

“Legal and Regulatory Framework surrounding the Ownership and Intellectual Property Rights of Traditional Knowledge and Indigenous Cultural Expressions in India”

**Chetna Ojha¹*
Llyod Law College,
Noida

***Arryan Mohanty²*
Symbiosis Law School,
Nagpur

Abstract

As a substantial portion of the global biodiversity has been preserved and sustained by indigenous populations, safeguarding traditional knowledge emerges as a crucial element for the conservation and sustainable advancement of the environment. The awareness of these communities is indispensable for the practical preservation and conservation of genetic resources and various biological assets. In numerous countries, the traditional knowledge of Indian products constitutes a more significant economic asset than other commodities. This phenomenon can be attributed to India being a region abundant in valuable resources, with many of these items originating from time-honored historical knowledge. The traditional knowledge about diverse products in India necessitates protection from misuse by foreign entities. India must enhance its strategies by patenting its traditional knowledge to navigate this challenge effectively. Intellectual property (IP) serves a fundamental role in the protection of the traditional knowledge and cultural heritage of indigenous groups. By conferring legal protection to their distinctive practices, beliefs, and innovations, IP rights enable indigenous communities to safeguard their identity and heritage. The intersection of IP rights with indigenous rights underscores the intricate nature of preserving traditional knowledge and cultural heritage. Indigenous groups encounter a myriad of challenges in this pursuit, including the risks of exploitation, appropriation, and misappropriation of their intellectual property. These difficulties are exacerbated by factors such as restricted access to legal resources, challenges in documentation, and cultural misunderstandings. The Council for Scientific and Industrial Research (Government of India) has undertaken an initiative to catalog traditional knowledge in the Traditional Knowledge Digital Library (TKDL) to ensure the protection of traditional knowledge, which has proven beneficial in this regard. Bio-pirates exploit intellectual property rights (IPR) as a mechanism to appropriate traditional information and misuse biological resources, an occurrence rooted in certain deficiencies within the existing IPR framework. This paper investigates the imperative for a sui generis legal structure within the Indian context to thoroughly address the ownership and safeguarding of traditional knowledge and Indigenous cultural expressions. Such a legal framework would acknowledge the collective rights of Indigenous populations, facilitate equitable benefit-sharing, and strive

¹ Co-author is a student of Lloyd Law College, Noida.

² Co-author is a student of Symbiosis Law School, Nagpur.

to harmonize the preservation of cultural heritage with the advancement of creativity and innovation.

Introduction

As a significant proportion of the planet's biodiversity has been preserved and sustained by indigenous populations, safeguarding traditional knowledge is imperative for conserving the environment. Their cognizance is crucial for the preservation and conservation of genetic resources and other biological resources. In numerous other countries, the traditional knowledge of Indian products is considered a more substantial commodity than other commodities. This phenomenon is attributable to India's status as a region abundant in valuable resources, with most of these items arising from historical conventional knowledge. The traditional knowledge associated with various products in India necessitates protection from exploitation by other nations.

India must enhance its efforts in the domain of patenting Indian traditional knowledge to safeguard against such realities.³ India ranks among the twelve megadiverse nations globally. Renowned for its extensive and varied biological heritage, India has documented over 91,200 animal and 45,500 plant species across its ten bio-geographic regions. Traditional knowledge constitutes a significant component of most indigenous cultural identities. The information frameworks that constitute traditional knowledge are essential in achieving sustainable development.

Moreover, preserving the social and physical environments in which traditional knowledge is embedded holds substantial significance. Efforts to exploit traditional expertise for industrial or commercial gain can lead to the misappropriation of the rightful holders' entitlements. Consequently, it is imperative to formulate methods and strategies for preserving and maintaining traditional knowledge to ensure sustainable development aligns with the interests of conventional wisdom.

India is acknowledged as a vital center of crop diversity and harbors numerous wild varieties of related crops. Additionally, India ranks as one of the twelve primary plant production centers and boasts a wealth of agricultural biodiversity. India's richness of traditional knowledge can be attributed to its extraordinary biodiversity and natural resources. Traditional knowledge serves as the cornerstone of cultural heritage. Most indigenous and local communities reside in regions rich in biodiversity and diversity. This natural environment constitutes their way of life and forms an integral part of their cultural identity. Indigenous populations serve as a reservoir of traditional knowledge concerning conservation and sustainable utilization. This invaluable resource has historically been readily accessible and, as such, has been susceptible to exploitation.⁴

³ Forum on Indian Traditional Medicine, Protection of Traditional Cultural Expressions in India
<https://fitm.ris.org.in/sites/fitm.ris.org.in/files/Publication/Scooping%20Paper%20No%203%20%281%29.pdf>
(Last visited August 17, 2024)

⁴ Gautam Badlani, Traditional Knowledge in IPR, iPleaders (August 19, 2024, 07:21 AM)

Traditional knowledge constitutes the aggregated wisdom, practices, and innovations transmitted across generations within indigenous populations. It encompasses an extensive array of disciplines, including but not limited to medicine, agriculture, craftsmanship, and narrative traditions. Traditional knowledge is frequently conveyed through oral means and intricately woven into indigenous societies' cultural tapestry. In medicine, indigenous communities hold invaluable expertise regarding herbal remedies, healing methodologies, and holistic health practices that have been meticulously honed over centuries. Likewise, agricultural methods grounded in traditional knowledge exemplify sustainable farming techniques, seed conservation strategies, and principles of ecological stewardship. Craftsmanship emerges as another domain wherein traditional knowledge flourishes, with indigenous artisans demonstrating exceptional skill in weaving, pottery, carving, and textile fabrication. Each artifact embodies a rich mosaic of cultural symbolism, ancestral methodologies, and indigenous aesthetics. Storytelling serves as a vessel for preserving myths, legends, and oral histories that convey significant lessons, ethical principles, and spiritual teachings.⁵

Cultural heritage is a repository of ancestral wisdom, indigenous languages, sacred ceremonies, and communal festivities. It is essential in promoting intergenerational continuity, resilience, and social cohesion within indigenous communities. The preservation of cultural heritage represents a reaffirmation of indigenous rights, self-determination, and sovereignty. It recognizes indigenous knowledge systems' inherent value and contributions to global diversity and sustainable development.

Protecting intellectual property (IP) is paramount for Indigenous communities to safeguard their traditional knowledge and cultural heritage. It provides legal mechanisms for communities to assert ownership, regulate access, and avert the exploitation of their knowledge. The instruments of patents, trademarks, copyrights, and geographical indications establish legal frameworks for such protection. Indigenous knowledge, accrued over generations, possesses significant value across various industries, including pharmaceuticals and agriculture. Without IP protection, this knowledge is susceptible to exploitation without due recognition or compensation. Moreover, protection safeguards against cultural misrepresentation and misappropriation, thereby preserving the integrity and sanctity of cultural heritage. IP legislation is a deterrent to bio-piracy and unauthorized utilization of indigenous knowledge, providing legal recourse against infringements. Indigenous communities depend on these legal frameworks to combat the patenting of traditional remedies and the misuse of cultural symbols. Protecting IP empowers communities to assert their sovereignty over their knowledge and heritage.⁶

<https://blog.ipleaders.in/ipr-vis-vis-traditional-knowledge/>.

⁵ Siman Kaur Khalsa, IP and Indigenous Communities: Protecting Traditional Knowledge and Cultural Heritage, Lexology (August 20, 2024, 08:51 AM) <https://www.lexology.com/library/detail.aspx?g=e55df31d-b6ff-4af2-b448-def39315d3a0>.

