



Protecting and Promoting Indigenous Peoples Rights in Academic Research Processes

A GUIDE FOR COMMUNITIES IN SOUTH AFRICA

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ACRONYMS

ABS Access and Benefit Sharing

CBD Convention on Biological Diversity

DST Department of Science and Technology

FPIC Free Prior and Informed Consent

HSRC Human Sciences Research Council

IK Indigenous Knowledge

IK Bill Protection, Promotion, Development and Management of Indigenous Knowledge Bill of 2016

IPRs Intellectual Property Rights

NCOP National Council of Provinces

NIKSO National Indigenous Knowledge Systems Office

NEMBA National Environmental Management Biodiversity Act

NRS National Recordal System

UNDRIP United Nations Declaration on the Rights of Indigenous Peoples

REC Research Ethics Committee (universities)

SASI South African San Institute

UNFCCC United Nations Climate Change Convention

WIPO World Intellectual Property Organisation

WTO World Trade Organisation



DEFINITIONS



Copyright refers to the exclusive economic and moral rights that creators typically have over their literary and artistic works, including the exclusive rights to reproduce, publish and adapt these works. In South Africa, works protected by copyright include literary works, music, artistic works, movies, computer programs and published editions.

Indigenous knowledge (IK) refers to local knowledge that is unique to a culture or society. IK has been passed on through generations by storytelling, ceremony and apprenticeship. This knowledge is vital for communities to thrive by encouraging the knowledge and practises to live on and from the land, healing and natural medicines, agriculture, food preparation, education and stewardship development.

Intellectual property refers to inventions, creative works, designs, symbols, literary and artistic works and other creations of the mind.

Intellectual property rights (IPRs) refers to the rights that are afforded to creators or owners of Intellectual Property.

Patent refers to the exclusive rights granted by national law to the inventor for an invention, including the right to decide whether and how the invention can be used by others.

Prior art is a term typically used in the context of patent law that refers to any evidence that an invention is already known and therefore does not meet the patent requirement of novelty.

Public domain refers to works that are not, or no longer, protected by intellectual property laws such as copyright, patent and trademark laws and may thus be freely used by anyone without obtaining permission.

Research ethics committees comprise representatives from institutions who have a central role in the approval of research undertaken within, or on behalf of the institution and ensuring this satisfies ethical standards.

Trademark refers to legally protected marks and signs capable of distinguishing the goods or services of one individual or company from those of another individual or company.

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BACKGROUND

This guide arose out of a collaborative research project that investigated climate change and the role of Indigenous peoples' knowledge in assisting communities adapting to climate change. The project involved members of Indigenous Nama and Griqua communities in South Africa (community leaders, elders, youth, and co-researchers) and researchers from Natural Justice, the University of Cape Town, and Indiana University-Bloomington (USA). During our conversations, some members of Nama and Griqua raised concerns about research processes in general. As expert knowers in how research and knowledge has historically been produced involving indigenous peoples, they articulated the inherent conflicts that arise when participating in research that is designed and led by those outside of their community. Some Nama and Griqua

noted that although their communities have a culture of sharing, they were hesitant to share their knowledge with researchers because of the risks involved, which might include losing control over how their knowledge would be used and how their communities would be portrayed. Furthermore, they expressed concern that their contributions to research in the past had been left unacknowledged by researchers who failed to share benefits with them and did little to establish trust. Despite these concerns and past experiences with researchers, however, several Nama and Griqua stated that they did not want to exclude external researchers completely, rather they wanted to develop more equitable and socially-just processes so that they could engage with prospective researchers on their own terms.

INTRODUCTION

This guide seeks to address some of the key concerns and expert insights raised by Nama and Griqua members related to externally developed research projects and processes. It also provides additional information regarding laws and policies that govern academic research. The focus here is on academic research conducted with indigenous peoples which therefore includes their indigenous knowledge (IK).¹

The guide begins by exploring the broader context of indigenous peoples and research, and shares how indigenous communities in different parts of the world have developed their own protocols and guidelines to address what they regard as problematic research processes. Shifting the focus to South Africa, the guide then summarises relevant international and national laws and policies, explains how such laws relate to indigenous peoples' rights, and explores how these laws could be harnessed by indigenous peoples and/or local communities.

