earned by the Authority from animal license fees; provided that only a CRB established in an area in respect of which an animal license has been issued shall be paid [70]. This benefits is clearly in monetary form which must be paid to the CRB and the Patron (the local chief) as; [71] (i) 45 percent to the CRB and (ii) 5 percent to the Patron.

The simplistic nature of benefit distribution and allocation system does not outline a benefit sharing arrangement for the general members of the local communities represented by the CRB and the Patron, nor does it oblige the CRB to establish a benefit sharing arrangement at the devolved level of the community. Rather, the simplistic mechanism establishes a relationship between the Authority and two community entities, i.e. the CRB and the Patron. The remaining benefit sharing arrangements between the CRB and the majority of local community members represented by the CRB is a social arrangement at the discretion of the CRB and the Patron. On the other hand, and with inference from the spirit of section *thirty-three* of the Zambia Wildlife Act, 2015 [72]. the money paid into the CRB fund under the CRB regulations is more of mandatory remuneration to the CRB for its role in the promotion and development of integrated approaches to the management of human and natural resources in the protected areas under its jurisdiction, than an act of benefit sharing since the CRB and its community have no right to influence the benefit sharing design.

Notwithstanding the foregoing legal provisions on benefit sharing, the legal framework only serves to institutionalize the dominant social orientation to benefit sharing based on, borrowing from Cullet, the absence of property rights for traditional resource holders [73].

Flowing from this, and in the absence of clear legal provisions, equity (from an Aristotelian view) operates to fill in the gaps of the law [74]. In such gaps, contractual arrangements have been used to determine benefit sharing arrangements in many countries [75], including Cambodia, Kenya and Zambia. But such contractual arrangements are ideally anchored on resource tenure rights and the vestment of land ownership – a complex issue which most local communities in Africa grapple with since absolute ownership of land and natural resources are mostly vested in the State. A USAID assessment of Community-Based Natural Resource Management (CBNRM) in Zambia finds that, like in many other African countries, the salient challenge facing natural resource management and conservation is a misalignment of local communities' social and economic interests with resource stewardship and use [76]. The challenge forms a resource tenure matrix in which local communities fail to secure rights over local resources, to establish control rules and management institutions [77].

Ultimately, the land and resource tenure conundrum weakens, firstly; the communities' status in negotiating benefit allocation modalities and secondly; as a consequence of the first, it weakens their subsequent claims [through FPIC and grievance redress mechanisms] to the actual benefits given that they are a weaker party in an asymmetrical benefit sharing relationship. As such, and contrary to the notion of equity in Aristotelianism, equity must fill existential gaps in the exercise of practical rationality [emphasis added] concerned with particular facts as well as universal rules [78]. In this logic, the role of equity in legal provisions on benefit allocation and sharing is to rectify the deficiencies of the social orientation to benefit sharing. As Zahnd argues, equity does not merely fill gaps in the law but becomes the necessary part of selecting the law applicable to a particular situation like benefit distribution, allocation and sharing [79].

**Conceptual framework for a socio-legal approach to benefit allocation and sharing**

This segment focuses on a conceptual framework of benefit allocation and sharing of benefits as an objective, a right, an obligation, a socio-legal safeguard and a mechanism. It is around these five thematic areas that the proposal for a socio-legal approach to benefit allocation and sharing at program/project and intra-communal level of operation will be pitched. The theoretical underpinning of this proposal is considered within the general principles of international law and specifically, within the need for justice in balancing competing rights and interests of different players.

The UN Convention on Biological Diversity [the CBD] is foundational to the concept of benefit sharing. It provides for benefit sharing in Article 1 as follows;

The fair and equitable sharing of 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 the rights over those resources and to technologies, and by appropriate funding.

