
JURISPRUDENTIAL ANALYSIS OF THE NEED FOR TRADITIONAL KNOWLEDGE LAW IN INDIA

Insha Khan, LLM, HNLU Raipur (2025-26)

ABSTRACT

Indigenous communities depend on their ecology and accumulated knowledge to maintain a rich cultural history. Their distinctiveness is preserved when these resources are preserved from unauthorised use. The rise of cases of Western corporations utilising the indigenous knowledge and patenting products led to widespread criticisms from the Global South. This necessitated the need for safeguards and recognition of the distinctive cultural and traditional heritage of the indigenous people under intellectual property. By having their traditional knowledge recognised, they can protect their culture in a better and more sophisticated way. India's traditional knowledge digital library is one such initiative. It is a repository of traditional knowledge, and it acts as evidence, which is useful particularly during patent applications.

Indigenous people frequently deal with issues including cultural misrepresentation, exploitation, and restricted access to legal recourse. Misunderstandings regarding cultural customs and bureaucratic obstacles exacerbate these difficulties. Traditional knowledge must be preserved to save the environment and promote sustainable development, much as indigenous peoples have helped to maintain world variety. In certain nations, traditional knowledge associated with Indian items has a higher economic value than other products. This is mostly due to India's abundant natural resources, which have been cultivated by local knowledge over many years. India's indigenous wisdom must be protected from global multinational corporations. Improving laws like those of indigenous knowledge patents might help alleviate these issues. This research aims to assess the present system for the protection of traditional knowledge in India and highlights the need to have a separate law to protect the traditional knowledge of the indigenous groups and their cultural heritage.

Keywords: Traditional Knowledge, Indigenous Communities, TKDL

CHAPTER I

INTRODUCTION TO TRADITIONAL KNOWLEDGE

1.1 INTRODUCTION

The rich tapestry of India's biological and cultural heritage is woven with the threads of traditional knowledge, a cumulative body of wisdom, practices and innovations nurtured by the indigenous communities for centuries. This knowledge in varying fields such as medicine, agriculture, environment, and craft not only serves as an economic asset but also represents the very culture of the communities, it's their cultural identity. Today, we live in the age of instant global communication, and no one is aloof from technology. The knowledge-based society has overpowered the material-based society. However, the globalised modern world governed by Western-centric notions of the intellectual property rights regime has systematically facilitated the misappropriation of this traditional knowledge. This recurring exploitation exposes a critical lacuna in the Indian legal system, that is, the absence of a robust mechanism to protect the rights of the indigenous communities and their culture.

At the international level, the protection of traditional knowledge has been recognised in instruments like the 'CBD' and the 'WIPO'. The IGC committee established under WIPO is the forum where member states discuss the IP issues that arise in the context of access and benefit sharing of genetic resources and the protection of traditional knowledge and traditional cultural expressions. Interestingly, in the IGC, there exists a divide between demandeur and non-demandeur countries, that is, countries which are in support of protection to traditional knowledge and the countries which see such protection as a hindrance to innovation. In this backdrop, this study undertakes a jurisprudential analysis, highlighting the need for sui generis traditional knowledge law in India, which is now not a mere policy choice but a jurisprudential imperative, essential to rectify historical injustices and legally recognise the rights of the communities.

1.2 RESEARCH METHODOLOGY

The research follows a doctrinal study method to examine the need for traditional knowledge law in India. Doctrinal analysis involves undertaking Indian statutes like the Biodiversity Act, 2002, Patents Act, international frameworks like the TRIPS agreement, the Convention on

Biological Diversity, the Nagoya protocol, and judicial precedents like the neem case and turmeric case. The secondary sources incorporated under the study include books, research articles and journals.

1.3 RESEARCH QUESTION

1. What are the social, legal or economic shortcomings of India's current framework for the protection of Traditional knowledge?
2. How can an effective sui generis system be designed in India that balances the needs of communities?

1.4 RESEARCH OBJECTIVE

1. To evaluate the jurisprudential essence of the need for traditional knowledge protection.
2. To analyse the existing legal framework of traditional knowledge protection in India.
3. To examine the need for a sui generis system for the protection of traditional knowledge in India.

1.5 LITERATURE REVIEW

1. **Evana Wright**, Protection of Traditional Knowledge¹. The book highlights the systems for the protection of traditional knowledge at international and national levels and presents an analysis of the intersection between intellectual property and access and benefit sharing. The book uses two important case studies, i.e. India and Peru, to highlight the lessons that may be used by local communities to make decisions regarding the protection of traditional knowledge.
2. **Johanna Gibson**, Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge². The author highlights the intersection between intellectual property and the system of traditional knowledge as held by the communities. It brings into light how often the international frameworks commodify

¹Evana Wright, Protection of Traditional Knowledge (2020) published by Edward Elgar

² Johanna Gibson, Community Resources: Intellectual property, International Trade and Protection of Traditional Knowledge (2016) Published by Taylor and Francis

the traditional knowledge without acknowledging the rights of the traditional communities.

