Chapter 2
Exploitation

Abstract The aspiration to ensure access to human DNA without exploitation of research communities being a central theme of the book, this chapter explores meanings of the word *exploitation* from its everyday usage to its various interpretations as a philosophical concept. The most significant contributions from the literature are traversed, such as *advantageous use of someone*, or *interaction stained by wrong*, or *gaining advantage at the expense of another*. Legal approaches to exploitation are introduced, with substantive and procedural fairness as themes that are revisited throughout the book. Likewise, non-legal approaches are introduced such as Wertheimer's *taking unfair advantage,* focus on *consent* as an indicator of fairness, and the *Principle of Permissable Exploitation*. Finally Mayer's three forms of exploitation are chosen as providing clear guidance for the questions being examined. The three forms are firstly where exploiters do not benefit their victims at all (the free rider), secondly where they do not benefit them sufficiently (an unfair exchange), and thirdly where they do not benefit them authentically (an illegal or highly immoral transaction, e.g. the provision of heroin at reasonable prices). The chapter closes by explaining how Mayer's last two classes will be used as yardsticks in subjecting the exchange of human DNA to scrutiny.

Keywords Exploitation · Legal exploitation · Non-legal exploitation · Principle of permissible exploitation · Fair exchange

As stated by Ruth Macklin in her study of double standards in medical research, concerns about justice in international research have, "focused mostly on worries about exploitation of human research participants or indeed of entire populations in the developing countries" (Macklin 2004, p. 68). Many authors have claimed that research participants in the developing world are exploited, one of the key assertions being that they do not receive a fair share of the benefits (Brody 2001, p. 2857). One of the primary aims of the CBD in its legal governance of the utilisation of non-human genetic resources was to prevent the perceived exploitation of developed countries. The term *biopiracy,* which has been coined to describe

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inherently unfair transactions involving genetic resources and is discussed in the next chapter, is predicated upon the concept of exploitation of individuals and groups, the prevention of which is the purpose of ethical guidelines for biomedical research.

This book examines the exchange of human biological resources across national borders, and seeks in particular to determine how scientific and medical research should utilize human biological resources without exploiting individuals, populations and even countries. It is therefore essential at the outset to explore and establish the meaning of this term *exploitation*, used so freely whenever claims of injustice or lack of fairness are made. Starting with everyday meanings of the term, attempts to understand the concept by various authors will be traversed followed by a discussion of how exploitation is described and dealt with both in the legal and non-legal context. The three forms of exploitation proposed by Mayer (2007) will then be described and assessed, seeking to provide a practical platform from which exchanges of human genetic resources, and arguments both for and against benefit sharing, can be examined.

2.1 Everyday Use of the Word Exploitation

Exploitation is at once an intuitively simple but also an ethically diffuse and unclear concept. The term is central to certain Marxist, neoclassical and liberal theories of economics, each of which contains firm assumptions about justice as well as a strong emotive component about the form of exploitation to be avoided. Activists such as Vandana Shiva utilised words such as piracy or biopiracy to denote a particular form of exploitation of developing countries by Western nations, whilst Che Guevara referred to the plunder of the poor in a speech to the United Nations (Guevara 1964). The word implies one-sided transactions that are perceived in some way as wrongful and to be avoided, and is strongly associated with concepts such as vulnerability, dignity and fairness in research that are deeply implicated in the field of bioethics. Authors differ widely on its precise meaning, one for example calling exploitation a "moral red herring" which nothing but a context-specific or case-by-case analysis can adequately resolve (Carse and Little 2008, p. 207), whilst others use utilitarian or Kantian ethics to arrive at its meaning.

Many of the definitions used are less than clear, such as Arnason's, "exploitation is interaction that is stained by wrong" (Arnason 2006, p. 162). Dictionary definitions separate two primary forms of the word, the first being an unfair treatment of someone, or the use of a situation in a way that is wrong in order to get some benefit for oneself, and the second one being the process of making use of something so that you gain as much as possible from it.[1] An example of the first

[1] [Online] Available at http://www.macmillandictionary.com.

form is the exploitation of illegal immigrant labour, and of the second is the commercial or economic or industrial exploitation of resources such as mining or timber extraction. Other uses of the word denote activities that are not necessarily ethically wrong. For example, the exploiting of one's talent, of natural resources, or even of the slowness of a business opponent all seem to be morally permissible, whilst exploiting the vulnerability or ignorance of another person in a business deal is generally regarded as less so.