Continuing with its emphasis on examining research processes from an indigenous rights perspective, the guide then considers academic

universities and their institutional policies for conducting ethical research and for working with human subjects. It introduces a variety of tools that communities could utilise to address some of the shortfalls in current academic research procedures and processes. Finally, it suggests some practical steps which could be taken when engaging with external researchers.

This guide is a general and brief introduction to the sensitive and complex issue of researching with indigenous communities. It is intended to provide additional information for indigenous peoples and/or local communities who are considering how they might engage (or not) with external researchers, and how they might begin to negotiate beneficial research processes that ensure the protection of their rights and indigenous knowledge. Every community is unique and each research process different, thus communities are encouraged to be creative, to collectively identify their own values and needs with regards to research, and where necessary to seek impartial legal assistance where they feel their rights may be in danger of being violated.

¹ Research conducted expressly for commercial purposes is not addressed in this guide.

GLOBAL CONTEXT

Diverse Communities – Shared Concerns

The concerns regarding research processes raised by the Nama and Griqua are similar to those voiced by many indigenous communities globally, and as we introduce below, these include First Nations communities in Canada to Aboriginal and Torres Strait Islander peoples in Australia.

First Nations, Canada

First Nations² people in Canada have expressed growing concerns regarding academic research and have brought attention to how researchers in the past and still today have published disrespectful and ethnocentric representations of indigenous peoples that jeopardize their efforts at self-determination and sovereignty. For example, the Tl'azt'en Nation of British Columbia have raised concerns over research that originated outside of their community and was conducted by non-indigenous individuals with no opportunities to correct misinformation or to challenge harmful interpretations. Similarly, Nuu-chah-nulth have recognized the power that researchers have to collect information and produce meanings which could be used against indigenous peoples' interests. The Six Nations Council in Ontario province recognised research as an endeavour which may affect their people, culture, and the way their people are perceived by the outside world.

First Nations peoples have used different strategies to address some of the negative impacts of research. For example, Nuu-chah-nulth peoples have produced a protocol and principles for those wishing to conduct research within their community. These principles include ethics (respect for community members), autonomy, protection, and the requirement that the research must benefit the community. Gwich'in Nation peoples have insisted that researchers obtain community permission and sign a licensing agreement before any research can take place. And the Six Nations Council produced their own ethics policy and a research ethics committee protocol. The Assembly of First Nations, a national advocacy organisation representing First Nation citizens in Canada, highlighted the challenges when non-First Nations attempt to use IK due to fundamentally different world views and that researchers may

not follow traditional laws and protocols when accessing, using, and interpreting the knowledge. To address such issues, they produced an 'Ethics in First Nations Research' paper that develops tools for enabling ethical research, which includes protocols and agreements, and concluded that an on-going major challenge was ensuring intellectual property rights were respected. First Nations groups and organisations have therefore produced many of their own ethical research guidelines and practices.

Aboriginal and Torres Strait Islanders, Australia

The Aboriginal and Torres Strait Islanders are two groupings of indigenous peoples in Australia. They have both produced valuable insights into the misappropriation of indigenous peoples' intellectual property rights. They have brought critical attention to how researchers have taken their art, traditional knowledge, and biological resources (including genetic material), and in some cases have obtained intellectual property rights to them without recognition or benefits being given to Aboriginal and Torres Strait Islanders. To counter these practices, Aboriginal and Torres Strait Islanders have used their customary laws to protect access to and the use of their knowledge and resources, while requiring researchers to first seek permission from elders prior to any research activities.

These cases illustrate that indigenous peoples globally have raised expert concerns regarding research processes for years, and that they are employing innovative strategies aligned with their cultures and local situations to assert their rights and protect their heritage. As we shall see in the following section, there are other legal instruments that communities can harness to protect their knowledge and promote their interests.

² First Nations are a grouping of indigenous peoples in Canada, which includes Nuu-chah-nulth and Tl'azt'en.

