
PERUVIAN INDIGENOUS KNOWLEDGE PROTECTION APPROACH

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ABSTRACT

Peru is an Amazonian country located in South America and is not only known for its picturesque natural beauty, flora, fauna and landscapes but also for its indigenous communities and people. Peru has always been a country where the indigenous people and communities, the non indigenous people as well as the government has been sensitive to and mindful of the indigenous traditions and their unique lifestyle. This has resulted in exemplar *sui generis* laws being drafted in the country for the protection of indigenous knowledge and the associated rights of the indigenous people. However, the very characteristics of Peru which make it so abundant and rich in terms of biodiversity and ecology are also the reasons that make Peru a very desirable destination for land mining and gold *mafia*, as will be shown in the latter parts of this article. This article also focuses on discussing the legislative framework related to the protection of indigenous knowledge in Peru.

1. Introduction

Peru is located in the South American continent and spans over a territory of 1.285 million km².¹ It is a tropical country with parts of the Andean and Amazonian regions in its territory and thus, it is naturally a mega diversity country owing to the dense volume and variety of its biodiversity; apart from a diverse biodiversity, it also houses around forty four culturally and traditionally diverse indigenous communities.² Peru has a plethora of medicinal (4,000) and native crop (130) plant species and five domesticated animal species (Alpaca, llamas, vicuñas, cochinita and cuy) are known to have their origin in Peru.³

This Article discusses the history and journey of legislating upon Indigenous Knowledge, in Part II and puts forth the point that the history and struggle for legislating on TK shows the willingness and awareness of the State to protect Indigenous Knowledge and associated interests. Part III discusses the two legislations, namely, Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002 and Law N° 28216- Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples, and analyses them on five parameters and tries to bring out the salient features of the legislative framework. Part IV tries to put forth the current situation on ground with regard to the indigenous people in Peru and the extent to which they are able to enjoy their ancestral land (which is one of the major factors in ensuring that indigenous knowledge is preserved, protected and carried forward). Part V summarizes and contextualizes the laws discussed in Part 3 in the backdrop of the current scenario on ground.

2. History of Legislation in Peru

Having noted the abovementioned facts, it is needless to say that the Government was eager to provide legislative protection to the rich Indigenous Knowledge of the country for the purpose of preserving the Knowledge, promoting equity, empowering the indigenous communities as well as for creating livelihoods for the communities throughout the country.⁴ There have been visible sincere efforts by the Peruvian Government for protecting Indigenous Knowledge since

¹ Susanna E. Clark, *Protection of Traditional Knowledge in Peru: A Comparative Perspective*, 3 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 755-797, (2004).

² *Id.*

³ *Supra* n. 1.

⁴ *Supra* n. 1.

1993, (a) when the Government felt the need to regulated the access to genetic resources at the Andean level and this was brought to fruition by the ‘Andean Community of Nations, Decision 391’ of 1996⁵; (b)The Andean Nations also deliberated and agreed upon the ‘Common Industrial Property Regime, Decision 486 of 2000, which linked biodiversity with the industrial policy⁶; (c) in 2003-2004, Peru demanded that there must be *disclosure of origin* along with disclosure of other associated uses of Indigenous Knowledge and pursuant to these demands, the Government set up various consultation groups to deliberate on mechanisms of benefit sharing, regulation of genetic resources, protection of Indigenous Knowledge, etc.⁷

Various government representatives, NGOs, members of the academia, members of the indigenous communities as well as the consultation groups concluded that a *sui generis* regime would be the most suitable for protecting Peru’s Indigenous Knowledge and this decision was not only welcome domestically, but, also put Peru in an influential position in the international forum of Indigenous Knowledge deliberations.⁸ For the purpose of drafting this *sui generis* regime, deliberations were held in two phases on the national as well as international level, wherein, government representatives, private sector, NGOs, academia and the indigenous communities participated and a new law⁹ was introduced for protection of Indigenous Knowledge related to biological resources.¹⁰

3. Peru: Legislative Framework

An analysis of the current legislative framework for the protection of Indigenous Knowledge will be done on five parameters, namely, Aim of the Legislation, Subject matter of the Legislation, Rights Granted, Terms of protection and the nature of protection, and, Manner in which the Legislation protection Indigenous Knowledge.

