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Protection Of Traditional Knowledge Through Intellectual Property Rights
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PROTECTION OF TRADITIONAL KNOWLEDGE THROUGH INTELLECTUAL PROPERTY RIGHTS

Sunil Dutt Chaturvedi[1] & Rohit P. Shabran[2]

Abstract

Traditional Knowledge (TK) and indigenous people, have all become popular terms in worldwide talks about sustainable improvement. The notion of TK is extremely important to the global society. TK is prevalent in many disciplines, including medicine, crafts, agriculture, biological variety, and so on. Apart from this, their distinctiveness arises in the fact that it become the subject-matter of attention of numerous global level groups, each of which perceives TK based on their purposes and objective. As there has been lack of sui generis laws for safeguarding Traditional Knowledge, it is protected under umbrella of IPRs, through its several forms, in limited way. Indeed, the protection of TK is presently the focus of WIPO policy-making. As a result, and as might be predicted, the safeguarding of TK will soon be structured under IPR law. TK and IPR are both supplementary and complimentary to one another. The goal of TK is to encourage people's interest and defend indigenous rights against bio-piracy. IPR, on the other hand, grants an organisation monopoly over the goods or service and allows it to get benefit. This article examines the international and Indian IPR systems to see if they are capable of dealing with traditional knowledge or whether they need be altered to include a separate legislation to preserve traditional knowledge and finding the solutions of problems present in safeguarding it. Furthermore, widespread commercialization and unauthorised use of TK has been noted as necessitating the need to filter and safeguard it.

Keywords- Traditional Knowledge, Intellectual Property Rights

I. Introduction

Traditional knowledge and intellectual property have historically followed different paths for a significant amount of time. IP refers to a broad category of positive legal systems, some of which date back to the Middle Ages, like patent law, and others which are more contemporary, such integrated circuits legislation. The invention, use, and exploitation of mental work are governed by IPR laws.[3] A variety of property rights, such as copyright, patents, designs, trade secrets, and trademarks, are included under "intellectual property." Though various types of

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[3] L. Bently & B. Sherman, INTELLECTUAL PROPERTY LAW 1 (2009).

intellectual property vary in numerous ways, they all have one thing in common: they all provide property protection for intangibles like concepts, ideas, and information.[4] Although traditional knowledge predates IP by a great deal, it has only just been acknowledged as a concept in Western research. Previously, it was nearly linked with anthropology before becoming a separate idea in the 1980s.[5] Due to their ability to confer exclusive ownership rights over abstract items like DNA sequences, algorithms, and signs, these various systems are categorised together.[6]

It is common to describe traditional or indigenous knowledge as having a dynamic trait, but there hasn't been much specific examination of the characteristics of indigenous innovation framework which are probably in charge of this dynamism. Rather, there is a propensity to view indigenous knowledge as practical knowledge expressed in propositional form, whether explicitly or implicitly. Innovation is frequently understood to be businesses creating new goods and procedures.[7] Indigenous knowledge incorporate a wide range of knowledge which are created, preserved, and transferred from one generation to another by Indigenous peoples. According to Hansen and Vanfleet, it covers procedures and innovations such as seed treatment, storage techniques, and planting and harvesting implements. This information is described as "traditional," not ancient or immemorial, but rather as "based on traditions." It is considered traditional merely because it is made in a way that honours the customs of the communities it is found in, wherever those communities may be. This is how TK can be clearly distinguished from worldwide knowledge, which is derived from global experiences and blends economic choices, philosophical beliefs, and western scientific findings with those of other widely distributed civilizations.[8]

TK is concerned with the processes involved in creating, preserving, and sharing information rather than the content of the knowledge itself. When we talk about knowledge, we usually mean information stored in human memory that may be beneficial in day-to-day life through recall and the application of acquired skills. In a broader sense, TK is described as wisdom, which denotes the fusion of information and experience mixed with a consistent set of values and worldview. The term "traditional" in relation to traditional knowledge (TK) denotes that

[4] *Id*. at 2.
[5] S B Brush, *Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology*, 95 AM. ANTHROPOL. 653 (1993).
[6] Peter Drahos, A PHILOSOPHY OF INTELLECTUAL PROPERTY 24 (1996).
[7] C Greenhalgh & M Rogers, INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH 4 (2010)
[8]Stephen A. Hansen & Justin W. VanFleet, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY 3 (2003).

this information is transferred from one generation to the next and that civilizations have amassed it via extended periods of time spent in a specific location, environment, or ecosystem. TK is typically communal in character and regarded as community property. As a result, it is communicated via certain traditional information sharing methods and does not belong to any one person within the group. According to Dutfield, what makes traditional knowledge (TK) unique is not its time period but rather how it is acquired and put to use. Put differently, the crux of any indigenous culture's "traditionality" is the social process of knowledge acquisition and disseminating that is exclusive to that society. Although a large portion of this information is really very recent, it differs greatly from the knowledge that native people learn from settlers and industrialised cultures in that it has social and legal implications.[9]

In Pacific region, it is becoming more and more recognised as a possible new source of financial worth, whether via bio-prospecting that yields new scientific and medical discoveries or via the growth of cultural industries founded on traditional practises. A movement to safeguard TK has emerged from past ten years due to this and the perception that it is presently in danger on several fronts, such as a decline in its passing to future generations, misappropriation, and issues with imported counterfeits. The main goal of this movement has been to establish an unalienable, permanent proprietary right in TK, vested in its proprietors, through sui generis law.

