EXTENDING GEOGRAPHICAL INDICATION PROTECTION TO TRADITIONAL KNOWLEDGE

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INTRODUCTION

The world that we live in has a bounty of cultures and traditions which are unique to their own regions. Especially, India is a hub for these cultures and traditions. In the recent areas as Information Technology has made its way into the houses, the world has become more and more interconnected and thus has risen the spread of knowledge. One such knowledge is Traditional Knowledge (Hereinafter called as 'TK').

Traditional knowledge is defined by the World Intellectual Property Organization(WIPO) as "*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 or spiritual identity.*"

There has been an increase in the concerns about TK as there has been a growth of recognition of TK by various countries due to its role in the conservation of biodiversity, biopiracy which implies an unauthorised use of a bioresource, lack of access and benefit sharing by the indigenous communities resulting in violation of human rights of indigenous people.

However, the international community has only recently begun to recognise and safeguard traditional knowledge. A model law on folklore was adopted by WIPO and UNESCO in 1981. The FAO adopted the idea of farmers' rights into its International Undertaking on plant genetic resources in 1989, and the Convention on Biological Diversity (CBD) emphasised the need of promoting and preserving traditional knowledge in 1992.[1] Despite these efforts, which have lasted for two decades, there are still no conclusive, broadly supported solutions for the conservation and advancement of traditional knowledge.

The Preservation of National Heritage is a duty imposed by the Constitution of India under Article 51 (A), Fundamental Duties, – It states that- 'It shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture.'[2] Also, Article 30 empowers minority groups to establish and administer their educational institutions. The minorities shall have the right to conserve their language, script, and culture. This right is subject to public order, morality, and health.[3]

[1] Ghazala Javed, Ritu Priya & Deepa V. K., *Protection of Traditional Health Knowledge: International Negotiations, National Priorities and Knowledge Commons*, 6 SOCIETY AND CULTURE IN SOUTH ASIA 98 (2018).

[2] India Const. art. 51, cl.(A).

All these factors necessitate the recognition and protection of TK on an institutional level. However, TK is a multifarious area and thus arises the problem of protection of TK. TK can't be protected through the modern forms of intellectual property(IP) as it's a collective right and not a private right like modern IP. The protection of TK has the possibility to defeat the purpose of for which the protection was sought due to the nature of TK. Thus, there is a need to protect TK in a very precise manner, so that the essence of Traditional knowledge is not destroyed. One such protection to TK can be through Geographical Indication(hereinafter called 'GI').

GI is defined by WIPO as "*sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.*" GI has the potential for protection and promotion of TK. The people possessing traditional knowledge have a right to access under article 21[4] of the constitution of India. [5]

This paper looks at the way the Geographical Indication regime can be used for the protection of TK. The first part looks at the need for protection of TK and assess the need for special protection of TK. The second part looks at the existing regime under WIPO and in India for the protection of TK. The third part evaluates the way in which GI can be used to protect TK and the international best practices for the protection of TK through GI. The fourth part looks at the recommendations through which the legal regime can be developed to ensure better protection of TK through GI.

NEED FOR PROTECTION OF TK

The term "biopiracy" has no widely accepted meaning. It is described as "the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions seeking exclusive monopoly control (typically patents or plant breeders' rights) over these resources and knowledge" by the Action Group on Erosion, Technology, and Concentration (ETC Group).

Several incidents using traditional knowledge have garnered attention on a global scale. The topic of traditional knowledge has therefore been elevated in the wider discussion around intellectual property. The problems that might occur when patent protection is given to ideas

[3]Indian Const. art.30.

[4]India Const. art. 51

[5]Sheela Bars v. Union of India, 3 S.C.C. 632.

pertaining to traditional knowledge that is already in the public domain are shown by the cases of turmeric, neem, and ayahuasca.

