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The Traditional Knowledge Bill, 2016: Biopiracy and Protection of Cultural Rights

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Abstract

Traditional knowledge is such knowledge which has been present and preserved by a traditional or indigenous community from time immemorial and has a market potential to be exploited commercially. The authors, through this paper, put forth the urgency of this critical legal issue which can be a huge monetization market for developing and culturally rich countries like India. The research has given a special focus on the historical background of various cases of biopiracy, which can create a base for understanding this urgency both in terms of substantive and procedural law. As an apt description given under the Statement of Objects and Reasons of the Traditional Knowledge Bill, 2016 [1] it is of urgent consideration to identify legal regulation over commercial misappropriation of Traditional Knowledge. Against this background, it would be pertinent to examine The United Nations Declaration on the Rights of Indigenous Peoples, 2007 (UNDRIP) with the central aim of understanding the scope and extent of protection of Traditional Knowledge owned by indigenous people.

Keywords: Intellectual Property, Indigenous people, Monsanto, Patent Act of 1970, UNDRIP

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[1] Dr Shashi Tharoor, The Protection of Traditional Knowledge Bill 2016, Bill No. 282 of 2016 (December 20, 2019; 10:00 A.M.) http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3013.pdf

1. Introduction

One of the most symbiotic relationships in the world can be clearly established between various diverse and unique cultural information[2] and intellectual property. This unique information has been treated from time immemorial as either an unwritten custom or practice. India, being a country rich in unique and diverse cultures, Traditional Knowledge, and folk identities, has proactively established repositories to protect, safeguard, and nurture these intangible customs and practices through a strong sense of awareness.

Traditional Knowledge Digital Library[3] (TKDL) is one such assertive action by the Indian Government to digitize such 'unique information' which has stood the test of time. But, the codified and non-codified[4] intellectual property is critically paramount in its continuous evolution. The non-codified aspects have created turbulent doctrinal issues in addressing cases related to infringement and commercial misappropriation. Traditional Knowledge (TK) is such knowledge which has been present and preserved by a traditional or indigenous community from time immemorial and has a market potential to be exploited commercially. For instance, in North and South America, communities were disempowered and had to fight hostility making social cohesion a task. Among the Maoris, colonization led to the dilution of the authority of traditional leaders and Traditional

[2] India pitches for WTO talks on checking theft of Traditional Knowledge, E. Times, May 30, 2018, at Foreign Trade.

[3] Over 1500 Yogic asanas shortlisted to thwart patenting by foreign MNCs, individuals, E. Times, August 09, 2015, at Politics and Nation.

[4] WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO E Docs (February 20, 2020; 11:00 A.M.), https://www.wipo.int/edocs/mdocs/sct/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_9.pdf

Knowledge, robbing away the community's hold over their land and heritage.[5]

TK can be categorized in various forms. Its commercial misappropriation has been rampant in countries which are currently struggling with its uncodified nature and statutory issues. This also brings forth the point of tussle between developing countries and developed countries in their deliberations at the World Intellectual Property Organisation (WIPO) to codify TK and bring forth an effective legal regime for it. As an illustration, developing states such as Indonesia, and traditional heritage are frequently vulnerable to misappropriation as the local rights of communities largely remain ignored.[6]

2. Biopiracy Cases

Since Traditional Knowledge has majorly been unwritten in most of the laws, the commercial exploitation of Traditional Knowledge without consent came into being with cases focusing on the piracy of biological resources, both flora and fauna. Since biopiracy can be established, regulated and questioned under the environmental laws of the country, the same got due recognition and focus in the initial set of cases. The Indian laws attracted commercial misappropriation of Traditional Knowledge through various cases. Most of these cases highlighted close examination by relevant courts regarding the 'patentability'[7] of a certain product. This marked a great interaction between patentability, commercial misappropriation of Traditional Knowledge and Section 3 of the Patents Act, of 1970.

