

# ***INTRODUCTION TO MAGISTERIAL DOCUMENTS AND HOLY SEE INTERVENTIONS ON GENETIC RESOURCES***

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All too often, “the fruits of scientific progress, rather than being placed at the service of the entire human community, are distributed in such a way that unjust inequalities are actually increased or even rendered permanent. The Catholic Church has consistently taught that there is a ‘social mortgage’ on all private property, a concept which today must be also applied to ‘intellectual property’ and to ‘knowledge’. The law of profit alone cannot be applied to that which is essential for the fight against hunger, disease, and poverty.”<sup>1</sup>

These words of John Paul II continue to ring true. Through both private and public investment, we continue to see incredible scientific advancement in the understanding and use of biological resources, the applications of which hold great social value and potential to improve the lives of people, particularly in the medical, pharmaceutical, and agricultural fields. To continue incentivizing such innovation and to spread the benefits of these innovations widely, just legal frameworks for intellectual property protection play an essential role. Yet while we recognise the value of intellectual

property protection, the scope of those rights must always be measured in relation to greater principles of justice in service of the common good. In the important discussion over the scope of these rights, the Catholic Church in its official voice plays the role not of offering “technical” solutions, but of “proposing the spiritual values that give meaning to life and guidance for practical decisions, including at the level of work and the economy.”<sup>2</sup> Other parts of this publication explore how these principles of justice might be applied in the debate over the patenting of genetic resources, but the task of this introduction is to lay out the values and principles which the Church asserts ought to guide this debate.

The Church recognises two important objectives in the legal framework of intellectual property rights: creating incentives for innovation and spreading the benefits of the innovations as widely as possible.<sup>3</sup> The scientific progress in the understanding and adaptation of genetic resources has led to commercial and social value potential in medical, pharmaceuticals, agriculture, and other fields. This may, for instance,

*¶ Relevant issues*

include a drought-resistant crop variety or a plant extract with medicinal properties. Legal frameworks and policies which incentivise innovation can serve the common good, in part because the potential for future profit has motivated private interests to invest in research on genetic resources and discover or create new applications of these resources. Yet justice may require that the products of scientific progress, particularly genetic resources, serve everyone equally and not only the sectors with the greatest acquisitive potential. The fundamental principle of the common good must be applied to ensure that progress in researching genetic resources does in fact benefit all mankind, serving the pursuit of the common good.

¶ *A 'social mortgage' on all property*

“The issue of ownership and use of new technologies and knowledge—which in our day constitute a particular form of property that is no less important than ownership of land or capital—becomes significant in this perspective. These resources, like all goods, have a universal destination; they too must be placed in a context of legal norms and social rules that guarantee that they will be used according to the criteria of justice, equity and respect of human rights. The new discoveries and technologies, thanks to their enormous potential, can make a decisive contribution to the promotion of social progress; but if they remain concentrated in the wealthier countries or in the hands of a small number of powerful groups, they risk beco-

ming sources of unemployment and increasing the gap between developed and underdeveloped areas.”<sup>4</sup>

The Church offers guidance in how we are to understand the principles at stake. We must look to the nature of property and the universal destination of goods, the purpose for intellectual property protection, and the rights of traditional communities and developing countries. At all times we must focus on the underlying principle of service to the common good.

**T**he “goods of this world are originally meant for all. The right to private property is valid and necessary, but it does not nullify the value of this principle. Private property, in fact, is under a ‘social mortgage’, which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods.”<sup>5</sup>

A discussion of the patentability of genetic resources must begin with understanding the nature of private property, including the granting of intellectual property rights. “The right to private property, acquired or received in a just way, does not do away with the original gift of the earth to the whole of mankind. The universal destination of goods remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise.”<sup>6</sup> Thus the respect for the exercise of private property rights is clearly subordinated to the common good. It serves as

a means to an end rather than an end unto itself. Individuals do not exist solely to serve their own individual interests, and all goods, all resources entrusted to particular persons, are subject to a ‘social mortgage’ based upon the principle of the universal destination of goods. This principle is explained thus: “God destined the earth and all it contains for all men and all peoples so that all created things would be shared fairly by all mankind under the guidance of justice tempered by charity.”<sup>7</sup>

The respect for private property rights is indeed a just cause, worthy of upholding and defending. Yet this respect for private property rights, including intellectual property rights, must always be understood as a means to an end. Private property rights are not unconditional, absolute rights, but rather an instrument, a means by which to serve the common good. The ability of these rights to be at the service of the common good can be threatened at both ends by excessive tendencies of the State or of “a blurred, economistic view of life”:

“Private property, ultimately, is for no one an unconditional, absolute right but rather, and above all, an instrument with which to achieve effective access to property destined for the whole of mankind, ensuring at the same time that all individuals and all families have their essential environment of freedom and just autonomy in the face of all kinds of totalitarian tendency — both that which comes from the State and that which is attributable to a blurred,

economistic view of life.”<sup>8</sup>

Stemming from the principle of the universal destination of goods, all people have the right to draw from the resources available to provide for their subsistence and growth.<sup>9</sup> It is because of this right that legal instruments for the protection of private property rights, including intellectual property rights, cannot lose sight of the universal destination of goods, the ‘social mortgage’ to which all private property is subject.

