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Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions' (TCEs) of Indigenous Peoples: Some Reflections

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Abstract

The cultural rights being often linked with aesthetic life and feeling; any encroachment on these is likely to violate the human rights. Therefore, protection recognition of Traditional Knowledge (TK) & Traditional Cultural Expressions (TCE) are of utmost importance in human rights protection as these are likely to be exploited under justification of entrepreneurialism and utilitarianism. These threats along with bio-piracy of TK and misappropriation of TCEs are the malefactions to the self-respect and identity of tribal communities and thus danger to their cultural rights. The protection of TK/TCEs in the forms of IPR within TRIPS council of WTO are though significant but remains inadequate as these lay emphasis on a number of technicalities and they don't account for collective nature of TK/TCEs. As a Legal procedure to protect Traditional Knowledge, this Article particularly examines three models. Access and Benefit Sharing (ABS) mechanism provided under CBD is a popular model, which is developed with Bonn Guidelines and Nagoya Protocol. Sui Generis Model provides extension for protection of TK but it involves practical challenges and difficulties. Existing IPR Framework has also been invoked in many cases to protect TK and TCEs. All the three models are widely accepted in international forums but none of them are sufficient to provide a mechanism for protection of TK and TCEs. It is argued that pluralistic approach should be developed to protect TK & TCEs as these rights are collective rights, belong to an indigenous community and are passed down from generation to generation within a community.

Keywords: Traditional Knowledge, Traditional Cultural Expressions, Indigenous Peoples Sui Generis, Protection, Protocol

1.0 Introduction

In the human rights discourse, cultural rights often remain under scrutiny because they, in addition to political dimension, are essentially inked into the aesthetic life and feeling. The latter aspect consists of the right to sense and feel, the right to think, and the right to

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recognition (Kapchan 2014:18). Any encroachment on these cultural rights is warming of violation of human rights (idid.:16). Accordingly, indigenous peoples' cultural rights embedded in traditional knowledge system are called for protection, safe keeping form encroachment and thus for recognition.

In this backdrop, the present article is designed to focus on the concept of traditional knowledge (TK) and traditional cultural expressions (TCEs) related with indigenous peoples. It discusses particularly various strategies for the protection of TK and TCE's.

1.1 Definition

The phrase 'traditional knowledge' is shorter form of the phrase 'knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles' used by CBD in the context of biological diversity (UNEP 1992:1ff) or 'traditional knowledge, innovations and practices' and 'traditional knowledge, innovations and culture' used in WIPO's *Report of Fact-finding Missions (FFM) on Intellectual property and Traditional Knowledge* (WIPO 2001:25; also *see* Wekesa 2006:4-5)*)*. The term TK is a broad term which denotes logical and practical knowledge framework that was the foundation of historical and developing societies. (Nijar 2013:1205). The skill and wisdom of peoples creating these societies—indigenous and local communities—manifested by way of customary norms and customary 'law' was the path through which the 'commons' were managed (ibid.:1205-1206). It has been defined by the CBD Secretariat:

> 'Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over centuries and adopted to local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general' (UNEP n.d.:1).

Thus the complexity of the matter lies with the fact that it is not necessary that every traditional knowledge holder belongs to an indigenous community. However, for the purpose of this article, the author restricts the use of the meaning of TK in the context of indigenous peoples. In this vein, there are two important points with regard to TK of indigenous peoples. First, knowledge is not traditional for the reason pertaining to its object, nor its field of reference, or content, or its historicity, or its philosophical attributes (Taubman & Leistner 2008).What makes it traditional is the manner in which knowledge is preserved and passed from one generation to another within a community. Second, traditional knowledge is not simply 'local' knowledge; rather it is knowledge of the universe, which is deeply associated with the moral imperatives of stewardship (Picart & Fox 2013).

The concept of TCEs was initially conceptualised as part of TK but later on it was removed from TK. In its latter version it has an inclusive meaning referring to

> '... any form of (artistic and literary), (creative and other spiritual) expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written (and their adaptations), regardless of their form in which it is

embodied, expressed or illustrated (which may subsist in written/codified oral or other forms)' (Blakeney 2015:190).