There has been comment about indigenous knowledge of therapeutic herbs being invaluable. A writer claims that genetic variety is similar to other things in that it cannot be replaced once it is gone. It's like seeking to discover a needle in a haystack, yet without it, we have no choice but to employ random screening. The strongest case here is past experience: In conventional medical systems, 74% of chemical substances employed as medications have an equivalent or similar purpose in Western medicine. Study done by the National Cancer Institute in an attempt to find anticancer and anti-AIDS medications has estimated that the accessibility of ethno-botanical information may have raised the output of active plants by 50–100%.[10] The indigenous people must be seen as knowledge creators as well as consumers. Development is

[9] G. Dutfield, *Valuing Traditional Knowledge. A Review of the Issues*, background paper for a seminar at the Rockfeller Foundation (November 7, 2000) in Jonathan Curci, THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY, 16 (2009).
[10] Elaine Elisabetsky, *Folklore, Tradition, or Know-How?*, 15:1 Cult. Surv. Q. 10 (1991).

hampered as freedom when the ability of the impoverished to produce creative works and their involvement in international culture and economic marketplaces are not encouraged.[11]

II. Traditional Knowledge and Intellectual Property Rights

Indigenous knowledge is "humanity's lifeline" to an era when humans respected the primacy of nature and acquired knowledge from observation, try, and error. But the valuable knowledge of these peoples disappears along with them, before the loss of the woods that many of them call home.

"Protection" in the context of intellectual property refers to applying IP laws to prevent third person from utilizing TK and TCEs in an improper or unlawful manner. Positive and defensive IP protection are the two types available. By granting positive protection, traditional holders can profit monetarily from commercial exploitation, avoid harmful uses, provide permission for third parties to use their TK and TCEs under certain conditions, and obtain property rights over them. By contesting patent claims based on TK, defensive protection seeks to stop other parties for gaining property rights over TK and TCEs. "Preservation" and "safeguarding," in another way, are more concerned with preserving and advancing cultural heritage than protection. These technique can assist one another and are not reciprocally exclusive, but they can also clash. While digitalization and preservation initiatives can increase the accessibility of TK and TCEs, they also run the risk of being used against the will of its holders. As a result, it is recommended that strategic IP management be used while documenting, digitising, and sharing TK and TCEs.

The laws pertaining to patents, trademarks, industrial designs, GIs, unfair competition, and trade secrets or private information, among other IP categories, have been utilised to safeguard TK against various sorts of exploitation and theft. Yet, there will only be a very limited amount of success in implementing IPR laws to safeguard native person's rights to their traditional knowledge. The intellectual contribution of these peoples was apparently not taken into consideration during their conception.

Maintaining a balance between the financial interests of the invention or idea's creator and the demands of society at large is at the central of the present worldwide system of intellectual property laws. There is no space for both sides. Extreme stances include, on the one hand, expanding protection and, on the other, abolishing the patent framework. The existing

[11] Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS., 97 (Spring, 2007).

international IP system is not suitable for the safeguarding of TK. There are techniques for identifying the owner in both copyright and patent cases, however this paradigm cannot be used to all types of TK. Sometimes, TK may be well-known to many groups, or it may be difficult to pinpoint the original group.[12] The right to be recognised for one's TCEs and the capacity to challenge any incorrect attribution are rights that TCE holders would want to have. The latter problem may surface, for instance, if counterfeit goods are sold on the market as real TCEs. TCE proprietors worry that such practise deceives customers by falsely implying a bond with the indigenous people and gives the impression that the company is operated by such people or that profits go back to those communities.[13]

A successful business relies on a combination of high-quality products, a unique brand, and a well-thought-out marketing plan. Branding is the engine that drives product sales by establishing an emotional connection with customers. A well-thought-out marketing plan should also be included to generate demand for the goods. These essential components are frequently paired with other crucial elements like raw materials, funds, efficient distribution channels, and specialised knowledge.[14]

From the standpoint of intellectual property, effective branding may entail the use of legal instruments like geographical indications (GIs), certification and group markings, and trademarks, each of which perform under its own set of regulations and pursues similar but different protection goals at different level. The details of these are followings-

(a) Trade Marks- Trade Marks are symbols that identify one company's products or services from those of other companies.[15] Trademarks have an marketing purpose apart from being distinctive. They are essential to a business's branding and marketing initiatives because they help define the company's goods' reputation and image in the eyes of the public. Lastly, they offer details on the calibre of the goods and services, among other things. To make well-informed purchase decisions, consumers require this knowledge.