LEGAL INSTRUMENTS

— Internationally and nationally, governments and stakeholders have been grappling with how best to protect indigenous knowledge and practices, and in this section key international legal instruments and national laws and policies are summarised.

International Instruments

The international community recognises the need to protect indigenous peoples' knowledge and practices, and as a result, issues concerning indigenous peoples' knowledge are now discussed at high-level international forums such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the Convention on Biological Diversity (CBD), and the United Nations Framework Convention on Climate Change (UNFCCC). However, indigenous peoples' participation in and influence over these processes is limited and so the outcomes may not always reflect their best interests.

By now, various international instruments exist that address indigenous peoples' knowledge from different angles. For example, one is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007. UNDRIP is important because it provides for the protection of numerous rights of indigenous peoples. These rights include the right to their land and natural resources, among others. A second key international instrument is the Convention on Biological Diversity (CBD) and, linked to it, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. The CBD has three main objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits of genetic resources. The Paris Agreement of the United Nations Framework Convention on Climate Change (UNFCCC) in its preamble states that Parties when taking action on climate change should respect and promote their respective obligations on human rights and the rights of indigenous peoples.³ Furthermore, the main text

states that climate adaptation action should, as appropriate, be guided by IK, and recently the 'local communities and indigenous peoples platform' has been established to strengthen the knowledge of indigenous peoples in tackling climate change, and to enhance community engagement. The UNDRIP, CBD and UNFCCC are crucial because they have laid out general principles that should guide interactions between indigenous peoples, local communities, and other parties intending to use indigenous peoples' and/or local knowledge and resources. For example, UNDRIP and CBD both emphasize the principles of requiring Free, Prior, and Informed Consent (FPIC) from knowledge holders, and the principle of Access and Benefit Sharing (ABS). Indigenous peoples and/or local communities can use these principles to develop their own guidelines to engage with parties such as academic researchers interested in accessing their knowledge or resources.



Image features: Mr. Willem Hans

³ Paris Agreement, (Paris, 12 December 2015, in force 4 November 2016), UNFCCC.



National Framework in South Africa

South Africa is a signatory to UNDRIP and has signed and ratified the CBD, UNFCCC and the Paris Agreement, thus they have international obligations to honour these instruments, e.g., by incorporating these international norms/ obligations into their national laws. In South Africa, there are numerous laws (and policies) that deal with indigenous knowledge. As far as the general protection and commercialisation of indigenous knowledge is concerned, there is currently a debate whether such knowledge is best protected as a form of intellectual property, or as a separate form of protection (i.e. *a sui generis* system).

The Indigenous Knowledge Systems Policy was adopted in 2004, and it was the country's first attempt at recognizing and protecting indigenous knowledge. It provides for the recognition, affirmation, development and promotion of indigenous knowledge in South Africa.

Spearheaded by the Department of Trade and Industry, the Intellectual Property Laws Amendment Act of 2013 was signed into law.⁴ This piece of legislation enables an indigenous community to protect their indigenous knowledge

under 'conventional' forms of intellectual property, namely through patents, copyright, and trademarks. A patent, for instance, can be used to protect indigenous medicinal knowledge, while copyright can be used to protect indigenous cultural expressions. Trademarks can be used to protect indigenous signs like tribal marks or tattoos, and/ or indigenous names. This approach has, however, been criticised by experts in the field as unsuitable largely because of the unique nature and characteristics of indigenous knowledge. Incompatibilities arise between indigenous knowledge and the conventional forms of intellectual property because indigenous knowledge is not always able to fulfil the strict protection requirements laid out under the various Intellectual Property Laws. And it appears overly complicated to adjust some of the key concepts of existing IP laws – such as the novelty and material form requirements in patent and copyright laws respectively, the limited duration of protection and the preference for individual authorship or small groups of authors or inventors – to the unique characteristics of indigenous knowledge.