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[5] Margaret Bruchac, Indigenous knowledge and traditional knowledge, Encyclopedia of Global Archelogy, 3814-3824 (2022)

[6] *Id*

[7] William Fisher, The Puzzle of Traditional Knowledge, Harvard University (December 20, 2019; 10:45 A.M.) https://cyber.harvard.edu/people/tfisher/Fisher_TK_3.pdf (Fisher is Wilmer Hale Professor of IP Law at Harvard University)

Therefore, in 1997, when Rice Tech [8] attempted to obtain patents for the rice varieties widely cultivated and produced in India, specifically known as 'Basmati,' the absence of formal recognition and protection for Traditional Knowledge within the framework of Intellectual Property posed a significant challenge. Furthermore, during this landmark case and its judicial journey, aspects of cross-border misappropriation and exploitation were not visioned out in conventional IP laws, which are purely territorial in nature. Apart from the huge debate between the developing and developed countries over the misappropriation of information and agricultural produce, the case of Basmati displayed how Traditional Knowledge cannot conventionally fit under the domain of Intellectual Property which is one of the limitations in conventionally understanding the traits of Intellectual Property. The case highlighted the journey of 'Basmati' from the Patents Act of 1970 to Geographical Indications (GI) to unique agricultural produce etc.,[9] since, at that time, India did not have any law for the recognition, protection and regulation of Traditional Knowledge.

At this juncture, through the case of Basmati, it is important to understand that traditional practices of growing agricultural produce, poses major challenges to social scientists in terms of reflecting the cultural and economic impact of TK. It was argued that rice cultivation in itself should be recognized as a form of TK.[10]

In 2019, the Indian Government filed a GI application for Basmati Rice which was rejected by Australia. The same has

[8] India – US Basmati Rice dispute, Patent No. US 5663484 A

[9] Prashant Reddy, The uneasy alliance between Basmati and IP, Spicy IP (December 26, 2019, 10:00 A.M.) https://spicyip.com/2007/10/uneasy-alliance-between-basmati-ip_4410.html

[10] Sumathi Subbiah, Reaping what they sow: The Basmati Rice Controversy and strategies for protecting Traditional Knowledge, Boston College International & Comparative L. Rev. 530 (529-559)

now been appealed in the Federal Court of Australia.[11] In contrast, authorities in the Indian ministry tried codifying Traditional Knowledge by way of creating a certificate of origin[12] through the Biological Diversity (Amendment) Bill, 2021. Another landmark case highlighting Traditional Knowledge and its commercial exploitation without consent through Patents is the Haldi Patent case[13]. In 1995, two Indians tried to secure patent protection over the wound healing properties of Turmeric[14], a widely known tradition in India from time immemorial. In 1996, Council for Scientific and Industrial Research (CSIR), in its motion against the United States Patent and Trademark Office (USPTO), to revoke the turmeric patent on account of 'prior art', produced a paper published in 1953 as documentary evidence. The paper secured validity as it got published in the Journal of Indian Medical Association.

One of the most intricate and recognized cases on biopiracy is Neem Patent Case[15]. The opponents in this intricate case submitted that astringent-based properties of Neem are not novel and prior information is available in Indian Ayurvedic scriptures. The patent was duly filed in regard to a Neem based oil which can be used to curb the growth of Fungi on various plants. The European Patent Office (EPO) dutifully analyzed and realized that the alleged patent fails on aspects of novelty

[11] Dipanjan Roy Chaudhary, Australia's decision to deny GI tag to Basmati Rice could be the result of Pakistani Lobbying, THE ECONOMIC TIMES, April 21, 2023 (30 May 2023, 06:30 P.M.) https://economictimes.indiatimes.com/news/economy/foreign-trade/australias-decision-to-deny-gi-tag-to-basmati-rice-could-be-result-of-pakistani lobbying/articleshow/99669521.cms?from=mdr

[12] Clause 42, Traditional Knowledge Bill, 2016 accessible at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3013.pdf

[13]Traditional Knowledge and Intellectual Property, WIPO MEDIATION CENTER & BACKGROUND BRIEFS (December 26, 2019, 10:15 A.M.) https://www.wip.int/pressroom/en/briefs/tk_ip.html

[14] Case of the Turmeric Patent (1997, USPTO)

[15]Patent on Neem, NEEM FOUNDATION (December 26, 2019, 10:30 A.M) https://www.neemfoundation.org/about-neem/patent-on-neem/

and inventive steps and does not take into account prior act information which is available. There have been various cases where commercial exploitation of plant varieties has happened without due permission taken from the relevant farmer or community. Monsanto[16] and various other companies have now been taken up to Indian courts for various cases of biopiracy.