2.2 Attempts at Understanding the Concept

Hawkins and Emanuel (2008) propose that the proper meaning of the word *exploitation* requires that the *advantageous use* of something or someone by another is required to be in some sense unfair or "morally problematic" (ibid, p. 44). They note that there is general consensus around three structural issues (ibid, p. 46). Firstly, regarding voluntariness, there is consensus that exploitation can take place voluntarily between willing parties and yet still be morally problematic. In other words, it is not necessary that one party be coerced or forced for exploitation to have taken place, and the wrongfulness of the transaction, if any, might lie in the distributive unfairness of the transaction, or in the deep vulnerability of the exploitee, under particular circumstances (ibid, p. 47). An example of this would be an employer taking on child labour from an extremely disadvantaged community and paying excessively low wages. Secondly, regarding the presence of harm, they believe that there is consensus that exploitation can but does not *need* to be harmful for the exploitee, for one can be wronged without being harmed.

Admitting that there is a loose sense of the word *harm* in which harm is just a synonym for wrong, they suggest that substantive criteria and reasons are required to determine the exact and contextual meaning of the word (ibid, p. 48). One example of this latter form of exploitation would presumably be secretly taking a photograph of an indigenous villager, with the intention of selling the photograph for a large amount of money. On the one hand the villager has not suffered any overt form of harm. On the other hand, she has not had a chance to object.

The famous case of Henrietta Lack, who died before the unauthorised utilisation of her tissue created highly profitable cell lines, was another example of no direct harm for the exploitee, whilst others subsequently denounced her treatment as being exploitative (Skloot 2010). Hawkins suggests that this form of exploitation, in which wrongs occur in the absence of direct harm, are regarded by many authors as being the most troubling of all (Hawkins et al. 2008, p. 48). Thirdly, regarding prohibition of exploitation, Hawkins notes a consensus that despite the fact that a practice may be exploitative, it does not automatically follow that it ought to be prohibited. Not all morally troubling acts can be effectively regulated by the state or the law. An example of this form, according to Hawkins, would be clinical trials in developing world countries, where people are desperately poor and the health system virtually non-existent (ibid, p. 48).

Carling adds another approach to determining the existence or otherwise of exploitation in an exchange, by asking two questions. Firstly, does one individual or group gain an advantage at the expense of another? Secondly he asks a normative question, namely is this advantage unjustly obtained? (Carling 1998, p. 220) The second question is more complex, and usually involves an analysis of what is meant by gain at the expense of another. One school of thought holds that such transactions are exploitative and wrong when and because they are coercive of the weaker party (Buchanan 1979; Schwartz 1995), whilst others hold that the wrongfulness lies in its degrading of the victims; when they are treated simply as means, not as ends (Wood 1995).

This book examines concerns about exploitation between parties where one party is frequently more vulnerable, and where various power and other differentials exist, leading to the possibility of injustice in the exchange. This question is therefore examined at greater depth in Chap. 6, which explores notions of justice, as well as contractual responses to the different forms of exploitation, which can take place between two transacting parties.

2.3 Legal Approaches to Exploitation

The law on contract, discussed further in Chap. 6 below, has evolved as a framework to regulate voluntary exchange transactions, during which parties of different power and resources negotiate or bargain and compete for advantage. Bargaining is according to Fried an enterprise involving risks for both parties, which "lacks both written rules and the scrutiny of an umpire […] Ethical constraints may therefore serve as a surrogate for procedural rules" (Fried 1978, p. 109). Justice during such exchanges is a relational concept, which balances one person's interests with others. Bigwood (2003) describes the evolution of the law against contractual exploitation, which can take place during a voluntary exchange between two (or more) parties. He explains that the underlying principle supporting such evolution, which was influenced by the law of equity and invariably involves protecting the weaker party, is captured in the sentence "other things being equal, we believe that a party should be excused from performing a contract that resulted from the other person's exploitation" (Bigwood 2003, p. 1).