⁶ Ibid

Indigenous communities confront diverse obstacles to safeguard and conserve their traditional knowledge and cultural heritage. The Indigenous and Tribal Peoples Convention, 1989 articulates the definition of Indigenous peoples as follows: Tribal populations that are differentiated from other national cohorts due to their unique economic, social, and cultural circumstances and are regulated, either wholly or in part, by their own established customs and traditions. Individuals who are acknowledged as indigenous based on their ancestral lineage.

These obstacles frequently arise from historical injustices, systemic disparities, and the intricate nature of assimilating conventional practices into contemporary legal structures. A salient challenge is the phenomenon of bio-piracy, wherein external entities exploit Indigenous knowledge for commercial profit without securing consent or offering equitable compensation to the originating communities. Bio-piracy commonly encompasses the patenting of traditional remedies, flora, or genetic resources used for generations by indigenous populations. The absence of legal frameworks designed to avert such exploitation renders Indigenous communities susceptible to such abuses, thereby undermining their rights to govern their intellectual and cultural assets.

Another impediment indigenous communities encounter is the insufficiency of legal acknowledgment and protection for their traditional knowledge within the prevailing intellectual property paradigms. Numerous indigenous practices, oral traditions, and cultural manifestations exist beyond the purview of conventional intellectual property laws, rendering them vulnerable to misappropriation or appropriation by third parties. The absence of formal documentation and recognition for oral traditions further complicates efforts to assert ownership rights and safeguard against unauthorized use or appropriation. Socioeconomic conditions such as poverty, marginalization, and constrained access to legal resources intensify the challenges that indigenous communities face in protecting their traditional knowledge and cultural heritage. Many Indigenous groups need more financial means, technical know-how, and institutional backing to advocate for their rights effectively.

All About Traditional Knowledge

Traditional knowledge (from now on designated as TK) is regarded as the collective asset the entire community possesses. It constitutes *res communis* (property belonging to society as a whole). This traditional knowledge exhibits a dynamic character, evolving in response to geographical, climatic, and sociocultural variables. Several salient characteristics of traditional knowledge are as follows:

- Traditional knowledge is conveyed across generations.
- The transmission predominantly occurs through oral traditions, with written forms of transmission being comparatively rare.
- The community collectively owns traditional knowledge, precluding any claims of individual ownership.
- Tracing the origins of traditional knowledge presents significant challenges.

TK is formed through the contributions of numerous individuals across an extensive temporal continuum. It is profoundly embedded in the existential realities of the people, and TK is inextricably linked to the lives of the traditional populations. The TK represents a collective entitlement that pertains to the community that has cultivated this knowledge over time. It encompasses practices, teachings, and insights transmitted across generations within an indigenous populace. However, it is essential to acknowledge that TK is only sometimes situated in the public domain. A portion of the TK may reside in the public domain, yet a specific community may preserve the remainder as confidential or sacred knowledge. There has been persistent discourse and deliberation concerning the parameters of TK.

Article 8(j) of the Convention on Biological Diversity⁷ articulates that traditional knowledge refers to the global cognitions, inventions, and customs of local and indigenous cultures. Traditional knowledge, acquired through experiential learning accumulated over centuries and tailored to the local culture and environment, is conveyed orally from generation to generation. It is characteristically communal and manifests as narratives, musical compositions, folklore, proverbs, cultural values, beliefs, traditions, community regulations, the indigenous language, and agricultural methodologies, which include cultivating plant species and breeding animal varieties. This knowledge is frequently called an oral tradition, as it has been imparted, sung, danced, illustrated, sculpted, and performed over millennia. Traditional knowledge is primarily practical, especially in agriculture, fisheries, safety, horticulture, forestry, and comprehensive environmental stewardship.

The World Intellectual Property Organisation (WIPO) characterizes traditional knowledge as the repository of knowledge, competencies, methodologies, and expertise cultivated, maintained, and transmitted across generations within a particular community, frequently constituting a significant aspect of its cultural or spiritual identity. Although a universally accepted definition of traditional knowledge (TK) has yet to be established on an international scale, it may be articulated as follows:

In a broad context, traditional knowledge encompasses the intrinsic value of the information itself and the prevalent cultural expressions, including distinctive signs and symbols associated with traditional knowledge. In a more restricted interpretation, traditional knowledge pertains specifically to knowledge as a concept, emphasizing the understanding derived from conventional intellectual endeavors, encompassing skills, practices, and innovations.

A paramount characteristic of traditional knowledge is its ancient provenance, predominantly transmitted through oral traditions. Nevertheless, the classification of knowledge as traditional is not solely predicated on its historical age; instead, it is contingent upon the processes of creation, preservation, and transmission that occur within a traditional cultural framework, wherein knowledge is communicated across generations, often via unique and customary systems of knowledge transfer. Thus, the interplay between knowledge and community confers

⁷ Convention on Biological Diversity, 1992, Art.8(j)

the traditional status upon it. Traditional knowledge is inherently culture-specific, contextually grounded, dynamic, and adaptive.

For illustrative purposes, the term “Mola” denotes a traditional textile craft that involves the intricate cutting and stitching of multiple layers of fabric to yield a vibrant and multicolored product. “molas” was historically undertaken by the indigenous Kuna communities of Panama. Although imitations of this craft have emerged in Taiwan, the “mola” distinctly represents a manifestation of traditional knowledge cultivated by the Kuna as a reflection of their cultural identity.⁸

Traditional knowledge fundamentally encompasses the accumulated wisdom developed over centuries through cultural practices. Furthermore, it frequently considers the expansion and adaptation of production methods under the evolving needs of society. Such innovations function as a continuum to existing knowledge and significantly influence the corpus of information conveyed to subsequent generations, thereby collectively shaping the essence of traditional knowledge for future generations. From the observations above, it can be discerned that the foundational elements of conventional expertise include: a) the formulation of novel practices or processes aimed at addressing specific needs; b) the intergenerational transmission of these processes or methods facilitated by cultural customs; c) the confinement to a particular group or community, underpinned by its intrinsic values. The example of the neem tree, regarded as possessing a wide array of applications in India, serves as a quintessential illustration of traditional knowledge. This application was documented in Indian texts composed over 2000 years ago and has been utilized for centuries in various domains such as agriculture, human and veterinary medicine, personal hygiene products, cosmetics, and as a natural insect and pest deterrent.⁹

Although deliberations concerning safeguarding traditional knowledge have been undertaken for over four decades, there still needs to be a universally accepted definition of traditional knowledge at the international level. It is reasonable to assert that the global framework governing traditional knowledge regulation continues to exhibit a degree of ambiguity. Within environmental agreements, traditional knowledge is predominantly regarded as a mechanism for conserving natural resources through potential economic valuation. This viewpoint markedly contrasts with the conventions established by the International Labour Organization (ILO) and the United Nations (UN), which advocate for the acknowledgment of the customary rights of indigenous populations. Nonetheless, the emphasis on environmental conservation and the rights of traditional communities stands in stark opposition to international commercial law, which primarily favors the economic interests of industrialized nations and their corporations. Given the intricate ambiguity of international regimes, the precise equilibrium among various interests in traditional knowledge policy is contingent upon domestic implementation. Traditional knowledge (TK) and traditional cultural expressions (EBT) are

⁸ Gautam Badlani, *Supra* Note 4

⁹ Riya, *Protection of Traditional Knowledge under Intellectual Property Rights Regime*, Vol.I Issue X, E-JAIRIPA, 149, 151-152 (2020) <https://cnlu.ac.in/wp-content/uploads/2022/08/10-Riya.pdf>.

regarded as national assets possessing significant potential for national prosperity due to their substantial economic value; however, their ownership is frequently asserted by foreign entities without equitable benefit-sharing, leading to conflicts of interest between developed and developing nations, such as Indonesia. Our shortcomings in establishing a robust protection system stem from a lack of an appropriate and sufficient protective framework, compounded by the scarcity of data, documentation, and information on TK and EBT.¹⁰

The plethora of definitions attributed to the term ‘protection’ elucidates a rationale for the ambiguity surrounding the justification for such protection. Certain scholars interpret this term within the framework of Intellectual Property Rights (IPRs), wherein security typically connotes the exclusion of third parties from unauthorized utilization. Conversely, others delineate protection as a mechanism to safeguard traditional knowledge from practices that may undermine or adversely impact the lives or cultures of the originated and cultivated communities. Nevertheless, the principal motivations for conferring security upon Traditional Knowledge (TK) encompass:

- (a) Considerations of equitable treatment.
- (b) Issues on conservation.
- (c) The preservation of traditional practices and communal integrity.
- (d) The deterrence of unauthorized appropriation of elements of TK.
- (e) The promotion of its applications and its relevance in developmental contexts.

