

INTELLECTUAL AND CULTURAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES IN ASIA: AN OUTLINE

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The concept of 'Indigenous People' in the New World and the Old World.

The prevalent definition (see ILO Convention 107 , 1957) of Indigenous Peoples reflects the historical context of the New World, with little relevance to the Old World where Asia is situated. According to this definition, the Indigenous communities, peoples and nations are those which had a "historical continuity with pre-invasion and pre-colonial societies that developed in their territories", they ... "consider themselves distinct from other sectors of societies now prevailing in those territories or parts of them", and these people form at present "non- dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as people in accordance with their own cultural patterns, social institutions and legal system".

This is not the historical situation in the Old World, of India and other parts of Asia or even Africa which have a colonial past. The colonial encounter in India affected not only tribal but also non-tribal societies. This colonial and pre-invasion experience appears to be critical to the definition of indigenous peoples. Colonisation in the New World involved annihilation of peoples, and destruction of whole civilizations. Both in Australia and the New World, the indigenous peoples were exterminated in many parts. This is not the reality of the Old World. Adivasis ('original inhabitants') is the term used for tribal populations in India, who are not 'indigenous' in the way the American Indians or the Australian aborigines are.

The 'Indigenous People' in India

In India, special rights of Adivasis include the Scheduled Areas, according to which tribal land can not be sold to non-tribals and only tribals can be agents of development. The Affirmative Action policy, guaranteed constitutionally, ensures reservations in education, employment and political representation by reserving political constituencies. A third protection is by Special Provisions (as in the case of Nagaland) where tribal dominated states have been given constitutionally guaranteed rights, (Article 371). Apart from land ownership, these rights include rights over all natural resources including forests. Although not brutalized like their New World counterparts, tribal societies in India and Asia have been often exploited. The rights that were given to them by post-colonial, independent governments are being eroded.

The Voice of the IP

(Declarations, Charters and Covenants)

Given the particular situation of IP in the New World, the right to self determination is one of the primary features of all declarations made by them. It subsumes such basic rights as those over land and resources as also recognition and respect for their cultures, identities and languages. The Covenant on Intellectual , Cultural, and Scientific Resources; The Mataatua Declaration on Cultural and Intellectual Property Rights of IP; The Kari-Oca Declaration and the IP Earth Charter; Charter of the Indigenous-Tribal Peoples of the Tropical Forests; Declaration of Principles of the World Council of Indigenous Peoples; Recommendations from the Voices of the Earth Congress as also the UN Draft Declaration on the Rights of

Indigenous Peoples, all deal with similar aspects of assertion of rights and demands for protection . This again, does not correspond to the Indian situation where an Adivasi right to territory is not an issue.

Indigenous People have also laid emphasis on the protection of their Intellectual Property Rights. In 1984, WIPO (World Intellectual Property Organisation) and UNESCO (United Nations Educational and scientific and Cultural Organisation) developed a "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions". This was however never adopted. The UNDP has been holding consultations in different regions including Asia and the Pacific, on the conservation and protection of Indigenous knowledge, specially with respect to biodiversity. In a noteworthy development, Indigenous Women have articulated their rights at the 4th World Conference on Women in Beijing, China, to safeguard the existing Intellectual Property Rights of Indigenous Women.

The clash between western and indigenous systems.

Indigenous peoples do not view their heritage as property, that is something which has an owner and is used for the purpose of extracting economic benefits, but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights

Western legal concepts of conquest and occupation provide the justification for the theft of indigenous land and property. Indigenous knowledge systems are created differently to the recently created system of intellectual property rights. Today IPR regimes provide the legal justification for the theft of indigenous knowledge. Western concepts of 'originality' and 'novelty' are forced on the international system where no space is created for customary knowledge existing for centuries.

Formal legal systems often create clashes between the rights of IP and others. For example in Indonesia the main source of the problem is the grant of concession rights in areas that belong to the local peoples under their customary (*adat*) laws. As a result of State forest policy and the inability of the local communities to obtain secure, registered title to traditional lands, concessionaires gain unlimited access to these lands for agriculture, mining, logging or road construction.

Lack of parity between IK and IPR Treaties

The central problem.

