
CONTEMPORARY LEGAL CHALLENGES IN THE PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA

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ABSTRACT

Man is by nature is a social animal. He may be in the culture of indigenous community or in non-indigenous culture but surrounded by biological diversity. Biodiversity is therefore the natural biological capital for our life support system. Our survival depends on the web of life created by the interactions of the millions of different animals, plants, fungi, and other microscopic organisms that share the Earth with us. Biological diversity renders invaluable services for human well-being. Our ecosystems services, particularly the ones that provide food, fiber, freshwater, pollination of crops, livelihoods, protection from natural disasters and significantly contribute to human health. Over 1,00,690 species of fauna and 47,480 species of flora have been documented in the 10 BZs of the country. This diversity is hosted by many types of terrestrial and aquatic systems namely forests, wetlands, grasslands, deserts, coastal, and marine ecosystems and indeed the local communities, indigenous or tribal communities are the treasure of traditional knowledge on all such areas biological resources.

There is an infinite emotional bonding between Indigenous community and biodiversity since time immemorial. Some plants and trees have greatest significance in tribal culture. The life of non-tribal or life of our modern society is also associated with biodiversity which has different bio-geographical areas. However, the local communities particularly, members of tribal sections largely depends on these natural resources for their day-to-day living, they protect the biological resources with their traditional knowledge and their own sustainable development strategy.

In contradiction, present day's biodiversity is under great pressure because of our neo-modern life style, rampant urbanization, technological and industrial developments, proliferation of environment-unfriendly economic activities such as inappropriate mining, appropriation of wetlands for construction etc., are indeed the main reasons that damage the sustainability of such ecosystem services and degradation of environmental and natural resources which ultimately impacts on life of indigenous habitats.

Few policies of states and central government by which evacuation of indigenous, local and tribal community from their natural habitats to other areas effect on their traditional knowledge. Apart from this, traditional knowledge of such community has not recognised under present intellectual property laws as compared to patent etc. Thus this article will enlighten on current issues on rights on Traditional Knowledge of tribal community as well as Intellectual Property Rights.

Introduction:

Traditional Knowledge (TK) in the context of biodiversity refers to the know-how, skills and practices evolved and adopted by local and traditional communities over centuries regarding maintenance and use of natural resources. The range of this knowledge is vast. It covers medicinal and other properties of plants and animals, the manner of using them for healthcare and other essential needs, insights into the intrinsic value of biodiversity for environmental and human purposes and manner of conservation and sustainable use of the elements of biodiversity. Its ethical norms help regulate human interactions with the natural environment and secure intergenerational equity.

Traditional knowledge can make a significant contribution to sustainable development. Most indigenous and local communities are situated in areas where the vast majority of the world's genetic resources are found. Many of them have cultivated and used biodiversity in a sustainable way for thousands of years. The contribution of indigenous and local communities to the conservation and sustainable use of biodiversity goes far beyond their role as natural resource managers. Their skills and techniques provide valuable information to the global community and a useful model for biodiversity policies. Such traditional knowledge of indigenous and local communities should enjoy the economic benefits. But their rights have not effectively been recognised as rights been needs protection in contemporary world. This research article explores the ideas of authors which are articulated this work based on secondary data and it will enlightens on concerned stakeholder to take appropriate affirmative legislative measures in safeguarding the rights of indigenous and local communities for their traditional knowledge.

Meaning and definition of Traditional Knowledge:

Traditional knowledge is the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over centuries and

adapted to the local culture and environment, it is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Sometimes it is referred to as an oral tradition for it is practiced, sung, danced, painted, carved, chanted and performed down through millennia. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general

As per the World Intellectual Property Organisation (WIPO) traditional knowledge includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity related knowledge and expressions folklore in the form of music, dance, song, handicraft, designs, stories, and artwork.

Traditional knowledge refers to the traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity¹.

There is implied meaning under Biodiversity Act 2002, under Sec 2 (a) “benefit claimers” means the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application².

Convention on Biological Diversities and traditional Knowledge:

As an international initiative the convention comes into force with the objective to encourage actions which will lead to a sustainable future. Convention on Biological Diversity (CBD) Opened for signature at the Earth Summit in Rio de Janeiro in 1992, and entering into force in December 1993. With 196 Parties, the Convention has near universal participation among countries. The Convention on Biological Diversity (CBD) is an international legally-binding treaty with three main goals: conservation of biodiversity; sustainable use of

¹ akwe-brochure-en.pdf (cbd.int)

² Sec 2 (a) of Biodiversity Act, 2002

biodiversity; and the fair and equitable sharing of the benefits arising from the use of genetic resources.

The Convention on Biological Diversity recognizes the dependency of indigenous peoples and local communities on biological diversity and their unique role in conserving life on Earth. This recognition is enshrined in the preamble of the Convention and its provisions.

