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Traditional and Indigenous Knowledge as Intellectual Property: A Legal Perspective on Protection and Enforcement in India

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Abstract

This research paper examines how traditional and indigenous knowledge (TIK) receives protection within India's Intellectual Property Rights (IPR) legal structure. The study emphasizes the critical value of ancestral wisdom while conducting a comprehensive analysis of regulatory mechanisms governing its safeguarding through diverse intellectual property legislation. Ancestral wisdom typically transfers orally across successive generations via narrative traditions, cultural performances, ceremonial practices, musical expressions, and recreational activities. While the World Intellectual Property Organization (WIPO) provides a general characterization of ancestral knowledge, the Convention on Biological Diversity (CBD) lacks a formal definitional framework. Both the United Nations (UN) and WIPO recognize that indigenous wisdom includes traditional cultural expressions (TCE) such as linguistic systems, oral histories, choreographic arts, recreational pursuits, mythological narratives, aesthetic patterns, visual creativity, and structural designs. This research illuminates challenges and opportunities in protecting TIK while ensuring its conservation, recognition, and fair utilization through framework analysis.

Keywords: Ancestral wisdom, Indigenous knowledge systems, Intellectual Property Rights, WIPO, Traditional Cultural Expressions (TCE)

Introduction

Traditional and indigenous knowledge (TIK) represents accumulated expertise, cultural practices, and creative developments of local and indigenous societies transmitted through successive generations. TIK plays a fundamental role in agricultural practices, healthcare systems, biodiversity preservation, and sustainable development initiatives, constituting a vital component of India's cultural and ecological heritage. Despite its critical importance, such wisdom remains vulnerable to exploitation and unauthorized commercial appropriation due to insufficient formal legal protection mechanisms. Intellectual Property Rights (IPR) provide protective structures for Traditional Knowledge (TIK), yet



conventional IPR frameworks, predominantly designed for individual or organizational innovations, often fail to accommodate its collective, multi-generational, and community-centered nature. India, with its extensive repository of indigenous knowledge traditions, faces the challenge of reconciling modern intellectual property rights structures with ancestral practices.

This research paper conducts a rigorous examination of India's legislative frameworks governing the protection and application of TIK. It analyzes statutory provisions, judicial decisions, and government programs, while exploring specialized frameworks, benefit-distribution models, and innovative approaches to ensure balanced protection, preservation, and sustainable utilization of India's traditional knowledge heritage.

Traditional Knowledge Within the Convention on Biological Diversity Framework

The planet's biological resources constitute the foundation of human economic advancement and social development. Consequently, increasing recognition exists for biological diversity as an exceptionally valuable global resource—significant not merely for contemporary society but for succeeding generations. However, presently ecosystems and species confront unprecedented dangers. The pace at which human activities drive species extinction is genuinely concerning. In November 1988, UNEP established the Ad Hoc Working Group of Experts on Biological Diversity. Their mandate was clear—determine whether an international convention dedicated to biological diversity was necessary.

During their initial meeting, the Expert Group determined that a legally enforceable instrument addressing biological diversity was indispensable. Subsequently, in May 1989, another Ad Hoc Working Group of Experts on Biological Diversity was established. This group received a particular mandate—develop an international legal structure facilitating biological diversity conservation while ensuring sustainable resource utilization. This committee received responsibility for assessing "methodologies and mechanisms promoting innovation among local populations, alongside requirements for distributing costs and benefits between industrialized and developing countries." Following seven working sessions, five involving negotiations, by February 1991, this working group received a new designation—the Intergovernmental Negotiating Committee (INC). Through the Nairobi Final Act, the INC successfully approved an agreed text establishing what became the Convention on Biological Diversity.

What objectives does this Convention pursue? Three primary goals exist: first, preserve biological diversity; second, utilize it sustainably; and third, ensure benefits from its utilization receive fair distribution among all stakeholders. The Convention acknowledges that sustainable utilization of biological diversity proves crucial for its conservation. The growing dedication of the global community toward sustainable development inspired the Convention on Biological Diversity. This represents substantial advancement in protecting biological variety, ensuring sustainable usage of its elements, and facilitating equitable distribution of benefits obtained from genetic resources.