As a widely known case in 2012, Monsanto was accused of allegedly genetically modifying six varieties of Indian Brinjal so as to generate Bt Brinjal. The case revolved around violations of Sections 3 and 4 of the Biological Diversity Act, 2002, as alleged by the National Biodiversity Authority of India (NBA) against Monsanto. The research project which was so undertaken was considered to be not in accordance with the requisite guidelines. Further, it was accused that parties have dutifully failed to provide 'prior notice' to the relevant biodiversity board, which is mandatory under Section 7[17] of the said Act. Despite the parties having entered into agreements focusing on 'Access Benefit Sharing'[18] and dutiful research, it was put forward that the real intention of Monsanto needs to be ascertained and whether any commercialization of BT Brinjal[19] has happened or not.

The violation under Section 41(2) by NBA is a critical allegation that holds utmost importance in comprehending the legal aspects associated with Traditional Knowledge and its commercial exploitation. The section categorically stipulates that due consultation needs to be taken from Biodiversity

[16]Dr C D Mayee & Bhagirath Choudhary, The Monsanto versus Nuziveedu battle will subvert the Indian IPR Regime, ET PRIME, July 5, 2018, at Disputes.

[17] Tharoor, supra note 6, at 7.

[18]A Guide to Intellectual Property Issues in Access and Benefit-sharing Agreemen ts, THE ABS CAPACITY DEVELOPMENT INITIATIVE (WIPO) (January 09, 2020, 10:00 A.M.) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1052.pdf

[19] Walid Abdelgawad, The Bt Brinjal Case: The First Legal Action Against Monsanto and Its Indian Collaborators for Biopiracy, BIO. LAW REPORT, 2012, 31 (2), 136.

Management Committees by NBA and others in order to take any decision related to the 'use of biological resources and any other knowledge associated with such resources' occurring within the territorial jurisdiction of such committees.

The International Bill of Rights depicts Traditional Knowledge as a cultural right of communities and further calls for its protection and preservation from exploitation. The right of indigenous people to promote, protect and utilize their Traditional Knowledge in one way can be found in the right to self-determination under Article 1 of the International Covenant on Civil and Political Rights, 1966 (ICCPR). The United Nations recognizes that "indigenous people have deep spiritual, cultural, social and economic connections with their lands…which are basic to their identity and existence itself"[20]

On close analysis, this looks like a weak violation but effectively bridges the gaps between the misappropriation of Traditional Knowledge with clear cases of biopiracy and infringement of plant varieties. The authors, through this case, want to put forward the point that it will be incoherent and impractical to let go of Traditional Knowledge and its exploitation as a running thread in cases of biopiracy, whether such cases are old or new. The prime facie reason for such a conclusion is the aspect of commercialization of certain biological products through knowledge acquired by Traditional or indigenous communities and saving on revenue from Research and Development by big companies. There has been a plethora of cases which have been filed against Monsanto, which presents the urgent need to pass a clear legislation on regulating the use of Traditional Knowledge, both for commercial purposes or otherwise. Apart from the Bt

[20] John Minode'e Petoskey, International Traditional Knowledge Protection and Indigenous Self-Determination, The Indigenous Peoples' Journal of Law, Culture & Resistance, 6 (1) (2020)

Brinjal case, the Bt Cotton case presents a tedious relationship between patent, plant variety and act of biopiracy.

In 2016, when Monsanto[21] moved to Delhi High Court with a claim of patent infringement, the conflict between Patents Act, 1970 and the Plant Varieties Act, 2001 became all the more evident. The trial court had already validated the said patent. On the other hand, Delhi High Court very categorically invalidated the claim of patent as it fell under Section 3(j) of the Patents Act, 1970. The court further stated that the products produced by Monsanto are suitable for registration under the Plant and Varieties Act, of 2001.[22] It is important to note that in 2019 when Supreme Court took the matter into its own hands, it held that Delhi High Court's decision is incorrect as it was based only on prime facie analysis and examinations. *Monsanto's* case serves as a wake-up call to acknowledge the need for balance between the protection of Traditional Knowledge and the rights of local or indigenous communities given that it is more often than not associated with their livelihood.

