

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 2

2025

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Concept of Traditional Knowledge in the Protection of Traditional Knowledge Bill 2022: A Comparative Analysis

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ABSTRACT

At international level there is no consensus on the definition of Traditional Knowledge. At the national level different countries have protected traditional knowledge in their IP law or through sui generis system. This article examine briefly the definition of traditional knowledge in relation to the Protection of Traditional Knowledge Bill 2022 in comparison with the similar concept in a few select countries in the world. India's Protection of Traditional Knowledge Bill 2022 provides an inclusive definition of traditional knowledge. The definition includes knowledge and expression of culture subsisting in various forms carried on for at least three generations. Traditional knowledge and traditional cultural expressions are two different concepts but are included in the definition, it mentions about medicinal preparations thereby restricting the other fields. The definition of traditional knowledge given by WIPO's IGC, Zambia's law and Kenya's law contains uniformity and hence compared with the definition under Protection of Traditional Knowledge Bill 2022.

Keywords: *Traditional Knowledge, WIPO, indigenous, local community, India, Intellectual Property.*

I. INTRODUCTION

The interests and rights of traditional knowledge holders or indigenous communities, is protected either through a sui generis system or within the existing Intellectual Property Rights (IPR) regime. Traditional knowledge is owned by a group, or a community and is already in public domain, so it is important to protect the knowledge against distortion and to retain the traditional nature of the knowledge. The aim of this article is to analyse and compare the definition of traditional knowledge provided in the Protection of Traditional Knowledge Bill, 2022 and in other legal texts of a few select countries. The present Article is divided into five sections, the first part of the Article is Introductory, the second part gives an overview of traditional knowledge related legislations in various countries. The third part of the Article is

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about the legal framework for protection of traditional knowledge as an intellectual property in India, fourth part deals with the analysis of the definition of traditional knowledge as provided in the Protection of Traditional Knowledge Bill, 2022 and its comparison with the definition of the same given by a few other countries' legislations and WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). And lastly the fifth part concludes the Article and provides some suggestions.

The term 'indigenous' is based around the relation of the original population to that of their colonisers. 'Indigenous people' identify themselves as indigenous of a place and this is on the basis of a "combination of cultural distinctiveness and prior territorial occupancy to a more recently arrived population having its own distinct and dominant culture".² The system and practices of indigenous knowledge are local knowledge which our ancestors developed over centuries of experimentation and are passed orally from one generation to another.³ However, the indigenous knowledge systems were overshadowed by the modern science and technology and hence have been disregarded until recently.⁴

Since 1980s, there were discussions of issues relating to traditional knowledge of indigenous peoples by different United Nations agencies. Traditional knowledge has been one of the mainstream issues at WIPO and when the preparation for the Seattle Ministerial Conference (1999) started, traditional knowledge also became one of the mainstream issues at WTO.⁵ Hence, the TRIPS Council was instructed by 2001 Doha Declaration (2001) to examine the protection of traditional knowledge. As the multinational companies started obtaining benefits from the traditional knowledge of the indigenous communities, the issue of intellectual property of traditional knowledge emerged.⁶

Foster v Mountford⁷ is a landmark case relating to prohibition to publication of traditional secrets, highlighting the serious consequences to Indigenous communities of commercial

²Sharon B. Le Gall, Intellectual Property, Traditional Knowledge And Cultural Property Protection, Cultural Signifiers In The Caribbean And The America, Routledge Research In Intellectual Property, 14% Kindle Edition, Location956 of 6922 , (Routledge 2014)

³Xylene Grail Donato-Kinomis, *Indigenous Knowledge Systems and Practices (IKSPs) in the teaching of Science*, 2, 13th National Convention on Statistics (NCS), October 3-4, 2016, available at <https://psa.gov.ph>, (last visited June 7, 2020)

⁴Douglas Nakashima, Marie Roue', Indigenous Knowledge, Peoples And Sustainable Practice, 5, Vol. 5 Social And Economic Dimensions Of Global Environmental Change, 314-324, edited by Timmerman in Encyclopaedia of Global Environmental Change, Editor in chief Ted Munn, (John Wiley and Sons Ltd., Chichester 2002, available at www.unesco.org.)

⁵Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 237, 33Case W. Res. J. Int'l L.233 (2001) Available at: <https://scholarlycommons.law.case.edu/jil/vol33/iss2/4>

⁶Srividhya Ragavan, Protection of Traditional Knowledge, 29, 2 MINN. INTELL. PROP. REV.1 (2001). Available at: <https://scholarship.law.umn.edu/mjlst/vol2/iss2/1>

⁷ See., (1976) 14 ALR 71

exploitation by others of their knowledge.⁸ At international level discussion is on defining the concept of Traditional Knowledge to give justice to the indigenous community for whom this knowledge is a part of their identity and life.