3. **Dr Topi Basar**, Protection of Traditional Knowledge³. The research paper provides a comprehensive analysis of complexities and the need for safeguarding the traditional knowledge in India. The researcher highlights the friction between the traditional practices and the current legal framework, particularly taking into account the northeastern region. The article highlights the need for a sui generis system in India to safeguard the diverse traditional knowledge.

CHAPTER II

JURISPRUDENTIAL ANALYSIS OF THE NEED FOR TRADITIONAL KNOWLEDGE PROTECTION

2.1 TRADITIONAL KNOWLEDGE: CONCEPT

Traditional Knowledge (TK) refers to a collective body of knowledge produced and nurtured within a community and is passed on within the community. In India, the traditional knowledge can be said to be its heritage, as it symbolises our socio-political belief system. TK is characterised by its collective and intergenerational creation, its holistic nature and its intrinsic link to the ecosystem. The WIPO defines TK as –

“TK is a knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural and spiritual identity.

In a broader sense, TK embrace the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK.

In a narrow sense, it refers to knowledge as such, in particular knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.”⁴

³ Dr. Topi Basar, Protection of Traditional Knowledge 2022, Published by live law

⁴ <https://www.wipo.int/en/web/traditional-knowledge/tk/index>

The very foundation of TK is community ownership of common knowledge passed on from generations; this notion stands diametrically opposite to the Western IPR paradigm notions like individual authorship or invention, novelty, and a fixed form of expression. India is a repository of vast traditional knowledge encompassing diverse fields like “Ayurveda, yoga, naturopathy, Unani, siddha, sowa rigpa (AYUSH)⁵”, agricultural practices and folk expressions. These indigenous communities have a unique culture and are largely aloof from urban living, and warrant minimal interference in their way of life. In India, indigenous peoples are notified as the Scheduled Tribe, and there are around 700 such ethnic tribes. These tribe have their unique lifestyle, folklore, and other know-how. These form a part of their traditional knowledge and are often of great commercial value to multinational corporations in developing their products. Thus, comes to the interests of the corporations in acquiring such knowledge. Acquiring traditional knowledge rights also works in favour of the indigenous communities as they get to decide whether they want to share their knowledge or not, and secondly, if they want to share knowledge, they get a fair share of benefits accrued from such knowledge.

2.2 NEED FOR PROTECTION OF TRADITIONAL KNOWLEDGE

2.2.1 JURISPRUDENTIAL ANALYSIS⁶

The preservation of traditional knowledge in India is not only a matter of policy but a question involving deeper jurisprudential concerns. TK differs from conventional intellectual properties fundamentally in that it is collective and intragenerational. The Western-centric IP regime fails to recognise this and thus exposes the need to revisit the theoretical bases of property, rights and justice.

The natural law philosophy advocates that the rights must reflect fairness and justice, and these rights exist inherently. TK shaped over centuries by the local indigenous communities arises from the lived relationship between the communities and nature, and these rights exist before and independent of legislation. Similarly, Locke’s labour theory, although originally focused on individual ownership, can be extended to collective contexts. If the labour of an individual justifies property rights, then the cumulative labour of generations must justify communal custodianship. To withhold recognition from TK is to privilege the individual over the

⁵ <https://ayush.gov.in>

⁶ Justifications for claiming IP <https://www.wto.org>

collective and to undermine centuries of intellectual and cultural investment by communities.

Utilitarianism advocates “greatest happiness for the greatest number of people”, thus a law is justified if it enhances social welfare. TK contributes significantly to public welfare, particularly to public health and biodiversity. The healing properties of Haldi⁷, Neem⁸ as a natural pesticide, etc, are a knowledge system that enhances human well-being. If these are left unprotected, their misappropriation causes loss to the community, and the multinational corporations take all the benefits, and such monopolisation restricts access, raises costs and restricts the benefit to the society. From a utilitarian perspective, this undermines the social benefit, and thus legal protection will ensure that the benefit of TK is accessible and the community receives the due recognition. To enact a framework for TK is therefore not only to prevent future misuse but also to restore dignity and economic value to communities that have long been deprived of their fair share.