Equity considerations - the custodians of traditional knowledge should receive fair compensation if the traditional knowledge results in commercial gain;

Conservation concerns the protection of traditional knowledge contributes to the larger goal of conserving the environment, bio-diversity, and sustainable agricultural practises; Preservation of traditional practises and culture - protection of traditional knowledge would be used to raise the profile of the knowledgeable; Preservation of traditional practises and culture.[6]

ISSUES IN PROTECTION OF TRADITIONAL KNOWLEDGE

There are various issues that arises in the protection of TK which will be discussed and analysed by the author. One of the major issues that arises is the way in which traditional knowledge must be defined. The reason for this problem in defining TK stems from the fact that TK is passed from generation to generation orally and is not codified. There are a variety of definitions available, however those definitions are not widely accepted.

There has been several concerns of the Traditional knowledge holders that have been listed by WIPO like: lack of respect for traditional knowledge and those who hold it; the loss of traditional life styles and knowledge; the unwillingness of younger community members to continue traditional practices; the misappropriation of traditional knowledge, such as its use without acknowledging its value or in a derogatory manner; and the failure to recognise the necessity of preserving traditional practices.

CASE STUDY OF TURMERIC

The ginger family plant turmeric (Curcuma longa) produces saffron-colored rhizomes that are used as a spice to flavor Indian cuisine. Additionally, it possesses qualities that make it a useful component in medications, cosmetics, and as a colour dye. It has historically been used as a medication to treat burns and rashes. • On "usage of turmeric in wound healing," two Indian nationals working at the University of Mississippi Medical Center were awarded US Patent No. 5,401,504 in 1995. • The US Patent and Trademark Office (USPTO) was contacted by the Indian Council of Scientific and Industrial Research (CSIR) to reexamine the patent. •

[6] WIPO (1999), "*Intellectual Property Needs and Expectations of traditional knowledge Holders"* Geneva: World Intellectual Property Organization.

According to CSIR, the medical usage of turmeric is not new because it has been used for hundreds of years to treat wounds and rashes.

Documentary proof of traditional knowledge, such as an old Sanskrit manuscript and a 1953 study published in the Journal of the Indian Medical Association, was used to support their assertion. The USPTO sustained the CSIR objections and cancelled the patent notwithstanding the patentees' arguments.

Observations: The turmeric case was historic since it marked the first successful challenge to a patent based on traditional knowledge from a poor nation. The Indian Government estimates that the legal expenses spent by India in this lawsuit would be close to $10,000 USD.

INTERPLAY BETWEEN GEOGRAPHICAL INDICATION AND TRADITIONAL KNOWLEDGE

The TRIPS Agreement of the WTO, which went into effect in 1995, was the first legal document to utilise the phrase "geographical indication." The TRIPS Agreement's Article 22(1)[7] defines geographic indications (GIs). GIs may be related to industrial, manufactured, natural, or agricultural products.

Article 22(1) says that "indications, which identify a good as originating in the territory of a Member, or a region or a locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin." In India, GIs are registered and protected under The Geographical Indication of Goods(Registration and Protection) Act, 1999(hereinafter called as "The GI act")[8]. In this act GI is defined as "*, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be*." Goods are defined as "*any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff*"

These definition of good and GI imply that they attribute the identification of a good to its geographical location.

[7] General Agreement on Trade related aspects of Intellectual Property, 1869 U.N.T.S. 299. [8] The Geographical Indication of Goods(Registration and Protection) Act, 1999, India Code (1993).

Now, if we look at the definition of traditional knowledge, WIPO defines TK as *"Traditional knowledge (TK) is 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 or spiritual identity*."[9]

If we look at the suggestions made for the protection of TK at national level they have beeb mostly limited to protection of pant varieties and patent law. There has not been much focus on the potential of GI for the protection of TK.

In a study by Panizzon and Cottier it was observed that:[10]

"Traditional Knowledge (TK) and Geographical Indications (GIs) share a common element insofar as they both protect accumulated knowledge typical to a specific locality. While TK expresses the local traditions of knowledge, GIs stand for specific geographical origin of a typical product or production method. GIs and TK relate a product (GIs), respectively a piece of information (TK), to a geographically confined people or a particular region or locality."