1.2 Threat to TK/TCEs

There are clear cut cases of exploitation of TK/TCEs by parastatal and private multinational corporations under the rhetorical justification of entrepreneurialism and utilitarianism. Moreover, they account for the damaging consequences of their ventures on indigenous communities (Picart & Fox 2013). Among the illustrations of bio-piracy, a great threat to TK, we can cite: US pharmaceutical Eli Lilly's going for patent of the anti-cancer drugs *vinblastine* and *vincristine* from the rosy periwinkle plant in Madagascar (idid.).

Bio-piracy adversely affects, explains Vandana, in such a way: first, 'it creates a false claim to novelty and invention, even though the knowledge has evolved since ancient times', second, 'it diverts scarce biological resources to monopoly control of corporations, depriving local communities and indigenous practitioners' and third, bio-piracy 'creates market monopolies and excludes the original innovators from their rightful share of local, national, and international markets' (Shiva 2000:116-118).

Similarly, TCEs are continuously targeted by misappropriation, modern-day cases of which encompass, inter-alia, the commercial employment of native symbols, songs, dance, words, and other forms of TCEs. TCEs misappropriation is far beyond deprivation of mere economic gain, representing rather as sort of human right abuse or, at least, an offense to the community's self-respect and identity (Kakooza 2014).

1.3 Strategies for Protection of TK/TCEs

In the light of the problems outlined above, there have been significant efforts to provide for the protection of TK/TCEs within the TRIPS Council of the WTO. However, forms of IPRs under the TRIPS Agreements are inadequate to protect TK/TCEs for a number of reasons.

Firstly, various kinds of IPRs lay emphasis on individual and intellectual accomplishments to a greater degree. Due to this, the legal identity of right-bearers is intrinsically individualistic or materialistic, whereas indigenous peoples believe that 'innovations are cultural properties' in the sense that by and large, 'they are product and property of a group' (Dagne 2014:38). TK/TCEs are generally considered as 'a means of developing and maintaining group identity and survival' (ibid.), than of upholding individual interest. The modern IPRs do not, in most cases, take account of the collective nature of TK/TCEs.

Secondly, the essential requirement to become the subject matter of protection in some IPRs is problematic. For example, in the case of patents, the requirement of 'novelty' seems out of context in case of protecting indigenous cultural rights. TK/TCEs structure is established gradually in an incremental process of evolution (Oguamanam 2004:143). The emphasis of existent IPRs on 'new knowledge' by the conditions of novelty and originality situates, in case of TK, the subject-matter beyond the purview of protection as TK is created on knowledge accrued over generations and continues to evolve in response to changing and emerging needs.

Thirdly, generally various forms of IP concede their owners a short period of protection. TK/TCEs often displays continuity, and is distinguishable by its evolution over the

period and its cross generational nature. Indigenous peoples insist that their TK/TCEs is a heritage that requires protection now and forever, as long as the indigenous culture remains on the earth, not merely for some short span of time (Dagne 2014:38).

Even in the cases where TK/TCEs are found eligible for protection within IP regimes some sorts of problems become apparent for the group that want to profit from the mechanism. IPRs incline to advance materialistic and other non-indigenous interests, because they are ordinarily subject to the interest of trade and industry organisations. The policy for IPRs registration are, normally 'expensive, complicated and time-consuming' for most TK/TCEs rights bearers (Dagne 2014:39).

For the amount of struggle required in registering TK/TCEs under the IP regimes formulated within the TRIPS framework of the WTO, however, pursuits were directed to other international forums that are responsible for the normative concerns further than IPRs, for example, those based on 'environment, biodiversity, human rights, health and development' (Dagne 2014:39). The legal procedure to protect TK/TCEs that are widely accepted in the various forums can generally be grouped into three major categories: an Access and Benefit Sharing Model; Sui Generis Model; and an IP-based model.

