



**HUMAN RIGHTS** *analysis*

# Legal protection of Indigenous Intellectual Property Rights

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**T**HE principles of Intellectual Property (IP) law are substantially the same in all countries with variations to suit the national requirements of each country. Under IP law, owners are granted certain exclusive rights to a variety of intangible assets, such as literary, artistic, and musical works; ideas, innovations and inventions; and words, phrases, symbols, colour combinations and designs etc. Common types of intellectual property include copyrights, trademarks, patents, industrial designs and trade secrets in some jurisdictions. The majority of intellectual property rights provide creators of original works a form of temporary monopoly with the aim of creating an economic incentive to disclose, develop and share their ideas. However, most of the current national and international IP laws do not protect or recognize intellectual property of the Indigenous Peoples. In most of the cases, IP laws maintain the dominance of developed nations over the underdeveloped world neglecting the Indigenous practices.

## Indigenous Intellectual Property

Indigenous Intellectual Property (IIP) includes special skills, knowledge, innovations, agricultural systems, medicinal and plant knowledge, even distinct way of life and cultural systems of indigenous peoples. It is quite mentionable that indigenous people first cultivated many of the world's staple foods; such as - potatoes, sugarcane, garlic, tomatoes etc. But indigenous farmers who cultivate the indigenous crops used to strengthen environment friendly, commercial hybrid crops receive no recognition for their agricultural contribution. On the other hand, medical Researchers, in several developed states have increasingly looked to indigenous medicinal knowledge as a guide of finding plants that could lead to useful new drugs. The process of deriving drugs from chemicals found in plants known as pharmacology seen as a viable alternative to genetically engineering drugs. Ethno-pharmacology which utilizes indigenous knowledge of plants to determine which plant to screen for possible drug developments hold several advantage over random screening and other methods of pharmacology including lowering the cost of drug

searching. Although indigenous medicinal knowledge is used frequently, it is patented by the researchers and companies without giving due recognition or benefits to indigenous peoples. Furthermore, there are many forms of artistic expression that are unique to indigenous peoples such as designs, symbols, songs, dance, stories (commonly referred as folklores) and even languages which are being taken without permission and used for commercial purposes and not protected by law.

## Negation of indigenous cause and existing Intellectual Property Laws

In this age of economic globalization, intellectual property has become international in character as it has great role in the economic development and transfer of technology. Since IP plays such a large role in international trade, international agreements serve to regulate between nations in the field of intellectual property. At the international level most of the intellectual property conventions/treaties are adopted under the auspices of the World Intellectual Property Organization (WIPO) and in case of multilateral trading system as espoused by the World Trade Organization (WTO), intellectual property is regulated under the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS). Therefore, international conventions/treaties adopted under the WIPO and the TRIPS agreement together constitute the greater part of current international IP laws and that is why to place indigenous cause of intellectual property rights in these two forums is a must to ensure maximum protection in Indigenous Intellectual Property Rights. But unfortunately neither the TRIPS nor any convention/treaty of WIPO recognized indigenous intellectual property rights.

Since current intellectual property laws recognize individual or corporation based ownership but do not acknowledge indigenous forms of community based ownership, therefore, indigenous peoples have no intellectual property rights under the existing intellectual property laws. In general the cultural properties of indigenous nations are not thought as 'commodified or commercialized' items, which can be sold or bought. In many cases, the cultural property is thought as belonging exclusively to the group

whether the group is a tribe, a nation, a community, a clan or a family. In contrast, states around the world are increasingly reorganizing the entire social, economic and political order based on legal systems designed to protect private property and concentration of wealth in the control of corporations and individuals.

However, over the years, indigenous peoples around the world have taken several initiatives, declaration for the protection of their intellectual and cultural property rights such as Declaration of Belem, July 1988, Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993, Julayinbul Statement on Indigenous Intellectual Property Rights, November 1993, Santa Cruz de la Sierra Statement on Intellectual Property, September 1994, Suva Statement on Indigenous Peoples Knowledge and Intellectual Property Rights, April 1995, United Nations Declaration on the Rights of Indigenous Peoples etc. At the United Nation's General Assembly's 61st session, on the 13th September 2007, an overwhelming majority of members resolved to adopt the United Nations Declaration on the Rights of Indigenous Peoples. Regarding the intellectual property rights of indigenous peoples, the General Assembly reaffirmed "... that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples... and solemnly proclaimed as an agreed standard for member nations around the world." Article 11 of the Declaration provides that states shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Unfortunately none of the above Declaration has any binding force to compel the state parties to protect indigenous intellectual property rights. It is also frustrating to mention here that recent meeting of WIPO Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held in Geneva from June 29-July 3, 2009 failed to reach any understanding regarding any future binding agreement for the protection of indigenous intellectual property rights.



