

Protection of Traditional Knowledge under Human Rights Law

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Abstract

In the realm of Intellectual Property protection, traditional knowledge has been receiving increasing attention in the past few years. Traditional knowledge (TK) is refined knowledge system which forms important part of cultural identity of every nation. Traditional knowledge plays important role in lives of vast majority of people across the globe. Traditional knowledge widely known as a valuable attributes of biological diversity and is one of the most important sources of sustainable development in most of the developing countries. Traditional knowledge is associated with many areas such as agricultural, medicine, folklore, food, arts and architecture, music, dance etc. This knowledge has been used for centuries by indigenous and local communities under local laws, customs and traditions.

In present era traditional knowledge is under immense threat of getting irretrievably lost under the onslaught of technological advancement, globalization and western culture. Thus it is essential to protect and preserve traditional knowledge. Till date, no full proof mechanism exists for protection of traditional knowledge, specifically in developing nations. There is uncertainty in the existing Intellectual Property Regime to protect the rights of indigenous peoples over their traditional knowledge, as well as the existing international standards and jurisprudence on Intellectual Property Rights.

In the light of above, an attempt has been made to explore the possibility of protecting intellectual property right of indigenous peoples over their traditional knowledge under the Human Rights jurisprudence.

Key Words: *Human Rights, Intellectual Property Right, Misappropriation of Traditional Knowledge, Traditional Knowledge, Protection.*

Introduction

“When you deprive people of their right to live in dignity, to hope for a better future, to have control over their lives, when you deprive them of that choice, then you expect them to fight for these rights.”

– Queen Rania Al Abdullah of Jordan

Today’s society is a knowledge based society where social foundation basically rests on knowledge. It is evident that small section of society enjoys greater access to the process of knowledge creation, exchange and application than the rest and even dominates it. Though the origin of traditional knowledge system is traced back to 2 million years its importance even today is unmatched. Different cultures have contributed to the development of traditional knowledge, knowledge which was an important part of their life and even today forms vital part of lives of number of people around the world. Specifically in the developing nations like India, traditional knowledge forms important part of their culture and even of development process.¹ Traditional Knowledge (TK) represents a viable knowledge system that was the basis of traditional and developing societies.² The term traditional knowledge per se does not refer to any product eligible for intellectual property protection.³

Over the ages, Indigenous peoples have developed a close and unique connection with the lands and environments in which they live. They have established distinct systems of knowledge, innovation and practices relating to the uses and management of biological diversity on these lands and environments. Much of this knowledge forms an important contribution to research and development, particularly in areas such as pharmaceuticals, and agriculture and cosmetic products. In the context of these uses, Indigenous peoples claim that their rights as traditional holders and custodians of this knowledge are not adequately recognized or protected. They demand not only recognition and protection of this knowledge, but also the right to share equitably in benefits derived from the uses of this knowledge.⁴

Along with the features and importance of protection of traditional knowledge this article discusses about Indian traditional knowledge system, protection available under Indian legal regime and misappropriation of traditional knowledge because of lack of proper

¹ Pranjali Gadwe, “Protection of Traditional Knowledge under existing Legal Framework: an Indian Perspective” BALANCE – International Multidisciplinary Law Journal – Vol. 2 Issue: 2 December, 2016,p.27

²Traditional knowledge encapsulates spiritual experience and deep relationships with the land and its resources’: Wyenberg, Schroeder, and Chennels, ‘Introduction’, in R. Wyenberg, D. Schroeder, and R. Chennels (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the Hoodia Case* (2009), p. 3, 6.

³ Hans Morten Haugen, *Traditional Knowledge and Human Rights*, *The Journal of World Intellectual Property* 8 (2005), 664.

⁴ M Davis, Science, Technology, Environment and Resources Group, *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. Available at: www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm

protection. Bio pirates often use Intellectual property rights (IPR) as tool to steal Traditional knowledge and misappropriate it, mainly because of limitations of IPR system.

Traditional knowledge (TK): Conceptualized Generalization

The International Council for Science (ICSU) define traditional knowledge as: A cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and means are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldview.⁵ Traditional Knowledge is the result of intellectual activity in a traditional context. It is intricately woven into the living styles and practices of communities.