⁵This is a general regulation which requires each member country to make it’s own domestic legislation. It applies when it is for sure that an invention is the subject of an IPR and has been obtained via genetic resources and complies with the access provisions.

⁶ This decision mandates that members will grant industrial property rights in a manner that the biological and genetic resources of the member state’s indigenous communities are protected and respected, especially while granting patents. The decision also requires production of access contacts or licensing certificates in cases where Traditional Knowledge of the Indigenous Peoples is used in developing an invention.

⁷ Rosa Giannina Alvarez Nunez, *Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience*, 12 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 487-549 (2008).

⁸ *Id.*

⁹ Law 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources.

¹⁰ *Supra* note 7.

3.1 Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002

The Law is a landmark development in the area of Indigenous Knowledge protection in Peru. An important milestone was the International Cooperative Biodiversity Group Program, called the ‘Peru Initiative’. It was started in 1993 as a bio-prospecting initiative by the Natural History Museum of Peru, Cayetano Heredia University of Peru, St. Louis Washington University, Searle Pharmaceuticals and the Aguaruna indigenous community of the Peruvian Amazon (represented by the National Confederation of Amazonian Nationalities).¹¹

This initiative was aimed at carrying out research on the medicinal species of plants available in the Peruvian Amazon with the help of Indigenous Knowledge of the indigenous communities in the area and this activity led to the conclusion of various agreements between the participating organizations and also between the organizations and the indigenous

communities, like, the agreement between the Aguaruna community and Searle Pharmaceutical regarding the use of the community’s know how and also use of their medicinal plants; various benefit sharing provisions¹² were also included in this agreement.¹³ The Peruvian Initiative became the basis of the design and development of the Law N° 27811.

- a. Aim of the legislation: The Law has a wide scope when it deals with the aims and objectives. Its objectives are: (a) foster respect and protection, preservation and development of the collective knowledge of indigenous peoples, (b) fair and equitable benefit sharing, (c) promote use of Indigenous Knowledge, (d) ensure Indigenous Knowledge is not used without the prior informed consent of the indigenous peoples, (e) to encourage the development of potential of the indigenous peoples and distribute collectively generate benefits, (f) to avoid misappropriation of Indigenous Knowledge while grant of patents.¹⁴

¹¹ *Supra* note 7.

¹² long term and short term benefit sharing, initial payments, milestone payments and royalty.

¹³ *Supra* note 7.

¹⁴ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 5.- Objectives of the regime The following shall be the objectives of this regime: (a) To promote respect for and the protection, preservation, wider application and development of the collective knowledge of indigenous peoples; (b) To promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge; (c) To promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general; (d) To ensure that the use of the knowledge takes place with the prior informed

- b. Subject matter of the legislation: The Law expressly protects the collective knowledge of indigenous peoples related to only biological resources.¹⁵ For the purpose of understanding what exactly is the subject matter of this Law, the definitions of ‘collective knowledge’ and ‘biological resources’ will be looked at.

‘Collective Knowledge’ refers to the Knowledge accumulated from generation to generation of indigenous communities regarding the characteristics, nature and use of biodiversity.¹⁶ And, ‘Biological resources’ mean those genetic resources or organisms or parts of organisms or other biotic components of ecosystems, which can be used or are used by mankind and hold some real value.¹⁷

Hence, we can conclude that the *sui generis* regime set up by the Peruvian state protects only that Indigenous/Collective Knowledge that is related to biological resources or biodiversity and has a real value attached to it.

- c. Rights granted: By the virtue of this Act, the Peruvian State, officially recognizes the indigenous people’s autonomy over the decision regarding disposal of their collective knowledge.¹⁸ The Rights given to indigenous peoples under this Act are inalienable.¹⁹

consent of the indigenous peoples; (e) To promote the strengthening and development of the potential of the indigenous peoples and of the machinery traditionally used by them to share and distribute collectively generated benefits under the terms of this regime; . (f) To avoid situations where patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions.