3.Substantive and Procedural Issues vis-a-vis non - codification

Based on an analysis of the landmark bio piracy cases, the authors believe that in order to dutifully interpret the legal framework of the Bill of 2016, it is vital to address key procedural and substantive issues under Traditional Knowledge which require urgent attention. Furthermore, these issues precisely present as to why cases of bio piracy have been rampant and have failed to address the rights of the owners or custodians. World Intellectual Property Organisation (WIPO) under its Inter - Governmental

[21]Aniket Aga, Serious Concerns over Bt Brinjal, THE HINDU, June 18, 2019 at Opinion.

[22]Mrinalini Kochupillai, India's Plant Variety Protection Law: Historical and Implementation Perspectives, 16 JOURNAL OF IPR, 2011.

Committee on Traditional Knowledge, Genetic Resources and Folklore highlighted in its 17th session[23] the need to categorize various forms of Traditional Knowledge on account of features, use, community placement and aspects of monetization. The meeting proceedings of this session which can be traced on the official website of WIPO highlighted categorically that Traditional Knowledge in itself is not a conventional concept which can be accorded conventional legal protection under IP laws. The session dutifully brainstorms as to why so many categorizations are needed if Traditional Knowledge should exist under a possible IP framework. This creates a background in understanding certain core issues with Traditional Knowledge which needs to be fulfilled under the Traditional Knowledge Bill of 2016. In 2021 in India, in the 161st Parliamentary Standing Committee Report[24], Section 3 (p) of the Patents Act, 1970 was analysed wherein the shortcomings of TKDL as a protective system were also discussed at length.

4. Doctrinal Issues and Categorization as an IP

The first substantive issue at hand which the authors want to put forward is the unconventionality of Traditional Knowledge which has to be taken into consideration while according conventional legal protection under the codified IP laws which are territorial in nature. From the curious cases of Monsanto to decided cases like Basmati, it is vital to understand that bio piracy or cases of commercial exploitation of Traditional Knowledge come into picture when it is used to create a patentable product. At this point, it is important to note that TK can be exploited only when it is embodied in some kind of commercial product. Otherwise, it will be difficult to sell Traditional Knowledge for commercial purposes on its own, because a consumer will not be able to locate it without

[23]WIPO, supra note 4.

[24]Committee Report on Review of IP Rights Regime in India, accessible at https://iprlawindia.org/wp- content/uploads/2021/07/GOI_IP-Review.pdf

the embodiment. Hence, TK was hugely exploited through patentable product and thereby, patent laws. But since, TK cannot be accorded the aspect of 'novelty' as it is there in nature (due to its prior presence in nature and no human intervention required for its creation), it fails to create a 'novel' patent as well. This was the focal point of revoking alleged Patents in cases of biopiracy, be it basmati or the neem case.

5. Custodianship and Ownership

Another substantive and procedural aspect related to the effective exploitation of TK is custodianship and ownership over such Knowledge. Where in most cases, it is almost impossible to trace the source of origin, whether a community being in the form of a custodian can be accorded ownership, is a question of vital concern. The concern becomes more frightening since custodianship and ownership are conceptually different from each other. Article 19 (1) (g) of the Constitution of India, guarantees the fundamental right to livelihood. When Traditional Knowledge or its use becomes a base of livelihood for such unique and indigenous communities, it is vital to read concepts of ownership and custodianship harmoniously with each other rather than separately. This can also be witnessed in contractual deals to dutifully exploit Traditional Knowledge, such as the Jeevani - Kani Tribe Case[25]. Therefore, it is important to understand that the recognition of the rights of Traditional Knowledge holders is not just necessary, but also constitutionally mandated.

TK is extremely vital for its owners; it becomes a paramount facet of a community's cultural heritage. For such communities, TK acts as a source of social cohesion and becomes a part of their identity and mode of survivorship. Even in the absence of a specific international legal instrument

[25]Using Traditional Knowledge to Review the Body and a Community, WIPO CASE STUDIES (January 20, 2020, 11:00 A.M.) https://www.wipo.int/ipadvantage/en/details.jsp?id=2599

concerning Traditional Knowledge, the latter can be found deeply embedded in various International legal human rights instruments, such as Article 27 of the ICCPR[26] and Article 15.1 of the International Covenant on Economic, Social, and Cultural Rights[27] (ICESCR).

