

**PROTECTING TRADITIONAL
KNOWLEDGE: A CRITICAL STUDY OF
EMERGING LEGAL PERSPECTIVES IN
INDIA**

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**ABSTRACT
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PART-I

ABSTRACT

Traditional and indigenous knowledge¹ form the back bone of cultural heritage. Traditional Knowledge (TK) is the knowledge of people in a given society, developed over time, and handed down from one generation to another. It is usually transmitted orally from generation to generation. It can be understood as tradition-based literature, artistic or scientific works, performances, inventions and discoveries, designs, marks, names and symbols; undisclosed information and other tradition-based knowledge creation. It is found in community laws, local languages, artistic works, beliefs, rituals and biodiversity. The knowledge related to agriculture, medicine, traditional festivals and cultural expression forms part of TK. The knowledge which is used by people is carried forward because of the values embedded in it. It is rich, as it is time tested and has withstood real-life challenges.

At present, Traditional Knowledge is embroiled in various problems and faced with many challenges. Its ownership is one such crucial challenge. The community and the society at large is the owner of Traditional

¹. M. Vieregger, in "Indigenous Knowledge: An Interpretation of Views from Indigenous Peoples", (1999), in L. M., Semali, J. L. Kincheloe, (eds), "What is Indigenous Knowledge Voices from the Academy", Palmer Press, New York, p. 333-343, writes that though the words Traditional Knowledge and Indigenous Knowledge appears to be synonyms and can be used in place of other but still there exist a very thin line which differentiates the both. He observes –

"The difference between traditional and indigenous knowledge peoples' communities is that indigenous knowledge peoples' communities, despite the pressure to integrate within the larger society of the national states of which they are part, still have their own distinct cultures. Local communities, on the other hand, usually do not have a cultural identity that sets them apart from the large society, or at least not to the same extend as in the case of indigenous peoples' communities."

Knowledge as it has been derived and used by the people for generations. The community at large has to reap the benefits of Traditional Knowledge. No individual has the exclusive right to own it unless they invent new things that add to the existing stock of knowledge. But, number of times some people misuse the same knowledge as claim on their own knowledge. It is primarily due to the non-availability of Traditional Knowledge in a documented form. Lack of documentary evidence and non-availability of information about existing Traditional Knowledge across the globe are serious hurdles to check the misappropriation of Traditional Knowledge. Individual researchers and research institutions often take advantage of non-availability of records on Traditional Knowledge by seeking protection for the patents derived from the Traditional Knowledge thereby depriving the bona fide beneficiaries. Finding out whether the applications for grant of patents for new inventions have similarities with Traditional Knowledge is a Herculean task. The grant of patents in US for discovery of certain properties of *Basmati*, *Neem*, *Rice strains* and *Turmeric* are glaring examples of the Indian culture and Traditional Knowledge. India brought this fact to the notice of the concerned authorities in US and succeeded in nullifying the patents granted. This is one example of gross misuse of Traditional Knowledge due to paucity of information.

Protection of Traditional Knowledge is another significant issue. There are no definite international treaties to protect Traditional Knowledge. International treaties related to the Conservation and Sustainable Use of Plant Generic Resources for Food and Agriculture and the WIPO initiations on protection of Traditional Knowledge and folklore are some of the guiding factors for safeguarding Traditional Knowledge. The concept of “*sui generis*” systems envisaged by the TRIPS Agreement is another tool in the hands of

people endorsing the protection of Traditional Knowledge. The Convention on Biological Diversity is another instrument which strives to safeguard some classes of Traditional Knowledge. The Convention suggests a “benefit sharing mechanism” to utilize agencies and government with private partnership may imitate some action. A separate fund can be set up to train people and bring awareness among the communities. The public domain should be made stronger by equipping it with well written laws and a strict enforcement mechanism.