The underlying principle predates equity considerations in numerous instruments safeguarding Traditional Knowledge (TK). TK generates value that needs to be more adequately recognized and compensated due to the existing framework of requisition and reparation. Consequently, it becomes imperative to safeguard TK to inject fairness into predominantly unmerited and disproportionate relationships. This rationale is illustrated in the context of inherited plant assets. Traditional cultivators both conserve inherited plant assets and actively utilize them.¹¹ The significance of these inherited plant assets is preserved and augmented through their application in cultivation, seed processing, and ongoing selection of the most suitable farmer varieties. These cultivators typically engage in exchanges with one another through barter or trade, thereby promoting the dissemination and further development of their varieties. The crux of this assessment is that since breeders and seed enterprises incur no costs for the samples they acquire, traditional or local farmers receive no remuneration for the value they contribute. There is no subsequent recompense or profit-sharing with these farmers.

The subsequent component elucidates the argument that TK security centers on the intrinsic value of such knowledge for conservation objectives. Thus, preserving biological diversity within agricultural systems generates value for the global community. Intellectual Property

¹⁰ Andi Tyas Tri Wibowo & Joko Setiyono, Legal Protection of Traditional Knowledge (Comparative Study of Bangladesh, Australia and Indonesia), Vol.5 Issue 10, IJSSHR, 4602, 4603-4604 (2022) <https://ijsshr.in/v5i10/Doc/27.pdf>.

¹¹ Carlos Correa, “Traditional Knowledge and Intellectual Property: Issues and options surrounding the protection of traditional knowledge”, 35 (3rd Ed., November 2001)

Rights (IPRs) may be employed to generate revenue that sustains operations that might otherwise be halted. For instance, a significant decline in biodiversity could ensue if traditional farmers abandon cultivating and breeding farmer varieties in pursuit of the greater profitability associated with modern varieties boasting higher yields. In this context, safeguarding TK serves to advance society's broader goals of environmental conservation, sustainable agricultural practices, and food security.

Many scholars perceive Traditional Knowledge (TK) security as an instrumental framework for fostering the conservation of customs and expertise that epitomize conventional modes of existence. The interpretation of "security" in this context markedly diverges from understanding Intellectual Property Rights (IPR). The fundamental element of the right to self-identification, essential for the ongoing vitality of indigenous and traditional cultures, underscores that safeguarding TK is a foundational component of humanity's cultural heritage. According to various statistical analyses, the calamity impacting the world's myriad cultures and languages is significantly more pronounced than the crisis concerning biodiversity.

In certain instances, the objective of TK security is to mitigate the unauthorized appropriation, commonly referred to as 'bio-piracy,' of traditional knowledge and to ensure equitable benefit-sharing. For instance, to reconcile the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement with the Convention on Biological Diversity (CBD), the Government of India has proposed the introduction of a provision within the Agreement that stipulates no patents should be granted that are inconsistent with Article 15 of the CBD.¹² Enhancing the information accessible to patent offices to assess novelty and innovation can effectively prevent the issuance of patents that unduly encompass TK.

Promoting traditional knowledge utilization constitutes a significant objective in its own right. The security of TK necessitates that the "broader application" be advocated. Safeguarding TK against loss and misappropriation or providing remuneration to TK custodians can be viewed as fundamental principles that stimulate the expanded application of such knowledge. A primary rationale for protecting TK from degradation and loss may be facilitating development. Within the framework of establishment processes, TK represents an underexploited resource. Legal protection can assist in maximizing the potential of products and services derived from TK. Furthermore, Traditional Knowledge may serve as a crucial asset for enhancing local innovation, which is imperative for the resurgence of local cultures.

Traditional knowledge, particularly in developing and underdeveloped nations, necessitates robust protective measures. Such measures should encompass the acknowledgment of the entitlements of Indigenous conventional knowledge custodians and prevent unauthorized appropriation of traditional knowledge rights by external entities. In light of the prevailing trends in globalization, a significant extent of global collaboration and cooperation is imperative for the practical safeguarding and advancement of traditional knowledge, with any protective framework needing to consider the societal, national, regional, and international

¹² Convention on Biological Diversity, 1992, Art.15.

dimensions. Moreover, the frameworks established concerning traditional knowledge must duly consider the perspectives and rights of the original knowledge custodians. These mechanisms should also address the economic implications associated with protective measures. Most critically, such protection must be economically feasible, understandable, and readily accessible to the traditional knowledge custodians.

In the contemporary intellectual property rights (IPR) framework, traditional knowledge can be safeguarded through two principal methodologies: Positive Protection and Defensive Protection. The distinctions between protective and constructive intellectual property measures are not absolute; thus, both strategies should be effectively employed to safeguard traditional knowledge.

Defensive protection: This mechanism shields traditional knowledge from unauthorized intellectual property rights acquired by third parties. The rights encompassed include:

A requirement is to disclose the origin of genetic resources and associated traditional knowledge pertinent to the invention within the patent application process. Establishing a comprehensive database encompassing detailed information on traditional knowledge presented in a scientific and technical format, accessible to patent examiners. Such a database would facilitate the assessment of the novelty of the invention in question.

For instance, India has developed a searchable database of traditional medicinal practices that patent examiners can utilize as evidence of prior art while evaluating patent applications. This initiative was prompted by a notable incident in which the US Patent and Trademark Office awarded a patent (subsequently revoked) for applying turmeric in wound treatment. This property is extensively recognized within traditional Indian cultures and documented in ancient Sanskrit literature. Defensive strategies may also safeguard sacred cultural expressions from trademark registration, including holy symbols or terminology.

Positive protection: This approach entails that typical holders of traditional knowledge obtain intellectual property rights directly through patents or alternative protective measures. Various states have undertaken diverse initiatives in this regard. Some jurisdictions utilize existing intellectual property mechanisms as a suitable means to protect traditional knowledge. Conversely, others contend that the unique characteristics of conventional knowledge necessitate establishing a novel system designed to complement the existing intellectual property framework, commonly referred to as “*sui generis*” measures aimed at preserving traditional knowledge. In certain instances, states have also modified or augmented existing intellectual property rights concerning traditional knowledge.

Some of the instances of positive protection may include:

Prior Informed Consent: Prior Informed Consent (PIC) constitutes the authorization from the original custodians of biological resources and associated traditional knowledge to access and commercially exploit such resources and related expertise. **Benefit-sharing:** Benefit-sharing pertains to a contractual arrangement for the equitable distribution of benefits (encompassing

monetary and non-monetary forms) arising from commercializing biological resources and the associated knowledge belonging to a traditional community with that particular community. Similar to other forms of intellectual property, no dedicated statute or legal framework is specifically designed to safeguard traditional knowledge within the jurisdiction of India. However, various intellectual property legislative instruments encompass specific provisions of conventional wisdom.