¹⁵ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 3.- Scope of protection afforded by this legislation This legislation establishes a special protection regime for the collective knowledge of indigenous peoples that is connected with biological resources.

¹⁶ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 3 (b) “Collective knowledge” means the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity. The intangible components referred to in Decision 391 of the Commission of the Cartagena Agreement include this type of collective knowledge.

¹⁷ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 3 (e) “Biological resources” means genetic resources, organisms or parts thereof, populations or any other kinds of biotic component of ecosystems that are of real or potential value or use to mankind.

¹⁸ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 1.- Recognition of rights The Peruvian State recognizes the rights and power of indigenous peoples and communities to dispose of their collective knowledge as they see fit.

¹⁹ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 12.- Inalienability and indefeasibility of rights Because they form part of the cultural heritage, the rights of indigenous peoples in their collective knowledge shall be inalienable and indefeasible.

The indigenous Peoples who are in possession of collective knowledge, are protected by this Law against disclosure or use of such knowledge without their PIC and when such knowledge is not in the public domain.²⁰

After the licensing agreement has been entered into, an obligatory compensation in the form of money or goods has to be made to the Community concerned and as soon as benefits have been obtained using Collective Knowledge, a minimum payment of 10% of gross sales has to be made to the Community in question.

- d. Terms of protection and the nature of protection: The knowledge protected under this regime should belong to a community and not only an individual person, who is a part of the community; however, the rights under this Act will not be available to the members of indigenous communities who have recourse to their own traditional systems of benefit distribution.²¹

Such collective knowledge which has been made known to the public by mass communication or any other way and it has been used extensively in the public domain for more than 20 years, a percentage of the value of sales of goods based on such knowledge has to be set aside for the Fund for Development of Indigenous People, set up under this Act. ²² This Fund is created for improving the living conditions of indigenous communities by financing development projects, which are planned and

²⁰ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 42.- Rights of indigenous peoples possessing collective knowledge Indigenous peoples possessing collective knowledge shall be protected against the disclosure, acquisition or use of that collective knowledge without their consent and in an improper manner provided that the collective knowledge is not in the public domain. It shall likewise be protected against unauthorized disclosure where a third party has legitimately had access to collective knowledge covered by a safeguard clause.

²¹ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 10.- Collective nature of the knowledge The protective knowledge protected under this regime shall be that which belongs to an indigenous people and not to particular individuals forming part of that people. It may belong to two or more indigenous peoples. The rights shall be independent of those that may come into being within the indigenous peoples, which may have recourse to their traditional systems for the purposes of the distribution of benefits.

²² Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 13.- Collective knowledge in the public domain For the purposes of this regime, it shall be understood that collective knowledge is in the public domain when it has been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities. In cases where the collective knowledge has passed into the public domain within the previous 20 years, a percentage of the value, before tax, of the gross sales resulting from the marketing of the goods developed on the basis of that knowledge shall be set aside for the Fund for the Development of Indigenous Peoples provided for in Articles 37.

made by the Communities themselves and presented to the Administrative Committee by the representative organization.²³

The Law has also created an independent and superior body that overlooks and monitors the implementation of the protections provided to Indigenous Knowledge and Indigenous Peoples, called The Indigenous Knowledge Protection Council.²⁴ It carries out the function of supporting and providing expertise and opinion to the Fund, the representative of indigenous communities and the INDECOPI.²⁵ It is a diversely and well represented body as it consists of five experts, out of these five, three are appointed by the representative organizations and the National Commission appoints two indigenous people.²⁶

Article 43 protects the Indigenous Peoples in instance a third party (having lawful access to the Knowledge but having signed a confidentiality agreement) makes an unauthorized disclosure of information to any person, then the Peoples have the right to initiate action against such infringement.

The indigenous peoples may bring suits of infringement against people who violate their rights mentioned under the Law. The following temporary reliefs may be provided to them : (a) stopping the acts that gave rise to the action/suit, (b) confiscation of goods produced using the contested collective knowledge, (c) temporary closure of the defendant's premises, etc.²⁷ After the adjudication is concluded, sanctions may be imposed in the form of fine, if the defendant is found liable.²⁸

²³ *Supra* note 8.