Another argument for the way in which GI and TK are on a common conjecture is that In practise, human and/or natural components are the outcome of conventional, standard procedures created and adopted into production by local communities. Wines, spirits, cheese, handicrafts, watches, silverware, and other goods with regional indications are as much manifestations of local culture and communal identification as other parts of traditional knowledge.[11]

For example: The Thewa Art of Pratapgarh district in Rajasthan which has been given GI Tag in 2014 under the GI act. The artworks that fall under the class of precious metals and their alloy and goods have

become famous worldwide. In Thewa, gold is emboldened on glass to create jewellery and other similar items. This knowledge of how this is being done actually rests with the traditional families of Pratapgarh, Rajasthan. This has been a result of thousand of years which the communities have spent in order to develop and perfect their art forms. In

[9] Traditional Knowledge, https://www.wipo.int/tk/en/tk.

[10] LEGAL PERSPECTIVES ON TRADITIONAL KNOWLEDGE: THE CASE FOR INTELLECTUAL PROPERTY PROTECTION | Journal of International Economic Law | Oxford Academic, https://academic.oup.com/jiel/article-abstract/7/2/371/794793.

[11] Michael Blakeney, *Protection of Traditional Knowledge by Geographical Indications*, 3 INT. J. OF INTELLECTUAL PROPERTY MANAGEMENT 357 (2009).

this context GI is already protecting the good, however it will be wrong to say that GI is not capable of protecting the knowledge behind the creation of Thewa art.[12]

In the above example it is evident that GI and TK are both used for preserving rights of a community and are a collective right. Geographical Indications never provide an exclusive monopolistic right over the use of specific information, but rather restrict the class of persons who can use a certain sign. They are not transferrable at any cost from one owner to another, but are recognised till the community maintains the collective heritage. Geographical Indications must be renewed on a regular basis, which helps to ensure that the product's quality is maintained. Natural, traditional, and handmade items of all types can have their commercial and monetary worth boosted if their unique traits can be traced back to their geographical origin. This is very effective in the sense that it makes the communities self- sufficient which will be proved through further case study in this paper. Geographical Indications are a particularly ideal kind of Intellectual Property since communities rely on communal traditions and a collaborative decision-making process. Furthermore, they safeguard and honour traditions while enabling them to adapt and improve. They are intended to recognise and honour the reputation and goodwill that have been created over many decades, if not centuries.

In addition to this, GIs can be kept in perpetuity as long as a community maintains the traditions that ensure the distinct quality of a local product. This overcomes the limitations of conventional systems of intellectual property protection. On the other hand, proponents of TK preservation emphasise its dynamism and ability for development, which is not always a property of TK.

The public appreciates the unique and appealing aspects of items created utilising traditional procedures and community knowledge, which may also be symbolised by the indication of source used to identify the products. Improved promotion and exploitation of the notion of geographical indications will allow for greater protection of the economic and cultural interests of traditional knowledge communities and organisations. For example, Thanjavur paintings in Tamil Nadu, Bastar iron craft in Chhattisgarh, Hyderabad Haleem in Telangana, and Warli paintings in Maharashtra are all items derived from TK that boost local people' economic capacity and permit the preservation of such TK.Geographical markers are especially important

[12] Press Trust of India, *Rajasthan's "Thawa Art" gets GI tag*, BUSINESS STANDARD INDIA, June 16, 2014, https://www.business-standard.com/article/pti-stories/rajasthan-s-thawa-art-gets-gi-tag-114061601200_1.html.

when supplies are made on a local scale and items are sold directly to customers. They also assist in improving their reputations and selling items directly to end customers. They also improve their ability to compete with major firms.[13]

PRESENT LEGAL FRAMEWORK IN INDIA FOR PROTECTION OF TK In this head the author has looked and analysed the current legal regime for the protection of