International Regime on Traditional Knowledge

The significance of safeguarding indigenous and local communities' knowledge, innovations, and practices is increasingly acknowledged within international discourses. The urgent imperative is to guarantee that the advantages derived from cumulative innovations linked to traditional knowledge accrue to their rightful custodians while fostering their socio-economic advancement. The inaugural initiative aimed at the protection of Traditional Knowledge (TK) within the intellectual property (IP) framework was a collaborative endeavor by the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1978, culminating in the 1982 Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. Since then, safeguarding Traditional Knowledge has garnered increasing focus, particularly with the Convention on Biological Diversity (CBD) ratification in 1992. Through Article 8 (j), the CBD has expanded the scope and mandate of protection with more comprehensive objectives. There has been substantial effort directed toward the protection of Traditional Knowledge by intergovernmental organizations engaged in intellectual property, environmental governance, and human rights oversight, particularly for indigenous and local communities regarding Traditional Knowledge, including the World Trade Organization (WTO) and its Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS), the World Intellectual Property Organization (WIPO), the Food and Agriculture Organization (FAO), the United Nations Conference on Trade and Development (UNCTAD), and the World Health Organization (WHO).¹³

Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was finalized on June 5, 1992. This agreement emerged from deliberations held in Rio de Janeiro in 1992, convened under the auspices of the United Nations Environment Programme (UNEP). The CBD, overseen by UNEP, delineates fundamental principles aimed at safeguarding the environment while promoting sustained economic development, thereby highlighting biodiversity conservation, the sustainable utilization of biological resources, and the just and equitable sharing of benefits derived from genetic resources.¹⁴ The CBD constitutes a significant reaffirmation of the sovereign rights of

¹³ Roohi Mohi-ud-din, Saema Farooq, Asmat Majeed, Nisar Ahmad Khan, & Zulfiqar Ali Bhat, Legal Framework on Protection of Traditional Knowledge: A Review, Vol.VIII Issue I, IJARSE, 100, 100-101 (2019) https://www.researchgate.net/publication/331221999_LEGAL_FRAMEWORK_ON_PROTECTION_OF_TRADITIONAL_KNOWLEDGE_A_REVIEW

¹⁴ S.K.Verma & R. Mittal, Intellectual Property Rights: A Global Vision, Indian Law Institute, 2006, 38.

States concerning their biological resources. Article 8 (j) substantiates the assertion that the holders possess rights over their knowledge, innovations, and practices, irrespective of their eligibility for protection under intellectual property rights (IPRs). In instances where such knowledge or practices are not amenable to protection by the existing IPR framework, there remains a governmental obligation to protect these rights via either the enactment of new IPR legislation or through alternative legal or policy interventions. These responsibilities should also encompass utilizing traditional knowledge, innovations, and practices.

Furthermore, the CBD acknowledges the critical role of traditional practices in the sustainable conservation of biological diversity. It mandates facilitating access to biological resources from industrialized nations and asserts that IPRs must not impede biodiversity conservation and sustainable usage. Similarly, it incorporates stipulations that advocate for promoting, developing, and exchanging indigenous and traditional knowledge and technology, consistent with the ethos of the CBD.

Food & Agriculture Organisation

The Food and Agriculture Organization (FAO) engages in a diverse array of initiatives on the accessibility of genetic resources, their sustainable utilization, the advocacy for, and the safeguarding of Traditional Knowledge within the Forest Department, particularly highlighting programs focused on non-wood forest products and the forestry practices of local communities, which warrant significant scholarly attention. In recent years, the most notable advancement has been the establishment of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRA), commonly called the International Seed Treaty. This treaty was ratified on November 30, 2001, during the 31st Session of the FAO Conference convened in Rome, with unanimous approval from participating nations. ITPGRA constitutes a comprehensive international framework that aligns with the Convention on Biological Diversity (CBD), designed to secure food sovereignty through the conservation, exchange, and sustainable utilization of the globe's plant genetic resources pertinent to food and agriculture, alongside ensuring the fair and equitable distribution of benefits derived from their utilization. The treaty duly acknowledges the entitlements of farmers and local communities, pivotal to the centers of origin and diversity, in the conservation, enhancement, and accessibility of these vital resources.

Furthermore, the Treaty accentuates the necessity of safeguarding Traditional Knowledge pertinent to plant genetic resources for food and agriculture to actualize farmers' rights (Article 9.2). It also mandates that national governments are accountable for fostering equitable involvement in the benefit-sharing mechanisms stemming from using plant genetic resources for food and agriculture among farmers. The treaty outlines a funding strategy aimed at mobilizing financial resources for priority initiatives, plans, and programs, particularly within developing nations and countries undergoing economic transitions, while also considering the Global Plan of Action adopted in Leipzig in 1996. Nonetheless, the Treaty exhibits constraints in its scope; its primary focus is on averting the erosion of agro-biodiversity rather than

biodiversity, and it posits the principle of farmers' rights rather than the broader rights of local communities.

United Nations Conference on Trade and Development

The member states of UNCTAD reached a consensus to incorporate the safeguarding of Traditional Knowledge into UNCTAD's initiatives concerning trade, environmental sustainability, and development. UNCTAD has critically analyzed the protection of Traditional Knowledge through the lenses of trade dynamics and developmental frameworks. Within UNCTAD, significant emphasis has been placed on the exchange of national experiences regarding formulating policies and measures to safeguard—traditional Knowledge for trade and identifying strategies to leverage Traditional Knowledge for both trade and developmental objectives. In October 2000, UNCTAD member states convened an Expert Meeting in Geneva. This meeting acknowledged the crucial role of Traditional Knowledge in fostering sustainable development within both national and international economic contexts. Consequently, it is recommended that UNCTAD intensify its efforts to protect traditional knowledge.

World Intellectual Property Organisation and TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights, established in 1995 and widely referred to as the TRIPS Agreement, constitutes one of the most extensive international accords in the annals of global governance. This legally obligatory instrument delineates specific minimum benchmarks that the member-states domestic intellectual property rights (IPR) legislations must adhere to. According to its preamble, the principal aim of the TRIPS Agreement is to facilitate the effective enforcement of intellectual property rights. The TRIPS Agreement stipulates that member-states must extend patent protection to novel inventions, embody an inventive step, and possess the capacity for industrial applicability. Nevertheless, traditional knowledge (TK) does not meet the criteria of being 'novel' or possessing an 'inventive step.' In certain instances, it may not even qualify as having industrial applicability. Consequently, it can be inferred that within the context of the international intellectual property rights framework, traditional knowledge and the contributions of Indigenous populations are not acknowledged as warranting intellectual property rights protection, whereas scientific innovations are deemed pertinent subjects for safeguarding intellectual property rights.¹⁵

The endeavors of the World Intellectual Property Organization (WIPO) regarding traditional knowledge (TK) and folklore commenced in 1978, during which WIPO established a sui generis framework aimed at the national protection of folklore in collaboration with the United Nations Educational, Scientific, and Cultural Organization (UNESCO). In 1998, WIPO initiated a novel proposal, encompassing a fact-finding mission involving contact with 28 nations concerning intellectual property (IP) and TK, thereby facilitating a comprehensive global investigation into the requirements of IP and the aspirations of TK custodians. During

¹⁵ Gautam Badlani, *Supra* Note 8.

its 26th session, the WIPO General Assembly instituted the Intergovernmental Committee (IGC). Furthermore, WIPO has commendably undertaken the production of a diverse array of scholarly documents, which include model clauses pertinent to contracts regarding genetic resources, the Conventional Information Security documentation toolkit, and initiatives focused on the foundational elements of a prospective sui generis framework for the safeguarding of traditional knowledge.¹⁶

National Policy, Regulations & Institutions for Traditional Knowledge in India

Article 21 of the Constitution of India¹⁷ enshrines the Fundamental Right to life and personal liberty. A broad interpretation of this article may afford protection to owners of Traditional Cultural Expressions (TCEs). The Constitution of India, in Article 29 (1), recognizes the safeguarding of cultural rights of minorities as a Fundamental Right. Nevertheless, only those communities that fall under the definition of minorities, as delineated in this section, can protect their rights, thereby excluding smaller communities that are comparatively more susceptible to exploitation than their more prominent counterparts. Article 51A (f) places the responsibility of preserving, respecting, and safeguarding the rich heritage of Indian culture upon every citizen of India as a fundamental duty. Traditional Cultural Expressions and folklore represent both heritage and culture.

