



A STUDY TO ANALYSE THE ATTEMPTS TO LEGALISE TRADITIONAL KNOWLEDGE IN INDIA

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Abstract

Protecting Traditional Knowledge is the need of the hour, but are the policy makers paying heed to the need of the hour? We all know that Traditional Knowledge needs protection and with the current regime in India, we are sort of failing at protecting it. Therefore, Mr Shashi Tharoor had introduced the Protection of Traditional Knowledge Bill, 2016³ which was a big failure when floored before the Lok Sabha.⁴ And now again in 2022, Mr Tharoor along with Mr RS Praveen Raj, Principal Scientist-IP Management and Technology Transfer, CSIR-NIIST, Thiruvananthapuram, have floored The Protection of Traditional Knowledge Bill, 2022 (Traditional Knowledge Bill) before the Lok Sabha and this research paper aims to study both the bills and analyse whether or not the houses and the Indian Policy makers would attempt to bring in a law that can really provide protection to Traditional Knowledge. This paper aims to provide an introduction whereby the author will introduce the concept of Traditional Knowledge, then the author will be critiquing the 2016 bill, how and why the bill was rejected and see if any plausible changes have been made in the 2022 bill. The author would also be analysing the current Patent regime for protection of Traditional Knowledge and see what changes could be made, If any, to strengthen the current patent regime. The author would then conclude by analysing the fate of the 2022 bill before the houses and analyse if at all a Traditional Knowledge act can be enacted and enforced in the near future.

Introduction to the concept of Traditional knowledge

“Traditional Knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”⁵ Traditional Knowledge hasn't been defined by WIPO or by any other culturally diversified countries. Traditional Knowledge makes an essential part of the Intellectual Rights Property branch but inspite of being in 2024, it doesn't have adequate protection provided at the International or National Level. “Every time we sit cross-legged while eating for better digestion, suck on mulethi (liquorice) or misri (rock candy) to prevent a cough, take a mouthful of ajwain (carom seeds) to prevent acidity or apply haldi lep (turmeric paste) on a physical wound, we are, in fact, using the traditional knowledge of India to our benefit without actually sharing the benefit with its Traditional Knowledge holder. Traditional knowledge stems from centuries of experience and wisdom, and is wide enough to include

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³ ‘Dr. Shashi Tharoor’s Official Website’. Accessed 3 September 2022. https://shashitharoor.in/private_member_bills_details/9%22

⁴ Primer, Ip. ‘Traditional Knowledge Bill by Dr. Shashi Tharoor Is a Failure’. Intellectual Property Primer (blog), 30 October 2017. <http://www.intellectualpropertyprimer.com/protection-traditional-knowledge-bill-failure.html>.

⁵ ‘Traditional Knowledge’. Accessed 12 January 2024. <https://www.wipo.int/tk/en/tk/index.html>.

customs, traditions or even certain methods (jugaad, or make shifting, or a hack, in common parlance) to make life or certain processes easier and more efficient. However, what might be a domestic nuskha (formula) for us, might be the source of commercial exploitation for someone else⁶. Thus this commercial exploitation is the main issue as there are no prevalent practise to safeguard the traditional knowledge holders also known as the Indigenous People due to various reasons, majorly being lack of awareness of their rights and remedies at law available if exploitation does take place. TK is majorly orally transferred from generation to generation.

When we use Traditional Knowledge on daily basis, we don't even know whose Intellectual Property we are actually using because these common formulas have been in public domain since time immemorial and the holder now lost in the crowd. These formulas are so common and available at ease at every household makes it even harder to search for its actual holder and thus provide protection. One out of the many examples is Yoga. Yoga was founded in India centuries ago "a comprehensive system to go beyond worldly desires. This was attained by training the wavering mind to reach a state of pure consciousness."⁷ Yoga, has widely been practised all around the world be it Hatha Yoga, Iyengar Yoga, Power Yoga or even Pilates Yoga⁸ the practitioners (not the original TK Holder) have been drawing benefits commercially without actually providing any kind of benefit sharing to its country, India. "Yoga as a comprehensive system fits well within the current definition of Traditional Knowledge as an Intellectual Property. However, due to its widespread nature and easy accessibility, it cannot gain as high a ground for protection as secret or sacred traditional knowledge is currently granted"⁹ but as WIPO has not yet defined TK or provided any kind of protection at the International level, making it very difficult for the indigenous communities to claim over the Traditional Knowledge like Yoga to be benefited monetarily or even morally.