The system of intellectual property rights, by principle, exists to encourage innovations and discourage embezzlement of knowledge. TRIPS agreement has established that knowledge is goods which can be traded. If so, there is no logic in distinguishing and discriminating between the ‘knowledge eligible for intellectual property protection in the formal system’ and ‘Traditional Knowledge in the informal system’. There is no justification for the totally different treatment, existing under the TRIPS IPR regime, for innovations using modern technology and Traditional Knowledge. Both should be given same legal status and recognition.

The preservation and protection of Traditional Knowledge is not only a key component of the basic right to self identification and a condition for the continuous existence of indigenous and traditional peoples; it is also a central element of the cultural heritage of humanity.

Hence, the rights of the indigenous local communities who preserve and conserve the bio genetic resources and associated Traditional Knowledge require immediate legal recognition and protection. There should not be any hesitation or delay to bestow property rights on the holders of Traditional Knowledge. The concept of ‘community/collective right over Traditional Knowledge’ must be developed urgently in the global IPR regime. The

property rights of local and indigenous people who hold TK must be recognized and given effective protection both in national legislation and in international legal instruments. The national and international legal instruments in this field must be developed as soon as possible.

TRIPS have failed to provide for the positive protection of Traditional Knowledge, innovations and practices. Many countries are misappropriating TK using this lacuna existing in TRIPS. Hence, a revision is needed of IPR laws as reflected in TRIPS. Article 27.3(b) of the TRIPS agreement needs to be reviewed to provide for *sui generis* protection of Traditional Knowledge, innovations and practices, as in the case of plant varieties. If TRIPS will remain unchanged, the developed countries will continue to import TK and other unprotected resources from our country which in turn, to our detriment, will be converted into intellectual property.

At the global level, Traditional Knowledge is still a relatively novel concern in international law. At present there is no binding and effective international law that safeguards and protects Traditional Knowledge and rights of the TK holders. Moreover, the TRIPS agreement does not mention Traditional Knowledge and there is no special treatment even by way of *sui generis* protection for Traditional Knowledge under TRIPS. The TRIPS has thus diluted the CBD objectives. The CBD mandate which stresses the importance of and the need to promote, international, regional and global cooperation amongst national states, intergovernmental organizations and non-governmental sectors for the conservation of biological diversity and sustainable use of its components, must be transformed into reality by devising appropriate legal and policy measures at international, regional and national levels. For this, Traditional Knowledge must be recognized by the global community as a scientific knowledge system developed, nurtured and

preserved by the indigenous, local and rural people, traditional healers, artisan communities etc., which is inseparably linked with their economic life, social culture and very existence.

Bio-piracy must be condemned and forsaken by the international community as illegal and unethical appropriation of bio-resources owned by the indigenous and local communities which would perturb the continuous improvement, evolution and development of TK and which in turn would lead to the complete erosion of Traditional Knowledge systems existing in different parts of the globe. Hence, as submitted by India at WIPO,² there is a need to provide appropriate legal and institutional means for recognizing the rights of tribal communities on their TK based on biological resources at the international level. There is also a need to institute mechanisms for sharing of benefits arising out of the commercial exploitation of biological resources using such TK. This can be done by harmonizing the different approaches of the Convention on Biological Diversity on the one hand, and the TRIPS agreement on the other, as the former recognizes sovereign rights of States over their biological resources and the latter treats intellectual property as a private right.

Piracy of indigenous knowledge will continue until global patent law regime directly address this issue, exclude patents on indigenous knowledge and trivial modifications of it, and create *sui generis* systems for the protection of collective and cumulative innovations of indigenous and local communities. The protection of diverse knowledge system of traditional practices and innovations requires a diversity of IPR systems, or combination of IPRs including systems that do not reduce knowledge and innovation to

². Protection of Biodiversity and Traditional Knowledge – The Indian Experience, submission by India at Committee on Trade and Environment Council for Trade-Related Aspects of Intellectual Property Rights, WT/CTE/W/156, IP/C/W/198, 14 July 2000, p. 2

private property for monopolistic profits. Systems of common property in knowledge need to be evolved as in the case of geographical indication³ for preserving the integrity of indigenous knowledge systems on the basis of which everyday survival of indigenous community is based.