India has yet to implement any legislation specifically addressing Traditional Knowledge; however, measures have been instituted in the form of the Biodiversity Act 2002, the Protection of Plant Varieties and Farmers' Rights Act 2001, and the Patent (Amendment) Act 2005 to fulfill its commitments under the TRIPS Agreement, the Convention on Biological Diversity (CBD), and the International Treaty on Plant Genetic Resources for Food and Agriculture of 2004. The Treaty on Plant Genetic Resources for Food and Agriculture has reaffirmed India's position in various intergovernmental forums safeguarding Traditional Knowledge. In India, the compilation of village-specific Community Biodiversity Registers (CBRs) aimed at cataloging all forms of knowledge, innovations, and practices has been initiated in select states. An initiative has been launched to develop an accessible computerized database for documenting Traditional Knowledge about using medicinal and other botanical resources, referred to as the Traditional Knowledge Digital Library (TKDL). Such a digital repository would empower Patent Offices globally to effectively conduct searches and evaluations concerning existing usage or prior art, thus mitigating the risk of patent grants and bio-piracy. In India, provisions have been established to protect Traditional Knowledge within the Biodiversity Act of 2002, the Protection of Plant Varieties and Farmers' Rights (PPVFR) Act of 2001, and the Patent (Amendment) Act 2005.

Indian patent legislation explicitly prohibits safeguarding traditional knowledge as delineated in Section 3 (p) of the Indian Patent Act, 1970.¹⁸ An entity that fundamentally constitutes

¹⁶ Riya, Supra Note 9 at 159-160.

¹⁷ Constitution of India, 1949, Art.21.

¹⁸ The Patents Act, 1970, § 3(p), No.39, Acts of Parliament, 1970 (India).

traditional knowledge or represents a mere aggregation or replication of established characteristics of traditionally recognized elements fails to qualify as an invention. It is, therefore, ineligible for patent protection. For instance, a patent proposal on a methodology for producing an enhanced Chyawanprash reveals a procedure that entails the chopping, roasting, and amalgamation of dried fruits, followed by their incorporation into Chyawanprash, which, according to Section 3(p) of the Patents Act 1970 (as amended in 2005), does not qualify as an invention. This creation is predicated upon traditional knowledge, rendering it non-patentable under the prevailing statute. Nevertheless, should there be a substantial modification in the existing conventional understanding that enables the innovation to fulfill the prerequisites established by Indian intellectual property law, then avenues for intellectual property protection may be explored.

The Indian legal framework encompasses suitable stipulations designed to safeguard traditional knowledge. By its inherent nature, traditional knowledge resides within the public domain; thus, any patent application of conventional wisdom does not meet the criteria for an invention as outlined in Section 2(1)(j) of the Patents Act, 1970,¹⁹ which defines ‘invention’ as a novel product or method necessitating an inventive step and possessing the capacity for industrial application. Moreover, following Section 3(e) of the Patents Act,²⁰ “*a substance derived solely from a mere admixture that results exclusively in the aggregation of the properties of the constituent components, or a process for the production of such substances,*” is not recognized as an invention and is, consequently, non-patentable.

Patent applications grounded in traditional knowledge that violates legal provisions may be rejected under Section 15²¹ or face pre-grant opposition under clauses (d),²² (f),²³ and (k)²⁴ of Section 25(1),²⁵. In contrast, patents that have been granted may be annulled upon opposition in alignment with clauses (d),²⁶ (f),²⁷ and (k)²⁸ of section 25(2)²⁹ of the Patents Act, 1970. The Patent Act 1970 incorporates provisions necessitating the disclosure of traditional knowledge as the foundational basis of the invention. Section 10(4)(ii)(D)³⁰ mandates the specification of the source and geographical origin of all biological materials utilized in the invention.

Diverse dimensions of traditional knowledge may be safeguarded under the patent framework. Technical aspects identified in prior art, which incorporate novel and inventive steps globally, can be secured via a patent application. For example, trademarks encompassing contemporary

¹⁹ The Patents Act, 1970, § 2(1)(j), No.39, Acts of Parliament, 1970 (India).

²⁰ The Patents Act, 1970, § 3(e), No.39, Acts of Parliament, 1970 (India).

²¹ The Patents Act, 1970, § 15, No.39, Acts of Parliament, 1970 (India).

²² The Patents Act, 1970, § 25(1)(d), No.39, Acts of Parliament, 1970 (India).

²³ The Patents Act, 1970, § 25(1)(f), No.39, Acts of Parliament, 1970 (India).

²⁴ The Patents Act, 1970, § 25(1)(k), No.39, Acts of Parliament, 1970 (India).

²⁵ The Patents Act, 1970, § 25(1), No.39, Acts of Parliament, 1970 (India).

²⁶ The Patents Act, 1970, § 25(2)(d), No.39, Acts of Parliament, 1970 (India).

²⁷ The Patents Act, 1970, § 25(2)(f), No.39, Acts of Parliament, 1970 (India).

²⁸ The Patents Act, 1970, § 25(2)(k), No.39, Acts of Parliament, 1970 (India).

²⁹ The Patents Act, 1970, § 25(2), No.39, Acts of Parliament, 1970 (India).

³⁰ The Patents Act, 1970, § 10(4)(ii)(D), No.39, Acts of Parliament, 1970 (India).

subject matter may also be eligible for patent protection. Patents can safeguard methodologies for extracting products derived from biological resources, such as microorganisms, flora, and fauna. However, under the patent framework, codified traditional knowledge lacks eligibility for patent coverage, as it fails to satisfy novelty criteria. Even so, using the codified understanding of conventional methods as prior art will prevent individuals from obtaining patents.

The Patents (Amendment) Act 2005 was instituted to safeguard the rights of indigenous populations. It imposes a duty upon patent applicants to reveal the provenance of the biological resources utilized in their innovations. In instances where the information pertains to Traditional Knowledge (TK), the patent office retains the authority to deny the issuance of the patent. Correspondingly, According to the 2005 Amendment, the subsequent conditions may serve as grounds for the denial of a patent application or the annulment of an existing patent:

- A patent may be annulled if it is found to have been acquired by providing false and deceptive information regarding the geographical provenance of the biological resources associated with the patent.
- Should the patent merely represent a compilation of various elements within the TK, it shall not be deemed patentable.
- If, in light of the knowledge accessible to the indigenous communities, the patent can be characterized as anticipated, it would likewise be subject to rejection.

