

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 6

2021

© 2021 International Journal of Legal Science and Innovation

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at submission@ijlsi.com.

Intellectual Property Rights Vis-à-vis Traditional Knowledge: A Critical Analysis

ADHISH ANILKUMAR KULKARNI¹

ABSTRACT

Traditional knowledge is defined as a cumulative body of knowledge and beliefs that is handed down through generations by cultural transmission. It concerns the relationship among living beings between themselves and with the environment. In this context, traditional knowledge is very intimately embedded into the fabric of society and cultural ethos.

The need for protection of Traditional Knowledge in recent times has gained greater prominence. In this era of modern technology, the possibility of Misappropriation, unauthorized usage, stealing and piracy of traditional knowledge has increased. Patenting and protecting the traditional knowledge through Intellectual Property Rights law is surely one of the ways to save the traditional knowledge from getting exploited. Countries have come up with laws at the National level to recognize the traditional knowledge to be one of the Intellectual Property and has further gone on to give rights over it. Thus, there is a need to do research on the role of Intellectual Property rights in protecting traditional knowledge.

The current paper studies the IPR laws at international level with respect to traditional knowledge and also examines the landmark cases of the same. The paper further makes an attempt in analyzing the laws of India in detail and determining to what extent Indian laws are successful in ensuring that the traditional knowledge is protected.

When it comes to protection of Traditional and Indigenous Knowledge in India, though the governments have made attempts in preserving them, there are still lacunas and gaps. Thus, the paper tries to come up with recommendations and suggestions to improve the current position of India with respect to protecting the Traditional Knowledge.

I. INTRODUCTION

India is a Country with rich cultural heritage and traditions. It is Honored as the cradle of Human Civilization, since the oldest cities of Harappa

and Mohenjo Daro are part of Indus Valley civilization of India. Thus, it is no surprise that when it comes to Traditional Knowledge and Indigenous knowledge India, has a major chunk to contribute to the world's collective Heritage.

¹ Author is a Student at CMR University School of Legal Studies, Bangalore, Karnataka, India.

Traditional knowledge in simple terms is the result of continuous craftsmanship and creative skills in various traditions, cultures and beliefs from ancient times. Traditional knowledge can be defined as “*Knowledge acquired over time by people in an indigenous society, in one or more cultures, based on experience and adjustment to a local culture and climate, and continuously predisposed by each generation's developments and practices*”.

All the Intellectual Creations of our Ancestors which were enhanced and enriched by future generations and protected by the current generation forms part of the Traditional Knowledge. It Includes a wide range of information related to various branches of knowledge such as botany, medicine, Soil and its varieties, crafts made out of wood, clay and other natural sources, Folklores etc. All of this has enormous benefits to the society at large and thus every nation should strive to protect it and ensure that it is not exploited or misappropriated.

From the basic understanding of the term “Traditional Knowledge” it can be said that the quintessential requirements of Traditional Knowledge are:

- a) It Should be transmitted through generations.
- b) It should be unique to a particular group of people or a community or country.

Hence a knowledge which fulfills the above-mentioned requirements can be referred to as the Traditional Knowledge.

II. PROTECTION OF TRADITIONAL KNOWLEDGE IN THE INTERNATIONAL ARENA

The first ever legislation to talk about protection of Traditional knowledge was the Convention on Biological Diversity which was enacted in the year 1992, later with the origin of TRIPS agreement of 1995 a strong debate was started as to what place should be given to Traditional Knowledge in the canvas of Intellectual property Rights. This can be considered as the bed rock of law protecting traditional Knowledge at the International level.

(A) Convention on Biological Diversity (CBD)

CBD was completed on 5th June 1992 in Rio de Janeiro, it is governed by the United Nations Environment Programme. It made attempts to give standards for Environment preservation at the same time ensuring that economic growth is not hampered. It ascertains right to use the biological transfer from developing countries and emphasizes that the conservation and sustainable use of biodiversity must not hinder with IPRs². Similarly, provisions related to promotion, creation of trade and use of indigenous and traditional information and machinery in the will of the CBD are also integrated³. Though CBD did not specifically define “Traditional Knowledge” it recognized

² Daniel Gervais, *The Trips Agreement: Drafting History and Analysis*, 4th Ed. (Sweet & Maxwell), 2012.