This failure is criticized by experts from developing countries as "where is IP protection when developing countries need it?"

## Bangladesh scenario

Although folklore, folk-dance, folk-literature, folk-songs and indigenous culture, agricultural practices, knowledge of biodiversity and traditions passed on from generation to generation, plays an important role in the formation of the cultural heritage of Bangladesh, those are not well protected under the existing laws. Neither the copyright law nor patent law of Bangladesh specifically mentioned or deals with them.

To protect IIP rights in Bangladesh, Government of Bangladesh should take following initiatives:

- Create necessary legal authority for the administration and identification of IIP.
- Provide financial assistance to the Universities and Research centers for conducting research works on IIP.
- Strengthen Intellectual Property Offices in Bangladesh to examine and provide legal protection to IIP.
- There must be a provision for compulsory declaration of origin and IIP check in all forms of intellectual property applications.

- Provide practical training on IIP to the personnel working in the Intellectual Property offices/organizations.
- Manage financial and technical assistance from the developed countries and international organizations to establish an Indigenous Knowledge Research Centre in Bangladesh.

While taking above initiatives, Bangladesh Government may take legal and technical assistance from WTO and WIPO. But it would be better if Bangladesh can develop its own expertise in the field of intellectual property law and indigenous knowledge protection system as well.

## Concluding remarks

Intellectual property protection for indigenous peoples which recognizes their close and continuing links to their cultural heritage is vital because Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors. Therefore, survival of indigenous peoples is not merely a question of physical existence, but depends upon maintaining cultural and spiritual links with the land customs, knowledge etc. We should keep in mind that to talk about the needs and rights of indigenous peoples is to talk about the rights of at least 300 million indigenous peoples around the world, often among the poorest and the most disadvantaged in their countries. Therefore, in the interest of 300 million misfortunate but blessed with many distinct, inherent, innovative and natural qualities, the indigenous intellectual property rights must be recognized and given effective protection in their respective national legislations and international legal instruments in this field should be developed as soon as possible.

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## FOR YOUR information

# Glimpse on UN Declaration on the Rights of Indigenous Peoples

**T**HE UN Declaration on the Rights of Indigenous Peoples 2007 deals with the rights of indigenous peoples in areas such as self-determination, culture and language, education, health, housing, employment, land and resources, environment and development, intellectual and cultural property, indigenous law and treaties and agreements with governments. Here are some highlights of the Declaration in plain language.

## Preamble

The Preamble lists some of the reasons, which led the United Nations to develop a declaration on indigenous peoples' rights.

The Declaration sets out the rights of indigenous peoples. The language of "peoples" is important. Indigenous peoples do not want to be treated simply as numerical "populations". They want recognition of their rights as distinct peoples, including the right to self-determination, and the right to control development of their societies.

## Fundamental rights

The Declaration sets out some very fundamental rights of indigenous peoples. It states that indigenous peoples have the same rights as other peoples and must be treated like everybody else. It recognises that indigenous peoples have the right of self-determination and the right to keep their distinct characteristics.

There is much disagreement over what self-determination means. Indigenous peoples base their claims to self-determination on the fact that they were the first peoples in their territories. Self-determination means the right of indigenous peoples to choose their political status and to make decision about their own development. Self-determination can take a variety of forms.

Some governments reject the right

of indigenous peoples to self-determination or try to limit its scope. They are fearful of independence movements and the possibility of national disintegration.

Indigenous representatives at the UN consider this view to be racist and discriminatory. They point to the fact that the UN Charter and the main human rights instruments state self-determination as a right of all peoples.

## Life and security

The Declaration sets out the right of indigenous peoples to exist as distinct peoples. Indigenous peoples are to be free from genocide and their children must not be removed from their culture and identity.

They have the right to stay on their land and must be specially protected in time of war.

Genocide means the physical destruction of a people, including through the removal of children.

Cultural genocide refers to the destruction of a people's culture.

## Culture, religion and language

Indigenous peoples have the right to their cultural traditions and customs. This includes aspects of their culture such as sacred sites, designs, ceremonies, technologies and performances. Their cultural property shall be returned to them, if it was taken without their permission.

Indigenous peoples have the right to their spiritual and religious traditions, their customs and their ceremonies. They have the right to their sacred sites, ceremonial objects and the remains of their ancestors. Governments shall assist indigenous peoples to preserve and protect their sacred places.