The Biodiversity Act 2002 regulates foreign entities, institutions, or corporations' access to genetic resources and pertinent knowledge. It intends to ensure the equitable distribution of benefits derived from utilizing these resources and expertise to the host nation and its populace. The legislation delineates protocols governing access to biological resources and Traditional Knowledge through three primary modalities:³¹³²

- Access to biological resources and Traditional Knowledge for foreign nationals, corporations, and Non-Resident Indians (NRIs) is contingent upon the “Prior approval of the National Biodiversity Authority.”
- Access for Indian nationals, corporations, associations, and organizations duly registered in India is predicated upon “*Prior intimation to the pertinent State Biodiversity Board.*”
- Exemption from prior approval or notification is granted to local individuals and communities, including cultivators of biodiversity, voids, and hakims, who have engaged in the practice of Indigenous medicinal systems.

The statute does not impose an obligation on Indian researchers to obtain authorization from the National Biodiversity Authority for conducting research within India, provided it is executed by Indian nationals and under collaborative research initiatives that align with the overarching policy directives established by the Central government. The sole circumstances

³¹ The Biological Diversity Act, 2002, § 3, No.18, Acts of Parliament, 2003 (India).

³² The Biological Diversity Act, 2002, § 4, No.18, Acts of Parliament, 2003 (India).

necessitating the consent of the NBA arise in instances where (i) the outcomes of any research utilizing the country's biodiversity are intended for commercialization and (ii) when the findings of the research are disseminated to a foreign institution or individual seeking access to the nation's biodiversity for research purposes.³³

The Act, under Section 21³⁴ and Rule 20 of the Biodiversity Rules, mandates the incorporation of appropriate benefit-sharing provisions within the access agreements and mutually accepted terms related to the access and transfer of biological resources or knowledge derived from or obtained within India for commercial exploitation, bio-survey, bio-utilization, or any other monetary objectives. The Authority is tasked with formulating guidelines and must disseminate specific details regarding the benefit-sharing formula via an official gazette on a case-by-case basis. The timeline and magnitude of benefits to be shared will be determined case-by-case, contingent upon mutually agreed terms between the applicant, the authority, local governing bodies, and other pertinent stakeholders, including regional and indigenous communities. One proposed mechanism for benefit-sharing entails direct remuneration to individuals or groups through the district administration, should the biological material or knowledge have been sourced from specific individuals or organizations. When such individuals or organizations cannot be identified, the National Biodiversity Fund shall allocate the financial benefits. A proportion of five percent of the benefits shall be designated for the Authority or State Biodiversity Board to cover administrative service charges.

The Protection of Plant Varieties and Farmers' Rights (PPVFR) Act 2001, along with the PPVFR Rules of 2003, primarily addresses the safeguarding of plant breeders' rights concerning newly developed varieties and the rights of farmers to register such varieties, as well as to conserve, cultivate, utilize, exchange, share, or sell the plant varieties that they have grown, enhanced, and preserved across numerous generations. This legislative framework represents a departure from the 1991 UPOV Model. It can be characterized as an alternative 'sui generis' system that simultaneously confers protection on the rights associated with formal innovations by plant breeders and the informal knowledge systems and traditional plant varieties maintained by farmers. The salient provisions in this Act pertinent to Access and Benefit Sharing (ABS) address the protection of farmers' rights and the proposed mechanisms for compensation or benefit-sharing in recognition of the contributions made by local communities or farmers in creating novel varieties. The Indian legislation on PPVFR constitutes a unique initiative undertaken by a developing nation to actualize the concept of Farmers' Rights as delineated in the International Treaty. Despite the presence of several limitations within this Act, it nonetheless offers a paradigm of an effective sui generis system for the protection of plant varieties that World Trade Organization (WTO) members are anticipated to implement to fulfill their obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

³³ The Biological Diversity Act, 2002, § 7, No.18, Acts of Parliament, 2003 (India).

³⁴ The Biological Diversity Act, 2002, § 21, No.18, Acts of Parliament, 2003 (India).

Copyright serves as a mechanism for safeguarding the artistic expressions of traditional knowledge (TK) custodians, particularly those from indigenous and migrant communities, against unlawful exploitation and development. This encompasses a variety of literary creations, including narratives, folklore, and mythologies, as well as customs, poetry; theoretical compositions; visual art forms; textile creations such as fabrics, garments, textile designs, tapestries, and carpets; musical compositions; and three-dimensional artifacts including pottery, ceramics, paintings, wood and stone sculptures, and a myriad of other objects. Public rights may be invoked to ensure the engagement of performers such as singers and dancers in theatrical presentations, puppet performances, and other analogous artistic displays. Furthermore, WIPO acknowledges the performances of indigenous and local communities as components of collective knowledge. Copyright legislation encompasses performance through adjacent rights or privileges conferred upon the artist. Consequently, it can be asserted that the performances emanating from traditional, indigenous, and local communities are eligible for protection under copyright law, particularly within the framework of performer rights. Copyright is designed to safeguard the manner of expression rather than the underlying ideas. Copyright holders possess the authority to undertake any actions delineated in Section 14 of the Copyright Act 1957.³⁵ Copyright may be employed to protect the artistic expressions of TK holders, specifically those artists affiliated with indigenous and migrant cultures, from unauthorized replication and exploitation of these expressions. Moral rights pertain to the relationship between creators/artists/authors and their works. Such rights may provide a crucial avenue for preserving the interests of indigenous peoples in creations that stem from indigenous knowledge.

Moreover, Section 31A of the Act³⁶ addresses the issue of compulsory licensing in instances involving unpublished Indian works. According to this provision, in situations where the author is deceased, unidentified, or cannot be located, or where the copyright owner is untraceable, any individual may petition the Copyright Board for permission to publish such works or to create a translation in any language. Before applying, the applicant is required to announce their proposal in a single issue of a daily newspaper in English that enjoys substantial circulation throughout the country, and in cases where the application pertains to the publication of a translation into a different language, also in one issue of a daily newspaper published in that language, thereby allowing for the original author, if existent, to assert their ownership claim.

Section 38 acknowledges the rights of performers;³⁷ Section 57 delineates the special rights of authors, commonly referred to as moral rights, which confer upon the author the entitlement to assert authorship, prevent or seek redress for any distortion, mutation, modification, or similar actions that may detrimentally affect their honor or reputation, and may be construed to extend protective measures to the interests of Traditional Cultural Expressions (TCE) proprietors.³⁸

³⁵ The Copyright Act, 1957, § 14, No.14, Acts of Parliament, 1957 (India).

³⁶ The Copyright Act, 1957, § 31A, No. 14, Acts of Parliament, 1957 (India).

³⁷ The Copyright Act, 1957, § 38, No.14, Acts of Parliament, 1957 (India).

³⁸ The Copyright Act, 1957, § 57, No.14, Acts of Parliament, 1957 (India).