Traditional Knowledge refers to the knowledge, innovations and practices of indigenous and local communities in the world. Yet there seems to be no definite and universally approved definition of TK.⁶

The Convention on Biological Diversity, which to date is perhaps the international treaty that better protects traditional knowledge defines it as “knowledge, innovations and practices of local and indigenous communities that embody traditional lifestyles for the sustainable conservation and utilization of biological diversity”.⁷

WIPO, on its part, indicates that traditional knowledge" comprises: tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields”⁸

The concept of TK may be reflected in the work of the WIPO, which outlines its general scope as follows:

[T]he term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-

⁵ International Council for Science, *Science and Traditional Knowledge, Report from the ICSU Study Group on Science and Traditional Knowledge*, Paper delivered to 27th General Assembly of ICSU, Rio De Janeiro, Brazil, September 2002, p. 3.

⁶ Peter Drahos, *A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 396 (Daniel J. Gervais ed. 2007).

⁷ U.N. Convention on Biological Diversity Art. 10(c)

⁸ Daniel Gervais. *Traditional Knowledge and Intellectual Property: a TRIPs Compatible Approach*. Mich. St. L. Rev. 137 at 137. 2005. See also WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999). Apr. 2001. Available at <http://www.wipo.int/tk/en/tk/ffm/report/final/index.html>

how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.⁹

The knowledge constitute crucial element of holistic identity for a group of people. The identity as such is associated with both the natural and man-made livelihood of these peoples.¹⁰ Hence, TK is generally argued to be held collectively.¹¹

From an ownership perspective, TK could arguably be classified as a form of intellectual property. In contrast to the normal entitlements of intellectual property that individuals normally enjoy, however, the property elements of TK are quite unique. TK is generated *collectively*, and processed and preserved by indigenous peoples or local communities.¹² TK is thus distinctively associated with a group of people who may regard their body of TK as being beyond that of a personal or proprietary nature.

TK is often transmitted orally from generation to generation, and it typically is not codified within any modern system of documentation. TK is also not limited to any precise form, of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds.”¹³ The uniquely communal sense in which TK is possessed might estrange it from modern intellectual property rights.¹⁴

⁹ Intergovernmental Committee (IGC), *The Protection of Traditional Knowledge: Revised Objectives and Principles*, Eighth Sess., WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Geneva, June 6-10, 2005, WIPO/GRTKF/IC/8/5 [hereinafter IGC Eighth Sess. Doc.]; IGC, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Ninth Sess., Geneva, Apr. 24-28, 2006, WIPO/GRTKF/IC/9/5, Revised Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles, Annexes to both WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/9/5, I. Policy Objectives, Annex 3 (2006) [hereinafter WIPO DRAFT, *TK Objectives and Principles*].

¹⁰ Hans Morten Hangen, “Traditional Knowledge & Human Rights” *The Journal of World Intellectual Property*, 8 (2005) p.665.

¹¹ Yovana Reyes Tagel, “The protection of Traditional Knowledge Associates with Genetic Resources: the role of Databases and Register (Helsinki Unigrafia, 2011 p.29.

¹² See CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/traditional/intro.shtml>

¹³ *Ibid*

¹⁴ One study shows that modern intellectual property rights systems, such as patents, copyright, trade secrets, and trademarks seem not really available to TK holders, in spite of few national practices using intellectual property rights for TK protection. See GRAHAM DUTFIELD, INTELLECTUAL PROPERTY, BIOGENETIC RESOURCES AND TRADITIONAL KNOWLEDGE 100-09 (2004); ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 225 (2007) (arguing that intellectual property rights are inadequate for the protection of indigenous bio-diversity rights). Cf. Nuno Pires de Carvalho, *From the Shaman’s Hut to the Patent Office: A Road under Construction*, in BIODIVERSITY & THE LAW: INTELLECTUAL PROPERTY, BIOTECHNOLOGY AND

This knowledge is transmitted through songs, stories, rituals and legends. Examples are galore throughout the nooks and corners of the world. To quote a few:

1. Thai traditional healers use plao-noi to treat ulcers.
2. San people use hoodia cactus to stave off hunger while out hunting.
3. Traditional water systems such as the aflaj in Oman and Yemen and the qanat in Iran maintain sustainable irrigation.¹⁵

Protection of Traditional Knowledge: Human Rights Standpoint

The 21st century has seen a rapid growth of two regimes: the intellectual property rights regime and the human rights regime. On one hand, growth of multinational corporations has led to a stronger and stricter intellectual property rights regime. On the other hand, human rights have gained primacy in public as well as political debates. Developing countries have argued that intellectual property rights and Human Rights often come into conflict, particularly when implementing their international obligations under TRIPS.