Judges have been required to decide and achieve legitimacy in countless exploitation cases over the centuries, without the same metaphysical luxuries enjoyed by philosophers and other commentators on justice who do not have their theories tested in practice (ibid, p. 8). In other words the law provides an account of how those judges who were assigned the responsibility to decide on legality, which included the questions of fairness and justice in particular transactions, determined the cases placed before them. Bigwood describes how exploitation in contract law is conceptualised in different ways, some examining the *mode of conduct* of the exploiter in more detail, which focuses on the conduct of the parties or the *procedural fairness*, whilst others examine the *quality of the outcome* of a transaction,

also termed *substantive fairness*. In making the point that substantive unfairness in the form of an outcome that is bad for one party is not essential for exploitation to exist, he emphasises that to exploit someone in contract formation is to wrong her or treat her unjustly, regardless of how much she may lose, or her exploiter may gain, materially from the event. In other words, he holds that whilst exchange imbalance may vitally assist in the determination of an exploitation claim, the demerits of the bargain struck are not themselves objects of evaluation, and are not essential to the existence of exploitation (ibid, p. 6). As discussed below, exploitation can take place whilst improving the lot of the exploited person.

2.4 Non-legal Approaches to Exploitation

Returning to the basic meaning of the word exploitation, Wertheimer explains that exploitation can be used in a non-moral or non-derisive sense when it means simply to use or take advantage of, and that it is necessary to determine precisely the grounds upon which exploitative transactions may be prohibited (Wertheimer 2008, p. 66). Using *taking unfair advantage* as a yardstick, he states that exploitation can be determined in one of two ways. Firstly, some dimension of the outcome of the exploitative act needs to be assessed, which consists of an analysis of (1) the benefit to A and (2) the effect on B. The second dimension or test of unfair advantage examines whether there is some defect in the process whereby the (unfair) outcome is reached.

The process might be exploitative for example, where A unduly coerces B into giving consent, or deceives B, or fails to provide B with relevant information, or B is unable to understand the information adequately, all which are components of the informed consent process. In the latter case, where B is unable to understand the information, the unfairness if any would presumably reside either in A having known of or being able to predict B's lack of understanding, or alternatively where B indicated an inability to understand the information. Exploitation in the form of wrongful coercion might include a seductive offer that for some reason distorts the judgment of B, or which induces a lack of voluntariness in response, both modes of conduct which deserve and will receive more detailed analysis in Chap. 6 below.

It is noted that the above analysis of exploitation as *taking advantage* does not deal with the situation where there is a moral defect in the process rather than the outcome, for example where A unduly coerces B into consenting to a transaction, but where the outcome is in fact advantageous to B. This would entail some version of benign or patronising dominance of another, for B's own good. An example might be a company forcing a tribe to sign an agreement to provide traditional knowledge about a plant for commercial purposes, by withholding certain information deemed to be likely to cause confusion and prevent the contract, leading to an eventual commercially beneficial outcome, which helps the community significantly and does not infringe any of their cultural values. Still a

moral assessment of such a process and outcome—a disrespectful process leading to a good outcome—might well be acceptable to a utilitarian, but is likely to be unacceptable to a Kantian analyst.

Where both parties benefit from a transaction, no matter how exploitative, Wertheimer describes such a mutually advantageous transaction as being *Pareto superior* (Wertheimer 1996, p. 14). He acknowledges that finding an acceptable standard of exploitation is no simple matter, and suggests,

> We appear to be stuck. Although I cannot produce a non-problematic theory of fair transactions, I remain convinced that some mutually advantageous transactions are quite unfair and exploitative. I am reluctant to mimic Justice Potter Steward's view of pornography with respect to exploitation, namely "I shall not attempt to further define pornography, but I know it when I see it". (Wertheimer 2008, p. 73)

Consent is subjected to rigorous examination in Wertheimer's analysis, defects in consent being critical to an enquiry into the fairness of a transaction. The importance of such an enquiry resonates strongly with the law of equity discussed in Chap. 6, where the validity of a contract is determined entirely by the procedure surrounding and quality of the consent. Proper or authentic consent is an essential component of procedural justice that is required to defeat exploitation. Support for this focus on consent comes from Carse and Little, who avoid the red herring surrounding the concept of exploitation by conducting what they term an *essentially contextualist* enquiry into all the norms, facts and options surrounding the transaction (Carse and Little 2008, p. 207). They contend that morally asymmetrical exchanges take place when consent is for some reason, vulnerability or otherwise, wrongfully obtained (ibid, pp. 211–214).[2]

A final and useful aspect of Wertheimer's analysis is his Principle of Permissible Exploitation, which he refers to as PPE (Wertheimer 2008, p. 83). PPE holds that we should allow a transaction whenever it would be better for all parties to the transaction and worse for nobody else. That we should not interfere where mutually and consensually the parties agree to an exchange that is in some way disadvantageous to one. This is a consequentialist and practical approach to deal with lesser forms of imperfect transactions that are acceptable to the parties. Finally Wertheimer admits that PPE arouses concerns, and suggests that it is a plausible principle of *non-ideal* moral theory.