Article 27 of the ICCPR reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

A holistic reading of this article means that there is an expectation on the high contracting parties to create a conducive ecosystem for the protection and enjoyment of cultural rights. Furthermore, Article 15.1 (a) of the ICESCR, reads: "The States Parties to the present Covenant recognize the right of everyone…[to] take part in cultural life." In the light of the issues raised in this paper, the authors posit that sufficient protection of Traditional Knowledge is encompassed within the International Bill of Rights to which India is a signatory. Any failure to provide a normative framework which does not grant adequate protection, either defensive or positive, leads to a violation of human rights.[28]

6. Commercialization versus Compensation

Another substantive and procedural problem is the allocation and award of compensation. With no codified laws in place, the commercial exploitation of Traditional Knowledge has

[26]United Nations (General Assembly). 1966. "International Covenant on Civil and Political Rights." Treaty Series 999 (December): 171.

[27]United Nations (General Assembly). 1966. "International Covenant on Economic, Social, and Cultural Rights." Treaty Series 999 (December): 171.

[28] HAUGEN, H. M, Traditional Knowledge and Human Rights. The Journal of World Intellectual Property, 8(5), 663–677, 2005.

been regulated by contractual agreements, both bipartite and tripartite[29]. If appropriate awareness is not there, it has been observed that communities have been paid 'one-time' compensation. This is done in order to make sure they do not become a part of profits arising out of continuous commercial exploitation of such Traditional Knowledge. In contrast, if the ascertainment regarding relevant parties for exploiting TK is not taken into consideration, it will create procedural impediments in granting compensation for the acts of biopiracy, which can be seen in various cases, which, as discussed above, are innate rights of the indigenous people.

6.1 Monetisation

Monsanto's involvement in seed breeding cases or biopiracy cases by violating provisions under the Patents Act, of 1970 bring forth not just the conflicting issues between these two laws, but also puts forward the regulation of the market by Monsanto, when it receives requests from various Indian seed companies to reduce its trait fees. At this point, it is vital to understand that Traditional Knowledge and its positioning under the regime of IP become fruitful because of the monetary aspects attached to it. This is duly established through the cases involving Monsanto.

The aspect of monetisation is not only an inherent feature of Traditional Knowledge per se, but also highlights the possible monopolization of the market by seed companies like Monsanto. One of the effective measures was taken by the Ministry of Agriculture in 2016 when it issued guidelines to regulate pricing under the Genetically Modified (GM) agreements. It is interesting to note that the unconventionality of Traditional Knowledge proves beneficial as these guidelines were created out of FRAND or Fair, Reasonable and Non -

[29] Biodiversity–related Access and Benefit-sharing Agreements, WIPO TRADITIONAL KNOWLEDGE RESOURCES (January 20, 2020, 11:15 A.M.) https://www.wipo.int/tk/en/databases/contracts/

discriminatory terms,[30] which have been used to analyze the legality of Standard Essential Patents or SEPs. Intellectual Property (IP) is excluded from the domain of the Competition Act, 2002, under Section 3(5) of the Act. Further, the aspect of monetization cannot be compared with other forms of IP, legal protection and framework, as TK becomes unconventional. Cases of biopiracy reflect monetization in terms of patentability only, whereas, TK can be misappropriated through Copyright and Trademarks also. Concepts like 'cultural misappropriation' have come into existence due to the volatility of TK while interacting with Patents as well as Copyrights and Trademarks.

When in 2001, the Protection of Plant Varieties and Farmers' Rights Act was passed, IP rights were guaranteed to breeders of such plant variety under Section 28. The Act paved the way for ascertaining monetization of Traditional Knowledge in the agriculture field through plant varieties. The Act proved beneficial by offering some relief through its provisions that restrict patentability and provide protection to novel plant varieties under it and further provided relief in terms of monetization and regulating market forces through a notice under the above-mentioned section. While harmoniously reading through Rule 36A, the registered breeders are under obligations to provide such varieties of the plant at 'reasonable market prices'. A lot of research submissions at this point claimed that there could not be a conflict between the Plant Varieties Act, 2001 (PV Act) and Patents Act of 1970, but the authors of this paper disagree with this statement. It is important to note that if a certain seed company, through its breeding techniques, brings out a claim (claim 25 in the Monsanto case), the same can be tested on grounds of novelty

[30]Doris Johnson Hines and Ming – Tao Yang, *Worldwide activities on licensing issues related to Standard Essential Patents*, WIPO MAGAZINE (January 24, 2020, 11:00 A.M.) https://www.wipo.int/wipo_magazine/en/2019/01/article_0003.html

and inventive step under the Patents Act, 1970 as well a 'new plant variety' under the 2001 Act. This brings a prime facie conflict between the two Acts.