Article 8(j) encourages parties to the CBD to equitably share benefits arising from the utilization of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity, subject to national law. This text establishes an intra-state relationship between State Parties and their communities

[70] The Zambia Wildlife (Community Resources Boards) Regulations, SI. No.89 of 2004, regulation 3.
[71] ibid, regulation 3(2) Schedule 1.
[72] Functions of the CRB in respect of promoting and developing an integrated approach to the management of human and human and natural resources in a Community Partnership Park, Game Management Area and open area falling under its jurisdiction.
[73] Philipp Cullet (n 7), 376.
[74] Eric G. Zahnd, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law' (1996) 59/1 Law and Contemporary Problems 263-295, 290.
[75] Chapman and Wilder AM (n 41), 21.
[76] Anna-Louis Davis and others, Community-Based Natural Resource Management in Zambia: A Review of Institutional Reforms and Lessons Learned from the Field. USAID Integrated Land Resource Governance Task Order under the Strengthening Tenure Rights II (STAR II), IDIQ and the Nature Conservancy, 2020, pg 1.
[77] ibid, 1.
[78] Eric G. Zahnd (n 64), 290.
[79] ibid, 295.

and/or projects and communities. It comports with Chapman and Wilder's idea of benefit of allocation – an idea which delineates the whole concept of benefit sharing arrangement at three levels, i.e. benefit allocation, benefit distribution and benefit sharing [80]. Further, Article 15(7) requires CBD Parties to take legislative, administrative or policy measures, as appropriate, […] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial utilization of genetic resources with the Contracting Party providing such resources.

The Nagoya Protocol to the CBD is particularly an international agreement concerned with, *inter alia*, justice insofar as sharing of benefits arising from the utilization of genetic resources and traditional knowledge associated with genetic resources. Central to the notion of justice in the Protocol is equity and fairness in ABS of genetic resources [81]. Analytical commentaries on the Protocol suggest that equity and fairness serve as a bridge linking the third CBD objective [benefit sharing] with the convention's first and second objectives [conservation and sustainable use] [82]. The concept of ABS is also seen as a paradigm shift from the historical asymmetry created by colonialism through which cultural and natural heritage was collected and appropriated into museums, zoological and botanical gardens in colonizing countries [83]. Using the principle of 'common heritage' of mankind, developing countries have had to provide their genetic resources freely, while products incorporating them were protected by intellectual property rights and their use therefore restricted [84].

Article 13 of the International Treaty on Plant Genetic Resources for Food and Agriculture (the IT-PGRFA) requires that [emphasis added] benefits accruing from facilitated access to genetic resources for food and agriculture be shared fairly and equitably in accordance with the other provisions of the Article. The Article substantiates the general objective of the Treaty, i.e. the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security [85].

Requirements for equity and fairness of benefit sharing within the aegis of the UNFCCC regime and the Cancun accord in particular, are only inferable from the text …requiring State Parties to ensure the full and effective participation of stakeholders, in particular, indigenous people and local forest communities. Participation in this text has been interpreted to include (i) participation of stakeholders in decision making and (ii) participation in the sharing of benefits [86].

The broad nature of these international promulgations does not guarantee equity and fairness at the local level as REDD+ programs and projects come in various designs according to political, legal and regulatory contexts at national level, and the sociocultural, socioeconomic and socioecological contexts at local level. This makes benefit sharing in state-to-community arrangements open-ended and often controversial [87]. In Zambia, for instance, the bases of benefit sharing arrangements in wildlife management are management initiatives aimed at empowering the poor rather than substantive legislative provisions [88].

