



FEMINISTS 4 A PEOPLE'S VACCINE PODCAST EP3 Transcript



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The Right to Health: Patent Monopoly and Access to Medicines

With Molly Jagpal and Chee Yoke Ling

[INTRO] Vanita [00:00:47] Welcome to the Feminists for a People's Vaccine podcast, a space for imaginations, discussion, and feminist analysis from the Global South. In this creative journey, we approach the tough questions brought to life by the pandemic. Join us to look at this once in a lifetime event as a passageway to imagine a fair and just world for all.

Molly [00:00:02] Hi, I'm Molly Jagpal and I work for DNDI, and I take care of communications in Southeast Asia, and today I have the absolute privilege of having a little conversation and a chat with a very respected and dear friend of mine, Yoke Ling. There you are. Now, tell us, can you go ahead and introduce yourself?

Yoke Ling [00:00:26] So I'm Malaysian and I'm a lawyer by training and I'm living in Malaysia. Today I am working as the executive director of the Third World Network, which is an international policy and advocacy organisation started by Malaysians. And we are headquartered here in Malaysia.

Molly [00:01:18] When I was looking at your formal CV, Yoke Ling, I was quite terrified by your credentials. I saw this background in law. I saw Cambridge University pop up and it

got me thinking- I'm thinking, how on earth did you go through that process of doing law? It's something that we identify with people going into big corporations. How did you end up fighting for justice?

Yoke Ling [00:01:44] Well, you know, it's very interesting because when I when I applied to go to law school, I didn't want to be a lawyer. In fact, I didn't want to go to university, I wanted to be a journalist. I was always interested in environmental issues in school and so I wanted to do something different. So, my uncle said, "Look, you know what? If you want to do something different, go and get trained as a lawyer". So, I applied. I went in and I had to say that was probably one of the best decisions I made. I had a couple of amazing professors who mentored me. And then when it came to wanting to do my master's, because I was interested in teaching, and there was a scholarship to go to Cambridge. And my mentor at that time in the law faculty said, you know what, why don't you apply to go to Cambridge? I said, no- by then I was very politicised about Colonialism; I'm not going to the motherland of imperialism, you know? No, I want to stay here. I was already very involved as a volunteer with Our Friends of the Earth, Malaysia. I was really getting exposed to the communities, to the reality of my own country because I'm an urban kid. Right? But this mentor of mine said, look, if you want to change the world, go to Cambridge, be challenged, be in a place where people are not thinking like you. Right? And when you come home and you have a degree with the Cambridge name, it doesn't matter what you say, they will give you a hearing. But when I came home, I realised that in the end, it has to be not just my voice, but the voice of those of us who come from the South, from the developing countries wanting to have our own pathway- this is what our future, what our development and what our people should have the right to decide.

Molly [00:03:18] We're all familiar with the right to health as a human right, but we don't have that much familiarity with what exactly are intellectual property rights. Could you just walk us through that?

Yoke Ling [00:03:34] So we have something called the Paris Convention on the Protection of Industrial Property, and that is the treaty back from the 19th century when it first started. And it's been changed over the years. But that is really what created the idea of what we call a patent. Right? A patent is a monopoly for a temporary period given to reward inventions which are industrial property. And you can choose in a country whether to join or not. And if you do join, you were given the freedom to choose which sector you may not even want to include, to give, for example, a patent. So, in the late 80s, there was a move led by big industries- pharmaceutical, biotechnology, chemicals, agribusiness, you know- to sort of say, you know what, we today are the companies in Europe and North America and Japan. We have the technology because we are the richer countries. Most of them got wealthy because of colonialism and taking all our resources for centuries. And so, because they had more wealth,