As opposed to Rawls, who restricted himself to developing an ideal theory of a just society, *non-ideal moral theory* aims to provide principles whereby individuals should act under the unjust and non-ideal conditions that pertain (ibid, p. 84). As shown above, some genetic research in developing countries is carried out in non-ideal circumstances, for example a lack of local research ethics committees (RECs), or an extremely vulnerable population, that are to some degree tainted with perceptions of unfairness. The research projects described above all involved

[2]Carse and Little (2008) refer to marketplace norms, which denote a transaction as morally permissible as long as both parties are competent, fully informed and sufficiently instrumentally rational, and there is no deception, fraud, manipulation, threat, coercion or force.

the taking of genetic samples from rural and often illiterate populations from the developing world, such as Tristan da Cunha and China as well as indigenous tribes such as the Hagahai, the Havasupai, the San, and the Australian Aborigines. Such cases call for reliable assurance that the research participants, obviously vulnerable in so many ways, are treated fairly.

Cori Hayden in an analysis of the complexities of the exchange of human DNA for genetic research, proposed an even simpler formulation in relation to consent for research, namely that research should "include people well" (Hayden 2007, p. 746). In a more just world, the present disparity between the power and fortunes of nations and peoples that led to exploitation of the weak by the strong would simply not exist. We are however, saddled with the fact that the concept of exploitation is central in the non-ideal environment that does exist, and remains difficult to constrain within a single definition.

2.5 Mayer's Three Forms of Exploitation

Exploitation remains a puzzling concept, complicated by the fact that under the principles of PPE, it is regarded as being sometimes permissible. We are left with the unanswered question, namely when and under what circumstances it can be identified or prohibited? Bearing in mind Wertheimer's admission on the futility of finding a unified theory of fair transactions, as well as the numerous scenarios within which genetic research is conducted, this book needs a clear and practical definition of exploitation that can be applied to evaluate the fairness of genomic exchange transactions involving humans. Robert Mayer (2007) addressed this question in a paper entitled, *What's Wrong with Exploitation?* in which he first singled out two terms, namely the "failure of reciprocity," and "wrongful gain" as being at the heart of what the distinction tries to achieve (ibid, p. 139). Wrongful gain, according to Mayer is the broader term, which is not always called exploitation. A thief who exploits one's carelessness and enters an open window to steal has broken the law and is called a thief, not an exploiter. Exploiters are those who gain illegitimately, or take advantage in a way that is wrong, not necessarily illegal, at another's expense, failing to reciprocate or benefit the disadvantaged party as fairness requires.

Under the broader criterion of wrongful gain therefore, a thief, an extortionist and a blackmailer are guilty of named offences, which whilst including elements of exploitation, do not benefit from being defined as such. The law defines these acts as criminal acts. The term exploitation would according to Mayer more appropriately describe the actions of free riders, drug pushers, slave masters, monopolists, usurers, sweat shop employers and so forth, who exact advantage in a morally dubious manner without necessarily breaking the law (ibid, p. 139). In other words, whilst many criminal (theft) or illegal (blackmail) acts contain an element of exploitation, the proper meaning of the word should reside outside of such particular forms of wrongdoing.

Using the word fairness as the touchstone, Mayer identifies three classes of exploitation, namely the first class, where the exploiters do not benefit their victims at all, the second class, where they do not benefit them sufficiently, and the third class, where they do not benefit them authentically (ibid, p. 143). In returning to the question of what fairness requires, Mayer reminds us firstly, that the loss suffered by an exploited party is always relative, rather than absolute (ibid, p. 141), and secondly, that "exploitation […] is a thoroughly political concept because contestable ideas about what fairness requires determine whether taking unfair advantage is recognized or not" (ibid, p. 144).

Returning to Mayer's classifications, class 1 exploiters fail to benefit the disadvantaged party at all, the free rider being the classic example. A free rider is a person who enjoys the donuts purchased for all at the office, but fails to provide her financial contribution when the hat is passed around for contributions. Or one who enjoys the entire performance of a street performer, then walks away without making payment. Notably, this first class of dealing does not take place in the context of an explicit exchange, and is therefore not relevant for this book which deals with the exchange of human genetic resources.