²⁴ *Supra* note 8.

²⁵ *Supra* note 8.

²⁶ *Supra* note 8.

²⁷ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 49.- Provisional measures At any stage in the proceedings, either ex officio or at the request of a party, the administrative authority of INDECOPI may, within the limits of its relevant competence, order one or more of the following provisional measures in order to ensure compliance with the final ruling: (a) Cessation of the acts that gave rise to the action; (b) The seizure, confiscation or immobilization of the goods produced using the collective knowledge to which the action relates; (c) The adoption of the measures necessary to ensure that the customs authorities prevent the entry into the country and the departure from it of goods produced using the collective knowledge to which the action relates; (d) The temporary closure of the defendant's premises; (e) Any other measure whose purpose is to avoid the occurrence of any prejudice deriving from the act to which the action relates, or to bring about the cessation of that act.

²⁸ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 62.- Sanctions Violations of the rights of indigenous peoples possessing collective knowledge shall give rise to the imposition of a fine, without prejudice to such measures as may be ordered to

- e. Manner in which the legislation protects Indigenous Knowledge: The Act sets up a Competent National Authority by the name of 'The Office of Inventions and New Technology of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI), which is competent to hear and settle matters related to the protection of collective knowledge.²⁹ Additionally, the INDECOPI also maintains registers, assess licensing contacts and perform other functions as required.³⁰

The Act has made provisions where, the person who wants to use collective knowledge for the purpose of research, commercial or industrial application, has to obtain PIC from the organization that represents the indigenous peoples in question; the organization in turn has to inform the largest number of indigenous peoples possible, of the proposal and seek their views on access and benefit sharing and then accordingly, let the applicants know of the community's decision.³¹

cause the infringing acts to cease or to prevent them from being committed. The fines that may be imposed shall be up to 150 tax units. The imposition and gradation of fines shall be determined according to the economic benefit secured by the infringer, the economic prejudice caused the indigenous peoples and communities and the conduct of the infringer throughout the proceedings. Recidivism shall be considered an aggravating circumstance, and the sanction applicable shall therefore not be less severe than the previous one. Where the defendant fails to comply within a period of three days with the terms of the ruling that concludes a proceeding, he shall be subjected to a sanction not exceeding the maximum of the fine allowed, according to the criteria referred to in the foregoing Article, and enforced collection shall be ordered. Where the defendant persists in failing to comply, the fine imposed may be successively doubled without limitation until such time as compliance occurs without prejudice to the possibility of the party responsible being reported to the Public Prosecutor with a view to the latter initiating the appropriate criminal proceedings.

²⁹ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 63.- Competent National Authority The Office of Inventions and New Technology of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI) shall be competent to hear and settle in the first instance all matters concerning the protection of the collective knowledge of indigenous peoples. The Intellectual Property Chamber of the Tribunal for the Defense of Competition and Intellectual Property of INDECOPI shall hear and settle all appeals in the second and last administrative instance.

³⁰ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 64.- Functions of the Office of Inventions and New Technology The following shall be the functions of the Office of Inventions and New Technology of INDECOPI: (a) To maintain the Register of Collective Knowledge of Indigenous Peoples and keep it up to date; (b) To maintain the Register of Licenses for the Use of Collective Knowledge and keep it up to date; . (c) To assess the validity of contracts for the licensing of collective knowledge of indigenous peoples, taking due account of the opinion of the Indigenous Knowledge Protection Board; (d) To perform such other functions as may be entrusted to it under these provisions.