³ G Chin Khan Muan, *Traditional Knowledge and Convention of Biological Diversity*, available at <http://www.aippfoundation.org/R+ID/TK%20&%20cbd.pdf>.

the rights of Indigenous Communities under Article 8(j).

Article 8(j) states that *“Each Contracting Party shall, as far as possible and as appropriate Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”*

Apart from Article 8(j) there exists other provisions in CBD which talk about protecting the Indigenous and Traditional Knowledge. For Instance, **Article 10(c)** mandates that the member states should Protect and encourage customary use of biological resources in conformity with the traditional cultural practices that are compatible with conservation or sustainable use requirements.

Thus, CBD gave an explicit recognition to the Indigenous and Traditional Knowledge of the nations and also made its member states not to be involved in immoral exploitation of the Traditional Knowledge.

(B) Attempts by United Nations

The United Nations has also contributed in protecting the Traditional Knowledge and Rights of Indigenous people. In the year 1994 UN came up with the Draft Declaration of Right of Indigenous People. However, it saw the light of

the day only in the year 2007 when 144 member states voted in favor of the United Nations Declaration on Rights of Indigenous People (UNDRIP) and it was adopted by the UN general Assembly on 13th September 2007. The UNDRIP mandates that Prior approval of the community should be obtained before using their Traditional Knowledge. However, this Declaration did not accept the idea of giving ownership to the communities over the Traditional Knowledge held by them.

(C) World Intellectual Property Organization (WIPO)

WIPO defines Traditional Knowledge as *“Knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity”*. WIPO started giving its attention towards Traditional knowledge in the year 1978. WIPO’s General Assembly in 2000 established an Intergovernmental Committee (IGC) on Intellectual property and genetic Resources. IGC since its inception has come up with model clauses for contracts on genetic resources, draft toolkit for information security etc. WIPO through its IGC has come up with the idea of building a database for storing all the traditional Knowledge so that the chances of exploitation are reduced.

WIPO assists the Representatives of indigenous communities to attend the WIPO talks through WIPO Voluntary Fund, so that they actively participate in bringing forward their concerns and protecting their interests.

WIPO's protection to Traditional Knowledge is threefold i.e., It aims to protect

- i. Traditional Knowledge in its true sense, which would include the information, skills and innovations related to agriculture, Health, biodiversity etc;
- ii. Traditional Expressions, which would include the designs, symbols, music, art (folklore) etc. of a particular community; and
- iii. Genetic Resources, the scope of this would be constituted by the valuable genetic material found in plants, animals or microbes which is used by the indigenous community.

Thus, WIPO through its initiative aims at protecting these three aspects of Traditional Knowledge.

(D) Types of Protection given to Traditional Knowledge

All Intellectual Properties are usually protected in two manners i.e., Negative protection and Positive Protection.

- **Negative/Defensive Protection:** This protection aims at stopping others from acquiring the right over the traditional knowledge which is held by a particular community. It is considered to be negative as it stops others from infringing or interfering with your exclusive right of enjoyment of your traditional knowledge.

For Instance, the infamous case of **Turmeric Patenting** which happened in the US. The US patent office had granted the patent (US

5,401,504) on the use of powdered turmeric for healing wounds to two individuals, namely Soman K. Das and Harihar Kohli. India's Council for Scientific and Industrial Research (CSIR) filed a suit against this and claimed that the wound healing capacity of turmeric has been recognized and used by Indians since time-immemorial thus it lacks "Novelty", hence no individual can claim patent over it. The US Patent and Trademark office withdrew the patent on 13th August 1997⁴ and informally recognized that the Medicinal value of Turmeric is the Traditional Knowledge held by Indians and no other person or association can claim right over it.

Similar attempt of Misappropriation was done by the Texas based RiceTec company which received US patent 5,663,484 on the **Basmati lines and grains**. The patent gave rights to the company for growing and selling a new variety of basmati rice. But by the strong efforts from Indian Research and Agricultural institutions the patent was revoked by the US patent Office⁵.