1.3.1 Access and Benefit Sharing System

Access and Benefit Sharing (ABS) mechanism is provided under the *Convention on Biological Diversity* (CBD) framework to modulate the prerequisite for access to and utilisation of genetic material and the sharing of profits from their use with indigenous communities (UNEP 1992: 9-10, Article 15). The Preamble to the CBD underlines the desirability of equitably sharing benefits emanating out of the application of TK in conserving biodiversity. To achieve the objectives of biodiversity conservation, it provides certain measures which, *inter alia*, include *in situ* and *ex situ* measures of conservation. Article 8(j) lays down the conditions for the enforcement of *in situ* conservation by requiring Contracting Parties to

> '...respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote wider application with approval and involvement of the holders of knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices' (UNEP 1992:6).

In this effect, the COP (Conference of the Parties) of the CBD developed modalities of ABS system —especially in the Bonn Guidelines—which recognised States' sovereignty over resources in their jurisdiction and acknowledges States' rights to determine condition of access to them. The users had to obtain 'prior informed consent' (PIC) from the TK holders [indigenous communities] on the 'mutually agreed terms' (MAT) (*see* UNEP 2002:1&4, Para-1, 13 &14). The Bonn Guidelines present a suggested list of features that could be considered guiding parameters in contractual agreements as well as basic requirement for MAT, particularly with regard to indigenous peoples and TK:

a. 'Regulating the use of resource in order to take into account ethical concerns of the particular Parties and stakeholders, particular indigenous and local communities concerned;

b. Making provision to ensure the continued customary use of genetic resources and related knowledge;
c. Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent;
d. The possibility of joint ownership of intellectual property rights according to degree of contribution' (UNEP 2002:13, Para-43).

Bonn Guidelines was criticised for several reasons including: First, these guidelines were of voluntary nature; therefore, there was no clarity regarding their legal binding aspect. Second, indigenous peoples were critical of the fact that the guidelines did not differentiate between their role and the role of any other stake holder who might be equally contributing in resource management (Koutouki & von Bieberstein 2012:523).

ABS system was further developed with the conclusion of the Nagoya Protocol (NP) in the year 2010[1] (UNEP 2011). With its adoption an international binding treaty in the form of the NP paved the way for the implementation of the ABS provision of the CBD; the Parties of the CBD get ahead in addressing many of the apparent difficulties to implement so far, which include the role of indigenous groups (Koutouki & von Bieberstein 2012:533). It is significant to note that the NP differentiate between benefit arising from the application of genetic resources which falls under the control of 'indigenous and local communities' and benefits arising from the application of TK connected with genetic resources. It is stated in Article 5(1) and 5(5) (UNEP 2011:6).

> Article 5 (1) reads: 'Each party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in fair and equitable way with the communities concerned, based on mutually agreed terms' (ibid.).
>
> Article 5(5) reads:
>
> '... benefits arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge' (ibid.).

However, with regard to the compliance of ABS mechanism, Article 17 of the NP necessitates Parties to upkeep compliance by monitoring and improving transparency with respect to the utilisation of genetic resources (Kamau et al. 2010; as cited in Koutouki & von Bieberstein 2012: 530). An equivalent provision of TK is not included, which could have profound impact considering the fact that the NP draws a clear distinction between the utilisation of genetic resources and the utilisation of TK (ibid.).

Moreover, if viewed from the critics perspective, State sovereignty apparently overrules the rights of indigenous peoples from beginning to the end of the NP. The main points highlighted are following: Firstly, the manner in which text is drafted conceives contrasting principles in case of indigenous and local communities' rights and those of State parties by applying the terms 'in accordance with domestic law' 'established rights', 'as appropriate', 'as

applicable', and 'with the aim of ensuring' whenever it dealt with indigenous local communities throughout the text of the NP (Koutouki & von Bieberstein 2012:526). Second set of criticism relates with Article 12.1 of the NP, which entails that references to customary laws shall be made by the contracting Parties in accordance with domestic law thus underestimating the values of customary laws of indigenous peoples (Koutouki & von Bieberstein 2012:533). Third, still the NP fails to focus on the issues of intellectual property rights of indigenous peoples TK. This is critical as Koutouki states:

> 'The discovery-invention distinction and importance of collective are central to a discussion of indigenous traditional knowledge of medicinal plants and patent law. Many patent owners feel that indigenous traditional knowledge is not proprietary-type knowledge, but knowledge that belongs to all hence not patentable. Indigenous traditional knowledge...therefore falls into category of discovery, whereas products manufactured by patent owners based on this knowledge fall into the category of invention and are therefore patentable' (Koutouki 2010: 20).