³¹ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 6.- Conditions of access to collective knowledge Those interested in having access to collective knowledge for the purposes of scientific, commercial and industrial application shall apply for the prior informed consent of the representative organizations of the indigenous peoples possessing collective knowledge. The organization of the indigenous peoples whose prior informed consent has been applied for shall inform the greatest possible number of indigenous peoples possessing the knowledge that it is engaging in negotiations and shall take due account of their interests and concerns, in particular those connected with their spiritual values or religious beliefs. The information supplied shall be confined to the biological resource to which

Granting Licenses is an important tool through which the Law provides protection to the Rights of Indigenous Peoples. There is an established framework for granting of licenses to Applicants. The Applications are processed by INDECOPI and remain confidential.³² The Application has to be complete in all respects: (a) License must be in writing (Spanish as well as the native language), (b) identification and description of the parties and the Collective Knowledge, (c) guarantee of equitable distribution of the benefits attained from the Collective Knowledge, (d) purpose, risks and implications of the proposed activity and its value estimation, (e) obligation of periodical reporting of the progress of the project to the owners of such Knowledge.³³ If the community has agreed to access for an industrial or commercial application, a license agreement, including terms of due rewards and equitable benefit sharing, has to be executed.³⁴

The Act has set up three registers for the purpose of entering Collective Knowledge and keeping record of the holders and their respective rights: National Public Register of Collective Knowledge of Indigenous Peoples (consists of Knowledge in the Public Domain); Confidential National Register of Collective Knowledge of Indigenous Peoples and Local Registers of Collective Knowledge of Indigenous Peoples.³⁵ The purpose behind creating these Registers is to enable the defense of the Rights of Indigenous Peoples and to preserve their Knowledge.³⁶

- i. The National Public Register provides information relevant for patents prior art searches and helps in challenging patent applications that encroach over the rights of Indigenous Peoples.³⁷ The National Register caters to Knowledge in

the collective knowledge under negotiation relates in order to safeguard the other party's interest in keeping the details of the negotiation secret.

³² *Supra* note 8.

³³ *Supra* note 8.

³⁴ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 7.- Access for the purposes of commercial or industrial application In the event of access for the purposes of commercial or industrial application, a license agreement shall be signed in which terms are provided that ensure due reward for the said access and in which the equitable distribution of the benefits deriving therefrom is guaranteed.

³⁵ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 15.- Registers of the collective knowledge of indigenous peoples The collective knowledge of indigenous peoples may be entered in three types of register: (a) Public National Register of Collective Knowledge of Indigenous Peoples; (b) Confidential National Register of Collective Knowledge of Indigenous Peoples; (c) Local Registers of Collective Knowledge of Indigenous Peoples. The Public National Register of Collective Knowledge of Indigenous Peoples and the Confidential National Register of Collective Knowledge of Indigenous Peoples shall be under the responsibility of INDECOPI.

³⁶ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 16

³⁷ *Supra* note 8.

the books as well as the internet and it is available to any person who visits the website of the National Institute.³⁸

- ii. The National Confidential Register has information in detail about the Indigenous knowledge but is not available to public at large, it is only available to those persons who have access authorization from the Communities.³⁹
- iii. Local Registers can be created, developed and maintained by the Indigenous Communities themselves.⁴⁰ The National Institute may provide assistance to the Indigenous Communities in the matters of design, development and system of the Local Register, however, these Registers have not been recognized as a source for prior art searches.⁴¹

Any People, through their representative organization can apply to the INDECOPI for registration of collective knowledge in the Register.⁴² The Application should include identification of the indigenous Peoples, related biological resources, clear description of the Indigenous Knowledge sought to be registered, etc.⁴³ Once the INDECOPI is satisfied with the application, it may proceed to register the same.⁴⁴ To promote the registration of Indigenous Knowledge, the National Institute may send out officials in order to register the Indigenous Knowledge.⁴⁵

3.2 Law N° 28216 Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (1 May 2004)

- a. Aim of the Legislation: The object of the Law is protection of access to Peruvian

³⁸ *Supra* note 8.

³⁹ *Supra* note 8.

⁴⁰ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 24

⁴¹ *Supra* note 8.

⁴² Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 19.- Registration at the request of indigenous peoples Any people may, through its representative organization, apply to INDECOPI for the registration of collective knowledge possessed by it in the Public National Register or in the Confidential National Register.

⁴³ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 20

⁴⁴ *Supra* note 8.