TK in India and have identified and elucidated the issues and challenges that prevail in India in relation to protecting the traditional knowledge posed due to its characteristics. There is no specific legislation in India for the registration and protection of TK. However, there are scattered legislation that seek to protect TK. These legislations are elaborated as follows:

1. THE PROTECTION OF PLANT VARIETIES AND FARMER'S RIGHTS(PPVFR) ACT, 2001

The primary concerns of the Plant Variety Protection Act of 2001 and the Plant Variety Protection Rules of 2003 are the protection of plant breeders' rights over the new varieties they develop and the rights of farmers to register new varieties as well as to save, breed, use, exchange, share, and sell the plant varieties that these latter have developed, improved, and maintained over many generations. a different "sui generis" system that protects the rights of formal inventions made by plant breeders as well as unofficial systems of knowledge and farmers' traditional plant varieties. The key sections in this Act that apply to ABS are those that deal with the preservation of farmers' rights and the suggested means for compensating or sharing in the benefits of local communities' or farmers' contributions to the creation of new varieties.

The Indian law on PPVFR is the only effort made by a developing nation to implement the idea of farmers' rights as stipulated in the international treaty. Although there are several restrictions on this statute.

2. THE PATENT (AMENDMENT) ACT, 2005

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[13] Rajesh BL, Anagha, Varsha S, *Geographical Indication as a tool for protecting Traditional Knowledger*, (2018), http://www.penacclaims.com/wp-content/uploads/2018/09/Rajesh-BL-new.pdf.

farmers' rights and the suggested means for compensating or sharing in the benefits of local communities' or farmers' contributions to the creation of new varieties. The Indian law on PPVFR is the only effort made by a developing nation to implement the idea of farmers' rights as stipulated in the international treaty. Although there are several restrictions on this statute. Due to the fact that it does not conflict with other clauses in this Agreement, such a clause is completely acceptable under TRIPS.

A number of significant measures were also included by the recently approved Patents (Amendment) Act 2005. Dealing with post-grant opposition further specifies that any interested party may give notice of opposition to the Controller in the prescribed manner on certain specified grounds at any time after the grant of the patent but before the expiration of a period of one year from the date of publication of grant of patent. The following two grounds are among the eleven grounds provided for such post-grant opposition: that the source and geographic origin of the biological material utilised for the whole specification are not disclosed or are incorrectly mentioned.

3. THE BIOLOGICAL DIVERSITY ACT, 2002

In order to guarantee a fair distribution of benefits resulting from the utilisation of these resources and knowledge to the nation and its people, the Biodiversity Act of 2002 principally concerns access to genetic resources and related information by foreign persons, organisations, or businesses. The Act established rules for using biological resources and traditional knowledge based on three different criteria.[14]:[15]

1. Foreign nationals, businesses, and NRIs have access to biological resources and traditional knowledge based on "prior consent of National Biodiversity Authority," 2. Access to Indian citizens, businesses, associations, and organisations that are registered there under the condition that they "previously notified the State Biodiversity Board" about their concern, and

3. Exemption from previous clearance or notification for local residents and communities, including farmers and others engaged in biodiversity cultivation and vaids and hakims, who have been practicing, indigenous medicines.

[14] Pratibha Brahmi, Sanjeev Saxena & B. S. Dhillon, *The Protection of Plant Varieties and Farmers' Rights Act of India*, 86 CURRENT SCIENCE 392 (2004).

[15] THE BIOLOGICAL DIVERSITY ACT, 2002, ACT NO. 18 OF 2003.

4. TRADITIONAL KNOWLEDGE DIGITAL LIBRARY(TKDL)

The goals of TKDL are as follows:[16]

aims to stop the awarding of patents for goods created using TK when there has been minimal to no creative step.

aims to serve as a link between data preserved in historic Sanskrit and patent examiners (with its database containing information in a language and format understandable to patent examiners) access to information that is not readily available to patent examiners makes it less likely that patents will be issued for "inventions" that simply include little or inconsequential adjustments.

The Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology, and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH), Ministry of Health and Family Welfare, of India, collaborated on the Traditional Knowledge Digital Library (TKDL) project, which was started there in 2001. At the CSIR, it is being put into practise. Specialists in traditional medicine (Ayurveda, Unani, Siddha, and Yoga), patent examiners, IT experts, scientists, and technical officers made up the multidisciplinary team that worked to create the TKDL for Indian Systems of Medicine.[17]

Extending the protection of GI for the protection of TK

The author has identified the kinds of traditional knowledge that could be protected through GI. Case studies have been presented in this part to highlight the way in which communities have become self-sufficient when given the protection of GI. This chapter also looks at the limits for the protecting of TK through GI.

Limitations of Geographical Indications for the protection of Traditional Knowledge: The usage of Geographical indication as a tool to protect traditional knowledge has a few limitations that prohibit it from being used as the extensive tool to protect traditional knowledge. For example, the Ayurvedic system of medicine does not have any specific geographical area to which it belongs and hence a geographical indication cannot be used. Fourthly, geographical indication only signifies the original source of the good, and if such a source is not important to the consumer, the protection of such goods by means of a geographical indication is

[16]About the Traditional Knowledge Digital Library, https://www.wipo.int/meetings/en/2011/wipo_tkdl_del_11/about_tkdl.html.

[17] *Id.*

immaterial. Therefore, it becomes an obligation that the good must possess and enjoy a good commercial reputation to use geographical indication as a tool of protection However, despite the economic benefits and preservation of such knowledge, there are certain limitations to protecting TK under the system of GIs.

Firstly, GI necessitates that protection can only be granted to a particular product. TK, however, comprises of much more than just tangible products derived from age-old knowledge. These include, for example, rituals, legends, stories, songs, folklore, etc. which cannot be sold as products arising from a geographical region.

Secondly, GI does not actually protect the product; it merely prevents misleading and false indication of origin of other products. For example, Kashmir Pashmina is a GI protected product for a variant of spun cashmere. If an unregistered user of the GI tries passing off another variety of cashmere as Kashmir Pashmina, action can be taken against such a person. However, if such a person uses the exact same material and processes made in the creation of Kashmir Pashmina and sells the finished product without hinting it to be Kashmir Pashmina, taking action for infringement of GI rights would prove much more difficult against such a person as he has not indicated his product to be a registered GI, though he has used the knowledge which goes into the creation of such a GI registered product.

Thirdly, obtaining GI protection for knowledge which would not be utilised commercially is of little use. A case in point is that of Muga Silk from Assam, which has obtained a GI tag for its glossy and golden tint and its durability. Though registered as a GI in 2006, Muga silk had no registered users at least until 2012. With no registered producers of Muga silk, prices of the same shot up. As creating the silk is labour-intensive, the market for the silk is selective, and the weavers belong to poorer communities, this created a

lack of incentive for Muga silk weavers to create the product for fear of not finding willing buyers for the now highly expensive product. Thus, while Muga silk received GI protection, the non-utilisation of such registration commercially, caused the holders of such knowledge from producing the silk any further, doing little to protect the weavers' TK and instead, playing a detrimental role.

CONCLUSION

This part looks at the international best practices for the protection of TK using GI and would evaluate whether these practices could be incorporated into the Indian regime. After a comparison of Indian law with foreign jurisdictions and international standards, reforms have been suggested for the development of GI regime for the protection of TK.

At all times, it should be recognised that GIs regulations only protect product identification. Indeed, intellectual property laws seldom safeguard knowledge as such. Trade secrets and patent law are exceptions to this rule. However, giving a local community or individual holder of TK the ability to exclude other parties from the unlawful use of its TK designations would not only better balance the distribution of benefits from that TK's usage. Finally, expanding the area of registered GIs protection under TRIPS would demonstrate to poor nations the practical benefit of an international IP framework and offer rationale for TRIPS implementation.