It is against this background that another

South African government department – the Department of Science and Technology (DST) – subsequently introduced a somewhat conflicting draft piece of legislation with the aim of protecting indigenous knowledge in a different way, distinct from trademarks, patents, and copyright: the Protection, Promotion, Development and Management of Indigenous Knowledge Bill of 2016 (IK Bill).⁵ This Bill provides for an alternative system to protect IK, which includes recording and documenting, as well as 'sui generis' protection that aims to create a special kind of IP protection, that takes into account both the moral and economic rights of knowledge holders, and the idiosyncrasies of IK. This protection also aims to cater to collective ownership, and the term of protection will be in perpetuity – for as long as the knowledge meets the eligibility criteria.

Since the IK Bill was first introduced there have been various opportunities for public participation during the Bill's development and in the process a number of concerns have been raised concerning the Bill and how it will work in practice (see the next section). Concerns included the following:

- The Bill could create conflict between different indigenous communities;
- The Bill may promote commercialisation of IK;
- The Bill provides little oversight of 'trustees';
- The National Recordal System is not the right platform to record, protect, and manage IK;
- Complete security of the database cannot be assured;
- There is limited indigenous representation on the NKISO Advisory Panel; and,
- Some indigenous communities are suspicious of entrusting government with their IK.

It remains to be seen which of the two legislative approaches will, in the end, prevail or how they can co-exist and be combined. The current version of the DST IK Bill⁶ seems to suggest, however, a subsidiary role of the IK Bill in relation to other IP statutes, including the Intellectual Property Laws Amendment Act of 2013.⁷ Alternatively, indigenous knowledge holders themselves could choose between the different options for protection as provided for in the two pieces of legislation.

⁴ The Act will only come into operation on a date to be fixed by the President by proclamation.

⁵ A first version of the Bill was introduced in 2015, a revised Bill was tabled in 2016, and version B6B-2016 was passed by parliament on 14th November 2017. Thereafter the Bill was sent to the National Council of Provinces for concurrence, and the final stage will be signing by the President.

⁶ Bill version (10.10.2016) available at: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B6B-2016.pdf>

⁷ According s32(1) of the latest version of the Indigenous Knowledge Bill: "This Act does not alter or detract from any right in respect of any statute or the common law."

How Will the IK Bill Work in Practice?

One of the key elements of the IK Bill is that it seeks to establish an office, the National Indigenous Knowledge Systems Office (NIKSO), which will be in charge of managing the rights of indigenous knowledge holders and educating and empowering indigenous communities to identify and use their indigenous knowledge. In 2013, the DST also launched the National Recordal System (NRS) which aims to protect, preserve, and promote indigenous knowledge by its documentation. In this section, we explore what it will mean in practice for communities.

How can IK holders ensure their knowledge is protected?

If the IK Bill is passed into law, only IK that is registered under the Act can be protected. Thus, if indigenous peoples and local communities want to ensure their IK is protected under the IK Bill they would need to record and register their IK **prior** to sharing it with any persons, including researchers. The IK Bill makes no provisions for protection

of IK that has already been shared publicly. For example, if an IK holder has previously shared their IK and it is accessible to the public (e.g. in research publications, magazines, on the internet, TV, newspapers or widely known), it cannot be registered nor protected under the IK Bill.

How will IK be recorded?

Provincial Documentation Centres will train community 'IK recorders' who will be responsible for recording IK holders' knowledge. These records will be transferred to the Provincial Documentation Centre where they will be checked. The records will then be transferred to the National Recordal System (NRS) cyberstructure where they will be stored securely.

Community trustees will be able to apply for IK registration certificates

The trustee⁹ of a community can apply to NIKSO to register IK. If the application meets the criteria, then the NIKSO Registrar will approve the application and issue a certificate of registration.



Figure 1. Schematic representation of the proposed process for communities to record their IK under the Indigenous Knowledge Bill

⁹ Indigenous communities will delegate a person to be their trustee, he/she will hold IK in trust on behalf of the community and be responsible for and accountable to the community for protection of their rights related to IK.



INDIGENOUS PEOPLES' RIGHTS IN THE CONTEXT OF ACADEMIC RESEARCH

In this section we explore how some key legal instruments support the rights of indigenous communities within the context of engaging in academic research processes.

