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**A CRITICAL STUDY ON PROTECTION OF TRADITIONAL KNOWLEDGE
UNDER IPR SYSTEM: IN INDIAN PERSPECTIVE****INTRODUCTION**

Properties are always prone to thefts and Knowledge is always prone to misappropriation. India's rich heritage, culture unparalleled and enriched with historical significance has paved a way for various innovative techniques in intellectual property rights. However, it has failed to protect the rights of local communities regarding traditional knowledge. Traditional knowledge refers to knowledge of local community and indigenous people, in one or more society, based on experience and adaptation to a regional civilization and atmosphere have developed over time and has been constantly shaped by innovations and practices of each generation.¹

Traditional knowledge (TK) is the most important component of a community's social and physical environment, so its conservation is dominantly important.² Traditional knowledge can't be expressed in a single line as it is a wide subject matter that includes various contexts such as medicinal knowledge, scientific, agriculture and the bio-diversity related knowledge. Innovations based on Traditional Knowledge is benefitted by IPR system under patent, trademark, geographical indication and protected as a trade secret, but the same laws turn out

¹Anu Bala, Traditional Knowledge and Intellectual Property Rights: An Indian Perspective, P.2 (2011).

² Protecting India's Traditional Knowledge,

https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html#:~:text=The%20significance%20of%20traditional%20knowledge,preservation%20is%20of%20paramount%20importance. (Oct 19/10/2020 11:02 AM).

to be risky to the community people. However, the modification to IP is necessary³ TK has its own significance in this field. In addition, 80% of the world's population is reliant on the TK⁴ but it becomes difficult to preserve, sustain and protect from infringement as their unified communities is been endangered, dented and has well the integrity of their cultures is been undermined⁵. Traditional Knowledge as set the strong foundation for assorted corporations to develop the medicines to cure many chronic diseases⁶ but these corporations neither gives recognition nor reimbursement for those creations done by indigenous and local communities.⁷

Government of India has been intensely successful in enacting various regulations and statutes in combating the infringements in Traditional Knowledge nevertheless; it is the need of the hour to have a sui generis law⁸ as India did not come up with a significant law.⁹ Government of India had lost due to inadequacy of law related to plant variety,¹⁰ the oral evidences are hard to produce and prove in the court of law as in the Haldi case, India produced dozens of reference which resulted successful for proving this case¹¹ so in the present paper researcher puts efforts to find out the possible ways to collect, compile, produce and prove the oral evidences with validity.

Traditional knowledge and Traditional Cultural emulates a community's cultural and social identity passed from generations, recognized by intellectual property. TK and TCEs are innovations have their own style of creative expressions and products of innovative intelligent activity, which need to be protected from misuse.¹²

HISTORICAL BACKGROUND OF TMK

³ World intellectual property organization, intellectual property and traditional knowledge, 17-18

⁴ World Health Organization, <https://www.who.int/mediacentre/news/releases/release38/en/> (Oct 19/10/2020, 11:22 AM).

⁵ Michael C. Ogwezzy, Protection Of Indigenous Or Traditional Knowledge Under Intellectual Property Laws: An Examination Of The Efficacy Of Copyright Law, Trade Secret And Sui Generis Rights, Vol 12, P.15 (2012).

⁶ Srividhya Ragavan, "Protection of Traditional Knowledge," Vol. 2, Minnesota Intellectual Property Review, Iss.2, 8 (2001).

⁷ Ibid.pg 15,16.

⁸ Sourish Banerjee "Traditional knowledge", 6, (2020).

⁹ Ms. Vatsala Singh, <https://www.khuranaandkhurana.com/2018/10/05/ipr-vis-a-vis-traditional-knowledge/#:~:text=Unlike%20other%20categories%20of%20intellectual,for%20revocation%20of%20a%20patent> (last visited oct 18,2020 2:36 PM).

¹⁰ *Indo-US Basmati Rice dispute (1997)*.

¹¹ Nair Aradhana "Bio-Piracy and The Need For Protection Of Traditional Knowledge In India: The Selected Case-Studies", 16 (2017).

¹² Times of India, <https://timesofindia.indiatimes.com/business/india-business/Traditional-knowledge-culture-can-be-patented/articleshow/27994684.cms> (last visited Oct. 19, 2020, 3:54 PM).