Existing IPR mechanism seems inadequate to protect traditional knowledge of indigenous peoples. The underlying principles of IP Law are not broad enough to provide protection to the right holders of traditional knowledge, due to its particularities.¹⁶

In general, the existing IP regime has been largely criticized because it seems to focus only on the economic aspect of intellectual property protection, ignoring other important aspects such as development or human rights.¹⁷ For indigenous peoples, the existing IP system legitimizes the usurpation of knowledge and natural resources solely for commercial purposes. Such practice, they say, is “a racist form of theft that ignores the close links between traditional knowledge, ancestral lands and biodiversity”¹⁸

Indigenous people have developed their own knowledge relating food, Agriculture and medicine, etc. people live and livelihood depend upon the knowledge developed by them.

TRADITIONAL KNOWLEDGE 257-58 (Charles R. McManis ed. 2007) (indicating national protection of TK by using existing IP systems); David R. Downes, *How Intellectual Property Could be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENV'T'L L. 253 (2000) (speculating the feasibility of articulating intellectual property rights over TK).

¹⁵ Raju Narayana Swamy, “*Protection of Traditional Knowledge in Present IPR regime: Mirage or a Reality*”. Indian Journal of Public Administration. VOL. LX, NO. 1, JANUARY-MARCH 2014.p.35-36

¹⁶ From the Selected Works of Maria Dolores Mino Ms. Available at:

http://works.bepress.com/mariadolores_mino/1

¹⁷ Mary W.S. Wong. Toward and Alternative Normative Framework for Copyright: From Private Property to Human Rights. 26 Cardozo Arts & Ent. L.J. 775 2008-2009.

¹⁸ See CIEL Genetic Resources, Traditional Knowledge and Intellectual Property Rights: Available at: <http://www.ciel.org/Publications/iprights.pdf>.

Thus it is way of life. If someone misappropriates their knowledge without their permission it results in a way in violation of right to people life and livelihood.¹⁹

Right to life is recognized as human rights both at international and national level. Our constitution also recognizes right to life as a human right²⁰. Traditional Knowledge is nothing but the culture of the indigenous people culture is recognized as the human right in the International Human Rights instruments these instruments provides for the protection of culture as human rights of the indigenous people.

Following are some of the instrument which assert and protect intellectual knowledge of the traditional knowledge holder:

1. Universal Declaration of Human Right (UDHR)

The Universal declaration of Human Right is a milestone document in World History of Human rights.²¹ Article 27 states that (1) everyone has the right freely to participate in the cultural life of the community; enjoy the arts and the share in scientific advancement and its benefit. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.²²

Culture involves traditional knowledge of people that may be relating to biodiversity, agriculture or food, medicine life. In thus declaration indigenous knowledge has been protected in the name of culture²³ any literary, dramatic, musical and artistic works and sound recording developed by the traditional people could be protected under the right to culture²⁴. Thus, the declaration gives every individual the right to enjoy the arts and to share in scientific advancement and benefit²⁵.

2. The International Convent on Economic, Social and Cultural Rights (ICESCR)

The Internal Convent on Economic social and cultural rights (ISESCR) is a multilateral treaty.²⁶ Rights to principle or take part in cultural life as explained in UDHR and

¹⁹ WIPO – IGC 2005 B Annex. P12 – Article 3

²⁰ Article 21 of the Constitution of India, 1950.

²¹ The declaration was proclaimed by the United Nations general Assembly in Paris on 10th Dec. 1948. It sets out for the first time, fundamental human rights to be universally protected.

²² Universal Declaration of Human Right, 1948.

²³ See http://www.hrea.org/index.php?doc_id=423

²⁴ Artistic works developed by indigenous people such as paintings, sculptures, maps, charts, graphs, diagrams, cartoons, (static not moving animations), logos, engravings, sketches, blueprints and buildings or models of buildings could be protected under right to culture. Protection is also given to works of artistic craftsmanship which can include crafts, embroidery, ceramics, woodworking and jewelry.