TRIPS must devise an international intellectual property regime that maximizes the potential for both Traditional Knowledge and modern scientific innovation to contribute to economic progress. To achieve this effect, the TRIPS must be reviewed and amended with following aims:

- a) To establish the concept of community property right with respect to Traditional Knowledge
- b) To recognize communities' rights over their resources and TK
- c) To recognize, safeguard and protect the Traditional Knowledge, innovations, practices and technologies of indigenous and local people and communities
- d) To mandate legal protection for TK
- e) To recognize the sovereign rights of states over their biodiversity and genetic resources, and
- f) To mandate the principles of prior informed consent and benefit sharing when other countries access the biogenetic resources and associated TK of indigenous and local communities.

Such an amendment will remove the inherent tension between CBD and TRIPS. It also will resolve the conflict between private rights of IPRs holders and community rights of Traditional Knowledge holders. It will ensure that the provisions of the CBD take precedence over TRIPS agreement.

³. Section 11 read with section 24 of the Indian Geographical Indications of Goods (Registration and Protection) Ac, 1999

Having considered its richness in Traditional Knowledge and associated resources, India should lose no time in starting the movement for amendment of TRIPS. An international mechanism is urgently needed to stop free import of knowledge from India. Being the champion for developing countries at international fora, India must coordinate amongst other green rich and bio rich nations blessed with TK and voice their concern in all appropriate forums like, WTO, WIPO, UN etc.

Now, coming to the national scenario, past experiences reiterate that our traditional, indigenous and local knowledge and associated resources are being used to make patented commodities for global trade. India could, certainly revoke certain patents based on our precious TK. But, how long and how many times should Indian government indulge in this legal battle? Having a law in place to protect TK would have made it difficult for foreign countries to patent products based on our Traditional Knowledge associated with plants like *neem*, turmeric, *karela*, *brinjal* etc. so unique to India. Issues like *neem* patents and *turmeric* patents should not reoccur.

Biopiracy threatens the everyday survival of ordinary Indians who belong to indigenous and local community and who hold valuable TK. If biopiracy is not stopped, our unique TK will be continuously threatened, misappropriated and patented by foreigners. Failure to enact appropriate legislation for the protection and conservation of TK is costing the country dearly.

What is common community knowledge cannot be allowed to be a subject of patent in the garb of IPR. It is the urgent need of the hour to rejuvenate the traditional systems of community management in order to counter the idea of biopirating, privatizing and converting the community knowledge into IPR. Care must be taken to ensure that IPR systems do not reduce valuable and

highly potential Traditional Knowledge and innovations into private property for monopolistic profits of others.

India should undertake a more proactive legal policy to secure, safeguard and protect its TK and enforce the rights of TK holders in the new world order. An effective protection would serve as a mechanism to prevent third parties from unduly appropriating Traditional Knowledge. However, it requires the documentation of all categories of Traditional Knowledge, innovations and practice, identification of beneficiaries and devising of an appropriate legal tool for implementation. An effective protection for TK would address all matters affecting the availability, acquisition, scope, maintenance, and enforcement of rights and interests related to TK, as well as those matters affecting the use, exercise and administration of rights and interests in TK.

The crucial importance of indigenous, traditional and local communities in preserving and nurturing biodiversity, biogenetic resources and associated Traditional Knowledge must be legally recognized by establishing the concept of community right. The legal recognition of community rights over biogenetic resources and associated Traditional Knowledge is fundamental to the protection of TK. The Indian government must develop suitable strategies including legal mechanism and policy decisions for safeguarding and enforcing the community rights of indigenous local communities over their Traditional Knowledge and associated biogenetic resources.