Traditional knowledge system can be traced from the existence of man and the nature, followed by developing their wisdom through the available natural resource and environment over many generations.¹³ TK is the different kind of knowledge which isn't typically acquired by the formal education system or in schoolings, but exclusively gained by the unique quality of the human being through the experience over centuries by the process of trial and error.¹⁴ India is notorious by its traditional medicine system, which began from the Vedic literature consisting of four Vedas Rig, Yajur, Sama and Atharva.¹⁵ Ramayana, Jyotisha, Puranas, Upanishads and Mahabharata have played a significant role in listing the drugs with their curative properties of various plants since from ancient Indian era, which also includes in the use of ceremonies, custom, medicine, food and fishing etc.¹⁶

PRE- VEDIC AND POST –VEDIC ERA

In Vedic epoch (ca. 1500–500 BCE), they were a practice on Vedic hymns by the Aryan tribes relating to the therapeutic custom that gave a rise in Vedic tradition and brought a close linkage among the Indian traditional medicine and Vedas. Aryans tribes were wanderer settled in the sub- continent of northern-west India they developed hymns after a very long period which had also inspired the non- Aryan therapists' practices. During this period the treatments for all kinds of diseases were based on divine credence. Thus, the blend of hymn, rituals, trinkets, Mantras and medicines were used for healing the diseases that affects both in bodily and psychological, was ascribed to malicious state of mind during those periods.^{17, 18}

During the post Vedic period, Sanskrit speaking Aryan in due course of time their ideas on the treatment of disease were transmitted to various prairies. This was the period of emergent wakefulness among were various cultures on the standard of living, health and welfare, due to

¹³ Samuel, P David , Medicinal plant biodiversity and traditional knowledge system of Maruthua Malai and associated hills of Southern Western Ghats, Shodhganga, pg1, pg2,2004 (last visited Nov.18, 2020, 2:45 PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/526/7/07_chapter%201.pdf. (last visited Jan.11,2021,4:32PM).

¹⁴ Badheka, Amrutaben R., Evolution of plant based traditional knowledge in practice and its scientific perspective, shodhganga, pg.1, pg.1,2017.

¹⁵ Subramaniam Chandran, Traditional Knowledge System and its Management: The Case of India, Research Gate, pg.1, pg.1,2011.

¹⁶ Ibid at Pg.1

¹⁷ *Supra* note 14, at Pg.18.

¹⁸ Emonnier, Nathanael, Zhou, Guang-Biao; Prasher, Bhavana, Mukerji, Mitali, Chen, Zhu, Brahmachari, Samir K, Noble, Denis, Auffray, Charles; Sagner, Michael, Traditional Knowledge-based Medicine: A Review of History, Principles, and Relevance in the Present Context of P4 Systems Medicine, Volume 2 - Issue 7, Progress in Preventive Medicine, 2017.

this the east region of convergence Yamuna, Buddhism, Jainism and other philosophical movement arose. These movements promoted gratis of scrutiny and experimental in various kinds of field predominantly in medicine knowledge ¹⁹

During the Greek evolution, Hippocrates (ca. 470–471 BCE) is considered as the “Father of Medicine” has they were the first to reflect on the concept of identifying the diseases based on systematic examinations on individual body. This has brought the greatest departure in the middle of spiritual- based medicine and technical- based medicine. ²⁰

PRE AND POST INDEPENDENT

During pre- colonial period, Among European colonizer, they were very few general practitioners by possessing lack of knowledge and medicines to curing the disease of human being. Later, the Portuguese and Dutch government in India they actively tried to find out the Indian traditional medicine knowledge and documented. These documented medicines were used for 100years and more to cure the diseases. In the mid of 18th century British took over from European settler and they carried on by their own physician and acquaintance and came up with many acts with related to medicinal system. ²¹Shortly, East Indian Company was well-known by itself in India, this gave arise to British physician for getting coach in aboard with related to foresters, botanists and zoologist. Since 20th century western medicine was prevailing than the traditional healing medicine such as Ayurveda.²² After independence India made an endeavour for the recognition of traditional medicine such as Ayurveda, siddha and unani and also shaped the norms for the industrialized and for the control in quality of traditional medicines.²³

MEANING

Traditional medicine knowledge can be achieved through the adjoining atmosphere, observation and experiences gained throughout generation by indigenous and local community people, which is a unique way of adopting the knowledge as compare to other education. Thus,

¹⁹ *Ibid.*

²⁰ *Supra* Note 18.

²¹ *Supra* Note 18.

²² History of Indian healing tradition, <https://www.ncbs.res.in/HistoryScienceSociety/content/overview-indian-healing-traditions> (last visited Mar. 3,2021).