**T**he “ultimate cause that intellectual property protection works for is the recognition of the dignity of man and his work, in its double dimension, namely as a medium of expression and growth of the individual personality and as a contribution to the common good.”<sup>10</sup>

The legal framework for the protection of intellectual property rights serves the just purpose of promoting and protecting inventive activity, always bearing in mind that the primary purpose of this protection is the service of the common good. “The *raison d’être* of intellectual property protection systems is the promotion of literary, scientific or artistic production and inventive activity for the sake of the common good.”<sup>11</sup> Policies and laws must maintain this understanding, oriented toward the ultimate cause for the recognition of the dignity of man and his work, both as an expression of the inventor and as a contribution to the common good. However, the Magisterium states: “On the part of rich countries there is excessive zeal for protecting

### *§ The purpose of intellectual property protection*

knowledge through an unduly rigid assertion of the right to intellectual property.”<sup>12</sup> It is such imbalances in understanding intellectual property rights which must be addressed, calling for the protection of intellectual property to always be in the service of the common good.

Scientific research, motivated often by commercial interest, to derive beneficial uses for genetic resources is indeed praiseworthy. In light of the tremendous scientific progress in the applications of genetic resources, the role of intellectual property rights must clearly be recognised. Some level of recognition of such rights, intended to encourage and protect investments of time and capital into promising research, may indeed be just and “may promote the common good by accelerating the search for solutions to problems in the modern world.”<sup>13</sup> For example, in the pursuit of new medical treatments, “special protections are needed to ensure that producers are able to recover their massive expenditures on research—including just wages for scientists and others who carry out such research, as well as compliance with regulations that ensure the safety of their products.”<sup>14</sup>

But the Holy See recognises that the acceleration of “the search for solutions to problems in the world” which intellectual property rights protection may promote, has been accompanied by an acceleration in the influence of investment capital to transform ‘intellectual property’ from an economic asset and compensation for individual innovators into a capital asset or production

factor for industry:

“The ever-strengthening bond between applied science and industry, which is particularly strong in certain leading sectors (industrial use of applications and results of knowledge of the structure of matter and life mechanisms) has caused “intellectual property” to evolve from an economic asset and remuneration for individuals (men or women) into a capital asset or production factor. Thus the capacity of companies for scientific research (undertaken on their own or in association with academic bodies) and the corresponding legal protection of the intellectual heritage that results have become one of the most important parameters governing their economic strength and their ability to attract investment.”<sup>15</sup>

While this creates greater complexity in understanding the various actors and interests involved in researching genetic resources and seeking corresponding intellectual property rights protection, it does not alter the underlying principles, the ultimate cause of intellectual property rights protection as a mechanism in service of the common good. “The intellectual property rights system must exist not only to protect creative and innovative impetus but also and primarily to serve the common good of the human family. As a universal common good, intellectual property demands that control mechanisms should accompany the logic of the market.”<sup>16</sup> Thus, the Church recognises

the value of intellectual property rights protection while pointing to the purpose of such rights and to the effects of imbalances in the current system of intellectual property rights protection, as it impacts traditional communities, developing countries, and in general impacts the common good.

**T**he patent regime for genetic resources must respect the rights of traditional communities to use and protect those genetic resources to which they have a claim, as well as to share in the benefits of exploitation of those genetic resources whose development derives at least in part from traditional knowledge those communities have collectively accumulated over generations. It must also recognise the moral duty to include developing countries in the benefits of new technological innovation in the research of genetic resources, particularly as these innovations pertain to essential elements of life and development, namely agriculture (food) and medicine (health).

“The biological environment tends in addition to be closely associated with the culture of [traditional communities], and constitutes an integral factor of their identity and social cohesion. Such rights of native populations in the land and its fruits exist, and have to be protected, even where modern systems of property protection—both movable and immovable property as well as intellectual property, do not contain elements that allow it to be recognized and

protected to a sufficient extent.”<sup>17</sup>

Respect for the rights of traditional communities in regard to IP protection of genetic resources requires a view of traditional knowledge as “a common asset of that same community, which has grown with small, anonymous contributions over a great many generations.”<sup>18</sup> Whatever agreements are made “should guarantee the achievement of equitable economic participation of native populations in the benefits deriving from the commercial exploitation of biological resources, and the promotion of effective means of ensuring respect for the collective ownership of traditional knowledge.”<sup>19</sup>

Research on genetic resources in developed countries has developed new plant and seed varieties using in part the traditional knowledge of traditional communities in developing countries. Restrictions on the flow of this knowledge through intellectual property rights mechanisms have followed. This has impacted farmers’ dependency on private firms, as well the costs they pay, for seeds, pesticides, and fertilizers. The impact of such an industrialised, capital-intensive agriculture on traditional communities, biodiversity, and developing countries requires careful evaluation.<sup>20</sup> Agreements for access to both genetic resources and traditional knowledge regarding those resources must be shaped by principles of justice, taking into account the relative positions of the various parties to the agreements. These agreements should neither become an opportunity for excessive rent-seeking, nor be tainted by