United Nations Declaration on the Rights of Indigenous Peoples

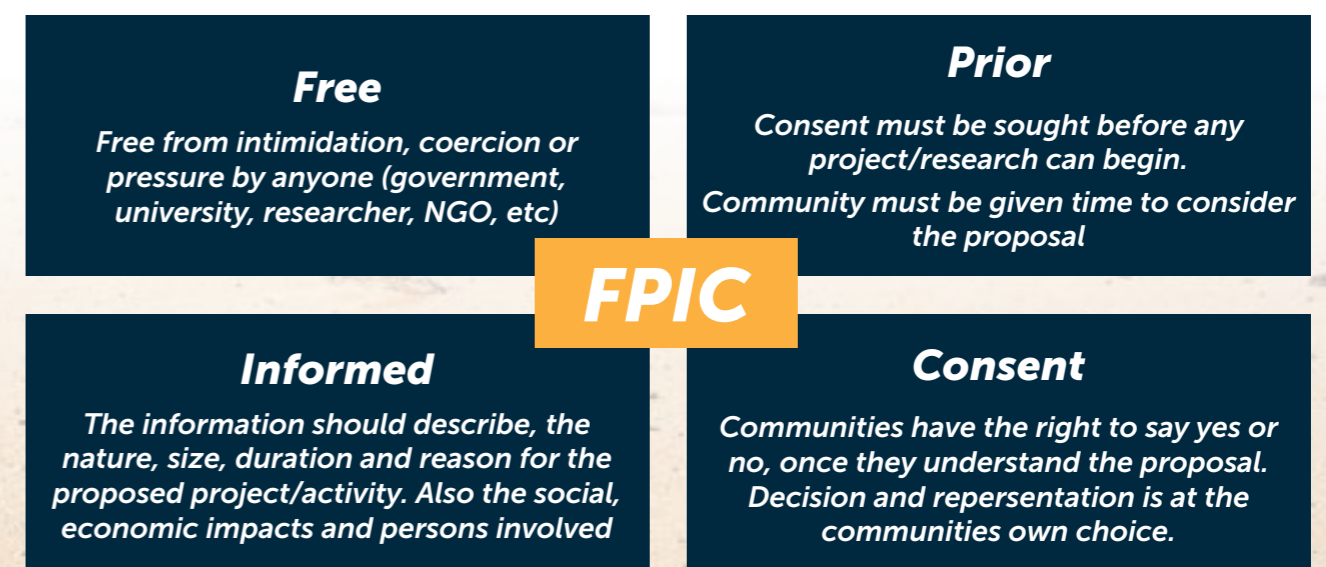
From their historically close relationship to the land and water, indigenous communities derive certain rights from international legislation in order to safeguard their identity and culture. To protect their values, way of life, and connection with the land, an international regulatory framework has been developed which prescribes rights to indigenous peoples. These are not additional or special rights, rather they address the fact that indigenous peoples have historically been severely marginalized and discriminated against, including the loss of their ancestral lands. These rights are meant to redress historical injustices so that indigenous peoples can access and enjoy the *same* rights as their fellow countrymen and -women.

Rights addressed by UNDRIP include individual and collective rights, cultural rights and identity, rights to education, health, and language. Indigenous peoples have the right to self-determination, an important fundamental right, which acknowledges all people are equal and entitled to control their lives and their futures, it is an individual and collective right.

UNDRIP promotes the full and effective participation of indigenous peoples in all matters that concern them – and this would include research taking place within their lands/territories and that includes their community members as interviewees. A number of Articles in UNDRIP recognize the principle of Free, Prior and Informed Consent (FPIC), including with regards to the removal of intellectual and spiritual property (Article 11), and any projects affecting indigenous lands and resources (Article 32).

Free, Prior and Informed Consent

FPIC is fundamentally important for protecting the rights of indigenous peoples. It is meant to complement two other overarching rights of indigenous peoples: the right to self-determination and the right to participation. This principle enables indigenous communities to determine the outcome of decision-making and research that affects them. The diagram below describes the four key elements of FPIC and what they entail.