From a humanitarian perspective, the justification of protection of TK can be seen in various international instruments such as UDHR and UNDRIP, which recognise the cultural rights of indigenous communities as a fundamental entitlement. Indigenous people have the right of self-determination, and in furtherance of this right, their right as owners of their cultural and traditional heritage must be recognised.

Thus, the importance of traditional knowledge in essence is difficult to quantify; it is a holistic concept reflecting the connection between the indigenous people and their natural environment.

2.2.2 ECONOMIC PERSPECTIVE

In addition to cultural exploitation of Traditional knowledge, there is also economic exploitation. Most of this knowledge is passed orally from generation to generation, thus making it difficult to trace the origin of the system. This, in turn, opens the traditional knowledge system to exploitation. The problem arises when this knowledge is commercially exploited without the consent of the rightful owners and without sharing benefits with the community. Further, the community itself loses the financial opportunity to develop a business based on its knowledge. While these communities do not view their knowledge as a commodity that can be traded, the TK holds a significant economic value. As per the data, ‘almost 80% of

⁷ Turmeric US Patent no. 5,401,504 (grant March 28, 1995) (revocation November 20, 1997).

⁸ Neem, 1994, the European Patent Office (EPO) granted EP0436257 revocation on May 2000

the world's population relies on traditional medicine for their primary health care needs'.⁹ Additionally, 'it is also estimated that where plants are used as a medicinal element, almost 75% of these plants were originally used in traditional medicines.'¹⁰ The world market for medicinal products, as derived from traditional knowledge values at around USD 43 billion and as per the estimation, if a fair share is given to the communities, approximately USD 5.4 billion would flow to these indigenous people.¹¹

CHAPTER III

LEGAL FRAMEWORK FOR PROTECTION OF TRADITIONAL KNOWLEDGE

3.1 INTERNATIONAL FRAMEWORK FOR PROTECTION OF TK

The protection of TK at the international level is gaining prominence, and there are several treaties and agreements affording protection for TK.

3.1.1 CONVENTION ON BIODIVERSITY (CBD)¹²

The 'CBD' came into force in 1993, "to promote conservation of biological diversity and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources."¹³ CBD emphasises state sovereignty over biological resources and requires that access to such resources, and the knowledge associated with them, should be based on 'prior informed consent' and 'fair benefit sharing'¹⁴. Thus, it recognises the role of indigenous communities in preserving biodiversity and highlights the importance of 'benefit sharing' and 'prior informed consent'. The "Nagoya Protocol of 2010" gave greater detail to the principle of access and benefit sharing by requiring parties to establish domestic systems that regulate access to genetic resources and TK. These developments reflect a recognition that TK cannot be treated as freely available to all, but must be accessed on terms that respect those who have preserved it. Yet, the framework is not without weaknesses. By centring authority in the state, it risks sidelining

⁹ Katrina brown, 'Medicinal plants, indigenous medicine and conservation of biodiversity in ghana' in Timothy M. Swanson, intellectual property rights and biodiversity conservation : an interdisciplinary analysis of values of medicinal plants

¹⁰ Jack Kloppenburg Jr, 'No hunting! Biodiversity, indigenous rights and scientific poaching', (1991)

¹¹ United nation development programme and rural advancement foundation international , 'conserving indigenous knowledge : integrating two systems of innovations'

¹² Convention on biological diversity, 1992

¹³ CBD Article 1

¹⁴ CBD Article 15

the very communities whose consent and participation are most critical. In practice, indigenous and local peoples often find themselves excluded from negotiations or compensated only marginally, raising questions about whether the spirit of the CBD and Nagoya Protocol has been fully realised.

3.1.2 TRIPS¹⁵

The protection of TK as an IP is supported by various authors, arguing that there is no economic justification to support a system that would remove items from the public domain and assign them to private owners. The solution would be to have minor amendments to the existing system of intellectual property to incorporate the protection of TK. This approach presumes that any unjust appropriation of TK through the grant of a patent is an incorrect application of existing law. The primary step to improve this is to modify the procedure for the grant of patents. The disclosure of origin clause requires that the patent applications disclose the source of genetic resources and associated traditional knowledge, evidence of prior informed consent of the concerned community and mutually agreed terms governing the use of traditional knowledge and access to benefit sharing. 'WIPO' and 'WTO' both support the use of the disclosure of origin clause. However, the critics argue that such a clause would be inconsistent with the measure set out in the 'TRIPS agreement'. The TRIPS agreement lays down requirements for patent registration, which are set out under articles 27 and 29. The supporters of the clause have, however, proposed that there should be an amendment to the TRIPS agreement to incorporate specifically the disclosure of origin principle under Article 29. This will establish a harmonious relationship between the CBD and TRIPS, with emphasis on the prior and informed consent and fair benefit sharing.