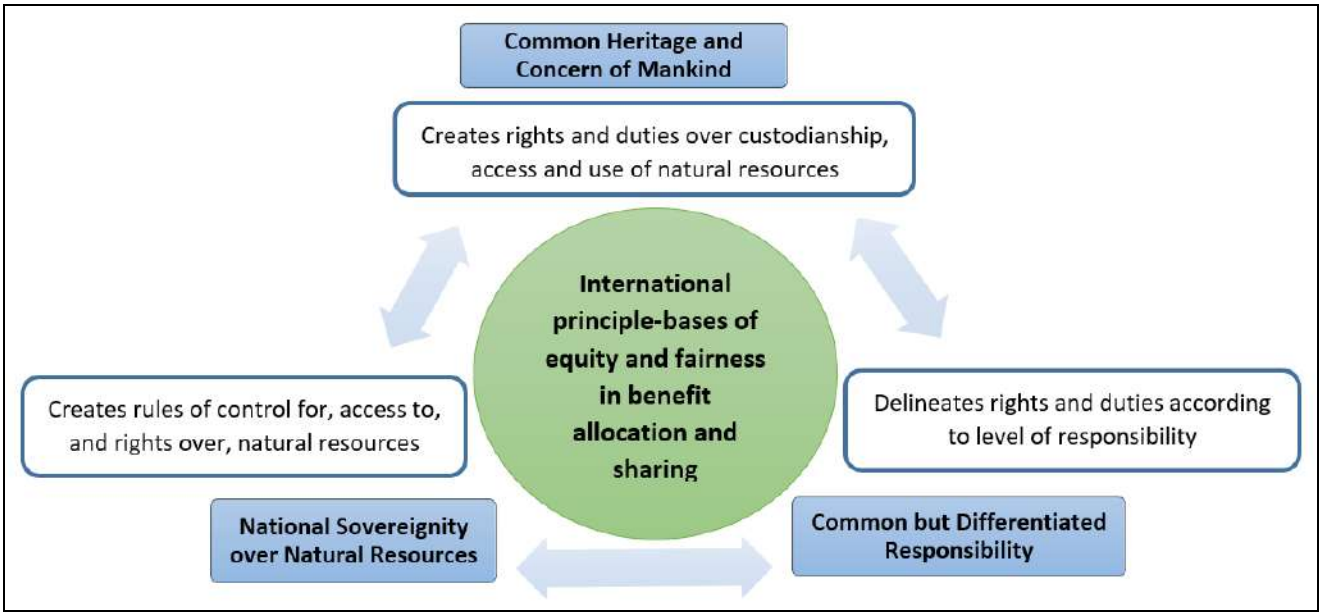
But irrespective of the level of operation at which benefit sharing is pitched, there are three international legal principles upon which the application of equity and fairness in benefit sharing is predicated; (i) national sovereignty to exploit own resources as promulgated in the UNCBD [89], (ii) common heritage of mankind as enshrined in the preamble of the United Nations Convention on the Law of the Sea (UNCLOS) and (iii) common but differentiated responsibility being a requirement of commitment from Article 4 of the UNFCCC, 1992. From these three principle elements of international law, benefit sharing is grounded in the principles of biodiversity conservation, international water and marine resource management, and in the climate change arena, particularly, the Reduction of Emissions from Deforestation and Forest Degradation (REDD+).

From the CBD, benefit sharing is originally predicated on the national sovereign rights countries claim over their biodiversity [90]. It has grown to create an equitable relationship between Parties providing genetic resources and its related traditional knowledge, and Parties wishing to exploit the genetic resources for research and development [91]. As such, national sovereignty over natural resources naturally lays the legal foundation for control of the exploitation of environmental and genetic resources. But while the CBD consciously derogates from the principle of 'common heritage' of genetic resources in preference for biodiversity as a 'common concern' for mankind, 'common heritage' remains an essential and foundational principle in the UNCLOS for the management and use of common pool resources in the oceans and high seas. It creates both a right of access and a duty for all contracting Parties to sustainably use and benefit from, the exploitation of environmental and genetic resources in the ocean and high seas.

Meanwhile, common but differentiated responsibility from UNFCCC regime delineates the rights and obligations imposed on all Parties, and eventually on all mankind, to different levels of responsibility towards the overall need for environmental protection, conservation and sustainability of the environment. It is from this principle that equity and fairness are born as substantive and procedural elements of justice to avert injustices and inequities between Parties in the process of accessing environmental and genetic resources deriving from the principles of common heritage and common concern. From this ethos, it has been noted, and correctly so, that the CBD objective on benefit sharing was conceived both as an economic incentive for the developing world to conserve biodiversity and as a means of correcting injustices by promoting equity. To apply the essence of this objective at the lowest level of operation in communities, equity and farness would ideally be promulgated from the rules of control that derive from, and

[80] Sophie Chapman and Martijn Wilder AM (n 41), 5.
[81] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2011, Article 5.
[82] Morgera and others (n 6), 2-3.
[83] ibid, 7-8.
[84] ibid, 8.
[85] UN FAO, The International Treaty on Plant Genetic Resources for Food and Agriculture, 2009, Article 1.1.
[86] Chapman and Wilder (n 46), 7-8.
[87] Morgera and Tsioumani (n 31), 160.
[88] Elisa Morgera, Wildlife Law in the Southern African Development Community: CIC Technical Series Publications No.9 (FAO and CIC, 2010), 41.
[89] CBD 1992, Articles 3 and 15(1).
[90] Sarah Laird and others (n 4), 1200.
[91] ibid, 1200.

comes with, the principle of sovereignty over natural resources. Essentially, the three Principles of international law mutually reinforce each other in generating what ought to be a legal basis for equitable and fair benefit allocation and benefit sharing intra-state and community levels of operation [see fig 1 below].