The government must also develop appropriate policy measures to implement the recommendations of National Knowledge Commission (NKC). NKC has made several recommendations on strategies to promote the knowledge systems of traditional medicine which include transformation of traditional medicine education by introducing evidence based approaches,

strengthening research on traditional health systems, strengthening pharmacopoeial standards, promoting traditional medicine by increasing quality and quantity of clinical trials and certification process, by digitizing Traditional Knowledge and by creating suitable framework of intellectual property rights, by establishing goals for conservation of natural resources, by promoting international cooperation, by supporting primary healthcare in rural areas creating a major re-branding exercise of Indian traditional medicine.⁴

The protection of Traditional Knowledge raises a number of issues such as the objectives and modalities of such protection and its impact. Such issues are extremely complex since there are broad differences about the definition of the subject matter, the contents of right, the rationale for protection, enforcing mechanisms, etc. The possible protection regime largely depends on how Traditional Knowledge is defined. The issues relating to Traditional Knowledge should be addressed in a holistic manner, including ethical, environmental and socio-economic concerns. Because, the social value of the basic Traditional Knowledge innovation is greater than the private market value of the knowledge as it is compounded by the value of the subsequent innovations also. The social value of Traditional Knowledge further includes any costs borne by the community due to its loss of Traditional Knowledge on commercialization. Similarly, it also includes any gains to the community that accrue from sharing of the profits from subsequent innovations developed.

There are, in addition, still many unresolved technical issues such as the problem of collective ownership and the modes of enforcement of rights. One reason for lack of clarity about the rationale for protection stems from the

⁴. David Downes, "Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps", Centre for International Environmental Law, Washington, DC, 1997.

different meanings given to the concept of protection. Some understand this concept in the context of IPRs, where protection essentially means to exclude the unauthorized use by third parties.⁵ Others regard protection as a tool to preserve Traditional Knowledge from uses that may erode it or negatively affect the life or culture of the communities that have developed and applied it.⁶ Protection has a more positive role in supporting Traditional Knowledge-based communities' livelihoods and cultures, as proposed by the Organization of African Unity's (OAU's) Model Law and its definition of community rights.

The concern of Traditional Knowledge protection should not surpass the fact that the preservation and use of Traditional Knowledge require ensuring the continued existence and enhancement of living conditions and cultural milieu of such communities. Local and Indigenous communities have to be given right to participation in rule making process. At the local level, the local and indigenous communities have interests to ensure that the use, exchange and benefit sharing aspects respect their customary laws and institutions. Indigenous communities need to be included and involved at every stage of such rule-making process involving the issue of access and benefit sharing.

Hence, there is an urgent need to design a *sui generis* legal mechanism in India⁶ which can provide a fair deal to the Traditional Knowledge.

⁵. T Simpson, "Indigenous Heritage and Self Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples", International Work Group for Indigenous Affairs, Copenhagen, 1997.

⁶. The draft of Model Law on the Protection of Traditional Knowledge and Community Rights is drafted in chapter 7 as a part of this research.

PART-II

SYNOPSIS AND PLAN OF THE WORK

STATEMENT OF PROBLEM

1. The main problem experienced by indigenous people is that the Traditional Knowledge does not satisfy the requirements of intellectual property protections.
2. The nature of Traditional Knowledge is such that more of it is transmitted orally than written down. This poses particular problems when parties not authorized by the holder of that knowledge seek to obtain IPRs over it. In the absence of any accessible written record, a patent examiner in another country is unable to access documentation that would challenge the novelty or inventiveness of an application based on Traditional Knowledge.
3. The only option for an aggrieved party, be it the holders of the knowledge, or someone representing them, is to challenge the patent during the granting process or after grant, where national laws permit. It is extremely difficult and costly for developing countries to monitor and challenge IPRs issued all around the world.
4. Where intellectual property protection could potentially apply to such knowledge, the prohibitive costs of registering and defending a patent or other intellectual property right may curtail effective protection.
5. There has been a clear bias in the operation of these laws in favour of the creative efforts of corporations, for example, pharmaceutical and other industries in industrialized nations.