II. OVERVIEW OF TRADITIONAL KNOWLEDGE RELATED LEGISLATIONS IN VARIOUS COUNTRIES

The TRIPS Agreement contains no specific provision on protection of traditional knowledge. Hence, the TRIPS Council was instructed by the Doha Declaration (2001) to examine the issue related to the protection of traditional knowledge. Some countries in their special laws protecting the traditional knowledge do not use the term traditional knowledge instead use different terms such as indigenous knowledge, community knowledge etc. and some countries contains provisions protecting traditional knowledge in their existing Intellectual Property regime.

Sr. no	Name of the country	Statute
1.	Ethiopia	Access to GRs and Community Knowledge and Community Rights Proclamation 2006
2.	Peru	Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources 2002
3.	Philippines	The Indigenous Peoples Rights Act 1997
4.	Guatemala	Cultural Heritage Protection National Law (No. 26-97, as amended in 1998)
5.	Panama	Law no. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001.
6.	Brazil	Provisional Measure 2.186-16, of August 23, 2001
7.	Costa Rica	Law on Biodiversity

⁸Ruben Clark, *Out Of Sight, Out Of Mind, But Well Within Reach: Protecting Traditional Knowledge In Commercial Dealings*, 3, available at <https://static1.squarespace.com/static/55861728e4b0403b40cdba08/t/597eb150db29d6c2e34d624c/150147515078/Clark%2C+Ruben++ALSA+National+Essay+Competition.pdf> (last visited January 21, 2021)

8.	Vietnam	Biodiversity Law 2009
9.	Zambia	The Protection of TK, GR and Expression of Folklore Act 2016
10.	Kenya	Traditional Knowledge Act 2016

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2000 and is working on text-based negotiations for finalizing an agreement on one or more international legal instruments for effective protection of traditional knowledge and traditional cultural expressions or expressions of folklore. On May 24, 2024, WIPO Member States adopted, by consensus, WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.⁹

III. LEGAL FRAMEWORK FOR PROTECTION OF TRADITIONAL KNOWLEDGE AS AN INTELLECTUAL PROPERTY IN INDIA

India's Intellectual Property Rights (IPR) laws incorporate the obligations imposed by the international treaties and conventions. While fulfilling its international obligations, India has tried to protect indigenous knowledge in the IPR laws by using TRIPS Agreement's flexibilities such as sui generis system for protection of plant varieties, excludes traditional knowledge as patentable subject matter, disclosure in patent application of the source and geographical origin of the biological material when used in an invention,¹⁰ non-disclosure or wrongful disclosure of source of biological material and any associated knowledge is a ground for both pre grant opposition and post grant opposition of patent¹¹ as well as for revocation of the patent,¹² Geographical Indications, Traditional Knowledge Digital Library (a repository of formulations or practices based on of Indian System of medicine (Ayurveda, Unani, Siddha, Yoga) available in open domain) etc. As a part of obligation under Convention on Biological Diversity, India enacted the Biological Diversity Act in 2002 for providing benefit sharing for usage of biological resources and for protection of traditional knowledge associated with it. The latest development is the introduction of Protection of Traditional Knowledge Bill, 2022 with the aim to provide for the in-situ protection, preservation, promotion and sustainable development of India's Traditional Knowledge and for related matters.

⁹<https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-2-en-the-wipo-intergovernmental-committee-on-intellectual-property-and-genetic-resources-traditional-knowledge-and-folklore.pdf>, accessed on 20-12-2024

¹⁰See., Section 10 (4) (iii) D, *Ibid*

¹¹See., Section 25(1) (j), S. 25(1) (k), Patent Act 1970 and S. 25(2) (j), S. 25(2) (k), The Patent Act 1970

¹²See., Section 64 (1) (p) and Section 64 (1) (q), *Ibid*

The Protection of Traditional Knowledge Bill, 2022 provides for the establishment of the National Authority on Traditional Knowledge (NATK) (Central Level Authority) and the State Board on Traditional Knowledge (SBTK) to advise the Government on matters relating to the in-situ conservation, sustainable management and use of traditional knowledge and equitable sharing of benefits arising out of the utilization of traditional knowledge; assist the right holders to negotiate terms with other possible users, whether commercial or non-commercial; undertake promotional activities for traditional knowledge. Further NATK is to advise the Central Government on matters relating to TKDL access (non-disclosure) agreements with foreign patent offices and such other matters as may be deemed necessary, for access to material from the TKDL; and the SBTK is to advise the NATK or appropriate government with respect to matters concerning grants of erroneous patents based on traditional knowledge of India.

The draft Bill provides for prior permission to be taken from NATK for making application for grant of patent for invention based on the traditional knowledge, provided the invention is the output of advanced research on traditional knowledge.