In the absence of explicit benefit sharing rules at international level, how can national entities make benefit allocation and sharing equitable and fair in order to provide for distributive justice at the local level [92]? The following theoretical framework proposes a socio-legal approach to answer that question. The proposed framework must tick five boxes as opposed to the conventional single box normally ticked for benefit sharing as a social 'mechanism' and from which the common term 'benefit sharing mechanism' derives. The proposed framework borrows from Cullet's thinking that there is no equity and fairness to talk about if the intellectual property rights of those who access and exploit the resource are more legally protected than the rights and interests of the resource holders.

**Benefit-sharing as an Objective**

Julia Marton-Lefevre, as IUCN Director General and Frances Seymour, as CIFOR Director General, have alluded to the fact that experience has demonstrated that exclusionary approaches to conservation can undermine the rights of the affected communities, in some instances, violate civil and political rights to the extent of undermining conservation objectives [93]. While supporting a rights-based approach to conservation, this statement presupposes the dominant thinking around conservation and the means of achieving it. It also presupposes that the separation of conservation and ABS formulations leaves conservation as a desirable but unrealistic objective [94].

In this ethos, ABS is not an objective in itself but a means to achieving conservation objectives. Therefore, it has been reiterated, on this premise, that the primary contribution of ABS to conservation rests with the idea that the utilization of genetic resources leads to the development of new products, and in doing so provides both incentives and additional economic benefits to support conservation [95]. In this line of thinking, benefit sharing is traditionally construed as a form of compensation meant to reward holders of genetic resources and related knowledge for their contribution to the development of products which are commercialized by others [96]. The reward-based thinking can be extrapolated to all other areas of natural resource management, biodiversity conservation and environmental protection in which benefit sharing is a *sine qua non*.

In the grand scheme of REDD+, the overall objective of benefit sharing is to incentivize and initiate broader support for actions that reduce deforestation and forest degradation in order to ultimately guarantee emissions reduction [97]. Benefit sharing has been described as a final stage in the process of generating, monetizing and allocating financial and non-financial REDD+ benefits, or a vehicle for distribution of benefits [98]. Even the consultative, transparent and participatory approaches through which benefit sharing arrangements are to be facilitated as required by the Forest Carbon Partnership Facility are all aimed at enhancing community support for REDD+ interventions [99]. Nearly all benefit sharing arrangements in wildlife, forestry, biodiversity conservation and ecosystem restoration programs/projects speak to, and are imbedded in, this ethos, i.e. benefit sharing as a means to some ends rather than an end in itself. To a significant extent, this is a reflection of Cullet's observation; that legal developments in the area of benefit sharing have not correlated with a need to attend to rights and interests of the holders of the resource at its source [100]. Ultimately this lag has left local people, i.e.

[92] Morgera and Tsioumani (n 31), 153.
[93] Julia Marton-Lefevre and Frances Seymour, Foreword in Jessica Campese and others, 'Rights-based Approaches to conservation: An Overview of concepts and questions' in Jessica Campese and others (n 2), xvii.
[94] Sarah Laird and others (n 40, 1201.
[95] Morgera and others (n 6), 11.
[96] Philippe Cullet (n 7), 372.
[97] Sophie Chapman and Martijn Wilder AM (n 46), 5.
[98] ibid, 5.
[99] ibid, 9.
[100] Philippe Cullet (n 7), 371.

farmers and holders of traditional/indigenous knowledge, in a weak position [101].