6. Within the context of scientific progress, modern intellectual property laws have allowed these industries to monopolize the benefits derived from their use of indigenous knowledge with disregard for the moral rights and material (financial) interests of indigenous peoples themselves.
7. Biopiracy can also be considered one of the main problems. The term “biopiracy” is often used to describe the misappropriation of knowledge and/or biological materials from traditional communities. With today’s rapidly globalizing IPR regime, situations of biopiracy are becoming increasingly evident. For example an American citizen owned a patent on the well known and commonly used Amazonian plant *ayahuasca*. Traditional Andean uses of *maca* (*Lepidium meyenii*) for increased fertility and the Indian use of *neem* as a pesticide have been patented in name of profit for Western companies. A major concern is that Western corporations will continue to adapt, incorporate, build upon, or directly claim indigenous knowledge without acknowledgement or compensation for the communities that developed the knowledge.

OBJECTIVES OF RESEARCH

1. To give a generally agreed definition of the term "Traditional Knowledge" and the determination of the policy objectives of the protection of Traditional Knowledge. So, First objective of the research is to conceptualize these terms taking into consideration the perspective of subaltern.
2. Further objective of this research is to clarify the basic issue i.e. holistic nature of Traditional Knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value.
3. The researcher will try to find out the possible ways for prevention of bio piracy.

3. To find out that what could be the possible options for the protection of Traditional Knowledge under existing intellectual property rights regime.
4. To analyze the present status of Traditional Knowledge in India. The objective of the research shall be two fold, first, to understand the subaltern perspective and second, to understand the perspective of modern rational law.
5. To provide some insights into the dynamics of legislative protection of Traditional Knowledge.

HYPOTHESIS

1. *Due to the absence of a uniform definition of Traditional Knowledge, there are problems in its identification and protection:* The researcher agrees with this hypothesis. There is no any globally agreed definition of Traditional Knowledge exist. Various conventions, international organization and instruments define the term differently.⁷ In a report of WIPO, it has been said that Traditional Knowledge is highly diverse and dynamic in nature, so it may not be possible and feasible to develop a singular, exclusive and complete definition for ‘Traditional Knowledge’.⁸ The main issues which have prevented a consensus from happening, on definitional aspects of Traditional Knowledge at international level are: its diverse subject matter, problems in identification of beneficiaries and problems in evolving a common consensus among the all with reference to implementation and enforcement mechanism. As in absence of any concrete definition of Traditional Knowledge, there exist problems in identification of the real beneficiaries; it’s opposite it also true.

⁷. Detailed discussion has been made in Chapter 2 and concluding remarks of this thesis

⁸. WIPO, “Intellectual Property Needs and Expectations of Traditional Knowledge Holders”, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO, 2001).

Available at www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_10.pdf (Accessed on 12-09-11)

Till the categories of TK holder's and real beneficiaries are not identified, it will be very difficult to give a singular definition.

2. There is lack of proper mechanism for identifying the ownership of Traditional Knowledge: The researcher agrees with this hypothesis. There have been continuing debates as to the ownership rights of the Traditional Knowledge. Some try to justify the protection of Traditional Knowledge under existing intellectual property rights and some outside of it, meaning thereby first kind of debate on ownership of TK is between individual rights and group rights. Second kind of debate is on the national ownership of the Traditional Knowledge wherein discussions are taking place on community rights, regional rights, state's rights and ownership rights under the sovereign rights of a nation. Since these discussions have not reached to any final concrete conclusion, therefore, there has been lack of a proper mechanism for identifying the ownership of Traditional Knowledge.