But at this point, the application of the PV Act cannot be extended to each and every case of bio piracy since not every case is surrounding claims on new varieties of plants; some of the traditional information or knowledge was exclusively used as a base for commercial products. Thus, the authors feel that the aspect of monetisation may be regulated to some extent with the Act of 2001 and its harmonious construction with the Act of 1970. Yet this framework cannot create a regulatory mechanism in a holistic way.

7. Comparative Perspective

The paper has previously stated and discussed at length through various cases how Traditional knowledge has been misappropriated across borders. The neem and basmati cases have shaped the legal understanding of Traditional Knowledge from the perspective of cross-border misappropriations. Hence, a comparative understanding gives a clarity about the best practices across the globe. This also highlights the urgent need for the legal protection of Traditional knowledge.

The duty of States to adopt positive measures to ensure that indigenous people's rights are respected is well established by the jurisprudence of the Inter-American system. States are obligated to adopt special measures that guarantee the full enjoyment of the fundamental rights of indigenous peoples. These measures are not discriminatory against the rest of the population, as indigenous people experience many vulnerabilities and discrimination. Special measures, which are crucial "in safeguarding the physical and cultural survival of indigenous peoples," have to "recognize the collective

manner of indigenous rights." The TK bill has immense potential to foster respect for similar rights in India.[31]

On the other hand, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that "indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, Traditional Knowledge and traditional cultural expressions" and that States should "respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[32]

8. Salient Features of the Traditional Knowledge Bill, 2016 and the Way Forward

In 2023, due to climate change, farming groups started conserving rice seeds for future cultivation processes. It significantly raised the concern for understanding and analyzing the framework suggested within the Bill. The Preamble of the Traditional Knowledge Bill, 2016 categorically stipulates the protection, preservation, promotion and development of Traditional Knowledge. While interpreting any given bill or established law, it is vital to understand whether the salient features pose any doctrinal limits or confusion. On closer observation of the aspects of commercial and non-commercial use under the definition clause of the bill, it can be clearly seen that the central focus is the market position of a given product embodying Traditional Knowledge. The definitions however do not provide any express or implied consent of the holders or owners of such Traditional Knowledge.

[31]IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc.56/09

[32]José Francisco Calí Tzay, Expert Testimony at the request of the petitioners in the case of the Maya Kaqchikel Indigenous Peoples of Sumpango and Others vs. Guatemala, Inter-American Court of Human Rights Case No. CDH-3-2020

The legislative drafting of the Bill highlights commercial exploitation and misappropriation to be the central focus, whereas the current issues revolve around biopiracy. It is vital to understand that any given Bill at a given point of time should highlight and address current legal issues alongside creating plans for futuristic issues.

The definition of Traditional Knowledge under the bill is exhaustive in nature and has taken due consideration of the different sessions of the Intergovernmental Committee on Traditional Knowledge, genetic resources and folklore which is mentioned earlier in this paper. While defining Traditional Knowledge, due consideration has been given to the different kinds of knowledge which exist in different terrains of India.

Section 3 of the Bill categorizes types of custodians for Traditional Knowledge to be either the state government or central government, as the case may be. The section further stipulates that there will be a transfer of custodianship if a given community is able to prove various grounds mentioned under clause two sufficiently. At this point, it is vital to note that the community has to 'prove' that such Traditional Knowledge is exclusive to it. It is ironic to note here that it is legally expected from an indigenous community which has been isolated organically from the urbanization of things, to be in a position to prove their claims of custodianship of certain Traditional Knowledge, which has been exclusive to them from time immemorial.