3.1.3 WIPO

Another important initiative has come from the 'World Intellectual Property Organisation (WIPO)', which established its 'Intergovernmental Committee on Intellectual Property¹⁶ and Genetic Resources, Traditional Knowledge and Folklore (IGC)' in 2000. Over the past two decades, the IGC has produced draft provisions on TK protection, reflecting attempts to balance innovation with cultural preservation. However, no binding treaty has emerged, largely because of disagreements between developed and developing countries. While many developing states

¹⁵ Trade Related Aspects of Intellectual Property Rights 1869 U.N.T.S. 299, 33 I.L.M. 1197

¹⁶ WIPO IGC <https://www.wipo.int/en/web/igc>

seek enforceable obligations that would prevent misappropriation, developed countries often prefer non-binding instruments, arguing that overly restrictive rules may hinder research and innovation. The stalemate illustrates the tension between competing interests and values at the heart of international lawmaking in this field.

The international legal framework, therefore, remains incomplete and inconsistent. While TRIPS entrenches an IP system that largely excludes TK, instruments like the CBD and Nagoya Protocol recognise its importance but rely heavily on states rather than directly empowering communities. WIPO's ongoing negotiations have yet to bear fruit, and domestic laws, however innovative, cannot provide global protection in an interconnected world. The result is a system that acknowledges the value of TK in principle but fails to secure it in practice. Until the global community develops a coherent and binding framework that respects the collective and cultural character of TK, indigenous and local communities will remain vulnerable to the loss of their heritage and to the continuing appropriation of their knowledge.

3.2 INDIA'S LEGAL FRAMEWORK

The rich biodiversity of India has significant cultural and economic value, and this value has led third parties to misappropriate the traditional knowledge and biological resources. The most widely known example is the patent relating to the neem tree, the tree in India is known for its antibacterial and antifungal properties and has been traditionally used for centuries. The researchers in the USA obtained a patent over the method of creating a stable pesticide, as well as the formulation itself, leading to widespread controversy.

DOMESTIC LAWS FOR PROTECTION OF TK

3.2.1 The Biological Diversity Act, 2002¹⁷(BDA)

The 'BDA' in India was developed to implement the country's obligation under the CBD and in response to the continuing act of biopiracy. Later in 2004, biological diversity rules were published; however, both these frameworks suffered from centralisation of power over biological resources and associated knowledge within the central and state government and removed the decision-making power from the local communities. The Act, despite this drawback, upheld the principle of access and benefit sharing, and in consequence the central

¹⁷ The Biological Diversity Act, 2002 Act No. 18 of 2003

government amended the patents act 1970 to secure further protection to TK, particularly the 2002 amendment which introduced a new exclusion from patentability- “an invention which in effect is TK or which is an aggregation or duplication of known properties of traditionally known components.” It further added grounds for objection and revocation of patents where the alleged invention is anticipated, having regard to knowledge, oral or otherwise available within the local or indigenous community in India or elsewhere. Furthermore, the additional requirement of disclosure of the source or origin of the biological resource used in the invention was made a requirement.

3.2.2 PATENTS ACT 1970 (amended in 2005)¹⁸

The Patent Act under section 2(1)(j) states that “invention means a new product or process involving an inventive step and capable of industrial application”. Thus, everything that falls under the category of TK would be construed as previously known or prior knowledge and therefore would not suffice under the interpretation of the word “invention” as used under the said section. Further, section 3(p) of the Patents Act explicitly prohibits patenting “an invention which in effect is traditional knowledge or which is aggregation or duplication of known properties of traditionally known component or components”.

3.3.3 TRADITIONAL KNOWLEDGE DIGITAL LIBRARY (TKDL)

Databases and registers play a very important role in the protection of traditional knowledge. The recording of traditional knowledge acts as a defensive mechanism, making knowledge available to patent offices around the world as invalidating prior art. Documentation also conserves traditional knowledge for generations, and it records a positive right over the traditional knowledge of the indigenous community holding such knowledge. India uses such a database at the national level for protecting the traditional knowledge called the ‘Traditional Knowledge Digital Library (TKDL)’ and the ‘People’s Biodiversity Registers (PBR)’. TKDL is a government-run database that records traditional knowledge related to medicine, with the contents made available to patent offices around the world. The PBR is established under the Biodiversity Act of 2002, and it acts as a local database register. The TKDL contains around 290000 traditional medicinal formulations and includes the source or origin of the knowledge, method of preparation, ingredients of formulation and other details. WIPO has recognised the

¹⁸ Patents Act 1970 (amended in 2005) act 39 of 1970

potential of TKDL in preventing unauthorised use of TK, with WIPO and CISR working together to internationalise the TKDL. Further, India also maintains a community-level database, the PBR people's biodiversity register, which records the information on knowledge of local biological resources and the associated traditional knowledge.