⁴⁵ Law N° 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources, 2002, art 22.

biological diversity and the Collective Knowledge of the Indigenous Peoples of Peru.⁴⁶

- b. Subject matter of the Legislation: The Law has been made for the purpose of checking biopiracy and it has defined bio piracy as follows:

“For the purposes of implementing the present Law, “Biopiracy means unauthorized and non-remunerated access to and use of biological resources or collective knowledge of indigenous peoples by others, without the relevant authorization and in contravention of the principles established in the Convention on Biological Diversity and the rules in force on the matter. Such appropriation may occur by means of physical control, through ownership rights to products which incorporate such elements that were illicitly obtained or in some cases through invocation of such elements.”⁴⁷

- c. Rights Granted: The Law guarantees the Indigenous Peoples, inclusion and the right to represent themselves as it makes provisions for representative from the indigenous communities to be a part of the National Commission.⁴⁸
- d. Manner in which the legislation protects Indigenous Knowledge: The Law mandates the formation of a National Commission for the protection of Peruvian Biodiversity and Collective Knowledge.⁴⁹ The functions of this Commission include establishing and maintaining a Register of Collective Knowledge of Peru, providing protection against acts of bio piracy, objecting to patent applications granted abroad which are based on the Peruvian Collective Knowledge, technical evaluation of the patent applications presented abroad which are related to Peruvian Collective Knowledge, etc.

4. Current scenario

Having discussed the history of legislation and the important legislations relating to the protection of Indigenous Knowledge in Peru, it is prudent to discuss the current and actual situation of the indigenous people and their issues in Peru. As per the last census, there are

⁴⁶ Law N° 28216 Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (1 May 2004), art 1.

⁴⁷ Law N° 28216 Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (1 May 2004), Supplementary and Final Provisions, Third

⁴⁸ Law N° 28216 Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (1 May 2004), art 3.

⁴⁹ Law N° 28216 Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (1 May 2004), art 2

more than five million indigenous people living in Peru.⁵⁰ This means that the indigenous people represent more than half of the total population of Peru.

The Indigenous People in Peru are a part of the five percent total indigenous population in the world.⁵¹ Indigenous People in Peru are also an important and integral part of the indigenous population in the Amazon region trying to protect and preserve the biodiversity of the area. Their efforts are instrumental in achieving the Sustainable Development Goals as set forth by the United Nations.⁵²

It is not an unknown fact that the indigenous people are protectors and the cultivators of biodiversity, flora, fauna and the ecosystems of almost all territories which are traditionally, culturally and historically their territory. The Peruvian region is no exception to this. An outstanding example of this are the *Nuwas* belonging to the *Awajun* community. Basically, the *Nuwas* are a group of indigenous women of the *Awajun* community.⁵³

In order to protect their homeland and preserve the naturally occurring biodiversity and keep the ecosystem of their land in place, the *Nuwa* women have formed a collective and have come together to cultivate traditional medicinal plants and tea in the area.⁵⁴ Their success can be attributed to the indigenous knowledge passed on to them from their ancestors since time immemorial. They have been able to cultivate and grow more than hundred different varieties of medicinal plants.⁵⁵

This project was so successful that the Government of Peru in association with the International Fund for Agricultural Development funded this project in order to ensure sustainability of this business model.⁵⁶ This is just one of the many examples which beautifully demonstrate the capability and potential of indigenous knowledge to be useful for achieving the Sustainable

⁵⁰ Frederica Barclay, "The Indigenous World 2024: Peru", 38th edition of *The Indigenous World* March 22nd, 2024, available at < <https://www.iwgia.org/en/peru/5388-iw-2024-peru.html> > (last visited on June 21st, 2024)

⁵¹ United Nations Sustainable Development Group, "Wisdom of the elders: How the UN works to preserve indigenous knowledge in Latin America", August 9th, 2024, available at <<https://unsdg.un.org/latest/stories/wisdom-elders-how-un-works-preserve-indigenous-knowledge-latin-america>> (last visited on June 21st, 2025).

⁵² *Id.*

⁵³ *Supra* note 51.

⁵⁴ *Supra* note 51.

⁵⁵ *Supra* note 51.