Trademarks encourage businesses to make investments in preserving or raising the calibre of their goods so that goods wearing their mark are known for being of high quality. Satisfied

[12] Graham Dutfield, *The Public and Private Domains: Intellectual Property Rights in Traditional knowledge*, 21 J. SCI. COMMUN. 274, 278 (2000).
[13] M Asplet & M Cooper, *Cultural Designs in New Zealand Souvenir Clothing: The Question of Authenticity*, 21 TOUR. MANAG. 307 (2000).
[14] ITC and WIPO, 'Marketing Crafts and Visual Arts: The Role of Intellectual Property. A Practical Guide' 13 (2003), *available at-* https://www.wipo.int/edocs/pubdocs/en/intproperty/itc_p159/wipo_pub_itc_p159.pdf (last visited Oct 21, 2023).
[15] Agreement on Trade Related Aspects of Intellectual Property Rights, 1994, Art. 15 (1).

consumers are more willing to repurchase or utilise a product. By permitting registration of special indigenous names, the trademark system may assist indigenous groups in protecting their economic rights in their TCEs and helping them to profit from the branding of their TCEs. When used in concurrence with a suitable marketing plan, trademark registration may help indigenous people distinguish their goods and establish a reputation and brand. As the inclusion of a trade mark raises the value of a commodity, this can boost customer identification of TCEs and the financial benefits for TCE holders. It is to be mentioned, nonetheless, the expenses related to the registration of a trade mark, such as those related to the fees for registration and renewal, the protection of rights, and the expansion of market plan.

(b) Patent- In order to use patent law to defend indigenous peoples' rights, three types of concerns need to be addressed. The first, and arguably most significant, barrier to establishing IPRs over genetic and biological resources is cultural. Secondly, the ways in which TK is formed, are incompatible with patentability standards. Third, the real-world issues involved in obtaining a patent and safeguarding and upholding rights once it has been awarded.[16] Bio-piracy is a major problem concerning patent. The word "bio-piracy," which was coined in the previous several decades, refers to the practise of patenting biological resources, such as traditional medicine, in the west.[17] Generally, developed countries tries to patent the biological resources of developing countries. TK right holders claim that a property right has been violated upon when this occurs. Both the information's original source and the content itself are not cited. No money is exchanged. The inventor does not own the it at the time of issuance. The patent will prohibit the TK's owner from obtaining a patent on their own. Nevertheless, in spite of the charges, a patent is issued for an innovation that might not even be closely related to traditional medicine (TM) as practised by an indigenous group. Bio-piracy is a contentious topic.

(c) Geographical Indications- According to Art. 22(1) of the TRIPS Agreement, "geographical indications" are indications that a product originated in a member state, or in a region or locality within that state, where a particular attribute of the good, such as its reputation or other characteristics, is primarily attributable to its place of origin. The TRIPS Agreement's Article 22(2) specifies the minimum level of safeguards that all GIs must have access to. It stipulates that legal ways should be made available to affected parties for preventing the use of GIs that deceive persons about the location of the items' origin. As per

[16] La Vina, *et.al., Traditional Knowledge: Challenge to Intellectual Property Rights.* 70 PHILIPP. LAW J. 140 (December 1995).
[17] Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT'L & COMP. L. 519 (2003).

the Article 10bis of the Paris Convention, it also mandates the provision of legal measures to stop usage that would otherwise be treated an "act of unfair competition." While member nations must safeguard GI, they have freedom to choose the best means of protection when putting the Agreement's provisions into effect as per their own legal frameworks and customs. GIs are protected at national and regional levels by many legal theories throughout the last ten years. These specifically include administrative protection schemes, collective and certification marks, protected appellations of origin and registered GI, and regulations against unfair competition and passing off. The historical background, and current economic climate of the jurisdiction in question will typically influence the selection of a protective mechanism or combination of protective methods. But crucial issues like the terms of use, and the extent of protection will be impacted by the variations between these systems.

GIs have historically been connected to food items, wines, spirits, and agricultural goods. GIs have, however, been mentioned as having the potential to be helpful in preserving indigenous knowledge in recent years. It was brought up at the 5th meeting of IGC that certain TCEs, like handicrafts created with natural resources, might be considered "goods" that are subject to GI protection.[18] physical cultural expressions (TCEs) include handcrafted items like artwork and other physical manifestations of culture. In particular, they include of sketches, designs, paintings, carvings, sculptures, jewellery, woodworking, metalworking, basketry, textiles, and musical instruments. If these material manifestations, also known as "handicrafts," meet the requirements for GI protection, they would be considered items which could be protected by GIs.[19] Because GIs function as a collective right and offer protection that may last an indefinite amount of time so long as unique connection between the products and the location is preserved and has not become generic, the GI system is thus compatible with the essence of native knowledge. Numerous instances of native names, and symbols that have been designated as GI may be found all across the world. The real knowledge connected to TCEs is still in public domain and subject to theft, therefore GIs cannot directly safeguard it. However, they can indirectly support that protection in number of ways. Firstly, GIs can defend a specialised market area along with the goodwill that has grown over time. They can shield TCEs from dishonest and fraudulent trading practises and stop outsiders from applying a protected geographical indication (GI) to products that don't come from a certain area or don't

[18] WIPO IGC Secretariat, CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS, WIPO Doc WIPO/GRTKF/IC/5/3 at 52 (2003).