3. Present I.P.R. regime is being misappropriated because there is no sufficient protection to Traditional Knowledge: The researcher agrees with this hypothesis. The TRIPS Agreement requires a review of Article 27.3(b) which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties. Paragraph 19 of the 2001 Doha Declaration has broadened the discussion. It says the TRIPS Council should also look at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, the protection of Traditional Knowledge and folklore. It adds that the TRIPS Council's work on these topics is to be guided by the TRIPS Agreement's objectives (Article 7) and principles (Article 8), and must take development issues fully into account. Though various working groups and organizations are making efforts in this

field but so far, no effective measures could be taken to protect the Traditional Knowledge either at the international level or at the national level.

4. *Biopiracy cannot be checked in the absence of a proper and efficient administrative and legal mechanism for its prevention and control:* The researcher agrees with this hypothesis. Traditional Knowledge is being misappropriated just because of the reason that Traditional Knowledge has not been given sufficient protection in present IPR regime. Though Article 27.3 (b) makes some arrangement for protection of Traditional Knowledge but that is not sufficient because it is not protected the way western science has been protected. Mostly the bio-piracy of Traditional Knowledge is happening in present system of IPR only. Had Traditional Knowledge been recognized in the IPR instruments sufficiently, bio-piracy of Traditional Knowledge would not have been possible. Unless and until proper and efficient administrative and legal mechanism at international and national level is developed, bio-piracy cannot be prevented from happening.

5. *Intellectual property rights can benefit Traditional Knowledge holders by promoting both their material and moral interests, if sufficient measures are taken in to account:* The researcher agrees with this hypothesis. It is the observation of the researcher that if Traditional Knowledge is given sufficient protection in IPR instruments, this type of knowledge can very well be protected from being misappropriated. The researcher suggests the various ways to protect the Traditional Knowledge in the existing regime by which material and moral interests of the concerned can be protected. The detailed discussion in the regard has been made in Chapter IV.

6. *Enactment of a 'Sui generis' legislation can be a solution to the problem:* The researcher partially agrees with hypothesis. The TRIPs agreement leaves room for the biodiversity rich developing and least developed nations to enact

a *sui generis* legislation and to protect it. This option can be utilized for the protection of Traditional Knowledge but defensive protection such as documentation of Traditional Knowledge is a pre-requisite. Till sufficient measures are not taken at international level, *sui generis* system alone cannot provide the desired level of protection. In this regard international and regional co-operation is also required and several legislations affecting the protection of Traditional Knowledge, are also needs to be amended. The researcher discusses these points in detail in Chapter VII.

RESEARCH METHODOLOGY

All the primary as well as secondary sources are to be utilized to make the study advanced, orderly and methodical. Relevant provisions of TRIPs, various conventions, reports, articles, Judicial decisions, International, National, Constitutional norms and national measures are to be taken as important research tools. The hypothesis will be evaluated on the basis of ground reality, legal provisions, practices and court opinions. A critical analysis would be made to evaluate the recent initiatives and measures taken at international level, efforts done by biodiversity rich countries especially by India for protection of Traditional Knowledge.

PLAN OF THE WORK

The *first Chapter* of the thesis introduces the subject matter and research methodology. In this chapter, the researcher also tries to test his hypothesis in the light of the statement of the problem and objectives of the research. The *second chapter* discusses about the meaning and concept of the Traditional Knowledge. It focuses upon the basic issues related to Traditional Knowledge such as its subject matter, characteristics, importance, importance of Traditional Knowledge in medicinal field, its kind, justification for protection, its commercial value, and misappropriation and case illustrations.

Third chapter talks about the international positional of the Traditional Knowledge. It illustrates the international position of Traditional Knowledge and makes a critical analysis of them. *Fourth chapter* of the thesis tries to find out whether is it possible to protect Traditional Knowledge through existing forms of intellectual property rights and traces the possible ways to protect the Traditional Knowledge in existing IPR regime. *The fifth* chapter elucidates the existing position and protection available to Traditional Knowledge in India. An attempt has been made to suggest legislation for protection of Traditional Knowledge in *sixth chapter*. The *last chapter* of the thesis produces concluding observations on various obscure areas and tries to give some suggestions.

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