⁵⁶ Ana Lucía Llerena, "Saving the Amazon: the story of indigenous women fighting climate change", *United Nations Peru*, March 27th, 2023, available at <<https://peru.un.org/es/225023-salvar-el-amazonas-la-historia-de-las-mujeres-ind%C3%ADgenas-que-luchan-contra-el-cambio>> (last visited on June 21st, 2025).

Development Goals. Not only is it testimony to the importance of indigenous knowledge but also testimony to the fact that with sincere efforts from all stakeholders, indigenous knowledge can be protected with prior informed consent and proper benefit sharing provisions provided the goal of the government is actually to do so.

As is true to all things, there are two sides to the story of indigenous knowledge, indigenous people and their rights as well. Indigenous people's land is one of the most important parts of their existence and identity. This has been explained eloquently by *Oswaldo Juep Danduck* of the *Awajun community* as follows:

*"Forests are everything to indigenous peoples. "An indigenous community without a forest would not be an indigenous community. The forest contains our ancestral indigenous knowledge. When the forest disappears, all this knowledge disappears, the traditions, the culture and even our language. With each forest that disappears, an indigenous community disappears along with it. Maybe the people will keep on living, but all the wisdom and the culture will be wiped away. Therefore, many indigenous leaders fight for the conservation of forests. Forests offer a school, a way of sharing knowledge gained over thousands of years. Our medicine, our cosmovision, our food, how we live, our crafts, how we dress, all is to be found in the forest. We do not only preserve the forest because it helps fight climate change."*⁵⁷

It is a fact to be noted that in Peru, more than forty percent of the land customarily belonging to indigenous (peasant) people constitutes at least twenty percent consists of the nation's designated mining sites.⁵⁸ This leaves the indigenous people in continual conflicts with the mining rights holders. This is notwithstanding the fact that Peru is a signatory to the ILO's Indigenous and Tribal Peoples Convention, 1989 as well as the United Nations Declaration on the Rights of Indigenous People, 2007 (UNDRIP).

It is not a secret that the past year has been a challenging one for the indigenous communities of Peru in the backdrop of their struggle to assert their territorial, customary and legislative (to

⁵⁷ Alice Van der Elstraeten, "PROTECTED FORESTS, PROTECTED COMMUNITIES: LAND TITLING IN PERU", *UN-REDD Programme*, available at <<https://www.un-redd.org/multi-media-stories/protected-forests-protected-communities-land-titling-peru>> (last visited on June 21st, 2024).

⁵⁸ *Id.*

an extent) right against the exploitative mining giants.⁵⁹ A testimony of this is the 2022 regulation that made mining easier by easing the restrictions on mining and land use. As a result, mining companies were able to encroach on and capture a considerable area of the Amazon forest, which as stated above is an important part of indigenous territory.⁶⁰

The parts of the forest which are traditionally *Awajún* and *Wampis* territories have been under attack for the past year by illegal miners for the purpose of goldmining. These illegal miners have the advantage of money and muscle power provided by the drug mafia in the Amazon basin.⁶¹ Having stated this, it is to be noted that not all miners are encroaching on the indigenous territory illegally; there is a section of miners who are able to take advantage of the 2022 regulation that eased the restrictions on mining in the area.⁶²

The injustice to indigenous people is not limited to the mining mafia and its tyranny. There also extend to the killings of indigenous activists fighting for indigenous causes and being inconveniences for the exploitative industrialists. For instance, the assassination of Santiago Contoricón Antúnes of the *Puerto Ocopa* community of the Amazon. He was popularly involved in the protests and actions against illegal mining and deforestation of indigenous lands for unauthorized coca cultivation.⁶³

Unfortunately, the assassination of Santiago Contoricón Antúnes was followed by the assassinations of two other indigenous leaders, namely, Quinto Inuma Alvarado of the *Kichwa* community and Benjamin Flores Ríos of the *Kakataibo* community. They were both killed on account of defending indigenous land and rights from the extractive mining, drug trafficking and gold mafia.⁶⁴

⁵⁹ Reuters, "Peru proposes 'new approach' to mining to combat economic disparities, conflicts", *Americas*, September 30th, 2022, available at <<https://www.reuters.com/world/americas/peru-proposes-new-approach-mining-combat-economic-disparities-conflicts-2022-09-30/>> (last visited on June 21st, 2024)

⁶⁰ *Id.*

⁶¹ Michelle Carrere "Illegal mining that allows money to be laundered from drug trafficking is expanding in the triple border regions of the Amazon ". *Mongabay*, 18 August 2023, available at <<https://es.mongabay.com/2023/08/mineria-ilegal-lavar-dinero-narcotrafico-triple-frontera-amazonia/>> (last visited on June 21st, 2025).