The existing Copyright Act possesses the potential to safeguard contemporary TCEs. Nevertheless, the preexisting TCE works, which currently reside within the public domain as stipulated by copyright legislation, are accessible for utilization by any individual, thus engendering a conflict of interest between the legitimate proprietors and the users. Moreover, TCEs must be more adequately accommodated within the copyright protection framework due to their inherent characteristics, including their communal and historically rooted ownership spanning centuries. The concepts of ‘originality’ and ‘individuality’ are two foundational principles of copyright law that do not align with TCE works. The Act underscores ‘authorship,’ a concept that is predominantly absent in the context of traditional communities. Furthermore, the protection granted under copyright is temporally limited. In contrast, TCEs, by their very essence, have persisted for centuries and should not be permitted to devolve into the public domain after a finite duration, a circumstance that diverges from the treatment afforded to copyright materials.³⁹

The Traditional Knowledge Digital Library constitutes a collaborative initiative undertaken by the Government of India, facilitated through the Council for Scientific and Industrial Research (CSIR) and the Ministry of AYUSH, aimed at aggregating data of traditional knowledge prevalent in India into a singular repository, encompassing diverse languages and formats. The TKDL is a reference tool for patent examiners before assessing art at International Patent Offices (IPOs). Two principal attributes of TKDL are its simplicity and accessibility. TKDL enhances accessibility regarding language, format, and classification. Traditional Indian knowledge is documented in local languages such as Sanskrit, Urdu, Arabic, Persian, and Tamil, among others; TKDL translates this prevalent information into the native languages of patent examiners as well as into five global languages: English, French, Spanish, German, and Japanese. The format of TKDL is distinct yet aligns closely with the standard patent application format, thereby facilitating comprehension for patent examiners. For each instance of traditional knowledge (TK), the comprehensive listing encompasses a bibliography of traditional Indian texts, including hyperlinks to scanned images of the original documents in their respective languages. TKDL has instituted a novel classification scheme for conventional knowledge, the Traditional Knowledge Resource Classification (TKRC), predicated upon the International Patent Classification (IPC) framework. Each collection within TKDL comprises both TKRC codes and IPC codes. Another salient feature of TKDL is its accessibility.⁴⁰ The complete version of TKDL is exclusively available for utilization by patent examiners at designated regional patent offices.

Nevertheless, a representative database edition is accessible via the TKDL website. This site features 1,200 representative listings. The Traditional Knowledge Digital Library has considerably influenced the safeguarding of India’s traditional knowledge. The library, functioning as a repository for Indian conventional wisdom, has assisted patent offices in meticulously evaluating patent applications for prospective TK elements. The repository

³⁹ Supra Note 3.

⁴⁰ Gautam Badlani, Supra Note 15.

encompasses TK documents in various languages, bridging the linguistic divide between traditional communities and patent offices. With the support of the TK Digital Library, India successfully contested 36 patent applications in Europe alone.⁴¹

The Traditional Knowledge Resource Classification (TKRC) represents a sophisticated classification framework for traditional knowledge documentation. The conventional medicinal practices of India have been systematically categorized and classified by TKRC into approximately 25,000 distinct subgroups encompassing Ayurveda, Unani, Siddha, and Yoga. The TKRC has facilitated the incorporation of around 200 sub-groups under the category A61K 36/00 as delineated in the International Patent Classification, in contrast to a limited number of previously accessible sub-groups related to medicinal plants under A61K 35/00, thereby elevating the standards of inquiry and examination of prior art pertinent to patent applications within the traditional knowledge domain. In 2011, the World Intellectual Property Organization (WIPO) convened an International Conference in New Delhi, in collaboration with the Council of Scientific and Industrial Research (CSIR), addressing ‘The Utilization of the Virtual Knowledge Digital Library as a Paradigm for Safeguarding Virtual Knowledge.’ In this context, WIPO also orchestrated an ‘International Study Visit to TKDL’ in partnership with CSIR and the Department for Promotion of Industry and Internal Trade (DIPP) for representatives from 19 countries expressing interest in replicating the TKDL model. The TKDL has demonstrated its efficacy as a formidable mechanism for contesting unauthorized claims over extant traditional knowledge information and safeguarding exclusive intellectual property rights associated with such knowledge. Furthermore, it reflects the proactive measures to ensure this information is available to contemporary and future generations. The objective is not to curtail the utilization of traditional knowledge but rather to guarantee that erroneous patent rights are not conferred upon applicants due to insufficient access to the prior art.

Analysis of the Protection of Traditional Knowledge Bill: 2016 v. 2022

The 2016 Bill

The Traditional Knowledge Bill 2016⁴² represented the inaugural legislative proposal in India to safeguard traditional knowledge and the associated genetic resources from unauthorized appropriation and exploitation. This legislative proposal was presented in the Lok Sabha, the lower chamber of the Indian Parliament, by the then Minister of Science and Technology and Earth Sciences, Dr. Harsh Vardhan. The bill’s primary objective was to establish a robust legal framework to ensure the protection and enhancement of traditional knowledge and its associated genetic resources. It advocated for the creation of a National Traditional Knowledge Authority, which would oversee the registration and documentation of traditional knowledge

⁴¹ Ibid.

⁴² The Protection Of Traditional Knowledge Bill, 2016, Bill No. 282 of 2016, March 10, 2017.

alongside the corresponding genetic resources.⁴³ The salient features of the proposed legislation included:

- The stipulation that traditional knowledge encompasses the knowledge transmitted through generations among members of Indian society while explicitly excluding knowledge privately held and utilized by various individuals and groups.
- Establishing a community-based traditional knowledge trust would possess exclusive rights to administer the traditional knowledge pertinent to the specific community.
- The commercial utilization⁴⁴ of traditional knowledge by any external individual—irrespective of collaboration with community members—would necessitate prior consent from the governing committee.
- The civil remedies incorporated within the bill would encompass injunctions, damages, and the accounting of profits while also stipulating a maximum imprisonment term of three years and a financial penalty of Rs. 2,00,000 or both.

It was noted that the proposed legislative measure was treated as a subject for deliberation, with the government of India being urged to contemplate comprehensive legislation that encompasses all facets of traditional knowledge. The World Intellectual Property Organization also received model drafts pertinent to the same from various nations. The Indian Parliament enacted the legislative measure in March 2016. The legislation aimed to provide legal support to the Traditional Knowledge Digital Library (TKDL) project and to ensure that the database is utilized to safeguard traditional knowledge. The legislation conferred upon the Indian government the authority to establish and maintain a digital repository of traditional knowledge accessible to patent offices globally to avert the issuance of patents on pre-existing traditional knowledge. The legislation also stipulated the creation of a Traditional Knowledge Digital Library Board, which would oversee the management and operational aspects of the TKDL. The legislative measure sought to ensure that the traditional knowledge of India's indigenous populations is preserved and utilized for the nation's advancement. The bill's enactment was pivotal in protecting traditional knowledge within India. It served as a paradigm for other countries to emulate in safeguarding their traditional knowledge. The Traditional Knowledge Bill 2016 was viewed as a crucial initiative towards protecting and enhancing traditional knowledge in India. Nevertheless, it was not ratified by the Indian Parliament, leading to the introduction of a revised legislative proposal, the Traditional Knowledge Bill 2022, in its stead. The revised measure builds upon the foundations established by the 2016 bill and aspires to address some of its deficiencies and inadequacies.