Another noteworthy case where an attempt to misappropriate the Traditional Knowledge of India was seen in the **Nap Hal** Issue. Nap Hal was the wheat variety from India on which a multinational seed Company named Monsanto had filed and received the patent (EP 0445929 B1) by the European Patent Office (EPO). Later three Indian Organizations filed case against

⁴ Jayaraman, K. US patent office withdraws patent on Indian herb. *Nature* 389, 6 (1997).

⁵ Charles Goldfinger, *The story of the Basmati rice patent battle*, Science Business, (May 20, 2007

10:50AM)
<https://sciencebusiness.net/news/72228/The-story-of-the-basmati-rice-patent-battle>.

such patenting, later in the year 2004 the EPO revoked the Patent granted to Monsanto⁶.

- **Positive Protection:** Positive Protection on the other hand grants the right to communities holding traditional knowledge to promote, control its use and obtain benefit by exploiting it. The positive Protection is given to the communities by the nations through the laws which they have for protecting Intellectual Property and many countries have come with exclusive laws to specifically protect the Traditional Knowledge. But a national law of the country will have limited jurisdiction and it will not have the scope to protect Traditional Knowledge beyond its territorial jurisdiction. Hence, most of the countries have been making demands for an International legal instrument to protect Traditional knowledge.

III. PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA

India as mentioned earlier is the home for rich cultural and traditional heritage. The amount of Indigenous and Traditional Knowledge held by India is humongous. The contribution of Traditional Knowledge of India to the development of Global Science is huge. Before looking at the ways in which the Traditional Knowledge is protected in India, it is important to have a quick look at the various fields in which India has contributed through its Traditional Knowledge.

(A) Indian Contributions to Global Science

- **Civil Engineering:** The Indus-Sarasvati Civilization was the world's first to build planned towns, with underground drainage, civil sanitation, hydraulic engineering, and air-cooling architecture. The burnt bricks were invented in India in 4,000 BCE. India had sophisticated technologies for water planning, road designs, natural air conditioning etc.

- **Metal Technologies:** India was the pioneer of metal tool technology. We had tools like needle with hole, true saw, hollow drill etc. Rust free irons were first produced in India and then exported to the rest of the world. We had special techniques of metallurgy and had unique swords and other war equipment.

- **Textiles:** India has a long history of textiles production. India was the largest exporter of Textiles at one point of time. The wide range of textiles made from different threads was the major attraction to the rest of the world. Even today the various sarees made from silk and other materials have been assigned geographical Indication tag recognizing their uniqueness.

- **Shipping and Ship Building:** Indians had mastered the art of ship building too. Indian traders had participated in the earliest recorded ocean trading systems. All the Indian products which had high demand in the middle east and western countries were transported through the strong ships built in India. It is not known to

⁶ No name, *Monsanto loses wheat Patent*, Down to Earth (Nov. 15, 2004 11:45AM)

<https://www.downtoearth.org.in/news/monsanto-loses-wheat-patent-12032>.

many that Vasco da Gama was escorted to India by a sailor who belonged to Gujarat.

- **Farming Techniques:** India's agricultural production was historically large and sustained a huge population compared to other parts of the world. Surpluses were stored for use in a drought year. Indian farmers produced different varieties of grains and other farm products without using any hybrid seeds or chemical fertilizers. The organic farm products produced through sophisticated techniques and equipment is the Traditional Knowledge held by the Indian farming community.

- **Traditional Medicine:** The Indian Medicines and treatment methods are world famous phenomenon now. From the regularly used Turmeric, neem, tulsi to the rare medicinal plants found in the dense forests of India give the testimony to the rich Indian medicines. Today many multinational pharmaceutical companies are recognizing and using Ayurvedic methodology of producing non-side effective medicines.

The above-mentioned examples are just the tip of the iceberg of India's Traditional Knowledge. Apart from these there are various other Indigenous Indian Industries which had made great innovations based on the Traditional Knowledge transferred from generation to generation.