The protection of Traditional Knowledge is under negotiations by the Intergovernmental Committee (IGC of WIPO) to draft legal framework for the protection of TK at the International Level so that a unified protection for Traditional Knowledge can be provided by WIPO to all its member state. Similarly, In India, in 2016 Dr. Shashi Tharoor had floored the bill for Protection of Traditional Knowledge Act, 2016¹⁰ which failed miserably before the Houses and the bill was shunned away. Mr Tharoor again floored the protection Bill, 2022¹¹ but the fate of the bill is still left to decide by the legislature.

⁶ Administrator, Admin. 'The Protection of Traditional Knowledge Bill, 2022'. Asia IP. Accessed 3 September 2022. <https://www.asiaiplaw.com/section/ip-analysts/the-protection-of-traditional-knowledge-bill-2022>.

⁷ Satischandra Chatterjee, Dhiredranath Dutta, An Introduction to Indian Philosophy, (12th ed., 2015)

⁸ 'Yoga: Methods, Types, Philosophy, and Risks'. Accessed 18 January 2024. <https://www.medicalnewstoday.com/articles/286745#philosophy>.

⁹ Raghavan, '[Vol II] Journal of Intellectual Property Studies [Issue II] Traditional Knowledge and India's Backend on Yoga'. Accessed 18 January 2024,

https://www.academia.edu/100132222/Vol_II_Journal_of_Intellectual_Property_Studies_Issue_II_Traditional_Knowledge_and_India_s_Backend_on_Yoga

¹⁰ 'Super note 2

¹¹ Tharoor, Dr Shashi. 'THE PROTECTION OF TRADITIONAL KNOWLEDGE BILL, 2022', n.d.

India being a culturally rich country has with immense Traditional Knowledge and Cultural Expression present still doesn't have a legal instrument to protect its own intellectual property from the world. Thus, this article addresses to questions like Can India develop its own legal framework to protect Traditional Knowledge? Will the 2022 bill be passed by the legislature this time? Are the current laws and legal framework like the Traditional Knowledge Digital Library sufficient enough to protect Traditional Knowledge?. Thus these are addressed in the next part of this research article.

Fate of the Protection of Traditional Knowledge Bill 2016 & 2022

Traditional Knowledge doesn't have a positive protection like the other branches of Intellectual property rights in India which means that Traditional Knowledge doesn't come under the ambit of a codified act for protection but Dr Shashi Tharoor, floored the Protection of Traditional Knowledge Bill,2016 before the parliament which was out rightly dismissed by the parliament stating their concerns over the protection Bill,2016.

The Protection of Traditional Knowledge Bill, 2016 was a failure¹² in many ways which is why it was outrightly dismissed. The Bill had several issues which not only put Traditional Knowledge in jeopardy but also the ownership of the Indigenous/Tribal People was also at threat. The Bill restricts the Traditional Knowledge only upto only 3 generations which just defeats the purpose of Traditional Knowledge. Though the Bill provides a definition to what Traditional Knowledge is still restricts the knowledge with the 3 generation policy which is a contradiction in itself and also in contravention to the Convention of Biological Diversity Art 8(j) which defines "Traditional knowledge as the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation"¹³ which clearly doesn't restrict the Traditional Knowledge upto 3 generations as stated in the 2016 bill.

The Bill also brings in the idea of custodian and defines it but gives all the powers to the Central Government of being custodian of the Traditional Knowledge which duly takes away the ownership and rights of the Indigenous people and Traditional Knowledge holders. Thus the idea of custodian and the central government being the custodian was the major issue in the bill which faced backlash from the parliament. How and why? Should a government be given the custody of someone else's intellectual property rights?

The 2016 bill also fell short of providing proper procedures for the registration of the Traditional Knowledge bill. Though Chapter 5 of the Protection Bill mentions about the procedures but doesn't really provide a registration procedure for registering Traditional

¹² Primer, Ip. 'Traditional Knowledge Bill by Dr. Shashi Tharoor Is a Failure'. Intellectual Property Primer (blog), 30 October 2017. <http://www.intellectualpropertyprimer.com/protection-traditional-knowledge-bill-failure.html>.