Meanwhile, a tribunal of the Inter-American Court of Human Rights [IACHR] held the view that conservation of natural ecosystems safeguards indigenous and tribal peoples' physical and cultural survival [102]. In the jurisprudence of the IACHR, benefit sharing is an objective for safeguarding indigenous and tribal peoples' physical and cultural survival as inferable from the tribunal's *ratio.* In this ethos, equity is represented in terms of access to and interactions with key institutions and how this interaction shapes power balances in political, socioeconomic, and ecological spheres which have often been the core of social exclusion in many developing countries [103]. From this purview, the pendulum of equity in benefit allocation and sharing swings away from its conventional objective as a means to some ends, to being an end in itself serving what Harry Jones outlines as five core purposes of equity (i) providing universal public services for fair treatment [104] (ii) providing targeted action for disadvantaged groups [105] (iii) providing social protection [106] (iv) enhancing redistribution [107] and (v) challenging entrenched power asymmetries [108].

While later on, Harry Jones himself concedes the fact that the outlined core purposes of equity derive from normative frameworks of moral and political philosophy [109], a socio-legal orientation to benefit allocation and sharing will require that these core purposes of equity be coded and interpreted in a legal instrument regulating benefit allocation and sharing in which equity and fairness are grounded as legal principles.

### 4.2. Benefit-sharing as Right and not a Privilege

Many benefit sharing arrangements in Zambia are couched as social contracts to enhance what Erikson and others have described as society's harmony, and to create in all parties to a benefit sharing arrangement, a sense of duty [110]. This sense creates an ethic of privilege in the community of people on the receiving end of the benefit and a sense of philanthropy on the part of the party disbursing the benefit on the other end. Contrary, where sharing of benefits is a right that attracts a legal obligation, beneficiaries cannot be treated as passive recipients of benefits, but active participants in discussing the nature of benefits, desirability and appropriateness of the benefit and the modalities through which it must be shared [111]. In respecting this right while fulfilling it as an obligation on the other hand, benefit allocation, even before sharing, becomes an iterative dialogue for establishing a common understanding as a foundation for partnership among different actors operating within the context of asymmetrical power relations [112]. Therefore, as a right, benefit allocation and benefit sharing establish a need to treat the two as independent (though mutually reinforcing) elements according to Cullet [113]; *allocation* being substantive and the actual *sharing* being a procedural right.

The IACHR held that members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to enjoyment of property rights, in order to safeguard their physical and cultural survival under international human rights law [114]. While the State of Suriname argued that the tribal people of Saramaka merely had a privilege and not a constitutional property right over the contested land and resources whose absolute ownership vested in the State [115], the court countered the argument and held that the physical and cultural survival of the tribal people inextricably depended on the same land and resources [116]. As such, the pendulum of the court's jurisprudence swung in favor of 'special measures' under human rights law – measures that would guarantee the continued physical and cultural survival of the tribal people, and that their traditional way of life, distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [117]. Therefore, indigenous/tribal or local communities' sociocultural and socioeconomic right to life superseded State property and resource tenure rights. Due to the inextricable interconnectedness of the two sets of rights, the unrestricted exercise of the latter is highly likely to jeopardize the full enjoyment of the former, the court ruled [118].

Benefit sharing under such an ethos, comports with the required 'special measures' under international human rights law referred to by the IACHR Tribunal in the *Saramaka People vs. Suriname* [119]. It establishes a legal relationship between rights-holders and duty-bearers; a relationship in which the responsibilities of duty-bearers are typically categorized into three, i.e. respecting, protecting and fulfilling the rights of the rights-holders [120]. Respecting communities' rights in this light is affiliated with access to negotiating an equitable and fair benefit-sharing arrangement while an equitable and fair sharing of benefits relates to fulfilling these rights. Essentially, equity in benefit allocation and sharing from the ethos of the IACHR tribunal, cures the error that may arise from the universal application of legal generality [121], - as the State of Suriname argued on the basis of property rights law vesting land ownership in the State.

Unlike the social orientation which furtively treats benefit sharing as a mere philanthropic exchange, the rights-based orientation views and treats benefit sharing as a deeper form of equitable and fair cooperation [122]. Relying on such a right, the community can define the manner in which the sharing ought to be framed and the types of benefits they may wish to secure in order to support their livelihoods [123].