(B) Governmental efforts in Protecting Traditional Knowledge

India being the holder of vast traditional knowledge is bound to come up with the legislations and other schemes for protecting the same. The Legislations which inter-alia give scope for protection of Traditional knowledge are:

- **The Patent Act 1970**

The Patents Act of 1970 makes provisions for giving protection to the Innovations and Innovative processes. However, one of the criteria for granting a patent is that the innovation should be Novel and Non-obvious. As said in the **section 3(p)** of the Patents Act, "An Invention which is an aggregation or duplication of known properties of traditionally known components or components is not patentable". Innovation which is made from traditional knowledge thus will fall into the category of "obvious" and hence such patent applications can be rejected or revoked.

The same was observed in the landmark case of **Dhanpat Seth v. Nil kamal Crates Ltd.**,⁷. In this case an Innovator had filed a patent application for the device which can be used to carry materials from one place to another. A case was filed against this claiming that the device has been made by copying the "Kilta" which is the traditional product used in Himachal Pradesh. The court observed that the Kilta has been used since time immemorial for carrying produce including agricultural produce in hill areas of Himachal Pradesh. The device developed by the Plaintiffs is in fact the result of Traditional Knowledge and duplication of known products

⁷ Dhanpat Seth v. Nil kamal Crates Ltd, 2008 (36) PCT 123 (HP) (DB) pg 127.

such as polymers and therefore it cannot be an Innovation.

- **The Copyright Act, 1957**

The Copyrights Act protects the original literary and artistic works of the people. This Act can be used as a shield to protect the Traditional Knowledge of artists belonging to tribal communities or any such artistic, musical or literary or literary work which is the result of indigenous knowledge such as folklore. Copyrights Act under section 57 also recognizes the moral and legal rights of the Copyright holder, hence this Act gives a legal recourse to claim remedy against unauthorized exploitation of traditional Knowledge.

- **The Protection of Plant varieties and Farmer's Rights Act, 2001**

As mentioned before, Indian Farmers have rich and innovative farming techniques and farm products. The traditional crops of India have worldwide demand, in this regard the Plant Varieties Act aims at protecting conventional farming methods of the farmers and tribal groups used to cultivate and preserve a wide variety of crops. This Act protects novel variety plants, current variety plants, chiefly derived variety plants and cultivator's variety plants. This Act was brought in order to have a national law which would be in Consonance with the TRIPS agreement of WTO.

- **Geographical Indications of Goods (Registration and Protection) Act, 1999**

Providing geographical Indication to a product is the most efficient form of protecting Traditional Knowledge. Traditional Knowledge is usually

jointly held by a group of people or community residing in a particular location, hence recognizing and giving legal protection by giving Geographical Indication to a product will in turn preserve and protect the Traditional Knowledge present behind the product. GI tag is granted to a product which is unique and produced only in particular locality by particular group of people. This Act grants GI tag for 10 years which is renewable any number of times. Hence the GI Act is playing a vital role in protecting Traditional Knowledge.

- **Biological Diversity Act, 2002**

India being signatory to the Convention on Biological Diversity (CBD) enacted a *sui generis* law by the name Biological Diversity Act to accommodate the provisions given by CBD into the Indian legal canvas. This Act inter-alia aims at safeguarding bio piracy and unauthorized exploitation of Traditional Knowledge. It restricts people from applying for gaining Intellectual Property rights outside India based on the Knowledge gained or studied using the Indian natural reserves without prior permission from National Biodiversity Authority (NBA). **Section 21** of the Act also provides a profit-sharing mechanism, wherein the profit received by a person should be shared with the people responsible for developing, Improving and using the technology from the commercial use of Traditional Knowledge.

- **Traditional Knowledge Digital Library (TKDL)**

Traditional Knowledge Digital Library (TKDL) is a pioneering initiative of India to protect Indian

traditional medicinal knowledge and prevent its misappropriation at International Patent Offices. TKDL is a digital database created by collaboration between the Ministry of Science and Technology and Department of AYUSH. The database includes the information relating to the Traditional knowledge of India in the language understandable by International Patent offices (IPOs). This helps the IPOs to cross check for prior art before granting a patent to any applicant. The Information on Traditional Knowledge once uploaded in TKDL website becomes public knowledge and hence can be accessed by everyone.