²³B Ravishankar and VJ Shukla, Indian Systems of Medicine: A Brief Profile,4 (3): 319 – 337, 319,pg.32,2007.

they play a major role through their knowledge and practices by protecting the human from diseases. TMK is gained without any expenditure as the medicines are manufactured through a variety of medicinal plants that's found in nearby environment for their survival. TMK can be categorized as

- Indigenous knowledge and the Community TK are gained by the minor group of people, they have their own standards and forbids that is pursued by their ceremonies and rituals for utilizing the natural resources.
- Publicly Knowledge, TK will be well versed to public by the way of communication or by understanding via various others source for e.g.- the use of turmeric for various purpose such as for wound, cooking etc.
- Individual knowledge, TK is recognized only to a family through the senior person of the family that is typically passed in words.
- Documented Tk, this knowledge is known to the public, but the realized knowledge can't be patented by the third party as it is properly documented and protected from embezzlement.²⁴

TROUBLES FACED IN PROTECTING TMK BY COMMUNITY PEOPLE

As there is lack of sui generis system for the protection of traditional knowledge, it has given rise in misappropriation and misuse by the third party e.g. most of the medicinal plants utilized by the indigenous and local community people the same is been used by the western allopathic medicine this was discovered after the chemical examination²⁵. As local community and indigenous people are unaware that their tiny creations yet which possess enormous benefits that can be recognized and protected by law, inaccessible to justice system in substandard, as well there is no local or regional court in each state with regard to traditional knowledge. Everything under the ambit Intellectual property rights are given in exchange of something but traditional knowledge rarely and barely gets anything in return. Often the precious knowledge is given out as gift for people to use and this turns out to diminish the value of the traditional knowledge. As most of the TMK is passed orally as well as written through different communities by various languages, it is observed that the present generations are losing the

²⁴Lukose, Lisa P, Protection of traditional knowledge as intellectual property: With special reference to India, Shodhganga, 51, Pg 67, 2014.

²⁵ Aritra Ghosh, Traditional Knowledge: Problems and Prospects August 2015, ResearchGate, pg.1, pg.5, 2015.

traditional knowledge due to unaware of many languages and rapidly changing to western atmosphere. Thus, various experts have also noted 6000 languages will die during 21st century.²⁶

INADEQUACY OF INDIAN IPR SYSTEM

As the present IPR has a broad meaning²⁷, this research paper will be restricted only to Patent, Copyright, Trademark, Geographical indication, Trade secret and protection of Plant variety act. The present IPR laws can't protect the traditional knowledge, firstly, time duration for protection is limited which becomes hamper to the traditional knowledge as it is followed and practiced through many years. Secondly, IPR laws recognizes only the ownership of individual and joint but not the community ownership. Thirdly, as the community are unaware of the laws which protects them to certain extent such as geographical indication, trademark etc. thus, which lead to the misappropriation of their product by third party. Lastly, the problem of biopiracy as the traditional knowledge is used for commercial uses without the prior authorization of the community people.

THE PATENT ACT, 1970

When granting patent for any invention three essential test will be examined firstly, novelty secondly, inventive step thirdly, industrial efficiency, then that invention should fall under the category of patent eligibility²⁸ and likewise it should not fall under the category of Section 3(p) of patent act²⁹ which excludes Tk from grant of patent as it doesn't abide by the criteria

²⁶ Ibid, at Pg.1.

²⁷ Definition of IPR under Article 2(viii) of the WIPO Convention includes rights relating to:

- literary, artistic and scientific works.
- performances of performing artists, sound recordings, and broadcasts.
- inventions in all fields of human endeavour.
- scientific discoveries.
- industrial designs.
- trademarks, service marks, and commercial names and designations.
- protection against unfair competition; and
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

²⁸ Section 2(1) (j) "invention" means a new product or process involving an inventive step and capable of industrial application. Section 2(1) (I) "new invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art.

²⁹ Section 3(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.

mentioned. Section 25 (1)(f) and (2) (d) ³⁰of the patent act states various grounds for rejecting the grant of patent. As TK is not an invention as per the patent act, so according to section 25(1)(f) TMK of indigenous and local community's patent will be declined. Section 25(1)(k), (2)(k) and 64(q)³¹ this section will affect the community people for granting the patent because all the process of the concept will be known and owned to all community people and isn't been possessed by one person. Section 2 (ja) ³² Traditional knowledge is mostly passed from one generation to another, so it is understandable that the present operators haven't applied their uniqueness on it, instead they have only derived the knowledge from their elders. Thus, this also can be the reason for rejecting the patent for lack of inventive step. Novelty is not defined under the patent act but basically it means the knowledge regarding any invention shall not be disclosed publicly for the purpose of novelty ³³ thus, as the knowledge is revealed to whole community it is evident that the knowledge is in the public domain and also most of medicine plants will be excluded for the reason of previously invented and to protect patent.