Class 2 exploiters, who fail to benefit their victims sufficiently, are according to Mayer always involved in an exchange, in which the exploited party gains in relation to the *status quo ante*, but loses from the standpoint of fairness. She gains, but not sufficiently. Fairness in this sense is determined by an enquiry into a just value for a particular good, namely whether there was fairness in exchange. An example would be where a rich man fails to pay a starving man's asking price for a box of apples, knowing that the poor man has few other options and will accede to the low offered price. The power differential combined with the vulnerability of the weaker party is usually apparent to an objective observer, and arouses feelings of unfairness.

Finally, class 3 exploiters fail to benefit the exploited party *in an authentic manner*. This type of transaction also involves an exchange between two parties, but one that is regarded as *inauthentic* in that it should not, according to publicly accepted rules or norms, take place at all. An example of class 3 exploitation suggested by Mayer is the drug-pusher who sells to an addict. The addict chooses to purchase the drugs and the price is reasonable, but society would regard the drug-pusher as being exploitative, the transaction being harmful and wrongful, and one that should be prohibited (Mayer 2007, p. 145). This book proceeds from the assumption that the exchange of human genetic resources for research purposes *is* indeed an authentic, or legitimate practice, and for that reason Mayer's class two form of exploitation is primarily relevant to the enquiry into the fairness of genomic research exchanges.

How then to apply Mayer's second-class test? After exploring the slippery nature of the term, it can be concluded that the second class of exploitation identified by Mayer, which involves reciprocal exchanges where fairness is being questioned, where the exploiter fails to benefit their victims sufficiently, is entirely germane for the first part of this study, and will provide a useful framework for analysis of exchanges in genomic research. All of the complaints and concerns

relating to bioprospecting discussed above had at their core accusations of exploitation, in the form of transactions, which are legally unassailable, but are redolent of short-changing, cheating, or some form of cheapness.

A closer look at the Tristan da Cunha case informs a simple assessment of fairness. In the initial transaction, the islanders gave consent to the company for the use of their DNA samples in exchange for a guarantee of access to a cure for asthma in the event of a possible future cure. When the company sold the rights to their subsequently discovered research lead for $70 million to another company, none of this benefit was shared with those who had provided the research samples. Application of Mayer's second class of exploitation test would simply enquire whether the first company, *Sequana Therapeutics,* benefited the islanders sufficiently.

Implementation of this test would admittedly require access to credible norms and standards in order to evaluate the fairness, or the equivalence of the exchange. Opponents of this test might therefore argue that no such generally acceptable criteria exist, or alternatively that the wide variety of circumstances surrounding such exchange transactions would make the application of such a test inoperable. Moreover, they might suggest that exploitation in an exchange can be determined by the application of a different set of criteria. A further objection might suggest that an examination of the actual process of engagement, namely the dealings, interactions and motives of the parties, would contribute more usefully towards an assessment of exploitation. Whilst a clear standard against which the outcome of an exchange is not readily available, it is suggested that an examination of the facts of a case on the basis of generally accepted standards does provide an observer with the ability to formulate an opinion as to whether the weaker party, the islanders in this case, were benefited insufficiently, and thus exploited.

2.6 Conclusions

During the discussion on the legal meanings of exploitation above, it was explained that the law of equity favoured an altogether different approach to exploitation, namely one, which emphasised the mode of conduct or unfair manner, employed by the exploiter, rather than the outcome or negative result suffered by the exploitee. This latter and more procedurally structured enquiry into the fairness of transactions will be further discussed in Chaps. 6 and 7 below. As every transaction comprises procedures, motives and relationships on the one hand, as well as substance and material outcomes on the other, both of these approaches are necessary and need to be integrated during an analysis of exploitation in the research exchange of human DNA.

To conclude this discussion, avoidance of Mayer's second and third forms of exploitation in the exchange of human genetic resources based upon considerations of fairness requires ensuring that the providers of genetic resources should be benefited sufficiently, and authentically, respectively. The former leads back to the

proposal made by a range of commentators referred to in the first chapter, namely that benefit sharing is necessary in order to satisfy justice and avoid exploitation in research exchanges involving human DNA. This proposal for benefit sharing, the subject of the first research question posed in this book, now needs to address four objections in order to secure legitimacy. The first of the objections to be addressed below is the suggestion that human tissue should be shared freely as part of the common heritage of humankind.

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