*§ Traditional communities and developing countries*

¶ *The way forward*

an economic dictatorship of highly developed nations over the developing world.<sup>21</sup>

“The knowledge economy is increasingly becoming a driving force in the global economy. Thus there is a need to protect intellectual property rights as an incentive for innovation and technology creation, yet it is also important to ensure broad access to technology and knowledge especially for low-income countries. The new goods derived from progress in science and technology are key to world trade integration. Improved technology and know-how transfer from the developed countries is necessary so that less-developed countries can catch-up and gain international trade competitiveness.”<sup>22</sup>

Understanding that the protection of intellectual property rights “as an incentive for innovation and technology creation” is subject to the ‘social mortgage’ on all property, the fruits of such innovation are therefore subject to the universal destination of goods, and cannot be withheld from developing countries. Indeed, “States, in accord with the duty of solidarity and giving due consideration to the rights of the developers of such technology, have an obligation to ensure a just and equitable transfer of appropriate technology which is favourable to sustaining the development process and protecting the environment.”<sup>23</sup> Advancement in the understanding and use of genetic resources, which may be promoted by a level of protection for intellectual property rights, must contribute to the common good, which includes developed and developing countries

alike.

**T**he role of intellectual property rights protection is clearly recognised for its contribution to promoting research and innovation with the potential to contribute greatly to the common good. The Church recognises the role of private property and private enterprise as actors who may contribute to the common good:

“Successful businesses identify and seek to address genuine human needs at a level of excellence using a great deal of innovation, creativity and initiative. They produce what has been produced before but often—as in the arenas of medicine, communication, credit, food production, energy, and welfare provision—they invent entirely new ways of meeting human needs. And they incrementally improve their products and services, which, where they are genuinely good, improve the quality of people’s lives.”<sup>24</sup>

Intellectual property rights protection has an important role to play in promoting scientific research and contributing to the common good. Bearing in mind the ‘social mortgage’ to which any such intellectual property rights are subject, the interest and rights of a variety of actors must be properly balanced to ensure that such IP protection does contribute to the common good. These rights include:

- The rights of the native populations that have developed the traditional knowledge and

- the expressions of folklore or who occupy the territories from which the genetic material comes. (e.g. the right to be fully informed on a given project and the right to fair participation in the benefits)
- The right of the countries to the resources associated with biological diversity.
  - The right of the inventor or discoverer to remuneration for any intellectual value that he may have added.
  - The possible rights and interests of companies.
  - Society's right to or interest in the stimulation of inventive activity and the development of science and the arts.

## NOTES

1. John Paul II, *Address to 'Jubilee 2000 Debt Campaign'*, 23 September 1999.
2. John Paul II, *Address to 'Jubilee of the Agricultural World'*, 11 November 2000.
3. H.E. Mgr. Silvano M. Tomasi, Intervention by the Holy See at the Sixth Ministerial Conference of World Trade Organization, 18 December 2005. WT/MIN(05)/ST/164.
4. *Compendium of the Social Doctrine of the Church*, Pontifical Council for Justice and Peace, 2004, § 283.
5. John Paul II, *Sollicitudo rei socialis*, 42.
6. Catechism of the Catholic Church, § 2403.
7. Second Vatican Council, *Gaudium et spes*, 69.
8. Holy See, *Document of the Holy See on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 26 April 2001, § 8. WIPO/GRTKF/IC/1/7
9. *Ibid.*
10. *Ibid.*, § 2.
11. *Ibid.*
12. Benedict XVI, *Caritas in veritate*, 22.
13. H.E. Mgr. Diarmuid Martin, Intervention of the Holy See to the Plenary Council of the WTO on Trade-Related Aspects of Intellectual Property Rights, 20 June 2001.
14. *Ibid.*
15. *Document of the Holy See*, *supra* note 8, § 4.
16. Mgr. Frank J. Dewane, Intervention by the Holy See at the Fifth Ministerial Conference of World Trade Organization, 13 September 2003. WT/MIN(03)/ST/147
17. *Document of the Holy See*, *supra* note 8, § 5.
18. *Ibid.*, § 3.
19. *Ibid.*, § 10.
20. Pontifical Council for Justice and Peace, *Trade, Development and the Fight Against Poverty. Some Reflections on the Occasion of the World Trade Organisation 'Millennium Round'*, 18 November 1999.
21. Paul VI, *Populorum progressio*, 59.
22. H.E. Mgr. Silvano M. Tomasi, Intervention by the Holy See at the Sixth Ministerial Conference of World Trade Organization, 18 December 2005. WT/MIN(05)/ST/164.
23. Pontifical Council for Justice and Peace, *Trade*, *supra* note 20.
24. Pontifical Council for Justice and Peace, *Vocation of the Business Leader: A Reflection*, November 2012, § 40.