IV. COMPARATIVE ANALYSIS OF DEFINITION OF TRADITIONAL KNOWLEDGE IN VARIOUS COUNTRIES' LAWS AND THE PROTECTION OF TRADITIONAL KNOWLEDGE BILL, 2022

As there is no universally accepted definition of traditional knowledge and the draft Bill on traditional knowledge has defined the concept, hence it is necessary to find out whether there is any lacuna in the drafted definition by comparing it with the definitions provided in various countries' statutes.

The Protection of Traditional Knowledge Bill, 2022 defines "traditional knowledge" to mean knowledge and expression of culture, subsisting in:

- codified or
- oral or
- other forms,

which may be publicly available or not, and is dynamic and evolving having passed on from generation to generation, for at least three generations, whether consecutively or not, associated with group or groups who are maintaining, practicing or developing it in traditional cultural context and includes:

- know-how,

- skills,
- innovations,
- practices,
- learning,
- medicinal preparations,
- method of treatment,
- literature,
- music,
- art forms,
- designs and
- marks

The definition excludes any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, management or unauthorized commercial exploitation;

WIPO defines Traditional Knowledge as “*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.*”¹³

The Ethiopian Proclamation uses the term ‘community knowledge’ rather than traditional knowledge and defines it as knowledge, practices, innovations or technologies created or developed over generations by local communities on the conservation and use of genetic resources.¹⁴ It provides that the publication or oral description of a community knowledge or that it is in use shall not affect its protection as community rights.¹⁵ Use of community knowledge is recognised as an inalienable right of the local communities. The proclamation is not applicable to the customary use and exchange of community knowledge by and among Ethiopian Local communities.

Peru’s Law 27811 (2002) for protection of Indigenous Peoples’ collective knowledge associated with biodiversity and the more establishes a sui generis regime for protection of traditional

¹³ See., <https://www.wipo.int/tk/en/tk/> accessed on 02-11- 2020

¹⁴ Article 2/14, Ethiopian Proclamation

¹⁵ Article 10 /4, *Ibid*

knowledge, innovations and practices as they relate to biodiversity for indigenous peoples.¹⁶ It defines Traditional Knowledge in Article 2 (b) as "Collective knowledge" as the accumulated, trans-generational knowledge evolved by indigenous peoples and communities which is concerning the properties, uses and characteristics of biological diversity.

The definition of traditional knowledge in Brazil's Provisional Measure 2,186-16, of August 23, 2001 is defined in association with genetic heritage in Article 7. It defines associated traditional knowledge as an individual or collective information or practice having real or potential value, having association with the genetic heritage of the indigenous or local community.¹⁷

For many communities traditional knowledge, traditional cultural expressions and genetic resources belong to a single integrated heritage, but from standpoint of intellectual property they raise different questions and may require different sets of solutions.¹⁸

According to the Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore in the draft work on overview of policy objectives and core principles it defined 'traditional knowledge' for the purpose of those principles only, as the content or substance of knowledge which is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodied in the traditional lifestyle of a community or people, or contained in codified knowledge systems passed between generations. And that this knowledge is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.¹⁹

In Zambia, traditional knowledge is protected under the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016. It defines the term "traditional context" to mean knowledge, practices, knowhow, learning, skill, process and method which is developed, sustained and passed on from generation to another generation within a traditional

¹⁶ Marisella Ouma, *Why and How to Protect Traditional Knowledge At The International Level keynote Address at seminar On Intellectual Property And Traditional Knowledge*, 2 Geneva, Switzerland 25 November 2016 intellectual Property Consultantmwarsie@Justice.Comwww.Marisellaouma.Co.Ke https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_2_16/wipo_iptk_ge_2_16_presentation_11ouma.pdf, accessed on 16-10- 2020

¹⁷ https://www.wipo.int/tk/en/databases/tklaws/articles/article_0002.html, accessed on 20-12-2024

¹⁸ Background Brief No. 1, Traditional Knowledge and Intellectual Property, <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-1-en-traditional-knowledge-and-intellectual-property.pdf>, p.3, accessed on 22-12-2024

¹⁹ Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, Protection Of Traditional Knowledge, Summary Of Draft Policy Objectives And Core Principles, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_5-annex1.pdf, p.6, accessed on 22-12-2024

community or by individuals or groups in the community traditionally or through custom and culture, and which forms part of a community's cultural or spiritual identity. It includes agricultural, medicinal knowledge and biodiversity-related knowledge. According to the Act, the term "traditional knowledge" is defined as any knowledge which is not limited to a specific subject area, technical field or medical field associated with genetic resources, which is originating from either a traditional community, individual or group as a result of intellectual activity and insight in a traditional context and such knowledge is embodied in the traditional lifestyle of a traditional community or is codified in knowledge systems and is passed on from one generation to another generation.²⁰

Kenya's Protection of Traditional Knowledge and Cultural Expressions Act, 2016 defines traditional knowledge in similar manner as that of Zambia's Act. As per Kenya's law, "traditional knowledge" is "any knowledge passed down from one generation to another generation —

(a) which originate from either an individual, local or traditional community-

- out of intellectual activity and insight in a traditional context,
- including know-how, practices skills, innovations, and learning,
- and embodied in the community's traditional lifestyle.

