

# TRADITIONAL KNOWLEDGE AND ITS PROTECTION

Pradnya Paturkar

Faculty of law, pursuing PhD in IPR from University of Mumbai, Mumbai India.

**Abstract:** This research paper discusses about TK and its protection. The most important thing to be understood is that the TK is formed due to the indigenous people, due to their survival instinct and then the geography of the place helps to imbed the knowledge; this has led to conservation of environment. The conflicting objective of the international convention does not provide appropriate legislations. Thus traditional knowledge and its associated forms can be well protected under Sui generis form. It mainly focuses on the recommendations that the legislations at international and national should be provided, which would help to curb the bio piracy and provide appropriate protection. The paper gives various recommendations with reasons, would help the government and the international organisations to formulate the legislations based on it.

**Keywords:** traditional knowledge, its associated forms, sui generis legislation recommendations, IPR, bio piracy, prior informed consent.

## I. INTRODUCTION:

The present global era is all about knowledge and data collection; utilisation of the data for commercial purpose. Here traditional knowledge and its associated forms is the knowledge which is freely available and it is utilised by the corporates for their commercial benefits. Traditional knowledge is the knowledge which is researched and developed by the Indigenous communities because of their survival instinct. It not only helped the indigenous community to grow socially but also economically. Their survival instinct along with the geography of the place has developed the traditional knowledge. The indigenous communities have always considered it sacred and passed the knowledge orally through one generation to another. Traditional knowledge has a very high commercial value therefore the corporates have a very high stake in the market globally. This has invested in to many International Conventions, making the member states to form the national legislations. But the conflicting objectives<sup>1</sup> of the legislations at international and national level have caused insufficiency in protection of the TK and associated forms under IPR, thus sui generis formation of legislations are suggested. The protection provided Under IPR is itself conflicting because under IPR knowledge or research should be unpublished and original, whereas the owner should get the benefit of monopoly from the creation for commercialisation; but in case of traditional knowledge it is already published and the indigenous community/ people are not provided with benefits and recognition. By ignoring the existing facts that it is not only ruining the cultural identity of the country, indigenous community but also endangering the conservation of the environment and natural resources.

The maximum commercialization of traditional knowledge is made by pharmaceutical, cosmetics and agricultural industry etc. Since the developed countries have made various international conventions for increase in the trade relations between the countries. The protection of the traditional knowledge and its associated knowledge also raised. Thus the protection is provided under the patents Act of the Intellectual property Act.

Here the on-going debate is that, the traditional knowledge is a published, that means it's not new, thus cannot be protected under the Patent Act. As the indigenous communities have survived the environment and developed its knowledge and folklore, they are the true owners. Thus the traditional knowledge is not only known to the whole community but some knowledge is also known to the non- indigenous community. Since Patent Act, requires three criteria to be fulfilled i.e. new, non-obvious, useful, unless it cannot be granted. In case of traditional knowledge and its associated forms, it is not new though it is useful.

Other problems that are discussed in TRIPs agreement is made with an intention of commercialisation or increase the trade favouring developed nations and not protection of the traditional knowledge. At international level while discussing the protection of traditional knowledge and enacting legislations for it, the conflict between convention on Biodiversity and TRIPs is discussed. Currently the legislations and legal provisions available are insufficient to provide the protection.

## II. THE CHALLENGES TO BE STUDIED TO GIVE PROPER PROTECTION TO THE TRADITIONAL KNOWLEDGE AND ITS ASSOCIATED FORMS.

- a. The rights of the indigenous people need to be protected.
- b. The indigenous people should be the owner of the indigenous knowledge/ traditional knowledge and its associated forms. They should also be considered as the owners of the genetic resources from the traditional knowledge obtained from the indigenous knowledge.
- c. Sui generis legislation is required for the protection of the traditional knowledge and the rights of indigenous people

<sup>1</sup> TRIPs and CBD conventions; where in TRIPs agreement the provisions are in favour of enhancing the trade then protection of TK; whereas under CBD it helps to protect the traditional knowledge and indigenous community/ people.

- d. International conventions should be made with an intention of protecting indigenous people/ community and traditional knowledge and its associated knowledge. The commercial benefit should be given secondary priority.
- e. The prospective problems that need to be addressed with appropriate remedies in the legislation are as follows.
- f. The future challenges like conflict between the indigenous and non- indigenous communities
- g. Conflict between the indigenous community and the corporates,
- h. The protection of the third world countries from the bio piracy of their traditional knowledge and exploitation of indigenous people and threat to their cultural identity.
- i. The threat to the biosafety.
- j. Threat to the lands of the indigenous people, their culture and folklore.
- k. Threat to the conservation of environment.
- l. The destruction of the indigenous community and their traditional knowledge due to encroachment of their land.

### III. WHAT IS THE NEED OF ENACTING LEGISLATION

The very first need of enacting legislation is; large amount of stake is involved globally in the Intellectual property so already the root of bio piracy is seeded. So complete protection of traditional knowledge without commercialisation is not possible, and importantly this traditional knowledge provides various better medicines for the incurable diseases with the help of indigenous community. Therefore if the protection and commercialisation of the traditional knowledge should go hand in hand. If complete stoppage of commercialisation of traditional knowledge is allowed, then it would lead to increase in bio piracy.

The second reason is that already traditional knowledge due to its high economic value is utilised under the IPR.

The third most important reason is; that traditional knowledge is commercially exploited under the IPR which is posing a huge threat to the rights of the indigenous communities and their traditional knowledge.