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[101] ibid, 374.
[102] *The Saramaka People vs Suriname*, Inter-American Court of Human Rights, November 2007, para 85.
[103] Harry Jones (n 8), vi.
[104] ibid, vi.
[105] ibid, vii.
[106] ibid, vii.
[107] ibid, vii.
[108] ibid, vii.
[109] ibid, 3.
[110] Leif Erikson and others (n 17), 6.
[111] Elisa Morgera, 'Fair and Equitable Benefit-Sharing in a New International Instrument on Marine Biodiversity: A Principled Approach towards Partnership Building' (2018) 5/19 Marine Safety and Security Law Journal – Special Issue on Ocean Commons 48-77, 57.
[112] ibid, 58.
[113] Philippe Cullet (n 7), 372.
[114] *The Saramaka People vs. Suriname* (n 39), para 82.
[115] ibid, para 119.
[116] ibid, para 121.
[117] ibid, para 121.
[118] ibid, paras 126-127.
[119] ibid, para 86.
[120] Jessica Campese (n 38), 3.
[121] Eric G. Zahnd (n 64), 277.
[122] Morgera (n 39), 58.
[123] Morgera and Tsioumani (n 31), 157.

Therefore, the rights-based approach to benefit sharing strengthens the position of rights-holders as the rightful custodians of conservation and responsible actors rather than passive recipients of a promised benefit [124]. On the other hand, it magnifies the responsibility of the duty-bearers towards their obligations, i.e. to respect, protect and fulfill community rights.

Benefit allocation and sharing as a right invokes two equity standards of justification as expounded by Harry Jones, i.e. relevance and consistence [125]. Firstly, relevance relates to a kind of connection between the way people are treated and some characteristic features of the persons being treated [126]. For instance, giving people food because they are hungry meets the standard of relevance [127]. But giving people food because they wear expensive clothes repudiates the equity standard of relevance. Applying this standard to benefit sharing arrangements means benefits need to be allocated, distributed and shared because it is a peoples' right. Contrary, when benefit distribution, allocation and sharing is predicated on the need to achieve project objectives, it repudiates the equity standards of relevance. Secondly; consistence relates to a kind of connection between and implicit in the way different people are treated [128]. For instance, should food be given some people because they are hungry yet the same food is withheld from another person who is equally hungry means the equity standard of consistence is repudiated. Therefore, benefit allocation and sharing is equitable when its rationality as a right is consistent across all benefit sharing arrangements for the purpose of maintaining its relevance in respect of the peoples' right.

However, the measure of the foregoing standards and effectiveness of this approach can only be guaranteed through clear legislative provisions defining the concerned 'rights' at play, and explicating provisions that also ensure transparency and predictability on the one hand, and relevance and consistence on the other hand. Such an approach to managing the rights and interests of stakeholders, communities and landholders is pertinent in order to provide certainty to external investors [129]. Outside of this ethos, sharing of benefits remains an ideal never realized [130], and the standard measure of equity and fairness in benefit sharing arrangements remains a subjective and indeterminate value judgement.

**Benefit sharing as a legal Obligation**

When and where benefit sharing is a right and not just social privilege, access to negotiating a benefit sharing arrangement primarily becomes an imperative procedural obligation in the first place. This sets the basis for a legal claim to benefit distribution and the eventual sharing of benefits as Chapman and Wilder have put it - in reference to benefit allocation as a basis for benefit claim whether by legislation or by contractual arrangements [131]. In REDD+ carbon trade schemes, the basis for such a claim should be based on carbon rights, i.e. a claim linked to land and resource rights [132]. In wildlife management, the legal obligation must be rooted in, and derive from, *usufruct* rights, traditional title to wildlife and land tenure [133].

In other natural resource management, biodiversity conservation and environmental protections projects, this legal claim should be predicated on resource tenure rights as this author has argued elsewhere [134]. To achieve the foregoing, Morgera is right in suggesting that legislation would have to be clear in granting specific rights to targeted groups, thus bypassing any ambiguities or inequities of other legislation or processes [135]. Secondly, legislation, particularly subsidiary legislation, would have to allocate clear responsibilities and transparent frameworks for the collection and allocation of these benefits [136].

As the case currently is, benefit allocation and sharing in sectors such as wildlife management do not derive from legal obligations but rather from considerations of compensating local communities affected by wildlife management decisions, or rewards for conservation efforts.[137] This leaves benefit sharing arrangements to the mercy of private bargains between different and unequal actors. In concurring with Prof. Francioni, equity in benefit sharing arrangements needs to be couched as an underlying legislative principle and not left to pure private-law bargains between business actors and local title-holders [138].