Indigenous Peoples' Intellectual Property Rights

As discussed above, mainstream approaches to IPRs are based on individual rights and economic aspects of culture; however, indigenous peoples tend to emphasize the holistic and collective notion of their culture (which is manifested in elements such as IK, language, spirituality, custom, and rituals). Indigenous peoples want to claim ownership and control over their IK in perpetuity, however, mainstream IP law does not facilitate this because most IPRs, including copyrights and patents, are granted for a limited time period only, after which 'works' enter the public domain. Under UNDRIP, indigenous peoples' intellectual property becomes part of the broader human rights framework and Article 31 expressly states that:



Image features: Mr. Jacobus Petrus Obies

“

[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

”



Some Rights Indigenous Peoples Can Utilize in the Context of Academic Research⁹



The right to self-determination, (Article 3), this allows indigenous peoples to permit or deny access to and use of their IK as this may affect the development of their culture and identity.



The right to participate in decision-making in matters which would affect their rights (Article 18).



The right to maintain, control, protect and develop their traditional knowledge, and manifestations of their sciences and technologies and cultures including genetic resources, seeds, medicines, and knowledge of the properties of flora and fauna (Article 31).



The right to maintain, control, protect and develop their intellectual property over such traditional knowledge (Article 31).

Domestically, the Bill of Rights in the South African Constitution articulates a number of rights that are of seminal importance to indigenous peoples. These include:

- A right to the environment (section 24);
- A right to language and culture (section 30);
- A right to belong and practice as a member of a cultural community (section 32); and,
- Procedural rights, such as rights of access to information (section 32), and right of access to courts (section 34).

In addition, the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) does provide some protection for indigenous knowledge under provisions relating to bioprospecting. However, bioprospecting only relates to research of indigenous biological resources for commercial or industrial exploitation, thus it does not cover purely academic research.

Lastly, the IK Bill specifies that all research, whether commercial or non-commercial, requires prior informed consent, which is consistent with the Nagoya Protocol (CBD), which as alluded to earlier, South Africa ratified in 2013.

⁹ Source: UNDRIP.

ACADEMIC RESEARCH PROCESSES

—
This section provides a general overview of academic research processes, and addresses the importance of ethics.

Research Ethics

Research ethics and principles have been developed to ensure that the rights and welfare of human subjects who participate in research are protected. There is variation in research ethics procedures between countries, institutions, and academics disciplines. Principles can include respect, protection of human subjects, beneficence (strive to do no harm and maximise benefits), justice (the fair sharing of research burdens and benefits), transparency, accountability, and professionalism.

The principle of respect recognizes the autonomy of research subjects to make decisions over what

shall or shall not happen to them. Furthering this principle, researchers must provide potential human subjects with 'informed consent documents' that include:

- Adequate information so that the potential research subject can decide whether or not to participate;
- That the information provided is understandable and can be fully understood and comprehended; and,
- Participation must be voluntary.



University Research Ethics Requirements

Universities should have research policies and processes concerning research with human participants that require researchers to obtain ethics approval **before** the research can be carried out. Each academic division or faculty may have its own Research Ethics Committee (REC) that requires each unique research project to have ethics clearance. Researchers must discuss with the REC the ethical issues involved in their research and the measures they will take to deal with possible negative impacts. Ethics approval is usually granted for a one year period, renewable upon re-application. If researchers approach a community, a community representative should ask to see copies of the REC application and the approval form, and ensure that it is up to date.

If a university to which a researcher is affiliated

does not have its own ethics procedures or if a researcher is independent and not affiliated with an academic institution, then communities could ask the researcher to submit their proposals to the Human Sciences Research Council (HSRC) for approval. The HSRC is South Africa's statutory research agency focused on the social sciences and humanities. The HSRC 'Code of Research Ethics' provides guidelines to ensure that researchers respect the rights and dignity of participants.

Despite many positive aspects of academic research ethics procedures, they are standardised frameworks and guidelines developed by external institutions; thus they cannot be expected to fully address the unique needs of indigenous communities engaged in research processes.

ASSESSING POTENTIAL RISKS AND BENEFITS OF RESEARCH



Adhering to the principles of FPIC, communities should be in a position to make an informed decision on the potential risks and benefits of any proposed research. In this section we consider some community level risks with regards to sharing IK and also the benefits of engaging in research.