The Convention delineates responsibilities and objectives that nations must accomplish to prevent plant and animal species loss and habitat destruction. It requires countries to establish protected area networks and integrate biodiversity conservation with sustainable use into their sectoral policies and planning structures. Under the treaty, individual nations maintain autonomy to determine optimal methods for protecting biodiversity within their jurisdictions. Participating countries additionally commit to respecting, protecting, and maintaining knowledge systems and customary practices of indigenous communities and local populations, ensuring benefits arising from resource use receive fair distribution.

While the CBD lacks an explicit "traditional knowledge" definition, the World Intellectual Property Organization (WIPO) characterizes it comprehensively as encompassing "all other tradition-based innovations and creations arising from intellectual activity in industrial, scientific, literary, or artistic domains." This includes diverse elements such as performances, inventions, scientific discoveries, de-

signs, marks, names, symbols, and confidential information.

Parties to the "CBD" have interpreted the term to signify knowledge, innovations, and practices of global indigenous and local communities. Oral transmission of traditional wisdom, refined through years of experience and adapted to local climate and customs, occurs between generations. It typically relates to communities and expresses itself through narratives, melodies, folklore, proverbs, cultural values, beliefs, rituals, indigenous languages, and agricultural practices, including plant and animal species development. Most traditional knowledge finds application in practical contexts, particularly in gardening, forestry, fisheries, and agriculture.

This definition specifies information types considered traditional by the CBD, though ambiguity remains regarding whose knowledge receives protection. While asserting that "indigenous and local communities embodying traditional lifestyles" fall under CBD's traditional knowledge provisions, the CBD has not provided a definition for this phrase. The absence of a universally accepted "indigenous people" definition likely explains the CBD's inability to provide one. Furthermore, the CBD fails to safeguard traditional knowledge of indigenous individuals outside designated communities by restricting its safeguards to "indigenous communities" while overlooking the more commonly employed term "indigenous peoples."

Including the phrase "embodying traditional lifestyles" in defining indigenous communities has enabled the CBD to impose limitations. Employing this modifying phrase, rather than respecting indigenous peoples' rights to self-determination and cultural evolution, tends to reinforce the notion that indigenous traditions must remain static historically to validate CBD-afforded safeguards.

The CBD's failure to define "local community" remains puzzling. The "seringueiros" of Brazil's Amazon rainforest, who have sustainably harvested rubber from forest trees across generations, and the "chicleros," or indigenous workers of Mexico, who collected chicozapote tree latex sap for chewing gum, exemplify extractive communities warranting CBD safeguards due to their resource-dependent cultures and sustainable extraction practices.

Additionally, non-indigenous communities like Brazil's "quilombos," residing in the Amazon for over 200 years, should be included within the designation "local communities embodying traditional lifestyles relevant to conservation and sustainable utilization of biological diversity," as their traditional cultures interconnect intimately with and depend upon local resources. Nevertheless, the CBD protects local community knowledge systems without defining the term, potentially extending its provisions to groups lacking land connections, unlike indigenous peoples, typically recognized as individuals with historical land ties, including those who relocated for employment opportunities and possess economic interests in extractive industries. Without indigenous people's connection to land, culture, and community, significantly reduced pressure exists for them to avoid irreversibly damaging land and its resources.

Disagreements regarding traditional knowledge preservation and PGPR utilization exist between developed and developing nations. Specifically, whether traditional knowledge on PGR utilization constitutes national sovereignty or collective human heritage. It is crucial to note that traditional knowledge is utilized in producing items connected to PGRs or in applying PGRs, as patents can exclusively be issued for PGRs. The CBD is a comprehensive framework treaty promoting biodiversity conservation, sustainable utilization of biodiversity components, and fair distribution of benefits derived from genetic resources. It acknowledges state sovereign rights over biological resources located within their territories. The ongoing erosion and depletion of traditional knowledge, practices, and technologies represents a significant concern for the CBD, as biodiversity is integral to numerous traditional and indigenous communities' existence and livelihoods. These societies have acquired remarkable insights into optimal methods for preserving and sustainably utilizing the world's unique biological resources.