(b) which is contained in the codified knowledge systems and includes-

- knowledge relating to agriculture, environment or medicine,
- knowledge associated with genetic resources or other components of biological diversity, and
- know-how of designs, marks and indications, traditional architecture, construction technologies.

There is also a provision for additional rights status to the cultural rights in traditional knowledge or cultural expressions in addition to any rights subsisting under any copyright law, trademark law, patent law, design law or other intellectual property laws. The additional right also includes the rights to maintain, control, protect and develop the traditional knowledge as well as its manifestations.

²⁰<https://faolex.fao.org/docs/pdf/zam163186.pdf>, accessed on 20-12-2024, see. <https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Protection%20of%20Traditional%20Knowledge,%20Genetic%20Resources%20and%20Expressions%20of%20Folklore%20Act%20No.%2016%20of%20202016.pdf>, accessed on 19-01-2025

The definition of traditional knowledge given in Zambia's law (member of ARIPO) has similar definition provided in the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore²¹ and Kenya's law contains uniformity. The Protection of Traditional Knowledge Bill, 2022 defines traditional knowledge to include traditional knowledge as well as traditional cultural expression, when internationally these two concepts are treated differently. So, there should be separate definitions for these two concepts. A comparison with the above definitions shows that the definition given in the Protection of Traditional Knowledge Bill, 2022 provides for the limit on the passing of such knowledge on the number of generations, which is not so in other cases. There is no mention of 'indigenous people' and 'local communities. The definition also does not include knowledge associated with individuals in the community and specifically mention medicine preparations where as in other cases the methods and preparations are not limited to just one field. Hence in the light of the above changes need to be incorporated in the definition provided in the 2022 Bill.

V. CONCLUSION

The term traditional knowledge is defined differently by WIPO, statutes of different nations and by different scholars. So far there has been no consensus on the definition of traditional knowledge. One uniform definition for traditional knowledge at this point of time is needed. And about the kind of protection for traditional knowledge, many scholars, Governments and WIPO intergovernmental Committee on TK, TCEs, believes that the current individual-based forms of intellectual property rights cannot adequately protect traditional knowledge, and argue there is a need for novel or sui generis legal regimes.²² Moreover, the WIPO through its Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore is also working for the protection of intellectual property associated with the traditional knowledge of the indigenous communities.

So far India has tried to protect indigenous knowledge of the indigenous community in various Intellectual property laws and has recently introduced the Protection of Traditional Knowledge Bill, 2022. There are special laws for protection of traditional knowledge of the indigenous

²¹ See., Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010, and amended on December 6, 2016], p.12, Available at https://www.newaripo.online/storage/media/1675335506_Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf, accessed on 19-01-2025

²² Francesco Mauro and Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, 1255-1266, *Ecological Applications*, Vol. 10, No. 5 (Oct., 2000), 1263-1269, (Ecological Society of America) available at <http://www.jstor.org/stable/2641281>, accessed on 21-01-2021

communities at international level and hence, at national level, we should not lag behind. The definition of traditional knowledge in the 2022 Bill includes traditional cultural expression which needs to be separate from traditional knowledge. Moreover, the Government need to ensure that the definition of traditional knowledge should cover all the aspects related to the traditional knowledge by referring to the statutes of Zambia and Kenya and WIPO's IGC drafts on traditional knowledge.

(A) Suggestions:

The following are some suggestion to be incorporated in the definition of traditional knowledge given in the Protection of Traditional Knowledge Bill, 2022:

1. Traditional knowledge and traditional cultural expression are differently treated at international level hence expression of culture including literature, music art forms should be excluded from the definition of traditional knowledge. There should be separate definition for traditional knowledge and traditional cultural expression in the Protection of Traditional Knowledge Bill 2022.
2. The definition of traditional knowledge in the Protection of Traditional Knowledge Bill 2022, should be in line with the Zambia's and Kenya's definition given in The Protection of Traditional Knowledge and Cultural Expressions Act, 2016.
3. The words 'indigenous people' and 'local communities' should be incorporated in the draft definition.

In the existing intellectual property rights regime of India such as in the Patent Act, Biological Diversity Act, the definition of traditional knowledge should be given.