As discussed earlier in the paper, ICCPR mandates not only the protection of such cultural rights but also expects the states to permit the enjoyment of the same positively. Similarly, Article 1.2 of the ICCPR, states, in relevant portions: "In no case may a people be deprived of its own means of subsistence"[33]. Keeping in line with these rights, Section 4 states that every

[33]United Nations (General Assembly). 1966. "International Covenant on Civil and Political Rights." Treaty Series 999 (December): 171.

community which is duly recognized as a custodian under the Bill will be guaranteed certain rights under the Bill. Various cases of biopiracy reflect failed attempts of owners and holders to sufficiently prove their ownership over the said knowledge in question. But, this section has dutifully connected domains of trademark law to Traditional knowledge, by granting the right to ascertain 'Brand Name' to a given Traditional Knowledge. This attempt through a legislative intent will address misappropriation without consent.

Further, it will succinctly help the holders/ owners to monetize Traditional knowledge effectively. The section dutifully regards the concept of 'Prior Informed Consent'[34] and 'Fair and Equitable share of benefits'[35]. Such benefits could be both monetary and non-monetary in nature. Section 4(2) of the Bill further recognizes that the practitioners of such Traditional knowledge will have the right for the 'commercial and non-commercial use' of such Traditional Knowledge. Additionally, Clause 3 mentions that such a community will have the 'right to grant license' and such license as issued to the non-member can be revoked at any given point in time.

Various contractual obligations have been reached by parties owing to Traditional Knowledge exploitation commercially and appropriating knowledge and practices of a given indigenous community. These contractual obligations are usually enforced through written contracts duly acknowledged by such communities. Such contractual obligations have always posed threats of one-time compensation to such indigenous communities or no profit sharing in case of continuous exploitations. The safeguards

[34]Glossary, WIPO TRADITIONAL KNOWLEDGE RESOURCES (February 15, 2020, 10:30 P.M.) https://www.wipo.int/tk/en/resources/glossary.html

[35]Spadika Jayaraj, Towards a Nuanced Approach to Protection of Traditional Knowledge, SPICY IP (February 15, 2020, 10:45 P.M) https://spicyip.com/2015/07/guest-post-towards-a-nuanced-approach-to-protection-of-traditional-knowledge.html

provided under Section 4 of the bill can also find a strong base in the UNDRIP, which recognizes ownership between Articles 11-31.[36]

Article 11 reads as:

> Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 31reads as:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, Traditional Knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, Traditional Knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

This Article is the first holistic recognition of Traditional Knowledge as a human right in the international legal rights instruments. States have a positive obligation to enforce this set of rights which serve as a standard setting. In a comparison of

[36] United Nations (General Assembly). (2007). Declaration on the Rights of Indig enous People.

the Bill with the UNDRIP, section 4, in a way, serves the demand of Traditional Knowledge owners and more importantly, protects the right of self-determination of the concerned communities.[37]

As per Section 8 of the Bill, it is clearly mentioned that no form of intellectual property, whether it is patents or any other intellectual property, will be granted or registered on any Traditional Knowledge which exists or is derived from India. The section has been clearly inserted in the Bill to create a basic framework for combating or prohibiting the misappropriation of Traditional Knowledge through biopiracy or otherwise. It is important to understand that biopiracy has been one of the most controversial aspects in redefining legal parameters of commercial exploitation of knowledge, both traditional and indigenous. The section also highlights a harmonious construction between the misappropriation of Traditional Knowledge or its exclusion, as mentioned under section 3 of the Patents Act, 1970. Additionally, if any invention or formula is so derived from Traditional Knowledge and needs patenting, due permission has to be taken from the national authority under Section 8 of the Bill. The first legal concern in creating a contextual framework for Traditional Knowledge arises when due explanation is given for misappropriation and other related technicalities to the same. Section 9 highlights the details of misappropriation and sets the various dimensions surrounding it. The salient features of this section highlight that acquiring a patent or exploiting Traditional Knowledge 'without due approval or permissions' will be expressly recognized as 'misappropriation'. The IP justification for Traditional Knowledge or creating its framework under the law has always been the monetizing aspect of such knowledge. Such justification not only becomes a base for commercially exploiting Traditional Knowledge but also helps in understanding that violations lead to the decreased value of

[37] *Id*

monetization of Traditional Knowledge. Misappropriation under the said section has also been highlighted as a punishable offence. This ensures both civil and criminal remedies are available in addressing the misappropriation of Traditional Knowledge, impacting its monetizing value.