Article 8, detailing the Convention's in-situ conservation strategies, encompasses most CBD stipulations on traditional knowledge. Article 8(j) stipulates that each contracting party shall, as far as practicable and appropriate, and according to its national legislation, honor, safeguard, and promote knowledge, innovations, and practices of indigenous and local communities reflecting traditional lifestyles relevant to conservation and sustainable utilization of biological diversity. It will also encourage



broader implementation of these practices with permission and involvement of individuals holding these practices, inventions, and knowledge, and facilitate fair distribution of advantages derived from their utilization.

The CBD has three principal objectives regarding traditional knowledge: (1) uphold, protect, and preserve traditional knowledge, innovations, and practices; (2) promote and facilitate application and enhanced utilization of traditional knowledge, innovations, and practices with consent and participation of indigenous and local communities; and (3) ensure equitable benefit sharing arising from traditional knowledge, innovations, and practices use with relevant communities.

Implementation of CBD's Traditional Knowledge Protections

Parties to the agreement implement the CBD's traditional knowledge protections through the COPs. Parties have formulated policies and guidelines addressing numerous elements critical for traditional knowledge protection. Multiple efforts designed to protect traditional knowledge have been developed and implemented by various parties, often in partnership with local and indigenous communities. Although these techniques differ among nations and communities, a range of effective programs is emerging that can aid in preserving and restoring traditional knowledge and cultural practices. The Working Group established by COP 4 to address CBD traditional knowledge provisions implementation may represent the CBD's most significant accomplishment in conserving traditional knowledge. The Working Group has invited local and indigenous community members to engage completely and actively in its work. It is accessible to all Parties. The Working Group performs several significant functions. The Working Group advises Parties on legal and other protections for traditional knowledge, methods to enhance collaboration between indigenous and local communities for biological diversity conservation and sustainable utilization, and Article 8(j) implementation and associated provisions.

The Working Group creates, organizes, and prioritizes Parties' objectives for traditional knowledge protection and investigates potential collaborations with other international organizations. Ultimately, formulating a work plan for implementing CBD's traditional knowledge protections is the Working Group's responsibility. The Working Group formulated recommendations for a work plan implementing Article 8(j) and associated provisions during its inaugural meeting in March 2000 in Seville, Spain. The work program, comprising seven components, assigned specific tasks to Parties, the COP Secretariat, and the Working Group. Information dissemination and exchange; (2) status and trends pertaining to Article 8(j) and associated provisions; (3) participatory mechanisms for indigenous and local communities; (4) traditional cultural practices for conservation and sustainable utilization; (5) equitable benefit-sharing; (6) monitoring; and (7) legal components.

Conclusion

CBD possesses inherent limitations. It mandates acquiring prior informed consent and ensures compensation for indigenous groups. Nonetheless, biological resources and associated Traditional Knowledge ownership by multiple indigenous practitioners and groups, sometimes dispersed across geographic boundaries, may create practical compliance challenges. Consequently, foreign users struggle to identify the authentic community possessing rights and its constituents. Furthermore, ambiguity remains regarding who may represent indigenous populations in discussions over benefit sharing and access. Additionally, sui generis protection methods' applicability is generally confined to specific geographic regions; nevertheless, biological resources and Traditional Knowledge misappropriation may occur internationally, thereby undermining these options and creating enforcement difficulties. The Nagoya Protocol addresses several previously listed issues. It is essential to recognize that although the Protocol signifies notable progress in protecting developing nations' biological resources and traditional knowledge, many provisions fail to meet these states' expectations. Nevertheless, the Protocol provides them with explicit alternatives. Moreover, although PIC is mandated in patent applications at national and regional levels, effective acknowledgment and execution can only be achieved through a

requisite international standard. The intellectual property system's legitimacy is contingent upon PIC's recognition. Under equitable principles in intellectual property law, petitions for intellectual property rights or their enforcement shall be denied if rights were acquired through deceit or fraud. Conversely, this would facilitate endorsement and promotion of inequitable conduct by the intellectual property system. The requirement for patent applications to include evidence of prior informed consent (PIC) is crucial for progressing toward a more equitable and balanced international intellectual property framework. The Bonn Guidelines, due to their voluntary nature, provide no mechanisms for implementing PIC requirements and lack guidance on formulating enforcement procedures and actions.

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