While these databases provide protection to traditional knowledge, there are potential threats associated with the process of documentation. The confidential information may be exposed to unauthorised access, and it may facilitate biopiracy by transferring more knowledge into the public domain, making it easier to be accessed.

CHAPTER IV

WAY FORWARD

SUI GENERIS REGIME

India has undertaken extensive protection for the protection of traditional knowledge; however, these mechanisms are primarily defensive in nature, and there exist implementation gaps. What exacerbates the situation is the economic weakness of indigenous people. The economic disparity leads to exploitation and exposes these indigenous people to lop-sided offers of multinational corporations. Thus, there is a pressing need for a sui generis regime in India.

The use of a 'sui generis regime' for the protection of TK has been supported by both the Conference of the Parties to 'WIPO' and 'CBD', and by the indigenous communities worldwide. A sui generis system can be developed and adapted to address the varying needs of the diverse communities. Where such a regime is based on prior informed consent and mutually agreed terms, it will empower the communities and prevent misappropriation and exploitation of their traditional knowledge. Establishing a sui generis system also provides a degree of certainty for local communities as well as other stakeholders. A sui generis regime will therefore encourage legitimate use by third parties while at the same time returning the benefits to the indigenous communities.

However, concerns have been raised as to the potential of a sui-generis system to further reinforce the cultural divide between the holders and potential users of TK and to impose the Western notions of bureaucracy over traditional knowledge. The use of a sui generis system may disempower the communities and perpetuate colonialism and dispossession. Nevertheless,

a sui generis system is supported by local communities as the present system failed to provide effective protection to these communities, and they have, in consequence, experienced the wrong of biopiracy; thus, a sui generis system may operate to uphold the long-suppressed rights of these people. The degree of certainty offered by such a regime will depend on the level of consensus achieved as to the scope of rights available and the beneficiaries of protection. Furthermore, the lack of an international system for protection and recognition of TK may also limit the effectiveness of the sui generis system.

CHAPTER V

CONCLUSION

India possesses an abundant wealth of cultural and traditional knowledge; however, these are declining rapidly due to inadequate safeguards. Much of this heritage survives only amongst the elderly. There is a need for proper documentation, legal recognition and fair-benefit sharing of this knowledge so that TK is not only preserved but also economically viable for future generations.

The legal framework in India lacks a holistic view of protection. The government of India still follows the outdated ILO 107 and has not yet ratified ILO 169, which explicitly secures the rights of indigenous people. The existing legal frameworks, i.e. Biodiversity Act 2002 and TKDL, only provide a defensive mechanism and do not create any rights for the communities. The draft bill 2022 for the protection of Traditional knowledge aims to provide a sui generis system for the protection of traditional knowledge in India, going beyond mere defensive protection. It vests the deemed ownership of TK in states and union territories while recognising communities as custodian who would enjoy perpetual, non-exclusive right to use and benefit from their knowledge. However, the bill has drawn criticism for prioritising state ownership over community control. Further, the bill has not advanced in parliament primarily because it was introduced as a private member's bill, reflecting that the protection of the rights of indigenous groups remains at the periphery of India's legislative priorities.

SUGGESTIONS

The research puts forth the following suggestions:

1. There is a pressing need for clear recognition of the communities as indigenous

communities. India still classifies them as a scheduled tribe, which leaves many communities out of the scope of protection. There is a need for a broader and inclusive definition of indigenous communities so that the rights of all are protected.

2. The protection granted via TKDL and PBR, although effective, must be expanded. Such documentation acts as a defensive tool against biopiracy but is limited to medicinal formulations. A more rigorous protection is required to preserve oral traditions, agricultural practices and cultural expressions. Thus, like TKDL, the knowledge in these areas must also be documented at the local community level in order to prevent exploitation.
3. The enforcement of the sharing mechanism under the Biodiversity Act must be strengthened. Although the Act provides for access and benefit sharing, in practice, the benefit rarely reaches the legitimate stakeholders. There is a need for transparency and accountability in the system for adequate protection of the rights of the communities.
4. Furthermore, the communities in India are largely unaware of the rights that they possess; thus, there is a need for awareness programmes and capacity-building programmes. Without awareness, even the best-designed laws cannot provide effective protection.
5. Lastly, India must strengthen its international engagement in reference to the protection of TK. The ILO Convention 169 has still not been ratified by India, which shows a lack of spirit to protect TK.

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