Potential Risks for the Community

Some potential risks to sharing IK, include the following:

- Documenting IK makes it more visible to the general public and consequently more vulnerable to misuse or misappropriation;
- Confidential information which is held as secret or sacred may become publicly available;
- The Indigenous Knowledge Bill only applies to and protects IK *registered under the Act*.
- There may be non-compliance with relevant laws and policies and/or that these laws and policies may not be enforced;
- When research concerning IK is published such publication may be considered a disclosure that can prevent the IK to be patented at a later stage, if applicable;
- There are fewer protections for communities under academic research than commercial research. While there are good reasons for distinguishing between commercial and academic research, this becomes particularly problematic in cases where academic research publishes information concerning IK and this information is then accessed and utilized by commercial players (e.g. to make a product). This is known as a 'derivative work' and is a secondary use of the information.
- Many communities consider their IK collectively held whilst university ethics consent requirements are generally at the individual interviewee level, thus there is the risk that individuals will share IK without a collective consent process.





Potential Benefits for the Community

Academic research should produce benefits and often the stated benefits are that society as a whole will benefit from the production of new knowledge. However, the situation of indigenous peoples and research is unique, and South Africa's draft Indigenous Knowledge System Research Ethics Policy, in its preamble thus notes that "...indigenous knowledge has become increasingly important in research, while at the same time local communities have become increasingly marginalized..." and emphasizes that "...research projects should be designed in a manner that communities benefit, culturally, socially, and economically". Indeed, in the Guiding Principles the policy states:



Principle of Immediate Risks and Benefits to the Community

This principle recognises that the research is of the immediate benefit to the community, and the risks associated with the research. The risk should be less significant than the benefits to be gained.



When engaging with potential researchers, community representatives should therefore consider how the community may benefit

and negotiate with researchers and/or universities to ensure that this is the case. In discussions with Nama and Griqua leaders and youth on the issue of benefits, they provided the following specific recommendations:

- Develop and share resource guides that inform community representatives of relevant laws and policies so that they can make informed decisions on how they engage with researchers and share their knowledge;
- Plan and design the research together with community representatives at the outset of the project, and include issues of community concern;
- Plan and design training and educational opportunities together with indigenous youth in the community at the outset of the project, and include issues of concern to indigenous youth.
- Include indigenous co-researchers in all stages of the research;
- Provide research data and findings in accessible formats/language to be shared with the community; and,
- Require academic institutions to provide academic scholarship and bursary opportunities for indigenous peoples and indigenous youth.

In summary: When engaging in research the benefits to the community should always be greater than the risks.



NEGOTIATING SOCIALLY JUST RESEARCH PROCESSES

Indigenous communities and their allies are developing tools that can be used by indigenous peoples and local communities to better engage with potential researchers and their institutions, and to negotiate if and how communities agree to engage in research processes.

Research Ethics Guidelines

To counter intrusive and sometimes exploitative research in indigenous communities, indigenous peoples and local communities could develop their own ethical guidelines for external researchers. Recently, the

South African San Institute (SASI) has launched their own 'Code of Ethics for Researchers' which sets out four pillars that researchers must abide by: respect, honesty, justice, and care.

Community Protocols

Community Protocols are charters of rules and responsibilities in which communities set out their customary rights to natural resources and land, as recognised in customary, national, and international laws. In South Africa, the Kukula Traditional Health Practitioners Association have developed their own community protocol

which governs the use of the healers' knowledge. Members have agreed to pool their knowledge and have created a representative body to manage their interests, negotiate if and how the members will share their knowledge, and ensure sharing is on terms beneficial to its members.