[19] M Blakeney, *Protection of Traditional Knowledge by Geographical Indications* in TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION 87 (C. Antons, ed. 2009).

meet the necessary standards for quality or features. Secondly, GIs make it possible to differentiate products. When a product successfully uses a GI to differentiate itself from the competition, the marketplace is categorised, and entry to a particular marketplace may be limited to manufacturers of goods with the required reputation, quality, or other attributes who are operating in the pertinent geographic area. Thirdly, the registration of a GI can improve the growth of rural areas and add value for TCE holders.[20] For instance, it has been demonstrated that registering a GI increases land value and production output, and the assurance that comes with legal protection may attract investment in a particular product and area. Fourthly, indigenous tribes can get acknowledgement for the cultural value of their TCEs and be able to protect them for future generations by registering their names, signs, or symbols as GIs. Lastly, GIs inform and educate customers on the provenance, calibre, and features of the products.

Connection between TK and GI is presumably very strong. Producers may be strongly motivated financially to align their product with a location that enjoys a solid reputation for manufacturing that specific good. Whether the product is cheese or other thing, the maker may find it easier to sell to buyers who are looking for certain features and attributes if they make reference to the particular place. Another argument is that investing in the product becomes more profitable when GIs are protected. It has been argued that producers would be less motivated to invest in the creation and promotion of a product without the protection of the GI since they would know that others may use the reputation they had developed for their own gain.[21] This indicates that a protected product is meant to be economically utilised because GIs seek to safeguard items of a particular area and quality from unauthorised commercial exploitation.[22]

(d) Certification and Collective Marks- Two unique kinds of markings are certification and collective marks. They denotes persons about particular features of products or services sold under the mark. The reciprocal responsibility of collective mark registration and protection among Union member nations is outlined in Art. 7*bis* of the Paris Convention. Art. 7*bis* of the Paris Convention is one of the articles that the TRIPS includes by reference. Consequently,

[20] T. W. Dagne, *Harnessing the Development Potential of Geographical Indications for Traditional Knowledge-Based Agricultural Products* 5 J. INTELLECT. PROP. LAW PRACT. 441 (2010).
[21] Myra E.J.B. Williamson, *Geographical Indications, Biodiversity and Traditional Knowledge: Obligations and Opportunities for the Kingdom of Saudi Arabia*, 26 ARAB LAW Q., 101 (2012).
[22] Sara Desmarais, *Returning the Rice to the Wild: Revitalizing Wild Rice in the Great Lakes Region through Indigenous Knowledge Governance and Establishing a Geographical Indication*, 3 L.L.J. 36 (2019).

associations' collective marks that function as GI, are safeguarded under TRIPS. A certification mark is one that certifies the products or services it is used with, stating that the mark's owner has verified the goods or services' quality, accuracy, origin, material, manufacturing process, method of production, or other attributes.

Individuals or organisations can authorise merchants to use a certain certification in relation to particular goods, by using certification marks and collective marks. For obtaining a certification mark, individual needs to be qualified to certify the items in issue and offer usage guidelines. The rules delineate the permissible users of the mark, the attributes it validates, the methods for monitoring and testing, costs, and dispute settlement. Conversely, organisation members utilise collective marks to set their products or services apart from competitors'. Rules outline membership requirements, permissible uses of the mark, and potential penalties for abuse. For individual members, collective marks may be more affordable than conventional trademarks in terms of cost, length, and breadth of protection. Since collective and certification marks both indicate a shared indigenous heritage and restrict the use of certain symbols or names, they can be useful for safeguarding and advancing TCEs. They can support indigenous communities in preserving the integrity of their culture, advancing their artistic endeavours, bolstering their financial standing, and increasing public knowledge of the legitimacy of their goods. Public education, quality control, and stakeholder support are necessary for these programmes to succeed.

For the most part, safeguarding interests of native people, has not been a fundamental policy objective in the formulation of trade mark, certification, and collective mark legislation, or geographic indication laws. It is therefore frequently fortuitous that these regulations are useful instruments for TCE holders to preserve their native names, signs, and symbols.[23] Similar to this, intellectual property assets are essential to a fruitful marketing plan since they may convey information about the product and aid in setting it apart from competitors' goods.[24] Examples of international forums where participants discuss the problems brought up by the intersection

[23] S. Frankel, *Trademarks and Traditional Knowledge and Cultural Intellectual Property* in TRADEMARK LAW AND THEORY, A HANDBOOK OF CONTEMPORARY RESEARCH 437 (Graeme B. Dinwoodie & Mark D Janis, eds. 2008).
[24] Daphne Zografos Johnsson, *The Branding of Traditional Cultural Expressions: To Whose Benefit?* in INDIGENOUS PEOPLES' INNOVATION 163 (Peter Drahos & Susy Frankel, eds. 2012)

of indigenous TK and IPR are readily found. WTO, WIPO, CBD, FAO, UNESCO, and various UN human rights bodies would be on the list.[25]

The chance to think about how to safeguard traditional or Indigenous cultural production in the area and how to regulate the particular exemption of fair use is presented by the proposed Asian Pacific Copyright Code.[26]

III. Protection at Global Level

Various types of norm-setting has been used to TK and cultural manifestations, such as state legal and policy instruments, regional accords, and several international instruments. Efforts made at international level for protection of these are: -