The subject of Intellectual Property rights in the formal sector has been set out in a series of international agreements, all of them binding. Some like the WTO force compliance with the threat of trade sanctions. In the case of protecting indigenous knowledge, most treaties are non binding . Every clause that deals with benefit sharing is contested and refused. ILO Convention No 169 which says a lot about legal standards for indigenous rights fails to protect the IPR of indigenous people. Whereas the UN Declaration on the rights of IP recognises the rights and aspirations of the IP, it will be a non- binding document which can not be legally enforced. In the International Undertaking on Plant Genetic Resources

(IUPGR), developed nations have successfully blocked an international recognition of Farmers Rights for the last 12 years. They also contest any notion of paying for the use of traditional germplasm in a benefit sharing arrangement. The CBD which has attempted to push through the interests of Indigenous Communities has been thwarted by the American refusal to ratify it and accept its conditions. In the CBD, the most contentious and so far unaccepted Article is Article 16 which deals with transferring technology as part of the deal to use the IK and biodiversity of local communities in different countries.

Challenges to the rights of Indigenous People

The countries of the Asia-Pacific region have a rich cultural heritage, including literature, arts and crafts, music, visual arts, ceremonies, architecture associated with particular sites, as well as forms of traditional knowledge related to forestry, medicines and medical practices, agriculture, and conservation and sustainable use of biological diversity. There is concern at the widespread unfair exploitation of the cultural heritage of these nations for commercial and business interests. Important elements of traditional knowledge, art forms and folklore are being lost rapidly in the absence of a proper legal protection mechanism at national and international levels.

Tribal people are being increasingly displaced by industry and development projects. Adivasi homelands have now become included in national parks and sanctuaries, resulting in displacement of the people who have lived there for hundreds of years. Ethnic strife in many regions of Asia has threatened indigenous and tribal communities, destroying their habitats.

Earlier tribal areas were used in the name of development without their consent, for building dams, roads, canals, mining and hydro-electric projects etc. Increased awareness among Adivasis who now demand their rights, together with sustained work by civil society, has improved the situation so that it is now mandatory to conduct a public hearing to hear the views of the people before a project can start, both in tribal and non-tribal areas.

The WTO with its chapter on Trade Related Intellectual Property Rights (TRIPS), has struck the most recent blow to the rights of IP. TRIPS have undone everything that the Convention on Biological Diversity (CBD) has sought to provide. TRIPS does not allow for the full exercise of national sovereignty over biodiversity because it obliges countries to enact intellectual property rights on plant varieties; it does not allow communities to seek a share of benefits obtained from patented biodiversity since there is no provision requiring patentees to disclose the country of origin of any biological materials; it does not require patentees to fulfil access obligations towards genetic resources, it therefore condones and facilitates biopiracy.

The Human Genetic Diversity project has collected genetic material from indigenous people and local communities without taking their consent. The material will be used to study genetic disease and generate huge profits for those who will come up with diagnostic kits and medicines. This is an even worse form of biopiracy than that mentioned above. The IP have condemned this exercise.

Commercialisation of IK and its impact

Kava (*Piper methysticum*), a plant endemic to the South Pacific has been traditionally used to alleviate stress and anxiety in the region. It is supposed to have other medicinal uses, like for skin ailments and for asthma and tuberculosis.

The recent commercialization of kava highlights many of the potential benefits and risks involved in the marketing of species 'new' to international consumers. The entry of kava into western markets has led to an explosion in demand for kava products. This has placed unsustainable pressure on supply sources geared only to serve local use. Although local farmers are benefiting from price increases, the types of commercial relationships they arrange with international buyers might not be to their long-term advantage. The unregulated access to kava is resulting in the collection of immature kava, thus jeopardising the quality of the medicinal product and depleting the resource base. There are other examples of commercialization leading to over-exploitation.

Efforts to protect the knowledge of communities: The Indian case

- Protection by the Constitution of India
- Integration of the indigenous knowledge system in mainstream health care
- Documentation of indigenous knowledge
- Indigenous Knowledge Digital Database
- Sharing benefits for using IK
- National Legislation protecting IK
- Sui generis models for protecting IK

IK is IT (Indigenous Technology)

It has to be recognised that IK is as much science based and as much a technology as any other more recent system of knowledge. The knowledge of the characteristics of medicinal plants and the systems of healing for humans and animals that have been developed, are the result of a systematic, scientific evaluation. This Shastric (ancient Indian) system of testing and validation is different from the empirical, western method of validation of western science but it is at least, if not more scientifically valid. The nuances of the preparation of herbal drugs are complex and the method of treatment is individually calibrated. The Indigenous System of Medicine in countries like India, China and others in Asia, is far more sophisticated than most cases of allopathic treatments. The use of IK should be linked to technology transfer fees and licensing arrangements as in the other kind of technology.

Recommendations

Steps to rectify the historical injustice done to IP, have to some extent been taken in the CBD. Unfortunately, its effectiveness is derailed by the refusal of the US to ratify it and adhere to its conditions. In order to uphold the principle of natural justice, both domestic legislation and international agreements will have to take pro-active steps to protect the rights and knowledge of indigenous people.