²⁵ B K Tiwari, “PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INTERNATIONAL HUMAN RIGHTS” Indian Streams Research Journal, Volume-4 Issue-8 Sept-2014 p.2

²⁶ Adopted by the united Nation general Assembly on December 16, 1966 and in force from January 03, 1976. This instrument commits its parties to work toward the granting of economic, social, and cultural right (ESCR). The ICESCR in one of the Human rights instruments relevant to the protection of Traditional Knowledge. This

ICESCR includes the three contents²⁷ This convention also imposes duty upon every member country to undertake to respect the freedom indispensable for scientific research activity²⁸.

3. International Convent on Civil and Political Right (ICCPR)

The International convention on civil and political right is multi-lateral treaty²⁹ it commits parties to respect the civil and political rights of individual, ICCPR 15 part of the International bell of Human rights along with ICESCR and UDHR, ICCPR is one of the significant human right instruments particularly in the context of traditional knowledge and indigenous resource. It imposes duty upon every state not to deny the right to minorities to enjoy their own cultural minorities could mean indigenous people and local communities. So traditional people who are minorities have right to enjoy their culture without discrimination of any kind³⁰.

Apart from these our constitution also guarantees fundamental rights. These fundamental rights are human rights. This part is the Magna Cart of Human Rights in India. It contains various rights and liberties such as, right to equality³¹, right to freedom³², right against exploitation³³, right to freedom of religion³⁴, cultural and educational rights³⁵, and right to constitutional remedies³⁶.

convent under Article 15 of the ICESCR states that the states parties to the present convent recognize the right to every one:-

(A) To take part in cultural life,

(B) To enjoy the benefits of scientific progress and its applications

(C) To benefit from the protection of the Moral and Material interests resulting from only scientific, literary or artistic production of which is author.

2. The steps to be taken by the state parties to the present convent to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The state parties to the present covenant under take to respect the freedom indispensable for scientific research and creative activity

4. The states parties to present convent recognize the benefits to be derived from the encouragement and development of international contracts and cooperation in the scientific and cultural fields.

²⁷ 1. Participation covers in particular the right of every one to engage in one's own cultural practices and to express on self in the language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others as well as to act creatively and take part in creative activities.

2. Access covers in particular to right of everyone to know and understand his or her own culture and to receive quality education and training with due regard for cultural identity. Everyone has also right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of language or specific institutions and to benefit from the cultural heritage and the creation of other individuals and communities.

3. Contribution to cultural life refers to the right of everyone to be involved in creating the spirituals, material, intellectual and emotional expression of the community

²⁸ Article 15 (4) of ICESCR.

²⁹ Adopted by the United Nations general assembly on 16th December, 1996 and in force from 23rd March, 1976.

³⁰ Article 27 of the ICCPR

³¹ Article 14 – 18 of the Constitution of India, 1950

³² Article 19 – 22 of the Constitution of India,

³³ Article 23 – 24 of the Constitution of India.

³⁴ Article 25- 28 of the Constitution of India.

The traditional knowledge could be protected under the right to livelihood as human right of the indigenous people. In *Banvasi Seva Ashram v. State of UP*³⁷, The Court observed that tribal people for generations have been using the jungles around for collecting the requirement for their livelihood, and ousting them from that land would amount to depriving them of their fundamental right to life and livelihood. The Supreme Court through this decision intended to protect traditional knowledge relating to collecting forest proceeds and food articles as a matter of livelihood of the indigenous people. Because collecting proceeds and food articles from forest requires special knowledge which is only known to the indigenous people.

Conclusion

For over a decade, the issue of traditional knowledge protection has posed an intractable problem for advocates, scholars, and developing country governments. Traditional knowledge advocates seek greater recognition and rights within international intellectual property law—particularly, the muscular TRIPS framework. The International Human Rights instruments recognized traditional knowledge of indigenous people as human right under right to cultural since 1948, recognition of protection of traditional knowledge under the shelter of human rights is new phenomena.

Human rights standards alone do not adequately protect traditional knowledge, because of human rights law emphasis only dignity, equality and other rights of human beings. It may be noted that there is evidence of conflict between IPR and Human Rights. IPR are being used contrary to the goals and obligations of developing countries. Intellectual property protection can have serious implications on the access to medicines. In this context it is expected legitimately that the Indian Judiciary must set an example by expanding the scope of human rights within intellectual property rights. Similarly, the Parliament must consider the matter earnestly and enact a *sui generis* system of law at the earliest in the interest of traditional knowledge holders.

³⁵ Article 29 – 30 of the Constitution of India.

³⁶ Article 32 – 35 of the Constitution of India

³⁷ AIR 1987 SC 374