they were more developed, and they could have more technology advantage. They said, OK, now that we [formerly colonized nations] are disadvantaged, how do we use this technological advantage to really control markets? Right? And so, they wanted new rules that would give them new rights. So, in 1995, we had coming into birth, into implementation, a new agreement, which is a very long name, it is called the Trade Related Aspects of Intellectual Property Rights, which we commonly will now hear it called the TRIPS Agreement. Now, when that agreement was being negotiated together at the same time with four, five, six, seven, eight, nine other agreements, all at the same time, most of our countries were not aware because we didn't even think of pharmaceutical patents in many of our countries, it was unthinkable. So, the people involved in the negotiations were very- it was not equal negotiations. I think it's all the active countries from the developing world- which were Brazil, India, Argentina, and a couple of the African countries- who had an idea of what was going on because they were having their own industries coming up. And so, they were the ones who were blocking and trying to save the day. But most of the other countries had no clue. And so, in 1995, this agreement came into legal life. And what does it do? It says that- first of all, it created the intellectual property rights. Once you are a member of TRIPS, you are obliged to follow one similar set of rules. And one of the most important for patents is that from now on, all products and all technology and all processes, once you meet the requirement, you give it [the patent] and you give it for a minimum of 20 years. And that's how we began to see the story of medicines around the world. If you are a member of this treaty, you are obliged to give it [patents], but it's not an absolute monopoly. There are ways you can actually balance between- yes- legitimate interests of those who are real inventors and creators, but also public interest in public health. And today for us, in much of our work in Third World Network, in many of our civil society activists- a community, we tried to avoid the word 'rights'. We say intellectual property. If you look at the history of patent law, it is about a privilege, because what are you getting, right? Because you are an inventor, you've done all these things and you qualify depending on your rules in your country, the state. The government representing the state says, "I will give you a temporary monopoly". It's a social contract between society and the inventor, right? But by turning away from the concept of privilege to the concept of rights, you change the whole psyche of how the world will look at what these things do and what impact they make.

Molly [00:07:18] It sounds psychologically, somehow it becomes acceptable, you know, as ordinary citizens of the world begin to believe that it's OK, because if it's a right, somebody somewhere is accountable. And public interest will always be factored in when it's arrived.

Yoke Ling [00:07:34] It does. It just changed the way we then look at 'who's rights', 'what rights? So that's why when we wonder, why is it that it's so hard to get governments to- they may have signed also treaties on human rights, yeah? Why is it so hard for us to enforce our human rights

in our national courts or to get our parliament to pass laws? Why is it so difficult? At the same time, it's so easy the way they pass laws on patents and trademarks and, you know, and make it even tougher, and tougher for us. And they get more and more favourable to private companies. That's because governments most of the time, will say, unknowingly, have greater enforcement rights so that they can use that as a stick. When we need to do the right thing, we find ourselves suddenly having a lot of barriers.

Molly [00:08:19] So when we talk about TRIPS Flexibilities, are they housed under that then?

Yoke Ling [00:08:24] Yes, it's under- it's in the TRIPS agreement itself.

Molly [00:08:28] So can you give us an example, Yoke Ling, of when that was exercised and used in reality?

Yoke Ling [00:08:33] I'll start with one of the most important, the first flexibility that we think is really important, and countries must exercise it now. When do you get a patent? Right? First of all, that product or that process must be an invention. OK, now what is an invention? TRIPS does not define it. It is up to us in our national law to define what an invention is. And before you give a patent, a claim, that invention must be three things: It must be new, it must involve an inventive step and it must be something that you can use or apply. They call it industrial application, so something that can go to the level of being an industrial production. Now, these are three. This is not created by TRIPS; it is part of the development of patent law, and it's just incorporated into TRIPS. OK? So, it's new inventions that are capable of industrial application- you must have all three satisfied. What each of these means is, again, up to each country's law. That is the most important flexibility, because if you get it right, you are not going to be giving so many patents and they don't deserve it. Right? And in the field of pharmaceutical and medicines and all that, we see such a lot of patents given. Even as an ordinary layperson, when you explain to people what those patterns are, that they create 20 years monopoly, people are shocked. All right? I'll give you a quick example. Something came up originally as a syrup. And then I change it from a syrup to a different form- I turn it into a tablet or a capsule. I get another 20 years. I have to take three or four or five tablets if I'm HIV/AIDS patient, and every day to take five different things, or three, or four is very difficult. That's why you don't comply, and you give up. And that's a problem. You know, you have to comply with the HIV treatment and it's for life. So, then you begin to say, OK, I could put two or three of them into one tablet. So instead of taking three, I'm taking one. This is what we call combinations. You could get it if your law allows in your country. You can get another 20 years for turning the two or three pills into one pill. So, that is an important flexibility. I'll give you another good example. Argentina in 2012 passed new guidelines for how to assess and examine a patent application. Is this something that should be given a patent or not? So, they looked at these chemical based inventions. Right?