¹³ Unit, Biosafety. 'Introduction'. Secretariat of the Convention on Biological Diversity, 19 October 2021. <https://www.cbd.int/traditional/intro.shtml>. Accessed on 16 February 2024.

Knowledge rather provides the procedure for the grant of custodianship and provides the Traditional Knowledge Docketing System. A proper procedure was not laid down in the 2016 bill which one of the major reasons why the bill failed.

The Bill provides immense power to the Central Government as stated above but not just the central it also provides power to the State Government to be custodians of the Traditional Knowledge if the TK belonged to the particular State putting the stakeholders of Traditional Knowledge in difficulty. The holder of Traditional Knowledge like any other Intellectual Property Right branch should be given the ownership and the rights that comes along with it and not the State or Central Government. The Bill has also not dwelled on the 2 important principles of Traditional knowledge which is Access Benefit Sharing (ABS) & Prior Informed Consent (PIC) which also forms a part of the Convention of Biodiversity¹⁴ as well. There has been no mention of these two principles in the entire bill leaves the Traditional Knowledge holders with no access to any benefit sharing for their Traditional Knowledge.

The Bill has introduced the TKDL i.e., Traditional Knowledge Digital Library as per Section 37 of the protection of the 2016¹⁵ clearly states the use and purpose of the Traditional Knowledge Digital Library, the bill gives its recognition to TKDL which itself has so many loopholes and requires amendments to maintain the secrecy of the Traditional Knowledge and refrain it to brought it in the public domain.

“The Linking of Traditional systems of Knowledge with modern IPR system is the question of relevance”¹⁶ which Mr Tharoor has tried to do but has failed miserably but this didn’t stop him and he again in 2022 floored the Protection of Traditional Knowledge Bill, 2022¹⁷ before the parliament keeping in mind the amendments which had been suggested in 2016.

The Bill is a lot of similar to the 2016 bill in several ways, though Mr Tharoor has tried to differentiate between the two bills are still similar to each other which can be identified by the bare perusal of the 2022 protection bill. The amendments made to the protection Bill, 2022 are only seen in their titles though the content and meaning of the sections still remain the same. “Custodian” was replaced with “Ownership & license Rights” in section 3 of the 2022 protection bill but the intent and interpretation of the section is still the same of section 3 of the 2016 bill.

There have been several amendments in the 2022 protection bill but the subject matter and the intent remains the same. The Protection powers have still been completely been vested in the Central and State Government instead of the Traditional Knowledge Holders/owners. Thus, shifting the ownership of the Traditional Knowledge with the Central or State Government will only dilute the ownership of the Traditional Knowledge holders which they will have an issue

¹⁴ Super Note 13

¹⁵ Super Note 13

¹⁶ Saba. ‘Protecting Traditional Knowledge - the India Story till Date’. SCC Blog (blog), 23 April 2018. <https://www.scconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/>. Accessed on 16 February 2024

¹⁷ Supra note 10

with as their intellectual property becomes the property of the Government which dilutes the idea of granting protection to them.

Even if the definition or the idea of a custodian has been done away with the essence of a Custodian is still embedded in the 2022 protection Bill which clearly shows the similarity between 2016 and 2022 bill. The 2022 protection bill has not laid down a proper procedure for registering Traditional Knowledge. The Bill in a way has left it on the TKDL for its protection and with no proper procedure laid down there can't be any protection provided to the Traditional Knowledge holders/owners.

Thus, with no protection regime currently available to Traditional Knowledge being an integral part of IPR has been getting protection under the Patent Act which is not correct as the law itself has its limitations and contradictions with Traditional Knowledge. The next part is going to analyse whether the available patent law remedies are sufficient enough for protecting Traditional Knowledge or whether the protection bill 2022 should be enforced?

Adequacy of the Patent law available for Protection of TK

Intellectual Property Rights as we know have several branches like Copyright, Patents, Trademark etc., and these branches have their respective protection available at the national and international level but are these branches sufficient enough to bring protection to Traditional Knowledge. This part will decode each branch with Traditional Knowledge.