⁶² *Supra* note 50.

⁶³ TERU Support Group, "Ashaninka Assassination Draws Attention To Indigenous Insecurity Threats", April 16th, 2023, available at, <<https://perusupportgroup.org.uk/2023/04/ashaninka-assassination-draws-attention-to-indigenous-insecurity-threats/>> (last visited on June 21st, 2025).

⁶⁴ *Supra* note 50.

V) Conclusion

The Peruvian legislative approach to protecting Collective Knowledge is on a whole, one that makes sure that Indigenous Communities are involved in every step of the way for protecting their Collective Knowledge. The Laws make sure that the State actively takes initiative in promoting the protection of Peruvian Collective Knowledge.

The Researcher has identified a few merits and demerits of the Laws in Peru. The merits however out do the demerits. Only demerits has been identified which is that the Laws only provides protection to Collective Knowledge related to bio diversity and biological resources and makes no provisions for other types of Collective Knowledge like art, folklore, politico social systems, etc.

There are several merits: (a) The open access to the National Public Register enables the inventors or prospective patent applicants to check if the Collective Knowledge (on which they have based their invention or used it in any way) has been registered in the Register and they can take action accordingly (obtain permissions for access, etc), (b) The National Confidential Register, which contains the details of the Collective Knowledge, can be accessed only by a person who has been given the permission to do so by the Community concerned and this ensures that a 'trade secret like' protection is given to Collective Knowledge, (c) The Local Registers are an appreciable effort which ensures that authentic information about Collective Knowledge gets registered, (d) The Laws make sure that the local communities are informed of the progress and commercial aspects of the projects developed with the help of the Collective Knowledge of the communities and this provision ensures inclusion of the Indigenous Peoples in the whole process. (e) The requirement that the development projects undertaken using finance from the Development Fund, are to be planned and deliberated on by the Indigenous Communities is a very unique and thoughtful provision for ensuring actual improvement and impactful development.

Having stated the merits and demerits of the legislations, it is pertinent to state that the laws and legislative processes are to be judged in the context of the actual happening on the ground.

As has been stated previously, their land is the indigenous peoples most valued asset

worldwide. Discussing and establishing the legislative norms and the merits and demerits of the legal regime pertaining to protection of indigenous knowledge is instrumental in establishing the intent of the legislature, understanding of the indigenous cause, the intention of a country in general to make efforts to accommodate indigenous people and to understand their way of life.

Notwithstanding the above mentioned, it is pertinent to note that the geography and ecosystem of Peru is such that these make Peru a very attractive option for miners and other exploitative industries. Even though the government has made efforts to control illegal mining and associated activities, it has proven difficult to deal with the mining mafia and the gold mafia in the Amazon region.

The indigenous people's efforts to protect their land have been commendable and unparalleled. The irony of this situation is that (as mentioned above) indigenous knowledge, know-how and cooperation of the indigenous communities has been and is being used to achieve the Sustainable Development Goals as laid out by the United Nations, specifically related to climate action, preservation of life below water, preservation of life on land and more specifically, building partnerships for attaining the seventeen Sustainable Development Goals.

The effort behind writing this research paper had been to bring out the legislative nuances when it comes to the protection of indigenous knowledge in Peru in the backdrop of actual situation on ground with respect to the implementation of basic rights being granted to the indigenous people. One of the most important rights being the right to be in control of and enjoy their ancestral land. However, the researcher acknowledges that in order for assessing the efficacy of the above discussed laws, further qualitative and field research is required to come up with ways and means to better the legislative and implementational framework related to the protection of indigenous knowledge in Peru.