Indigenous peoples have the right to their histories, languages, oral traditions, stories, writings and their own names for people and places. Governments shall ensure that in courts and other proceedings indigenous peoples can understand and be

understood through interpreters and other appropriate ways.

## Education, media and employment

The Declaration sets out the rights of indigenous peoples in the areas of education, the media and employment. Indigenous children have the right to education, including education in their own languages and culture. They have the right to use mainstream media, as well as to establish their own media. They have the right to be treated fairly in all matters relating to employment.

## Participation and development

The Declaration sets out the rights of indigenous peoples to participate in decisions and developments which affect them. Indigenous peoples must participate in, and give their consent to, decisions on law-making that affect them. They have the right to their own economic activities and to special

measures to improve their economic and social conditions.

## Land and resources

The Declaration sets out the right of indigenous peoples to their land. They have the right to maintain their distinctive spiritual relationship with their land, waters and resources. They have the right to own and develop their land, waters and resources, and to return of land taken without their consent. Their environment and their cultural and intellectual property must be protected. Indigenous peoples have the right to control development of their land.

## Cultural property

There is high demand for indigenous artwork and cultural artefacts. Through theft and unauthorised use and sale, indigenous peoples have been robbed of their cultural heritage. Therefore, indigenous peoples are seeking protection of their "cultural property". This includes sites, human remains, oral traditions, designs, arts and ceremonies.

## Intellectual property

Indigenous knowledge is a valuable resource. However, the profits are rarely shared with indigenous peoples. Therefore, indigenous peoples are seeking protection of their "intellectual property". This means indigenous knowledge in areas such as medicinal plants, agricultural biodiversity and environmental management.

## Self-government and indigenous laws

The Declaration sets out guidelines for situations in which indigenous peoples exercise their right of self-determination through self-government. It recognises the right of indigenous peoples to determine their citizenship, to their own laws and customs, to relations with other peoples across borders, and to treaties and agreements with governments.

## HUMAN RIGHTS watch

# Low health standards impede recognition of indigenous peoples' rights

The low standards of health among indigenous communities is perpetuating the gap in many countries between the recognition of their rights and the actual situation on the ground, Secretary-General Ban Ki-moon said, calling for swift action to find solutions.

In his message on the International Day of the World's Indigenous People, the Secretary-General appealed to governments and civil society "to act with urgency and determination to close this implementation gap, in full partnership with indigenous peoples."

This year's Day focused on the threat posed by HIV and AIDS, and Mr. Ban underscored the importance of indigenous people having access to the information and services needed for detection, treatment and prevention.

This marginalized group numbering 370 million in 70 countries suffers disproportionately from low health standards linked to poverty, malnutrition, environmental contamination and inadequate healthcare, he said.

Calling the world's indigenous peoples the "custodians of some of the most biologically diverse areas on Earth" who speak a majority of all languages, the Secretary-General welcomed some recent national moves in which governments have apologized for past injustices, while others have adopted legal reforms.

But he cautioned that "many face discrimination and racism on a daily basis," as well as poverty and inadequate access to education. UN High Commissioner for Human Rights Navi Pillay said the International Day is an occasion to reaffirm the commitment to translate positive developments in international human rights standards into concrete progress for indigenous peoples.

"To achieve this, we all States, indigenous peoples, the United Nations system and others concerned must join our efforts and reach solutions based on true dialogue, mutual understanding, tolerance and respect for human rights," she noted in a statement. "This is no easy task. But it is the only way we can move the rights of indigenous peoples from paper to practice."

Ms. Pillay, in an opinion piece published in The Hindu, stressed that the world's indigenous peoples need and deserve more than just symbolic celebrations on 9 August. "After centuries of repression, they need comprehensive tools to defend their human rights, their way of life, and their aspirations."

One such tool, she noted, is the UN Declaration on the Rights of Indigenous Peoples. Adopted in 2007, the Declaration underscores the right of indigenous peoples to all social and health services, and to the enjoyment of the highest standards of physical and mental health.

"We must step up our common efforts to make the Declaration something more than a mere pledge of intent. We must translate its letter and spirit into concrete change, change that can be felt in indigenous peoples' daily life."

In 1994, the General Assembly proclaimed 9 August the anniversary of the first meeting in 1982 of the UN Working Group on Indigenous Populations of the Subcommission on the Promotion and Protection of Human Rights to be the International Day of the World's Indigenous People.

It will be commemorated this year at UN Headquarters in New York tomorrow with cultural events and panel discussions.

Source: International Work Group for Indigenous Affairs

Source: UN News Centre