The Convention on Biological Diversity

Indigenous peoples and biodiversity are closely related. Apart from the harm that biodiversity loss does to the ecosystem, widespread biodiversity destruction also has a second, even more tragic, side effect: the extinction of indigenous civilizations and their vast, mostly unrecorded knowledge base. The disappearance of these enormous repositories of information and skill puts mankind at risk of losing its history and maybe even its future.[27]

CBD is an accord that created from the Rio Earth Summit in 1992. It was formerly believed that biological variety represented humanity's shared ancestry. The CBD declared that the ownership of TK and biological resources belongs to sovereign states. The CBD's preamble acknowledges that many indigenous communities that uphold traditional lifestyles rely heavily on biological resources, and that it is desirable to share profits fairly that arise from the application of TK and practises that are pertinent to the preservation of biological resources and sustainable use of its constituent parts. There are two elements to this sentence. The reliance of particular lifestyles on biological resources is covered in the first section. The statement's second section specifically addresses rights. The paper defines "traditional knowledge" using the phrases "innovations and practises," rather than just the general term. Although TM isn't mentioned by name in the 1982 model rules, it is undoubtedly a "practise" covered by the CBD.

[25] C. Antons, *The International Debate about Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property* in TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION 39 (C. Antons, ed. 2009).
[26] Natalie P. Stoianoff & Evana Wright, *Fair Use and Traditional Cultural Expressions* in MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC (Susan Corbett & Jessica C. Lai, eds. 2018)
[27] Eugene Linden, *Lost Tribes- Lost Knowledge*, TIME (September 23, 1991) 46.

Additionally, the CBD distinguishes between local and indigenous communities. That being said, TK from both sources is regarded as equal. However, there are significant presumption in connection with the term "traditional." It implies that a time of cultural transmission that is true to the past has occurred. By including local communities into the same formulation, the CBD successfully avoids the question of historical fidelity. The CBD's Art. 8 is titled "In-situ Conservation." It shall also encourage the wider application of these practises, innovation, and knowledge with the consent and participation of the people who possess them, and foster the equitable distribution of the profits resulting from their use. Protection-related issues are left to national law, as per the provisions contained in Article 8 (j). It presents the problem in terms of encouraging the broader application of sustainable strategies for making utilization of biological variety.

Urbanisation, pollution, overgrazing, overhunting, intense contemporary agricultural practises, habitat degradation and fragmentation, recreational activities, and alien, invasive species are the main culprits threatening biodiversity.

Declaration of the Rights of Indigenous Peoples

TK is also included in the 2007 United Nations Declaration on the Rights of Indigenous Peoples.[28] The rights of Indigenous communities to practise and preserve their cultural traditions and practises is stated in Article 12. This covers right to cultural property as well as the right to preserve, protect, and develop the past, present, and future manifestations of their cultures, including ceremonies and technologies. TM is explicitly included under "traditions and customs" even if TK is not included by name in this Article. TK rights are defined by indigenous peoples through their laws, traditions, and practises, rather than by national legislation, which is a far cry from 8 (j) of the CBD. Definition of "indigenous" is left open throughout the treaty. The clause in this declaration hasn't had much of an influence, even though the CBD has had some on later legal thinking. The Follow up of unwritten laws, traditions, or customs may be challenging in practise, even while abiding by published national laws is highly certain.

International Labour Organization Convention No. 169

[28]United Nations, *available at-* https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (last visited Oct. 24, 2023).

The Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169) is 1st global convention under the UNO on the legal safeguard of indigenous communities.[29] Despite being adopted inside the ILO, this convention talks about the human rights of indigenous peoples and contains regulations pertaining to social security, work, and health. It does not directly related to the problem of TK conservation; instead, its primary goal is to affirm the bond between indigenous peoples and their land. The Convention's definition of "indigenous peoples" is crucial to this study because it includes people in independent nations who are recognised as indigenous Because these peoples are characterised in connection to four essential factors i.e. time, physical space, persistence, and territorial occupancy by foreign populations, this concept is significant. The ILO Convention contains several principles pertaining to the rights accorded to indigenous people. Governments are tasked with creating policies that support these peoples' complete realisation of their social and cultural identities, institutions, and practises, according to Article 2 (2b). According to Article 5(a), these peoples' social, cultural, religious, and spiritual practises and values must be acknowledged and safeguarded, and the nature of the issues that these groups and individuals encounter must be given careful consideration. These clauses, in addition to the fact that not many States have signed the convention, are far from providing a foundation for the IP protection of traditional knowledge possessed by native peoples. These clauses provide a good illustration of how a soft law *negotium* might be included into a hard law *instrumentum*. Nonetheless, this Convention establishes the conceptual framework for the interrelationships between land rights and the cultural rights including TK.

The Universal Declaration on Human Rights and the Covenants

Indigenous people continued to pursue a globalised approach to achieving justice, in spite of many hurdles. They benefited from new opportunities brought about by the UN system's growth, which begin with the framing of the UN Charter in 1945. Human rights accords looked to be full of evocative promise.