So, the Ministry of Health, the Ministry of Industry and the National Institute of Industrial Property, which is your intellectual property arm, they got together. They did these consulting studies; they adopted these new guidelines. And when they implemented these new guidelines in 2012 itself, the number of patents given for medicines in that year in Argentina was 54. 54, OK? Mexico has about the same size of a market as Argentina, which means the same number of people will be affected, your calls, et cetera. And you know how many patents were granted in Mexico in that same year? 2500. Mexico granted 2500. Argentina granted 54. Now both are members of the TRIPS agreement, but they use the flexibility very differently. One of the reasons why the number of patents just drop dramatically with the new guidelines in Argentina, it's because they have very strict standards that limit the patenting of a bunch of things. Right? Compositions, what I just said about combinations- you know, two, three pills put into one- even doses! If I come up with a 20-milligram tablet- 20 milligrams in your tablet, the 20 milligrams of the active substance that actually has the medicinal value. And then maybe 10 years later, I say, actually, I'm coming up with one of 40 milligrams because of whatever or the other is more effective, etc. So, if your country allows it- the first 20 milligrams as a dosage, if your law allows it, that's new and inventive. Right? You get 20 years. Then 10 years later, you say 40 milligrams is more effective for the body to be able to get its medicine to work better. So, if your country allows it in its law, the 40 milligrams get another 20 years. All right? This is what we call in the patent world 'evergreening', you know, it is an evergreening patent. It goes on, and on, and on, and on, with different patents. And basically, what the aim is, is to give you a monopoly in the market.

Molly [00:12:54] I wouldn't call it ever greening. I'd call it a never-ending disaster!

Yoke Ling [00:12:58] Yeah, maybe everybody else it too nice!

Molly [00:13:01] So that's all fascinating and a bit scary, Yoke Ling. But what I want to ask is, can you tell me in what circumstances do we use patents or are patents issued? Can you just explain that again, please, with more clarity?

Yoke Ling [00:13:19] Right. What TRIPS agreement says is that, yes, you give a patent, and this is really patent law that has been incorporated, it has to be an invention, it has to be new, it has to involve in inventive step and it has to be of industrial application. Alright? And this is important. The third one is, because- something could be new, you could pass a test of 'new', you pass the test of having and exercising an inventive step. But if you are not going to work- the term is 'work a patent'- that means you're not going to manufacture, you're not going to actually use the technology or make the products and then you just want to lock up. You can write that all you are is just something new and inventive, but it's not ready to be used at an industrial level. That means it's not capable of being turned into a product or a technology that can serve

society. So, at that stage, you don't get a patent. This is important because it is not capable of industrial application. It means that other people can continue doing the research because you can have 10 different teams of people working on trying to solve a problem or get the medicine for some disease. Right? So, you want a balance so that people can continue working. If it's not of industrial application, you won't get a patent. That's very important. So, these three have to go together, right? Like I said earlier on, this is a number one, what we call flexibility. So, you decide in your national law what is new, what is inventive, and what is of industrial application. And then you get an application, right? Let's say, Molly, you are a pharmaceutical company or a biotech company. You have been working on a particular medicine. When you apply for a medicine- for a pharmaceutical patent, not a medicine- you actually haven't got the medicine yet. It doesn't exist yet because the way this whole system is constructed- if I'm working on substance, chemicals, but only talking about chemicals at this stage, I'm working in the lab. I'm looking to see whether this particular chemical has a potential, has an active ingredient, something in this substance that has some activity and that could be developed into a medicine. So, let's take a very well-known example, something we take every day. So, you know, we take paracetamol like this. Panadol- Panadol is actually the brand name. So, the original was called Panadol which is the name of the company that started doing it. But the active ingredient is paracetamol. And because there are no more patents around this product- it is a very old product- that's why we can go to a to a pharmacist, and we can buy paracetamol. We ask for paracetamol. Right? And generic companies- many people are making this all over the world. That's why it's so cheap. So, what happens is, when you actually discover a potential active substance, that's when you file a patent. So, let's say I file in the year 2000, OK, and I get my patent approved in 2005, but the 20 years that running for 2000. So, it goes back through the whole period. OK? But what it does is, effectively it's given you a minimum of 20 years, which is a long time in this world, ok? Every day you don't have competition in the market, you know, you don't get cheaper medicine. So, what you first get is this and then you will go and start- you continue doing your R&D and developing that active ingredient, a compound, that chemical molecule into a medicine. OK? But as long as I have my patent approved in that period, nobody- no other manufacturer, no other, you know- can go and make it. Even if you know, you can't do it because I have filed. One medicine is not one patent. You will file first, for the basic combo, which is the primary, and then you file process patents because you may have different products. You say it's new and inventive. In the old days before TRIPS, you choose- maybe you want to give patents only for process, but not product. So, Molly, you and I and five other people are walking in to get this medicine in five different ways. OK? But maybe your way is a mix of medicine, you know, so it is absorbed into the body faster, better. And we may have different advantages. So, if I can show that my process is new, inventive, and different from yours, then you can get a process patent. I can get a process patent. But the medicine in