The concept of law is not just about creating substantive rights under a given framework, but also to create a very effective remedial regime as well. The Bill, under Section 10, highlights that custodians will be entitled to all kinds of remedies, including damages and injunction and such damages will be granted as per the discretion of the Court. This similar expectation can be found under Article 11(2) of the declaration, wherein it emphasizes that states are required to provide restitution in matters where Traditional Knowledge has been taken without following safeguards such as prior consent.[38]

Innovatively, Section 20 creates the National Traditional Knowledge Fund. Apart from recognizing the concept of custodianship to relevant communities, the Bill has also created a national-level authority. This section formulates a very important framework in ascertaining optimized exploitation of Traditional Knowledge in the form of benefits and royalties where the national authority is the custodian. The section further creates a path-breaking approach towards securing benefit claimants and their rights through social economic justice. The fund which is so collected under section 20 can also be utilized for the conservation, promotion and development of Traditional Knowledge.

The interconnection between Traditional Knowledge and Article 15 of the ICESCR can be mapped as follows: Article 15 stresses on the right to enjoy the benefits of scientific progress and its applications. This assures the communities the right to operationalize and use Traditional Knowledge with

[38] United Nations (General Assembly) Declaration on the Rights of Indigenous People (2007)

communities' economic interests being secured. The article further provides the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production. This is a universal right; however; its implementation is possible when replicated in the domestic laws of the country. Section 20 of the Bill, as discussed above, replicates this in the form of the creation of the National Traditional Knowledge Fund.

The various aspects of Traditional Knowledge jurisprudence alongside the cases related to it have highlighted a lack of self-awareness in indigenous and traditional communities in relation to their indigenous and Traditional Knowledge. Section 35 of the Traditional Knowledge Bill, 2016 very categorically highlights that such communities which think they are the true custodians[39] of certain existing Traditional Knowledge can make an application to the national authority under the section. In alignment with registration frameworks and trademark and patent law, the Bill highlights through Section 35 that one month will be given by the national authority to receive objections in regard to the application received from communities who want to be recognized as custodians.

The right to culture and its application under the International Bill of Human Rights, is an evolving concept and applies not only to a substantive protection but also procedural safeguards. These safeguards are expected to be implemented across the state by the legislature, executive and judiciary as given under Article 2, ICCPR also known as an overarching provision.[40] It is extremely important that proposed normative framework incorporates principles of natural justice keeping

[39]Partnering with Custodians of Traditional Knowledge Key to tackling Climate Change, Protecting Humanity, Speakers Stress as Permanent Forum Continues Session, UN PERMANENT FORUM ON INDIGENOUS ISSUES (February 22, 10:30 P.M.) https://www.un.org/press/en/2019/hr5432.doc.htm

[40] Haugen, *supra* note 25.

in line with the vulnerabilities faced by a community. One of the important provisions which require an urgent discussion in this regard is in reference to the cognizance of cases[41] only when a complaint is filed by the Central Government, authority or any other benefit claimer as mentioned under the section. Hence, in case no complaints are filed with the requisite authority, there is a greater chance that cases of no consent based commercial exploitation may get unnoticed. As seen above, the UNDRIP calls for a mechanism regarding the redressal of exploitation of Traditional Knowledge, having a law that does not give due regard to this point only would make it a toothless tiger.

9. Conclusion

The Traditional Knowledge Bill, 2016 attempts to create measures to fight cases of biopiracy. But it fails to address how awareness regarding the same can be brought to traditional and indigenous communities. The process of applicants as custodians has been duly created under the Bill without understanding the ignorance of these communities in such matters. Further, no due protection has been exclusively given to Traditional Knowledge. Hence, the Bill strategically fails to address concerns regarding the commercial exploitation of such knowledge, which is beyond the ambit of patent laws. As a plan for futuristic actions, the Bill dutifully escapes the idea of connecting Traditional Knowledge and folklore and its impact on commercial exploitation. Until and unless these crucial aspects are not taken into consideration with solid solutions, the Bill will be more of a calculated myth than a justified attempt in securing and safeguarding Traditional Knowledge.

[41]Tharoor, *supra* note 6, at 19.