According to Art. 27 (2) of the UDHR, each human is entitled to the defence of the material and moral interests arises from creative, scientific, or literary work in which they are the primary author. Taken in association with Art. 15 (1) (c) of the ICESCR, which declares that there is no specific requirement for safeguarding indigenous knowledge in order to reap the

[29]International Labour Organization, *available at-* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (last visited Oct.15, 2023).

benefits of the protection of the moral and material interests arising from scientific, literary, or creative work of which he is the creator. Therefore, it is unlikely that breaking any article will result from national or international IP legislation.

The collective rights of native peoples are not covered by the human rights norm on IPR, which is an individual right, because the subject matter of these rights is collectively shared. It's also true that many indigenous cultures do not understand what it means to be an individual private property owner. The first barrier to the recognition of a particular human right over collectively held TK is the absence of individual transferability of the right of ownership. The individual's right against the State has served as a base for the justifiability of human rights: The usefulness of western ideas in assisting indigenous peoples in preserving their identity are under duress to integrate and submit to the modern world, may be limited by this focus.[30] At the highest levels of worldwide law-making, the networks of indigenous political negotiation that arose around the concerns of native persons focused on creating a wide agenda centred on rights.[31] But intellectual property remained a technological black art, and nothing was known about how it related to indigenous knowledge systems.

TRIPS Agreement, 1994

The international agreement known as TRIPS, provides the minimal degree of safeguard that members of GATT are required to offer. Through time, it enables developing countries to align their laws with the pact. In the end, the outcome ought to be a norm that is almost the same across nations with very disparate economic development levels. According to some, this approach deprives developing countries of their wealth and resources.

Through the IP protection of biotechnology across all nations, the TRIPS Agreement has created new business prospects. Article 27 of TRIPS can have a significant impact on global trade notwithstanding its imperfect formulation and inherent ambiguity. However, there are several genetic inventions that are claimed to be from the South and include accusations of stealing, adding to the difficulties surrounding these potent effects. Utilising advanced technology like genetic engineering, the businesses of industrialised nations are able to derive value from biodiversity. Major multinational corporations, such as Monsanto or Car, are able

[30] J. R. Axt, *et.al*., Biotechnology, INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS, CRS 27 (1993).
[31] R. Niezan, *Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples* 42 CSSH 119 (2000). See also C. Charters, *A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making* 17 INT. J. MINOR. GROUP RIGHTS 215 (2010).

to get patent protection by manipulating DNA from, say, butterflies found in fields, woods, or coastal waters of developing States in their lab. Consequently, while businesses get royalties on the basis of DCs' saved resources and TK, the simple transformation of materials in industrialised nations' laboratories has sparked a public uproar from DCs. The need to counterbalance the rights and duties of the participants in this international trade, had been highlighted by the economic issues surrounding biotech patents and their relationship with TK. There is now an imbalance in rights and duties of States and non-State individuals, such as multinational businesses and indigenous and local groups, due to the TRIPS Agreement's internationalisation of the patentability of generalised rights. In order to offset the possible drawbacks of uneven benefit sharing, the international community has enacted additional international legal instruments.

World Intellectual Property Organisation

One of the United Nations' specialised branches is the WIPO. In 1978, WIPO and UNESCO started working together to define traditional knowledge. As a result, the Model Provisions were accepted in 1982. The purpose of these model provisions was to serve as a model for future international and national law. Instead of seeing cultural property as a component of global intellectual property framework, they establish a new sui generis framework.

The WIPO IGC on IPGRTKF Secretariat has chosen to divide the comprehensive theory of TK into 2 distinct groups, each having associated legal pathways: (i) knowledge related to biodiversity, which includes genetic resources like traditional agricultural methods, folklore expressions, and locally or indigenous plantation materials; and (ii) knowledge related to arts, which includes handicrafts and folklore expressions that are intended to be used in the creation of a framework that is appropriately including the features of folklore expressions. This differentiation seems to offer many conceptual benefits in the endeavour to render TK content more appropriate for safeguarding under current intellectual property regimes. "Cultural expressions and folklore" and "GR-related TK" are essentially 2 sides of a coin, notwithstanding their variances. The IGC process is successful in developing a strong worldwide awareness of the issues by offering a specialised platform for organised interchange of data and viewpoints inside WIPO.

IV. Protection at National Level

In India, there is no sui generis statutes for safeguarding Traditional Knowledge. However, it is protected under several other legislations some of which are discussed here: -

The Patents Act, 1970

English law served as the inspiration for the 1911 Indian Patents and Designs Act. Indian Patent Law was changed in 1970 due to the high cost of medicinal items. Most TM would have extremely difficult protection under Chapter II of the Indian legislation of 1970. According to Section 3(e), a substance is defined as a material that is created by a simple admixture that only aggregates the characteristics of its constituent parts. The applicant would presumably has to give evidence that the combination produced unanticipated consequences while complying with this clause. Section 5 of The Patents Act, 1970 is harmful to TM in particular and drugs in general. Patents on innovations that are meant to be utilised as food, medication, or drugs cannot be issued for the material itself; rather, they can be granted for the manufacturing process or technique. By doing away with product patents, the legislation provided special incentives for evolving effective manufacturing techniques. Additionally, it gave generic medication producers a lot of options. It infuriated western pharmaceutical corporations at the same time.