**Benefit-sharing as a socio-legal safeguard**

Many benefit-sharing arrangements in Zambia at the program/project level derive from donor conditionalities. In such arrangements, benefit-sharing is treated as a mandatory requirement of the program/project sponsor to the program/project implementers. Inversely, benefit-sharing would not be deemed an essential safeguard if the donor did not attach such stringent requirements with the overall funding conditionalities. This is contrary to the manner and form in which the IACHR promulgates benefit-sharing in the *Saramaka People*'s ruling. The IACHR ruling establishes benefit sharing as a socio-legal safeguard deriving from a fundamental need to safeguard the socioeconomic and sociocultural right to life of affected communities [139].

In restricting the State of Suriname's exercise of state property rights over commercial natural resources found within customary/tribal land territory, and in protecting the Saramaka peoples' tribal ways of life under Article 1 of the American Convention of Human Rights, the court ordered the State to abide by three safeguards; (i) ensure effective participation of the people in conformity with to their customs and traditions (ii) guarantee the share of reasonable benefits from any development plans, investments or exploitation of natural resources, and (iii) ensure that no concessions are allocated in the tribal peoples' land without a prior environmental and social impact assessment [140].

[124] Sudeep Jana (n 2), 186.
[125] Harry Jones (n 8), 3.
[126] ibid, 3.
[127] ibid, 3.
[128] ibid, 3.
[129] Sophie Chapman and Martijn Wilder AM (n 51), 27.
[130] Raymond A. Atuguba (n 22), 111.
[131] Sophie Chapman and Martijn Wilder AM (n 55), 5.
[132] ibid, 5.
[133] Morgera (n 77), 40-41.
[134] Makweti Sishekanu and Morgan Katati, 'The Normative Framework of Resource Tenure Rights: The Nexus of Community and Legal Rights and its Implications on Natural Resource Management in Zambia' (2021) Forthcoming in LEAD Journal, 2.
[135] Morgera (n 77), 41.
[136] ibid, 44.
[137] ibid, 44.
[138] Francesco Francioni, 'Foreword' in Morgera and others (n 74), xiv.
[139] *The Saramaka People vs. Suriname* (n 39), para 129.
[140] ibid, para 129.

These three safeguard requirements are as mutually reinforcing as the indivisibility of human rights.

Court emphasized that the safeguards were for the purpose of preserving, protecting and guaranteeing the *Saramaka* peoples' special relationship their land [141]. Benefit sharing under such an arrangement presents a legally-binding social safeguard requirement irrespective of whether the safeguard was a conditionality of program/project funders or not. Essentially, in such a socio-legal orientation;

1. Benefit sharing must be based on well-established rights of communities and not on promised social privileges
2. Benefit sharing becomes a legally justiciable obligation and not a social responsibility of one party towards the other
3. Benefit sharing becomes an objective in itself rather than a means to some ends, and;
4. Benefit sharing becomes a legally justifiable mechanism on the one hand and a socially acceptable form of cooperation based on equity and fairness.

**Benefit-sharing as a mechanism**

With its origins in the CBD, benefit sharing was first conceived as a transactional mechanism to restrict access to genetic resources so their use can be exchanged for benefits between identified users and providers of the resources [142]. With time, the conception of benefit sharing has evolved into a mechanism which may not be explicated in better terms than Morgera and Tsioumani have elaborated it; a substantive tool in reinforcing the general principles of public participation in environmental decision-making [143]. Thuy and others have defined benefit sharing as a distribution mechanism for both monetary and non-monetary benefits generated through the implementation of REDD+ programs/projects [144]. This definition has seemingly laid the foundation on which other experts have construed benefit-sharing in REDD+ programs/projects as a mechanism for identifying financial and non-financial outcomes of REDD+ interventions, and how these benefits are distributed between or among stakeholders [145].