the end- the product is not patented. But once you are required to patent the product as well, even though we may have three different ingenious ways of getting to that product, then then the other process people drop off. So, this is why it's a problem. That means you actually kind of kill innovation sometimes, right? No incentive. The first to file gets monopoly. Now, there is an exception. This is another flexibility. If you are doing research, right? For example, there is a patent over Sofosbuvir, ok, which is a very important drug for Hepatitis C epidemics. We have all been working with it, many of us. So, it's patented in Malaysia, the DNDI- Drugs for Neglected Diseases Initiative that Molly is from- they got another potential drug that works with Sofosbuvir. But you need these two drugs, and we want to do a clinical trial, but we need Sofosbuvir, which is patented in Malaysia. Now, there is an exception in TRIPS- if you want to use a patented product, but since it is so expensive, I can get a generic that's cheaper from another country. I can bring in a generic, ok, without the permission of the patent holder. So, if it's for research, I'm not doing any commercial level production. I can bring in a cheaper version of the same drug, which is what we did in Malaysia. Right? We imported Sofosbuvir from Egypt, which has very high standards and did not give a patent on Sofosbuvir, whereas most other countries did. And so, Egypt is the only place where you can get a generic, which is independent of the patent holder. OK? So, we imported it and it's perfectly legal. So for research, for clinical trials, you have an exception. Once you get to the commercial stage, you can't, right? So even if I can- and we hear a lot of times the pharmaceutical industry says, "Why are you so worried? You know, we don't have absolute monopoly. If you want to do research, you are free to do research using the generic version of this chemical, et cetera, et cetera. So, what's the problem? You can go on and do your own research." When we say that you [pharmaceutical companies] are killing innovation with the patent system- think about it. If I do research on medicines, but I cannot commercialise because at that stage, it is no longer allowed without the consent and permission of the patent holder. What's the incentive for me to do R&D and innovation?

Molly [00:19:37] So you've kind of come full circle there, Yoke Ling, because earlier on you talked a little bit about how patents- that people believe that patents can stimulate inventions and almost are an incentive for R&D and innovation. That looks good on the 'wrapper'. But once you get into the 'packaging', that's where the complexities are.

Yoke Ling [00:19:58] That's right. That's right. Don't you see how it actually works and plays out? Right? And you see that it's the complete opposite. We realise that there is no evidence, really, to link having all these fantastic 'protecting of the of the private rights', you know, these 'private claims', that it will bring you more innovation or it will bring you more investment, because sometimes they say things like- "If you don't respect intellectual property and you don't respect patents, then I as an investor, I'm not going to come to your country to invest".

In 2006, the World Health Organisation set up a commission on intellectual property, innovation and public health because this is already becoming a problem. You have studies from the Federal Trade Commission of the United States- there are so many academic studies, studies from government think tanks, from government agencies, showing that the actual number of new chemical compounds- like 'real', you know- the [number of] new things is really not that many. There are very few new compounds. We are looking at old compounds. We're going back to looking at nature and biological products. Now, remember the word 'discovery'? A lot of discoveries were made by going to talk to indigenous communities, local communities that for a long, long, many, many, generations, millennia, have been using herbs and all that. And it's all in the literature- you look at the drug discovery and the development of a lot of it is go and send some ethnobotanist to go and do- you know- the people who do all this research and then they publish. So that are very fundamental questions in this chain- when is it a discovery, when are you working based on other people's knowledge? We are building because it used to be that all this drug development was very much a collaboration of scientists in public institutions, etc. It's not something that just comes up from a company's lab. Even today, what have we learnt from the vaccine for COVID-19? Because vaccines actually are not a profitable product except seasonal flu because, you know, every year you're going to have to do it, so you know, it's a captive market. But why are there no vaccines for HIV? It's hard, it's hard work, but there is not a whole lot of money being pumped into it and so forth. The COVID-19 vaccines had huge public money pumped into it- the whole of Moderna's, you know, product- really, billions came from US taxpayer money. The Oxford Institute, you know- which is what we call now the AstraZeneca product- a group of academics did a brilliant study. They showed that something like 98 percent of the funding that has been used to research this particular vector, this way of bringing the vaccine to work, in this particular way- it did not happen last year. You know, people working in this field know that this Coronavirus is out there. So, they have had 20 years of scientific research, this group in Oxford, and they were funded predominantly by taxpayer and philanthropy groups.