COPYRIGHT ACT,1957

Under the copyright act, 1957 there is no section that specifically recognizes the protection for the indigenous or local community people. The copyright act doesn't deal with the entire community ownership as it recognizes only joint authorship. Copyrights can protect the indigenous people's artists expression from the mishandling.³⁴

TRADE SECRET

³⁰ that the subject of any claim of the complete specification is not an invention within the meaning of this Act or is not patentable under this Act.

³¹ Section 25(1)(k)(2)(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

³² "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

³³ Section 13 of patent act an invention should be anticipated by previous publication and by prior claim.

³⁴ However, Michael Blankley argues that copyright may not be a sufficiently inadequate or perfect mechanism to protect arts of the indigenous people. For example, copyright laws cannot protect designs that have been around for several hundreds of years and can therefore be considered as a part of the prior art. (Michael Blankley, "Milpurruru & Ors v. Indofarm & Ors: Protecting Expressions of Aboriginal Folklore Under Copyright Law," E LAW, Vol. 2, No. 1, April 1995) Similarly, where the dance of indigenous community is removed from the main theme and song and incorporated into western music, there is no protection if the dance was copied without permission, as the dance will be deemed to be in the public domain. Where a tribal painting is copied with minor modifications, the indigenous tribes will have no rights under copyright law.

Knowledge to be categorized as trade secret then three essential things are knowledge must have marketable value, should maintain secret and must not be in the public domain.³⁵ Article 39 (2) of TRIPS states for protecting the confidential information at international level. It mainly focuses on the rights of the patentee and not on TMK holders.³⁶ if trade secret is known to any person then it doesn't amount to secret and the know knowledge can't be protected under this act. The main problem faced by the community people is, it is very difficult to fulfil the above mentioned criteria has TMK is been passed by through generations the secret breaks due to the current situation, has the family members are divide to various places then the practices of TMK as well inks and secondly, as the same product and methods are used for preparing the medicines from the ancient times, it becomes a known knowledge to public due this reasons it is difficult to be protected.

TRADEMARK ACT, 1999

Even if the indigenous and local community people register for the trademark, due to certain limitation on using the trademarks for certain goods and services they trademark will be misappropriated by the corporate company due to which the community people will loss there rights on the trademark. As the trademark is concern regarding the logo and name, if these community aren't aware of the trademark this can also be another way for mishandling their knowledge by the third party.³⁷

GEOGRAPHICAL INDICATIONS OF GOODS ACTS, 1999

GI means it reveals the goods originating in certain region or territory. GI protects only the traditional goods and doesn't protects the insubstantial property and traditional practices under the traditional knowledge such as the processes of traditional medicinal treatment, folk music etc. GI, occasionally it is been defrauded by third party has they possess the same product from same region, so it becomes difficult to the consumer for identify between the original and

³⁶ Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

³⁷ *Supra* note 1, at Pg. 3.

replicate product. Thus, without acknowledging the original author any person can acquire traditional knowledge and achieve IPR protection.

PROTECTION OF PLANT VARIETY ACT AND FARMERS RIGHT,

2001

while the old varieties have been constantly developed and used by the community people, it becomes difficult to ascertain the owner of the traditional species. As most of the traditional species have not developed in the appropriate way so it effects to meet the criteria, and this become hampered in protecting the traditional species. As most of the farmer comes from a poor background, they don't spend their time and money in registering the plant when found and in many other cases due to lack of knowledge regarding the act the famers doesn't goes for the register. Thus, this can be manipulated by the third party for the ownership.³⁸

CONCLUSION

As the indigenous and local community people knowledge is very precious, so there must be some recognition given to their intelligent work. Whereas there are no IPR laws that protects the rights and the creation of the community people as it is passed through generation and for the work done by the whole community and not by individual. Therefore, the laws should be legislated by knowing the problems of the community and by discussing with them. The present IPR laws is not legislated only for traditional knowledge, so this itself states that the problems aren't recognized properly and framed for traditional knowledge. Thus, there must be sui generis law that protects the rights and knowledge of these community people as well they should be taken certain measures by the law shield, to educate the community people regarding the rights and to safeguard their traditional knowledge from biopiracy.

³⁸ Ibid. at Pg.31.