Traditional Knowledge and Patents are these two worlds apart?¹⁸ at the basic understanding of Patent law to fulfil and invention to be patent it has to be “Novel” at the face of it. Well!! Read the above line again there are contradictions itself if we see Traditional Knowledge and Patent Law. Traditional Knowledge itself means that it has been used previously which obviously means it is “prior art” and it is not novel and therefore no protection with Patent Law.

The importance of the protecting Traditional Knowledge started with the turmeric case which was that “In 1995, the United States awarded patent on turmeric to University of Mississippi medical centre for wound healing property. The claimed subject matter was the use of turmeric powder for wound healing. The Indian Council for Scientific and Industrial Research (CSIR) had objected to the patent granted. Due to extensive researches, 32 references were located in different languages namely Sanskrit, Urdu and Hindi on the traditional use of turmeric. After a legal battle the patent was revoked, stating that the claims made in the patent were obvious and anticipated, and agreeing that the use of turmeric was an old art of healing wounds.”¹⁹ and it was this case that brought light that Traditional Knowledge but a lot of patent holders started to merely tweaking Traditional Knowledge and started to patent the knowledge

¹⁸ Finetti, Claudia. ‘Traditional Knowledge and the Patent System: Two Worlds Apart?’ World Patent Information 33, no. 1 (1 March 2011): 58–66. <https://doi.org/10.1016/j.wpi.2010.03.005>.

¹⁹ ‘Patenting of Traditional Knowledge in Light of the Turmeric Case | IIPRD’, 10 September 2022. <https://www.iiprd.com/patenting-of-traditional-knowledge-in-light-of-the-turmeric-case/>.

to protect it and exploit the knowledge in their favour. The term used for such inventions is “Derived Knowledge”²⁰ The Supreme Court has also held Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of patent.

The idea of Derived Knowledge was also mentioned in Dhanpath Seth & Nil Kamal plastic crated Ltd²¹ which recognized the importance of inventive step when applied to TK derived invention it stated that as long as the derived inventions does not qualify as prior art the application for the grant of the patent will go through up until the grant stage.

Even though we have Patent Law as an alternate remedy to safeguard Traditional Knowledge it still has it’s boundations which creates issues for the safeguarding TK which is why the CSIR in collaboration with AYUR created the Traditional Knowledge Digital Library for protecting TK in India. The Bills also clearly state about the TKDL being an important tool to document and safeguard TK within the library but is the TKDL sufficient?

Traditional Knowledge Digital Library biggest loophole is the Non-Disclosure clause which creates an issue in the minds of the Traditional Knowledge holder that even after the voluminous and tedious documentation uploading in the digital library the knowledge could be used by someone else as there is no penalization if the Non-Disclosure clause is violated and there is no deterrence effect upon the exploiter which is why TKDL itself requires amendments and modifications.

Therefore, the patent law and TKDL lacks adequacy in providing the protection the Traditional Knowledge actually requires which is why the bills were floored upon the houses.

Conclusion

There is an urgent need to protect Traditional Knowledge in India because of diversity in nature and culture. The protection bill of 2016 and 2022 are surely a Step Forward but also a Step back as well. The undue power vested in the State and Central Government and with no proper mechanism for Access Benefit Sharing and Prior Informed Consent just defies the purpose of the protection of Traditional Knowledge and its Holders. The communities are the ones who should be protected and their Traditional Knowledge (Intellectual Property) should be secured and not the Government. With the current Patent Law protection and TKDL loopholes the holders/communities or rather what the bill defines them as “Knowledge Society” would still fear the exploitation the commercial companies can do which is why we need a positive mechanism for the same. Even though a step being taken the odds of the 2022 protection bill also looks the same as of the 2016, Bill. The Fate lies in the hands of the policy makers and we shall hope that if proper modification and amendments suggested in the 2022 Bill, the Bill could be passed before the house and India being such rich in it’s Traditional Knowledge can get it’s own domestic legislation.

²⁰ Biswanath Prasad Radhey Shyam vs Hindustan Metal Industries. AIR 1982 SUPREME COURT 1444

²¹ Dhanpat Seth v. Nilkamal Plastic Crates Ltd, 2008 (36) PTC 123 (HP)