Despite these criticisms, TK protection through ABS remains popular in national and international framework especially with the adoption of NP for more transparency and legal certainty.

1.3.2 Sui Generis Model of Protection

Sui Generis is a 'Latin term meaning 'a special kind'. In intellectual property discourse, the terms refer to special forms of protection regime outside the known framework' (Wekesa 2006:3; *also see* Bizer et al. 2017). Sui Generis solutions are developed separately for TK and TCEs.

There are two major varieties of TK protection under the *sui generis* model that are discussed briefly below.

1.3.2.1 Defensive Community Patent System

One of the noticeable methods in relation to *sui generis* variation is named as the 'defensive community patent' system (Dagne 2014: 42; also *see* Mgbeoji 2001:186). Provided the given history of open-endedness in the yardstick for patentability in IP law, this scheme appreciates that the framework of IP may 'creatively' be altered to extend protection to TK. The 'defensive community patent' framework recommends the recognition of a robust IP which is apt to consolidate main features of TK in the utilisation of genetic resources for biotechnological purposes. As holders of IP rights, indigenous peoples hopefully be capable to refrain third parties from getting hold of IP rights over their resources. In case where TK of indigenous communities are exploited without PIC, it is assumed that law would take its own course either in the form of an injunction, indemnification or both (Dagne 2014: 42-43).

As operative and effectual the community patent blueprint appears, it can be difficult to integrate it into prevailing regimes of IP law. Considering the restricted role of indigenous and local communities (ILCs) as an international law maker, it is not likely for technologically advanced States delegates to permit a compromise that put up TK in a way proposed under this approach. The business interests are high for industrial nations—for which IPRs-based goods comprise the major chunk of exports—to make out strong property rights in the way of 'communal patent protection' for TK (Dagne 2014:42). It can be challenging to maintain an

equilibrium between the rights of ILCs under a 'communal patent system' and the [selfish] desire of transnational companies who are anxious to find substitutes for their patents on money-making drugs and agro-technology yields that are about to expire after twenty years of the TRIPS Agreement's implementation (ibid.).

1.3.2.2 Culture Specific Protocols for Protection

The second approach towards *sui generis* model may be based upon cultural specific protocol derived from the customary laws of indigenous peoples. The idea is to look forward towards the 'private law at the community level' for the protection of traditional knowledge (Bowrey 2006:66). The reason for doing so is explained by Angela R. Riley (2005). She argues that engaging tribal law to guard the cultural property of indigenous peoples pave the way for several opportunities. Tribal law has its source in the tribes' ancient customary laws, their unique philosophical values and present day norms of tribal governance. Thus, it echoes not only substantive legal doctrines but also the cultural background from which they are originated (ibid.: 90-91). She also cites examples *sui generis* model based on customary laws in the protection of TK. For example, Maricopa community of the Gila Indian Reservation have come up with 'Native Plant Law' which ensures protection of native plants such as *washingtonia filifera (*fan palm*), lysilima thornberi* (ornamental tree), and the *neoevansia diguetii* (dahlia cactus), among others, because of their medicinal properties (Riley 2005:108).

In spite of the above mentioned positive aspects of developing *sui generis* mechanism based upon customary practices there is a flip side to it which represents the challenges and practical difficulties in implementing bottom-upward approach towards the protection of TK. First, customary laws of tribes and indigenous peoples are uncodified principles and in order to develop any indigenous code for the protection of TK it needs to be codified (Riley 2005: *passim*). The very idea of codifying the customary laws may be intimidating to many indigenous peoples who chose to enjoy the flexibility of oral traditions. Second, indigenous peoples are heterogeneous group with divergent customary laws. There is all likelihood of concurrence of *sui generis* laws within a particular region.