Article 8(j): 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 practices³. Furthermore, because of its relevance to the work of the Convention, considerations relating to the traditional knowledge of indigenous peoples and local communities are also being incorporated in all the programmes of work under the Convention⁴.

Stresses the need to consider indigenous and traditional knowledge as an important existing information source that should be taken into account, and made available through appropriate mechanisms⁵;

Reaffirming the dynamic nature of traditional knowledge, innovations and practices, recognizing that traditional knowledge should be given the same respect as any other form of knowledge in the implementation of the Convention⁶.

The Akwe Kon Voluntary Guidelines

In this regard, Parties to the Convention adopted several voluntary guidelines, including:

The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or

³ Convention on Biodiversity 2002

⁴ Working Group on Article 8(j) (cbd.int)

⁵ Handbook of the Convention on Biological Diversity | 3rd edition, Pg.519, 506

⁶ Handbook of the Convention on Biological Diversity | 3rd edition, Pg.519, 520

which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities;

The Tkarihwaieri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities;

The Mo'otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge;

The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity;

The Glossary of relevant key terms and concepts within the context of Article 8(j) and related provisions⁷.

These guidelines are intended to provide a collaborative framework ensuring the full involvement of indigenous peoples and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous peoples and local communities of proposed developments.

Some important Akwé: Kon Voluntary Guidelines are as follows...

Parties to the Convention decided to develop, in cooperation with indigenous and local communities, guidelines for the conduct of cultural, environmental and social impact assessments regarding such developments. On the basis of recommendations by the Open-ended Working Group on Article 8 (j) and related provisions, the seventh meeting of the Conference of the Parties adopted the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to

⁷ Working Group on Article 8(j) (cbd.int)

take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities⁸.

In the conduct of cultural impact assessments, due consideration should be given to the holders of traditional knowledge, innovations and practices and the knowledge itself. Customary laws governing ownership, access, control, use and dissemination of traditional knowledge, innovations and practices should be observed. Protocols with regard to indigenous and local communities should be followed with regard to the disclosure of secret and or sacred knowledge, including those that may involve public hearings and judicial processes in the courts. In the event of the disclosure of secret and or sacred knowledge, prior informed consent and proper protection measures should be ensured⁹.

Consistent with principle 11 of the ecosystem approach, endorsed by the Conference of the Parties in paragraph 1 of decision V/6, traditional knowledge, innovations and practices should be considered an important and integral component of baseline studies, particularly the traditional knowledge, innovations and practices of those who have a long association with the particular area for which the development is proposed. Traditional knowledge, innovations and practices can be cross-referenced by old photographs, newspaper articles, known historical events, archaeological records, anthropological reports, and other records contained in archival collections¹⁰.

Indigenous and local communities should be encouraged, and provided with the necessary support and capacity to formulate their own community development plans. Such plans should include and should develop mechanisms for strategic environmental assessment that are commensurate with the goals and objectives of the development plans and appropriate poverty eradication programmes as defined by the indigenous and local communities¹¹.

Any developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should maintain a balance between economic, social, cultural and environmental concerns, on the one hand, while, on the other hand, maximizing opportunities for the conservation and sustainable use of biological diversity, the access and equitable sharing of

⁸ Secretariat of the Convention on Biological Diversity (2004). Akwé: Kon Voluntary Guidelines

⁹ <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

¹⁰ Convention on Biological Diversity: Akwe Kon Guidelines No 38

¹¹ Convention on Biological Diversity: Akwe Kon Guidelines No 55

benefits and the recognition of traditional knowledge, innovations and practices in accordance with Article 8(j) of the Convention, and should seek to minimize risks to biological diversity. The cultural, environmental and social impact assessment processes should reflect this¹².

In any assessment procedure, subject to national legislation consistent with international obligations, Governments, their agencies and development proponents should take into account the rights of indigenous and local communities over lands and waters traditionally occupied or used by them and the associated biological diversity. There is a need for clarification of legal responsibilities, particularly with regard to matters that may arise during the conduct of cultural, environmental and social impact assessments, including enforcement, liability and redress measures¹³.

In all circumstances related to the proposed development, the customary laws and intellectual property rights of the indigenous and local communities with respect to their traditional knowledge, innovations and practices, Ways and Means 23 should be respected. Such knowledge should only be used with the prior informed consent of the owners of that traditional knowledge. In order to safeguard their rights, indigenous and local communities should establish, or be assisted to establish, protocols consistent with relevant national legislation for access to and use of traditional knowledge, innovations and practices in the cultural, environmental and social impact assessment processes. Assistance in establishing such protocols should be provided if so requested¹⁴.