Molly [00:22:40] That makes it even more wrong, though, doesn't it, Yoke Ling? About the public taxpayer money, I mean.

Yoke Ling [00:22:47] Yes, yes, exactly. And then the same state gives the privilege, called a 'right', called a 'patent' and then they come and charge you and then you pay double or three times as much [for the product]. So, there's a big funeral going on for vaccines in the industrialised countries. So, if you look at the whole history of innovation, the best innovation, the best things have been discoveries or sharing of knowledge. You look at polio, yeah? Two scientists were working on polio vaccines in the United States, funded by philanthropy and public money back in the day. There were two scientists and, in both cases, these two polio

vaccines that were developed were never patented. And one of them, you know, Salk- Professor Salk- he did a very famous interview where he was asked this question, you know, about patenting the vaccine. And he said, “Can you patent the sun?” Because it was unthinkable. If it had been patent, just thinking how the world will be. We may not actually be talking about polio eradication today because the polio vaccine is very cheap. Anybody can make it. So, if you contrast polio and you look at COVID-19, you can see that the root of it is not that deep. It’s actually quite clear that it is the intellectual property system.

Molly [00:23:56] On the subject of shining the light, it’s got to go beyond civil society, governments and industry. It’s so important to engage the general public, which is where I think COVID has been a real eye opener for everyone around the world. Look at the disparity. Why are drugs so expensive? Why can’t we get the vaccine? How do you feel about how it’s kind of, blown the roof off the house now with COVID and access issues, right?

Yoke Ling [00:24:26] I think because from the buildup, you know, over the exorbitant prices and the profiteering- I mean- you see some of the recent United Nations reports, you know, coming out in 2017, 2018, and they really use the words ‘profiteering’ and ‘rentier’, you know, so it’s no longer something that some CSO’s and some patient groups are fighting for. I think, really this is one issue, you know, that has really a bit of a tsunami [effect]- I know it’s happening also because of COVID, right? The fact that we have South Africa and India taking the lead to put a proposal on the table in the TRIPS council in WTO to say, let’s suspend, you know, the enforcement [of TRIPS]. It was unthinkable about a year ago, two years ago, you know, it [the proposal] was October in 2020. Right? Now, it didn’t just happen overnight. It’s because these countries went through the experience of what happens when you have no access. OK? So, the fact that these countries- and today we have what, we have something like 63 countries, including India and South Africa, who are co-sponsors of this TRIPS waiver, as we have called it. And this is, again, allowed in the WTO system- any agreement in the WTO can have a waiver if there are circumstances which you can justify. It’s an in-built thing, right? So, we have 63 countries which are official co-sponsors and another maybe 40 countries that have given support. It means we have 100 countries right now, all developing and least developed countries. Now, the Biden administration has come in because of the campaign and because there is a very, very strong civil society [presence] in the United States as well, because it’s part of that big fight over exorbitant prices and the unfairness of the system, which makes a taxpayer pays two or three times [over], you know? But the Biden administration is saying we will accept some temporary suspension for vaccines only. The waiver is talking about all medical products needed. It’s not just vaccines. If we find, you know, we need to cure millions of people who are getting sick- and more will get sick if we don’t control this. So, every medicine that is being possibly- that can possibly be used now is being tried out. And many of them are

surrounded by patents, right? Masks, diagnostic kits- because diagnostic kits are also patented and they're very expensive, right? So, the whole range of products- the product range is very wide. [However] The United States says only vaccines. So, this is a fight. It started, and now every week they are having meetings in Geneva; former heads of states, the Pope, you name it. You know, the campaign for equity in vaccines is enormous. So, the European Parliament has also come up to say we have that we have to support this waiver. But the European countries are also split. In the South, the south of Europe, you know, you have Spain and Italy, where they have shortages. They support. You know, in principle, Germany is represented by Mrs. Merkel- even though she's no longer the Chancellor- but she has taken a very hard-line position to say that we cannot rock the boat with intellectual property because if we do, then the system is going to collapse, basically, and there'll be no innovation and blah, blah, blah. Right? So, there's a fight within Europe, but it's- but the U.S. has shifted a little bit. The battle has started. But it is not just about the vaccine issue. It's about the rules of the game, it's about the system

Vanita [00:27:40] The Feminists for a People's Vaccine podcast is produced by DAWN, Development Alternatives with Women for a New Era, and TWN, the Third World Network. Today's episode was edited by Alice Furtado and engineered by Ernesto Sena. Thank you for joining us today. I am Vanita Nayak Mukherjee, see you on the next episode.