Community Research Contracts

Historically contracts have been used to regulate mutual forms of exchange between individuals or groups, and contracts can also be used to regulate research. Some indigenous groups have chosen to work with and seek out advisors to assist them in developing their own 'community research contracts'. These contracts can specify the obligations and responsibilities between researchers and indigenous groups, and can outline ways to work together in the spirit of collaboration, responsibility, accountability, respect and reciprocity. Community Research Contracts should include, for example, details of the proposed research, potential risks for the community, expected benefits, conditions for the collection, use, retention and disclosure of data, information concerning publications, undertakings of the researchers and the communities, and issues related to ownership and any intellectual property rights concerning the IK and of any works created as a result of the research. Indigenous peoples and local communities can also negotiate terms

to ensure that researchers respect their customary procedures, culture, and dignity; disclose only certain information with prior written consent; and do not publish any facts or portrayals that may be harmful to indigenous peoples and local communities.

Why should communities develop such contracts with researchers? Contracts bind both parties to abide by their contents, and they can be used to hold universities liable and accountable for their faculty researchers. They are also a technique to refuse normative research practices. Contracts can be especially useful when researchers or their institutions are from outside of South Africa, as they can state that South African law will apply. Currently, as the Indigenous Knowledge Bill is not yet passed into law in South Africa, contracts offer a key strategy to enforce indigenous knowledge rights. However, contracts are no panacea as they are unlikely to truly breakdown unequal power relations between the researcher and researched, and they can be complex legal documents that require specialists.

Monitoring Research Processes and Raising Concerns

Nama and Griqua leaders and youth also stressed that individual researchers should provide communities with contact details of university institutional representatives they can contact if they have any concerns about the research. For example, this could be the Research Ethics Committee Administrator, or the Human

Subjects Office, or similar. Indigenous peoples and/or local communities may wish to monitor the research process to ensure that the research is progressing as agreed. Concerns could be raised with individual researchers and/or the research institutions.

SUMMARY

This guide has introduced the issue of externally-led academic research processes with indigenous peoples. The guide has shown that indigenous peoples globally have raised concerns regarding how research is designed, implemented and shared. To counter past negative impacts some communities have developed their own ethical principles, protocols and agreements. Indeed, governments and stakeholders have been grappling with how best to protect IK, and international legal instruments such as UNDRIP and the CBD have been developed, which include guiding principles such as FPIC and ABS. The guide then zoomed into the current situation in South Africa, and considered how the government is incorporating international norms and obligations into their own national frameworks. The differing approaches of the DTI and DST were compared, and the recent IK Bill which seeks to offer 'sui generis' protection for IK and cater to collective ownership highlighted. The South African government has already begun to establish the infrastructure for the operationalisation of the IK Bill with NKISO and the NRS, thus the guide briefly outlined how the latter will work in practice. How the different legal instruments support indigenous rights was explored, followed by an academic research section, where ethics principles were introduced and general university requirements outlined. A section on potential risks and benefits provides some ideas and stresses that benefits should always outweigh risks. Finally, some innovative tools, such as ethics guidelines, community protocols, and community research contracts which are currently being used by indigenous communities to assert their rights was introduced.

As highlighted at the start of the guide, researching with indigenous peoples is a sensitive and complex issue, and each community unique and research process different. We hope this guide has provided useful information which communities can harness to support their collective discussions regarding academic research processes and to negotiate more socially-just outcomes in the future.

RESOURCES

For more information on the United Nations Declaration on the Rights of Indigenous Peoples, visit <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

Learn more about what Intellectual Property is - Check out <http://www.wipo.int/about-ip/en/>

For more information on the Convention on Biological Diversity, visit <https://www.cbd.int/convention/>

Engage with the 'local communities and indigenous peoples platform' of the UNFCCC, see more at <http://unfccc.int/adaptation/items/10475.php>

Look out for The Protection, Promotion, Development and Management of Indigenous Knowledge Bill becoming law at <https://pmg.org.za/bill/635/>

View the Human Sciences Research Council: Code of Ethics at <http://www.hsrb.ac.za/en/about/research-ethics/code-of-research-ethics>

Explore Natural Justice's e-learning modules on key international frameworks in the context of community rights at <http://naturaljustice.org/e-learning-modules/> and find out more about community protocols at <http://naturaljustice.org/community-protocols/>.

SASI 'Code of Ethics for Researchers' available at <http://trust-project.eu/wp-content/uploads/2017/03/San-Code-of-RESEARCH-Ethics-Booklet-final.pdf>





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