Unintentionally for TM, developing new manufacturing techniques might be challenging. In practise, this would mean combining TM with science. China has made remarkable investment to combine modern approaches with traditional medicine; India has not. TRIPS Article 65.4 said that India has until January 1, 1995, to comply with WTO rules. This article grants an extra five years of postponement for product patent protection in a certain field of technology. Medicines now get product patents for the first time in thirty-five years thanks to the Patents (Amendment) Act of 2005. Sec. 5 of 1970 Act is deleted in the Amendment. The prohibition on patenting pharmaceuticals is lifted as a result. Sec. 3(d) is still applicable in the event of TM. In India, TM will remain difficult to patent. The Amendment enumerates few things as non-inventions like the mere finding of a new element or use for a known element, etc. that does not lead to an improvement in the acknowledged effectiveness of that element. A similar clause exists in the Act of 1970, although it does not expressly state that an innovation is defined as a novel use of a known material that improves its ‘known efficacy.’ Although case law must be established, this seems preferable to patenting some TM. However, there has been issues where Indian TM has been copyrighted in America due to the sizeable pharmaceutical enterprises in the US.

The idea of the ‘active principle,’ which reduces medicine to a single chemical with a therapeutic effect, is foreign to traditional healers whose remedies are intrinsically tainted,

notwithstanding the potential for synergy between the many components. Moreover, ideas of health, illness, and effectiveness, as well as cultural values, were and are used to justify their use. These theories are naturally incomprehensible to the majority of contemporary medical professionals and pharmaceutical scientists. They are often offered by stores over the counter and are governed by a completely different regulatory framework in the West.[32]

Biological Diversity Act, 2002

The 1st Inter-Ministerial Committee on Protection of Rights of Holders of Indigenous Knowledge was constituted in New Delhi in response to many cases involving the alleged infringement of TK. The Committee investigated potential areas for future law, with a primary focus on protection. The Biological Diversity Act of 2002, which particularly addresses TK, was prompted by this gathering. Generally speaking, it aims to safeguard TK while also regulating access to genetic materials. It makes decision-making more centralised.

The National Biodiversity Authority (NBA), which will be housed in Chennai, is granted exclusive authority under Chapter 3 of the Act to the Central government; however, regional offices may be formed with the Central Government's approval. Local offices can therefore handle community needs. It is yet unknown how the Act would affect things overall. Overly onerous administrative processes might impede research if the law is overly restrictive. It might, at most, safeguard national control on biological resources, including traditional knowledge. The NBA's organisational structure indicates that, despite its goal of serving local communities, it will function more like a government agency. Having said that, as the Neem, Basmati, Darjeeling and Turmeric dispute shows, it may take significant resources in a more globalised world to contest the legitimacy of US patents.

The Geographical Indications of Goods (Registration and Protection) Act, 1999

The Indian Parliament has passed The Geographical Indications of Goods (Registration and Protection) Act, 1999 along with The Geographical Indications of Goods (Registration and Protection) Rules, 2002 for the safeguard of GIs at national level. India has also suggested expanding geographical indications (GI) to cover more types of TK to harmonise the CBD and TRIPS. GI is most famous for safeguarding local delicacies like cheese and wine, but it has also been suggested as a way to maintain traditional knowledge. How useful this would be in

[32] Graham Dutfield, *TK unlimited: The emerging but incoherent international law of traditional knowledge protection*, 20 J. WORLD INTELLECT. PROP. 151 (2017).

reality is unknown. The majority of GI are French, and they give particular consideration to goods that are unique because of a confluence of geographical and cultural elements. Certain items have criteria set by regional groups. Enforcing national legislation preserves the geographical indication's integrity. American Indian arts and crafts are a more pertinent example of a product that is protected by legislation. Non-native manufacturers were employing materials and procedures that were not authentic to create items that were presented as real, especially in the case of tribes in the Southwest.

The Arts and Crafts Protection Law, enacted by the state of New Mexico, assigns merchants the responsibility of ascertaining if a product was handmade by a Native American. Contrary to popular belief, there is no test to identify if a product was manufactured conventionally. It cannot wear a distinguishing mark indicating that it is an authentic, hand-made Indian product until been examined by a merchant. As the last argument makes evident, it would be quite challenging for a non-specialist to ascertain whether the object was manufactured with conventional techniques. However, imitation is hindered by the law. If it is known that a specific drug comes from a given area, then GI's ability to defend TM is restricted.

Geographical indicators must be highly valued by the general public as well as the inspecting authorities in order to be an effective (and accurate) type of protection. Regarding French culinary goods, this kind of knowledge was generally available. The proper manufacturing process for American Indian arts and crafts is still up for discussion. Only a very tiny number of experts are knowledgeable in this field, thus a specially organised committee would be required to issue a final declaration. For art, consumers could be content with a retailer's accreditation, but things become difficult when it comes to pharmaceuticals. Protection cannot be achieved without a great degree of organisation. Although GI protection seems straightforward at first glance, it can actually be rather difficult. National legislation enforcing these criteria must be developed, and committees to establish standards must be established. The system might only cover a small portion of other TM systems, but it might be useful in well-established TM systems like China. Furthermore, a patent only safeguards concepts not actual goods.