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⁴³ Akirti Gupta, Protecting Indigenous Cultural Heritage: A Comparative Study of the Traditional Knowledge Bill of 2016 & 2022, Vol.III Issue IV, IJIRL, 489, 493-494 (2023) <https://ijirl.com/wp-content/uploads/2023/08/PROTECTING-INDIGENOUS-CULTURAL-HERITAGE-A-COMPARATIVE-STUDY-OF-THE-TRADITIONAL-KNOWLEDGE-BILL-OF-2016-AND-2022.pdf>

⁴⁴ Chakrabarty, S.P., Kaur, R. A Primer to Traditional Knowledge Protection in India: The Road Ahead. Liverpool Law Rev 42, 401–427 (2021)

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The 2022 Bill

To address the inadequacy of legislative frameworks concerning the safeguarding of traditional knowledge in India, Dr. Shashi Tharoor introduced a legislative proposal in 2016 aimed at the Protection of Traditional Knowledge; however, this initiative ultimately failed to garner parliamentary approval and could have been more effective. The proposed bill articulates a comprehensive definition of the term traditional knowledge and delineates the ownership rights associated with such knowledge. The Traditional Knowledge Bill 2022 represents a legislative proposal in India designed to shield traditional knowledge and related genetic resources from unauthorized appropriation and exploitation. This bill was presented in the Lok Sabha, the lower chamber of the Indian Parliament, in August 2022 by the Minister of Science and Technology, Dr. Jitendra Singh. Following a review of the limitations inherent in the prior legislative attempt, Dr. Shashi Tharoor reintroduced the bill in April 2022, incorporating specific amendments to protect and preserve traditional knowledge. The Protection of Traditional Knowledge Bill proposed in 2022 is also subject to extensive critique, mainly due to its need to align traditional knowledge with the safeguards provided by Intellectual Property Rights. More explicitly, the bill posits that the concept of Traditional Knowledge exists outside the parameters of the Intellectual Property Rights framework. Furthermore, the 2022 bill asserts that Traditional Knowledge cannot be classified as an innovation or attributed to a singular individual; instead, it is a cultural inheritance transmitted across generations, thereby rendering it incompatible with the principles of Intellectual Property.

The proposed legislation seeks to create a comprehensive legal framework for safeguarding and advancing traditional knowledge alongside its associated genetic resources. It advocates

for forming a National Traditional Knowledge Authority, which would be responsible for registering, documenting, and conserving traditional knowledge and its related genetic resources. Furthermore, the bill suggests the establishment of a Traditional Knowledge Digital Library (TKDL),⁴⁵ which would function as a repository for traditional knowledge and associated genetic resources. The TKDL is intended to enhance the protection of traditional knowledge by providing patent examiners with access to and the ability to search for traditional knowledge before the issuance of patents. The 2022 bill primarily concentrates on the challenges surrounding the patenting of traditional knowledge while allocating comparatively less attention to other forms of Intellectual Property Rights (IPR). Intellectual Property Rights and Patents confer ownership and exclusivity over novel inventions and innovative knowledge, and there have been numerous initiatives aimed at extending exclusivity to Traditional Knowledge in India; according to the 2022 bill, this practice constituted a significant injustice to the individuals who were the original creators of the ideas underpinning these inventions.

The legislative proposal fundamentally advocated for an innovative framework of protection for traditional knowledge independent of intellectual property rights, aiming to ensure the safeguarding, advancement, and sustainable development of such knowledge consistent with prior practices. The primary distinction is that, in contrast to previous instances where protection and promotion were contingent upon the intellectual property rights framework, the current proposal disregards the existing intellectual property rights paradigm.⁴⁶ It acknowledges the unequivocal and sovereign entitlement of the Union of India over the traditional knowledge that resides within its geographical boundaries. In other words, the relevant government shall be considered its proprietor for any traditional knowledge exclusively practiced within a specific state or union territory. Conversely, suppose a particular form of traditional knowledge is disseminated across multiple states or union territories. In that case, the respective governments shall be regarded as having joint ownership, complete with equal and indivisible claims and interests. Furthermore, the legislative measure acknowledges the contributions made by specific communities toward the evolution of traditional knowledge by conferring upon them certain rights, including the right to self-determination.⁴⁷

The proposed legislation stipulates that to attain recognition as a custodian of traditional knowledge, the pertinent holder(s)/communities must establish a knowledge society, which is delineated as a collective of individuals or families, whether indigenous, tribal, or otherwise, inhabiting the confines of the national territory, who can be distinguished as a distinct entity from other groups or members of society due to their exclusive affiliation with one or more manifestations of traditional knowledge under applicable legal frameworks. Following the acknowledgment as custodians, the knowledge society shall possess a non-exclusive, perpetual

⁴⁵ Martin Fredriksson (2022) Balancing community rights and national interests in international protection of traditional knowledge: a study of India's Traditional Knowledge Digital Library, *Third World Quarterly*, 43:2, 352-370.

⁴⁶ Akirti Gupta, *Supra* Note 43 at 495-496.

⁴⁷ Safir Anand, *The Protection of Traditional Knowledge Bill, 2022*, *AsiaIP* (August 27, 2024, 08:11 AM) <https://www.asiaiplaw.com/section/ip-analysts/the-protection-of-traditional-knowledge-bill-2022>.

license for commercial and non-commercial utilization of the traditional knowledge, with all members collectively enjoying these entitlements. This legislative initiative is a commendable advancement towards consolidating India's extensive heritage in traditional knowledge, effectively challenging any notions regarding exclusive ownership. Observing the future perceptions of this development and whether a consensus is attained in the near or distant future will be intriguing.⁴⁸

Conclusion

The concept of comprehending Traditional Knowledge as a form of Intellectual Property. Traditional knowledge encompasses the collective knowledge, innovations, and practices of indigenous and local communities globally. It is cultivated from experiences accumulated over numerous generations and is intricately adapted to specific cultural and environmental contexts, with traditional knowledge being transmitted orally across successive generations. This knowledge system is often characterized by collective ownership and manifests in various forms, including narratives, musical compositions, folklore, proverbs, cultural values, belief systems, rituals, communal regulations, indigenous languages, and agricultural methodologies, which encompass the cultivation of plant varieties and the breeding of animal species. Frequently designated as an oral tradition, it has been perpetuated through practices such as singing, dancing, painting, and carving for millennia. Traditional knowledge is predominantly practical, especially in agriculture, fisheries, healthcare, horticulture, forestry, and environmental management. When considered in conjunction with Intellectual Property Rights, traditional knowledge can be safeguarded through legal mechanisms, specifically the Intellectual Property Rights framework, which includes trademarks, copyrights, geographical indications, and patents, among others, as well as non-legal protective measures, which refer to the informal safeguards for traditional knowledge that lack binding force, including ethical codes of conduct.⁴⁹

As evident from this comprehensive review, safeguarding traditional knowledge (TK) associated with biological resources constitutes a complex issue. Although a compelling rationale exists for compensating communities that possess valuable TK pertinent to biological resources, it is equally imperative to scrutinize whether intellectual property (IP) rights serve as the most suitable legal framework for acknowledging such rights. Moreover, it is essential to reconcile the protection of historical knowledge with the imperative to foster the development of new knowledge for the future. Even the most ardent proponents of an international framework for protecting such TK, such as India, are encountering significant challenges in implementing even a domestic legal framework. The legislative measures instituted thus far in nations like India, such as the Biological Diversity (BD) Act, have resulted in a convoluted array of regulations that need more consistency and predictability. The most

⁴⁸ Ibid.

⁴⁹ Roohi Mohi-ud-din, Saeema Farooq, Asmat Majeed, Nisar Ahmad Khan, & Zulfiqar Ali Bhat, *Supra* Note 13 at 4608.

recent two attempts to formulate Access and Benefit-sharing (ABS) guidelines have not progressed beyond the preliminary stage of soliciting feedback on draft proposals.⁵⁰

A sui generis legal framework is frequently proposed as a viable mechanism to enhance the safeguarding of traditional knowledge; however, before the enactment of such legislation, existing policies and initiatives, including the National Intellectual Property Policy, Digital India, and Startup India, are essential to facilitate the increasingly fragile state of traditional knowledge systems. It would not be inaccurate to assert that the current generation is responsible for preserving the invaluable knowledge of an at-risk generation to secure the sustainability of both species and humanity in the future.

⁵⁰ Prashant Reddy & Malathi Lakshmikumar, Protecting Traditional Knowledge Related to Biological Resources: Is Scientific Research Going to Become More Bureaucratized? National Library of Medicine (August 28, 2024, 08:38 AM) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4588132/>.