1.3.2.3 Sui Generis Model for the Protection of Traditional Cultural Expressions

In the context of TCEs, the international community have developed alternative regulatory mechanisms in the form of model norms to be used by the States to develop their own national legislation. Some of the relevant alternative model laws are:

Model Law	Year	Abbreviation
Tunis Model Law on Copyright for Developing Countries	1972	TML
Model Provisions of the UNESCO/WIPO	1982	MPUW
South Pacific Model Law for National Laws	2002	SPML
WIPO Draft Provisions	2004	WDP
Swakopmund Protocol, ARIPO	2010	ARIPO

Source: Bizer et al. (2017:133)

Killan Bizer et al.(2017) while analysing the above mentioned model laws point out the salient features which includes: First, the *sui generis* rights includes right of TCEs owners to restrict general public from its use, and provisions on benefit sharing. So the owners of TCEs

had both economic and moral rights. Second, these model laws recognised perpetual collective rights of indigenous communities in their TCEs (Bizer et al., 2017:133).

WIPO in its endeavour to protect rights of indigenous and local communities with respect to TCEs maintains that in the development of *sui generis* system, the following crucial issues may be addressed: (a) aims and objective of protection; (b) subject matter of protection; (c) required tests which need to be passed, for example, the matter is not published; (d) who shall be the owner of the rights; (e) procedures and modalities to acquire rights; (f) the enforcement mechanism and sanctions for violation of rights; (g) duration of rights; (h) whether the protection is retrospective; and (i) how the rights shall be recognised beyond the national boundaries (WIPO 2020:36-37).

1.3.3 *Protection under Existing Intellectual Property Rights*

Considering the fact that existing IPR regime has more established rather dominant global footprints, it has been invoked in several cases to protect TK and TCEs. It is possible that an innovation based on TK may be granted patent. Likewise, illegitimate patent may be challenged on the ground that there was nothing novel in the innovation. For example, the patent obtained by the US scientist on Ayahuasca (*Banisteriopsiscaapi*) for its medicinal property was successfully challenged by Indigenous Organisations of the Amazon Basin. (Nunez 2008 519-520). In the same vein, aboriginal artists from Australia challenged, under copyrights and unfair trade practices, like the practice of printing their arts on carpets by codifying rules and regulations (BoS-NSW 2006).

Similarly, the law of confidentiality and trade secrets may be utilised to prevent non-disclosed TK from being published by someone not authorised to do so. For instance, in *Foster v. Mountford*, the book entitled *Nomads of Deserts* led to the decision of its withdrawal from the circulation on the ground that publication of sacred-secret materials might undermine the social and religious stability of the members of Pitjantjatjara Council (Antons 2009:117-118). However, there are certain drawbacks in the existing IP framework for which it may fall short in the protection of TK and TCEs. Some of them are: (a) TK and TCEs are owned collectively by members of indigenous societies while the IP framework lays emphasis on individual rights; (b) cost of IPR system is on the higher side which almost invariably act as an deterrent for indigenous peoples; (c) protection obtained under existing IP framework are temporary whereas indigenous societies may endeavour for perpetual protection.

After analysing different approaches to protect TK and TCEs it would be safe to argue that none of the approach is self-sufficient in providing 'holistic protection' to TK and TCEs linked with indigenous peoples. In same line, Tesh Dagne (2014) argues for the development of 'pluralistic approach' in protecting TK and TCEs. A synergy of different approach can be envisaged from the case of local tribes of Kerala wherein the local tribes instead of going for a defensive protection chose to engage in negotiation with a private corporation and granted them licence to exploit the TK attached with fruit plant (*trichopus zeylanicus travancoricus*) used by the Kani tribe. In turn they received royalty. The licence was only for ten years; thereafter all the rights would rest with local tribes (*see* Anuradha 1998 for details).

1.4 **Conclusion**

In spite of the fact that indigenous peoples have a rich cultural heritage and profound traditional knowledge system they are socially and economically deprived. The theft and

misappropriation of indigenous cultural property are adversely affecting such communities world-wide. For the best protection of cultural property, custodianship may be handed over to indigenous peoples themselves. And, a pluralistic approach involving mainstream intellectual property tools and *sui generis* models involving customary laws should be developed to protect Traditional Knowledge and Traditional Cultural Expressions.

Note

1. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan; opened for signature on 2 February 2011, UN Doc UNEP/CBD/COP/DEC/X/1 and entered into force on 12 October 2014.

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