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## **Traditional Knowledge and Intellectual Property Rights : A historical perspective**

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Indian nationalist leadership of the late 19<sup>th</sup> century was in a confused state of mind. It could not decide whether it should challenge the colonial empire's might and incur its wrath or appeal to its sense of noblesse oblige and ask for small favours. Mahatma Gandhi resolved the dilemma by squarely placing the west on the defensive on ethical grounds and for all times to come. (In fact, Mohandas Gandhi became Mahatma Gandhi precisely when he accomplished this.) Third world countries find themselves in a similar pre-Gandhian dilemma on the important question of intellectual property rights associated with traditional knowledge (TK) of which they are the repositories. Should they individually nit pick or should they collectively take a principled stand. The latter option, desirable as it is, is difficult to exercise, the more so because the concept of noblesse oblige seems to have disappeared from international affairs.

The term third world was coined in 1952 by the French demographer Alfred Sauvy to denote the economically underdeveloped countries. The First and the second worlds were then described as an afterthought. Capitalist, industrialized countries constituted the first world, whereas the Soviet communist

block represented the second world. The coinage was inspired by the expression third estate which denoted the commoners of France before and during the French revolution as opposed to the priests (first estate) and nobles (second estate). With the collapse of the Soviet Union, the second world has disappeared, even though the term third world continues to retain its original meaning.

We would like to define the three worlds in a connected and physically meaningful way , using the industrial revolution as a marker, with the third world retaining its original composition. In this new scheme, the third world comprises countries whose societies have essentially remained untouched by the industrial revolution. The second world consists of (west European and other) countries which have been transformed through industrial revolution, industrialization or by association, but have retained some memories and sensitivities from the pre-industrial times. The first world comprises a solitary country, USA, which is a social product of post-industrialization era, representing a total break from earlier times. The second world has been influenced by intra-European responses and colonialist experience, while the first world has been fashioned entirely by its conscious and subconscious reaction to the Europe it left behind.

When the world was Euro-centric, it was easy to define what was new. If Europe did not know of it, it did not exist before. In 1738 William Champion was granted a patent in his capacity as “the first European to produce metallic zinc”, even though the process was known to have been brought from east Asia (It originated 2000 years ago in Aravalli Hills, Rajasthan, India.) However 100 years

previously, in 1608, when Hans Lipperhey applied for a patent on telescope, he was turned down “on the ground that it is evident that several others have knowledge of the invention”. By the same logic, in today’s decentralized world if knowledge is available anywhere, it should not be possible to patent it.

Just as the first, physico-chemical, industrial revolution went hand in hand with European colonial expansion, the second, biotechnological, revolution is being attended on by globalization. The industrial revolution was an entirely self-contained European exercise, though it was facilitated by the subjugation of third-world countries. (If zinc metallurgy had not been imported from Asia, it would have been invented afresh.) But the on-going biotechnological revolution needs the third world. It is the third world’s traditional knowledge in civilizationally vital areas of food and health care that is being molecularized for incorporation into the broad-stream of modern science. This would have been a laudable exercise were it not for the retreat of the state and the weakening of internationalism. No body would have minded enrichment of science if some firms were not getting enriched in the process.

Third world countries are inherently incapable of protecting their TK. They have become aware of its value because of the scientific advancement in the west. Most TK of the world is undocumented. Even in countries like India where it was partially committed to paper under colonial auspices, what is now the written word was not self-contained. It was meant as an aid to a living oral tradition. In any case, ancient documents were not prepared to withstand the scrutiny of a modern-day patent attorney. Nations can be expected to plead their

case in a court that is above all of them. A country cannot expect to win a case in the domestic court of another country according to the law laid down by the latter. (In the period following the celebrated cancellation of a turmeric patent on India, s objection more than 200 patents have been granted on turmeric, some to Indian organizations themselves. None has been challenged : most are unchallengeable as US laws stand.)

Patent laws in Europe followed by USA were enacted to deal with mechanical contraptions and to protect and further localized interests. Globalization has changed the rules of the game; and molecularization the game itself. Novelty needs a new definition and a new sensitivity. If traditional knowledge provides the initial clue, mere use of sophisticated instrumentation to “unlock” the chemical secrets of plants should not constitute an inventive step. TK should be viewed as a global heritage, to be protected by the world as a whole. The burden of protecting TK should not fall on the emaciated shoulders of its third-world repositories. If any organization exploits it commercially, it should pay a royalty into a global fund meant for the welfare of the world’s poor.

When the Paris Convention on Industrial Property internationalized patent laws in 1883, they had been in existence for 400 years. Today we must frame global IPR laws for situations for which there is no precedent. These laws should not be petty. They should be enshrined in a framework that is universal by being ethical. In 1738 what is now USA was earnestly appealing to England to grant recognition to Thomas Godfrey, the first ever inventor of sextant. Haughtily,

London refused. USA has come a long way since. Now that USA has emerged as the solitary world power, its laws should also evolve. It must set an example for rest of the world by amending its own antiquated and parochial patent laws to truly reflect the spirit of a global world.

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