The fourth important reason is that, the indigenous community are the true originators of the traditional knowledge. Due to their survival instincts and immense faith or spiritual reasons they have helped themselves to acquire the knowledge and utilise it for the wellbeing. The conservation of the environment as whole means the plants, forests, animals etc. is due the indigenous communities. Therefore it is the duty of the State to protect it.

The fifth important reason is that, they should be protected or else the destruction of the indigenous communities and their knowledge will cause the direct destruction of the environment and extinction of the knowledge. We should remember that the knowledge is gathered and researched by them, so they are undoubtedly the originators of the knowledge and the place they have developed.

The sixth reason is that the commercialisation is causing huge impact on their survival<sup>2</sup> leading to the conflict between Indigenous and Corporates and Indigenous and non- Indigenous communities.

The global market for traditional knowledge is huge thus an international sui generis legislation framework and guiding lines are required. In other words international legislation is required for the national framework. The benefit sharing by the corporates would help to resolve the problems, it means the protection of the indigenous community and their knowledge and commercialisation would go hand in hand. This would not hamper the on-going process of commercialisation and would be able to protect the traditional knowledge and conservation of environment.

### IV. WHY SUIGENERIS LEGISLATION IS REQUIRED—

The traditional knowledge and its associated forms can be better protected under the sui generis legislation which should not be included under the heading of IPR. The present legislations are inefficient and are not helping the protection of traditional knowledge. The study shows that provisions are enacted in order to enhance the trade and helping the corporates rather **making the balance between the protection of traditional knowledge and its commercialisation.**

The sui generis legislation should be made with the objective of protecting the indigenous communities and their traditional knowledge. If in case any commercialisation is made it should be made with complacent of benefit sharing agreement and with prior informed consent of the indigenous communities/ people.

The most important role is played by the State. It is the liability of the State to protect the indigenous community and commercial exploitation of traditional knowledge and its associated forms. The global trade nexus and the inefficient legislations and conventions causing actual threat to the traditional knowledge and its associated forms. Therefore to nullify the negative effect of the conventions and its mandatory provisions on the member states, it is significant that an international convention protecting the traditional knowledge and indigenous community is required, with a clear objective towards protecting it not under IPR.

The main issues that revolves around the protection of traditional knowledge is, that the third world countries and underdeveloped countries are highly affected due to the conflict of interest in the objectives of international conventions, which pressurises the member states to follow the international convention provisions in order to be in the Global trade. The third world countries **especially**<sup>3</sup> losses their cultural identity and TK and its associated forms without any recognition and much commercial benefit.

<sup>2</sup> As under IPR it used as an exclusive right, because of which even the indigenous communities / people cannot use it.

<sup>3</sup> Because such countries does not have good legislations.

It is important to understand that any kind of legislation is made should be with an objective of protecting the rights of the indigenous people/ communities and then traditional knowledge and its associated forms.

The available legislations are causing high global trade and bio piracy and also violating the indigenous humans' rights. The after effects of this is that ---

- a. The destruction of environment, forest areas, lands;
- b. The TK is endangered and thus many other unknown TK's is not shared by the indigenous communities due to the breach of trust caused by the corporates or any person with the indigenous communities/people and not given the right credit and benefit without prior consent of the actual owners lead to severe friction and dispute between the indigenous communities and the non- indigenous communities/ corporates.
- c. Bio piracy hits hard on the relationship between the indigenous and non –indigenous communities.
- d. The non- introduction of the indigenous communities/ people in the making of the International convention and national legislations or legal provisions, does not help to understand the root problems of the indigenous communities/ people.

## V. RECOMMENDATIONS AND CONCLUSION:

- a. International convention should be made with a primary objective of protecting traditional knowledge and indigenous community's rights and the secondary objective should be given to the commercialisation of the traditional knowledge. Considerations of all the local protocols and indigenous group/ people's objective and rules while enacting the international conventions should be made.—the emphasis should be given on the international convention or protocols so that it would guide the national legislations to protect the TK and associated forms and be a part of the global trade. or
- b. The Nations should be allowed to make their own legislation for protection of the indigenous communities' rights and the traditional knowledge commercialisation with mandatory provisions of the benefit sharing and the prior informed consent. The provisions should be made with additional objective like the environmental conservation. Challenges faced in that country related to traditional knowledge. Inclusion of the indigenous groups/ communities should be made while enacting the legislations.
- c. The economic benefit should be provided in the betterment of the indigenous communities by making a National indigenous fund utilised only for the group of indigenous with whom the agreement is made. The whole expenditure should be made transparent by providing the information on the website. Various programs could be conducted for the betterment of the indigenous people.
- d. The most significant part of the legislation should be the Dispute resolution body. The body should make use of arbitral methods, but the matter should be decided within 6months. The basic procedure should include the appointment of the investigator by the government along with the investigator from the indigenous community/ ies with whom the breach or violations of their rights have caused. The report should be submitted to the Dispute resolution body. After the submission of the report the matter should be taken into consideration by the said Body and give decision within 6 months. The decision given by the Body should be published on the official website of the government. Here though the report is submitted by the investigators; still the onus is on the corporates.
- e. The Suigeneris legislation should not provide protection under IPR rather a separate provisions should be made to protect the traditional knowledge or genetic resources. In other words the traditional knowledge should not be protected under any branch of IPR. For example if any traditional knowledge is utilised for the formation of the medicines it is protected under traditional knowledge branch of the legislation. So that no bio piracy can be caused under Patents Act. The same should be made in case of associated forms of traditional knowledge.
- f. A whole new branch should be made in order to protect traditional knowledge covering the biotechnology and genetic resources as it would help to avoid the following problems of, exclusiveness and monopoly under the IPR.
- g. The legislation should not be retrospective. Henceforth, already caused bio piracy cases cannot cause any legislative confusion and technical problems.

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