IV. CRITICAL ANALYSIS OF INDIAN LAWS

The Government of India through legislation and faculties like TKDL has made an attempt to recognize and protect the Traditional Knowledge, however to a great extent it is unsuccessful in sufficiently protecting the Traditional Knowledge of the land. The repeated misappropriation of Indian Traditional Knowledge by foreign nationals and corporations is proof that Indian laws have not been efficient enough to protect Traditional Knowledge from being exploited. From the Turmeric case in the US to misappropriation of Basmati to claiming patent over Neem, there have been constant attempts of stealing and exploiting traditional Knowledge of India. Historical records show that the western countries, especially the UK has not just stolen the wealth of India but also its vast amount of Traditional Knowledge. Very less has been done by the Indian government to keep a check on

misappropriation of Indian Traditional Knowledge in other countries.

Though, the GI Act and Biodiversity Act, *inter-alia* talk about protecting the Traditional knowledge they have very limited scope. GI Act only takes into consideration resources which have more demand and which are into regular trade, the non-commercial products are ignored and do not get the protection. On the other hand, the Biodiversity Act deals only with Traditional Knowledge which is connected to biological or genetic resources. Thus, there is a lack of robust-exclusive law to protect the Traditional Knowledge of our country.

V. SUGGESTIONS AND RECOMMENDATIONS

There is a lack of exclusive Legal Instrument to deal with the protection and preservation of Traditional Knowledge both at National and International level. Following suggestions can be taken into consideration to improve the current status with respect to Traditional Knowledge protection.

- A *sui generis* law at the international level and a national legislation in consonance with such international law should be enacted to give a well-structured legal framework of protection of Traditional Knowledge.
- A universal definition of “Traditional Knowledge” should be decided by all the countries to have a uniform understanding of the meaning and scope of the term however ensuring at the same time that is not narrow.
- Attempts at International level should be made by Indian Government and Indians in

publishing and bringing to light the rich Traditional Knowledge of the nation so that it gets its due recognition and any infringement or unauthorized exploitation of Indian Traditional knowledge is not entertained by any international patent organization.

- It should be looked into that the Indigenous communities or group which holds the Traditional knowledge is provided with proper representation to raise their concerns and protect their interest.

- Ownership should be given to Indigenous groups which have sufficient proof that they are the original holders of the Traditional Knowledge.

These changes if adopted honestly and implemented effectively can bring in positive change to the position of India in protecting its Traditional knowledge.

VI. CONCLUSION

To conclude one can, say that India surely has made attempts in recognizing and protecting its Traditional Knowledge however, after critically analyzing the laws, it is seen that the same are insufficient. Traditional Knowledge of India helps in coming up with inventions which are eco-friendly and allow sustainable development without affecting the environment. We should study, preserve and revive the Traditional Knowledge. To achieve this there should be efforts of both Government and individuals. Individuals should generate new research in this field, compile the existing information and the government should make it reach a wider audience through books, articles, websites,

seminars, documentaries, films and protect them through legal means.

VII. REFERENCE & BIBLIOGRAPHY

1. Dr. M.K.Bhandari, Law Relating to Intellectual Property Rights (Central Law Publications 5th Ed. 2017).
2. V.K.Ahuja, Law Relating To Intellectual Property Rights (Lexis Nexis 3rd Ed. 2021).
3. Rajive Malhotra, *Traditional Knowledge Systems*, Infinity Foundation (Nov. 29, 2021 05:00 PM) <https://rajivmalhotra.com/library/articles/traditional-knowledge-systems/>.
4. A Damodaran, *Traditional Knowledge, Intellectual Property Rights and Biodiversity Conservation: Critical Issues and Key Challenges*, 13 JIPR 509, 509-513 (2008).
5. Riya, *Traditional Knowledge under Intellectual Property Rights Regime*, 1 E-JAIRIPA 149, 149- 164(2020).