This represents the commonest form and shape in which most benefit sharing arrangements are presented to specifically serve the purpose of a social mechanism for broader participation and incentivization of participants. But whether the participation wrought through such a mechanism can be said to be fair and equitable in practice underpins the thesis of this paper. The common rational feature of this mechanism is the understanding that when communities or those who control land do not derive benefits from the conservation of biodiversity and natural ecosystems, they are likely to engage in unsustainable practices for short-term benefits [146]. But if this be the underpinning rationale for benefit sharing, its inverse would then be plausible; that if it were possible to establish other mechanisms for conserving biodiversity and natural ecosystems than benefit sharing, community involvement in biodiversity conservation would easily be considered unnecessary.

**Conclusion**

This paper has benefited a lot from insights of ABS in the international context of the UNCBD in general, and principles from other international legal regimes around which benefit sharing revolves, in particular. Gleaning from the UNCBD, UNCLOS and the UNFCCC, the paper finds three international principles that are relevant to the legal foundation of benefit sharing at international level, i.e. biodiversity as a common concern for mankind, national sovereignty over natural resources and the common but differentiated responsibility in the protection of the environment.

At national level, the paper underwrites an argument that the dominant social approach to benefit sharing in Zambia constitutes a significant part of a problem, i.e. the failure of many benefit sharing arrangements to achieve their purpose in terms of conservation on the one hand, and failure to yield socioeconomic improvements of local peoples' lives on the other hand. The dominant social approach to benefit sharing, and the social orientation in which these arrangements are steeped, is seen in the traditional use of the term 'Benefit Sharing Mechanism' (BSM). The term 'mechanism' traditionally refers to a framework for motivating and incentivizing participation of local stakeholders in a natural resource management, environmental protection and biodiversity conservation program/project, and an avenue for consensus building between program/project proponents and the local people. As such, the term BSM has traditionally been used to view benefit sharing narrowly as a social mechanism.

The analysis of legal provisions for benefit sharing in Zambia's legal frameworks further depicts the dominant social orientation to benefit sharing which weakens the position of equity and fairness as legal principles. It is hereby concluded, therefore, that the legal nature of equity and fairness in benefit sharing does not necessarily subsist in the mere promulgation of text in a legislative or regulatory instrument, but in the spirit of the text in respect to its enforceability and justiciability, i.e. benefit sharing as the end rather than a means to the end; benefit sharing as a socio-legal safeguard rather than a mere social safeguard; benefit sharing as a right rather than a social privilege offered in charitable terms; benefit sharing as a legal obligation rather than a social discretion, and benefit sharing as a mechanism not only for enabling projects/programs but also for enabling legal redress.

This paper has argued that benefit sharing as a 'mechanism' should not be the only the box benefit sharing arrangements are expected to tick. It is on this premise that the paper has consciously attempted to use the term Benefit Sharing Arrangement (BSA) in place of 'mechanism'. Where benefit sharing arrangements have narrowly been designed as social mechanisms for sharing benefits, they tend to reflect social choices made or consent given without adequate reflection or appreciation of consequences, or in pursuit of merely transitory desires. As proposed herein, a socio-legal approach to BSA should start with benefit allocation in which equity represents what should constitute a just benefit, and sharing of benefits in which equality represents the final actual distribution of benefits in a fair manner. The two elements should carefully be treated independently yet

[141] ibid, para 129.
[142] Sarah Laird and others (n 4), 1200.
[143] Morgera and Tsioumani (n 31), 162.
[144] Pham Thu Thuy and others, Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries: CIFOR Working Paper 108; 2013, pg 1.
[145] Sophie Chapman and Martijn Wilder AM (n 55), 4.
[146] Morgera and Tsioumani (n 31), 162.

mutually reinforcing each other as the former is substantive and the latter is procedural. In such an ethos of benefit allocation and sharing arrangements, equity, fairness and access are legal imperatives rather than social misnomers.

Finally, the proposed socio-legal approach can only be effective in practice if, and when, firstly, the legal framework applicable to a particular benefit allocation and sharing arrangement makes clear provisions in respect of benefit sharing principles and the rights of the prospective parties to the benefit sharing arrangement; and secondly, the community entities entering into a benefit sharing arrangement with other non-community entities must have capacity to negotiate a benefit allocation and sharing arrangement, to know and claim their resource tenure rights as a basis for negotiating benefit allocation and sharing arrangements. They should not only have substantive rights to legal redress for violations of benefit sharing obligations, but should also have a capacity to exercise their procedural right to embark on the necessary procedures in seeking legal redress.

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