Traditional Knowledge Digital Library (TKDL)

The documentation of effectively known information on various conventional medication systems that is publicly available has proven to be crucial in ensuring the unparalleled quality and power of this customary learning, as well as preventing it from being mishandled in the

way of licences on non-unique advancements, which have been a case of government concern. To prepare a methodology paper on the establishment of a TKDL, an interdisciplinary team was assembled in 1999. In an effort to prevent theft incidents, the Indian Government launched the TKDL drive in 2001. Department of AYUSH and CSIR collaborated to create India's Traditional Knowledge Database (TKDL), a community initiative designed to prevent patent offices worldwide from granting licences for applications based on the country's vast repository of traditional knowledge. [33] It promotes data and knowledge on traditional learning that is currently practised in the country, in languages that are also understandable to international patent office inspectors. Eventually, data from 14 ancient texts including 65,000 Ayurvedic plans, 70,000 Unani plans, and 3,000 Siddha plans can be found in the TKDL. An 'Entrance Agreement' governs access to TKDL, regarding privacy.

V. Conclusion

The description above suggests that there are a number of challenges with TK's comprehensive protection through IP. As such, it is justified to say at this early point that the requirements and expectations of holders of TK will only be partially met by the existing *lex lata* of IP. Governments trying to integrate TK into their diverse natural resource management procedures typically regard it as untrustworthy due to its anecdotal character. Additionally, because traditional knowledge (TK) can be anything that its bearers believe it to be, it can be challenging to distinguish TK from the many other facets of traditional societies' traditions.[34]

The intricate network of connections seen in the cosmological connectionism of indigenous peoples is what propels their innovative practises. Cosmological connectionism establishes connections between indigenous networks and locations, fostering a sense of concern for those areas.[35] Developed nations are bringing the bar for IP protection and enforcement up to par with their national IP laws by using international multilateral and bilateral venues.[36] For addressing the problems of prior informed consent and access to TK related to genetic

[33] Council of Scientific and Industrial Research (CSIR)- Traditional Knowledge Digital Library, *available at*- https://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng (last visited Oct. 27, 2023).
[34] A. Howard & F. Widdowson, *Traditional Knowledge Advocates Weave a Tangled Web*, 18 OPTIONS POLITIQUES 46 (April, 1997).
[35] Peter Drahos & Susy Frankel, *Indigenous Peoples' Innovation and Intellectual Property: The Issues*, in INDIGENOUS PEOPLES' INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 1 (Peter Drahos & Susy Frankel, eds. 2012)
[36] Ezieddin Elmahjub, *Intellectual Property and Development in the Arab World: A Development Agenda for Libyan Intellectual Property System*, 30 ARAB LAW Q. 2 (2016).

resources, the Conference of the CBD Parties conducts activities. Concerns about the preservation of TK in trade and development activities are addressed by UNCTAD.[37] Adopting laws protecting the rights of impoverished and native persons would really be a big step forward for the third world, whose economy depends heavily on natural resources like TK.[38] According to Reichman, a Compulsory Liability Regime (CLR) for traditional knowledge would encourage investing in business uses of traditional know-how without impairing the public domain or erecting obstacles to participation in the research commons. To put it another way, liability regulations, rather than traditional IP laws that exacerbate the tragedy of anti-commons, are more likely to foster local innovation in DCs.[39] Thus, in comparison to TIPRs, a CLR would promote commercial steps in a more collaborative environment. The commercial player, the TK holder, or the user will determine which model they desire.[40]

There are several issues that have been identified as urgently needing attention, which should expedite the achievement of public expectations regarding the optimal use of genetic resources, TK, and folkloric expression.[41] The requisites of the present time, in nutshell, are the central concern. For enabling the drafting of suitable contracts, TM holders are to be urged to articulate their prerequisites. A law like the Indian Biological Diversity Act, however, may also be an example for other countries. The usefulness of databases is still being shown. This approach seems to be the most workable given that the general public can comprehend patents, for better or worse.[42]

[37] Asiia Sharifullovna Gazizoval, *Protection of Traditional Knowledge: The Work and the Role of International Organisations and Conferences*, 9 INT. J. HIGH. EDUC. 98 (2020).
[38] Feifei Jiang, *The Problem with Patents: Traditional Knowledge and International IP Law*, 30 HARV. INT. REV. 33 (2008).
[39] Jerome H. Reichman & Tracy Lewis, *Using liablity rules to stimulate local innovation in developing countries: Application to traditional knowledge* in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (K. .E. Maskus & J. H. Reichman, eds., 2005).
[40]Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property*, in series of CAMBRIDGE INTELLECTUAL PROPERTY AND INFORMATION Law 296 (William R. Cornish & Lionel Bently, eds. 2009).
[41] Endang Purwaningsih, *et al., Legal Protection Towards Traditional Food Based on Mark and Geographic Indication Law*. 9 J. ADVANCED RES. L. & ECON. 242 (2018).
[42] Murray Lee Eiland, PATENTING TRADITIONAL MEDICINE, 46 (2009).