Other international initiatives on Traditional Knowledge

In addition to the Convention, a number of international bodies, instruments and initiatives are of particular relevance to traditional knowledge. They include as following:

Agenda 21: Principle 22 of the main document that came out of the 1992 Earth Summit in Rio de Janeiro recognizes that indigenous peoples have a vital role to play in environmental management and development because of their traditional knowledge and practices;

¹² Convention on Biological Diversity: Akwe Kon Guidelines No 56

¹³ Convention on Biological Diversity: Akwe Kon Guidelines No 57, 58

¹⁴ Convention on Biological Diversity: Akwe Kon Guidelines No 60

The International Labour Organization's Convention on Indigenous and Tribal Peoples: This Convention calls for action to protect the rights of indigenous peoples;

The Declaration on the Rights of Indigenous Peoples: (Art-31 UNDRIP) emphasizes the protection of indigenous people's right to their traditional knowledge.

The Inter-American Development Bank and its Strategy and Policy on Indigenous Peoples: approved by the IDB in 2006;

The Inter-American Draft Declaration on the Rights of Indigenous Peoples:

The United Nations Permanent Forum on Indigenous Issues:

The World Intellectual Property Organization:

The United Nations Education, Scientific and cultural Organization:

The European Bank for Reconstruction and Development, the Asian Development Bank and the African Development Bank: These Banks are committed to ensuring that the development process promotes indigenous peoples' participation;

United Nations Development Programme (UNDP) and the World Bank Both organizations have launched programmes to promote indigenous peoples' development and to ensure that the development process fosters the full respect for the dignity, human rights and uniqueness of indigenous peoples;

United Nations Conference on Trade and Development (UNCTAD): Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions.

Legislative and Policy Initiatives:

The conservation and sustainable use of biodiversity, based on local knowledge systems and practices, are engrained in Indian ethos and enshrined in the Constitution of India (Article 48A: Protection and improvement of environment and safeguarding of forests and wild life.— The State shall endeavour to protect and improve the environment and to safeguard the forests

and wild life of the country. and Article 51(g): to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;)¹⁵.

Key laws, strategies and policies related to biodiversity are as follows:

The Biodiversity Act (2002),

National Wildlife Action Plan (2002-2016),

National Environmental Policy (2006),

NBAP (2008) and NAP for Climate Change (2008).

In addition to above, India has recently strengthened implementation mechanisms in policy, legislative and administrative measures for biodiversity conservation and management. In this context, there are major positive national levels legislative initiatives include:

(i) Biological Diversity Act and Rules;

(ii) Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act, 2006);

(iii) Wildlife Crime Control Bureau;

(iv) Green India Mission;

(v) Mahatma Gandhi National Rural Employment Guarantee Act;

(vi) Setting up the National Fisheries Development Board (2006).

Biodiversity has also been mainstreamed in the agricultural sector through following legal framework:

National Policy for Farmers (2007);

Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act;

¹⁵ Constitution of India-1950

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), Ministry of Agriculture), in forestry policies (e.g. Forest Rights Act),

In planning and development (e.g. EIA Notification 2006),

In tourism (e.g. National Wildlife Action Plan (NWAP)), and

In the fishery sector (e.g. National River Conservation Programme, National Lake Conservation Plan, National Wetland Conservation Programme).

Intellectual Property Rights and Traditional Knowledge

The traditional Knowledge Digital Library (TKDL) is pioneering initiative in India under the joint collaboration of Council of Scientific and Industrial Research (CSIR) and ministry of Ayush, to prevent exploitation and to protect Indian Traditional Knowledge at the 14 Patent offices worldwide. The access of the database is given to patent offices worldwide that have signed non-disclosure access agreements with CSIR. The CSIR-TKDL unit also files third party observations and Pre-grant oppositions on patent applications related to Indian traditional Knowledge based on the TKDL evidences. So far 265 Patent applications have been either withdrawn/deemed withdrawn or amended or set aside on the basis of TKDL evidences. The People Biodiversity Register (PBR) is a tool for formal recording and maintenance of comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use. The CSIR-TKDL Unit has signed a Non-Disclosure Agreement with NBA of PBR information. Such positive initiatives will surely ensures' the protection of Indian traditional knowledge. On the other hand, even though, traditional knowledge holders recognised under different categories of intellectual property law, they are not the owners of knowledge as compared to other intellectual property like patent, trademark, design etc. Hence, the effective incentivising or rewarding legal framework is the needed to protect the rights of traditional knowledge holders.

Concluding Remarks:

The above initiatives of government not clear in recognising TK holders under patent regime and to provide exclusive economic benefits. The contribution of TK to global pharmaceutical industry is infinite but TK holders are not recognised so far. The specific legislation in protecting traditional knowledge is required to Indian context. The current IPR

regime has not effectively protecting such an indigenous knowledge related to biodiversity which includes agriculture, medicinal, ecological related knowledge; and also for the protection of other traditional knowledge relating to folklore. Separate effective sui generis system or alternative law, is therefore necessary to protect traditional knowledge indigenous as well as local communities.