



POSITIVE PROTECTION AS THE ONLY SAVIOUR TO PROTECT TRADITIONAL KNOWLEDGE: A COMPARATIVE ANALYSIS

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INTRODUCTION

This study's objective was to identify and assess the most appropriate and effective safeguarding strategy for traditional knowledge (TK). This study seeks to obtain a greater understanding of how Traditional Knowledge can be protected in this globalized economy while dealing with contemporary issues. This research ascertains that using Positive Protection to safeguard Traditional Knowledge is the most successful approach available.

According to the World Intellectual Property Organization, “Traditional Knowledge 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”. (World Intellectual Property Organization, 2010) TK is rightly valued by indigenous and local communities as an integral aspect of their ethnic traditions. Sustaining the different knowledge systems that will grant existence to TK could be critical for their long-term well-being, as well as their ideological and artistic dynamism.

When addressing the root question of the research *i.e.* ‘What is the most effective and successful method of protecting Traditional Knowledge?’, it is necessary to evaluate the conventional and non-conventional methods of safeguarding Traditional knowledge. It can be argued that traditional intellectual property tools such as Patents, Copyright protection, Trademarks and etc. do not adequately safeguard TK since much of this knowledge isn't novel or could not be traced back to a single person. However, to address this lacuna, eventually, the segregation of ‘Positive Protection’ and ‘Defensive Protection’ methods has been solidified. In response to significant international demand, predominantly in third-world countries, effective new protection methods to safeguard TK that went beyond the traditional methods had to be unveiled in this sphere. This research mainly focuses on the non-conventional Positive Protection Methods and their efficiency to safeguard TK.

METHODOLOGY

This research was carried out mainly utilizing qualitative data and purely falls within the purview of Doctrinal legal research. This research is mainly associated with the qualitative method, which relied on primary sources such as statutes and regulations that illustrate the existing Law as it is, as well as secondary sources such as books and journal articles that illustrate how various authors perceive or respond to the research question. This research primarily used the black letter approach to analyse procedural principles, fundamentals, precepts, notions, their theoretical foundations, and inter-relationships discovered in primary sources including legislation enacted, court rulings, treaty obligations, scholarly articles, reference books, academic journals, and discussions.

This research employed the legal dogmatic technique to analyse data since it is the most felicitous method for analysing and systematizing spheres such as TK law. The internationally accepted sources of law were examined and analysed in the legal dogmatic approach to ascertain what the present predicament of the law is.

Legal comparative analysis was also employed to compare several jurisdictions to synthesize international legal viewpoints on the discipline of safeguarding TK. This approach is more adapted for comprehensively illuminating the research problem while determining how various jurisdictions effectively utilized the Positive Protection method to safeguard Traditional Knowledge.

RESULTS AND DISCUSSION

Numerous intellectual property tools can be utilized to safeguard TK to a certain extent. Nevertheless, there seems to be no appropriate global protection for this particular subject for the most part. Even though the exact dimensions of the entitlement are still to be decided, a *sui generis* right may



encompass perpetual protection. This may result in the preservation of historic collective works including knowledge that is helpful but not inventive according to intellectual property law's requirements. In comparison to industrialized economies, emerging economies were more receptive to an international traditional knowledge entitlement. (OseiTutu, 2011)

Defensive protection is a series of techniques designed to prevent third parties from obtaining unauthorized or unsubstantiated Intellectual Property rights to TK. There are several ways to implement this strategy, including Disclosure of Origin and Traditional Knowledge databases, that would easily be utilized to maximize the productivity of prior art investigations. (Sumanadasa, 2011)

Positive protection strives to safeguard traditional knowledge by establishing positive rights that enable proprietors of Traditional Knowledge to safeguard and develop their knowledge. (Curci, 2009) Establishing a liability system in which initial manufacturers or suppliers are rewarded through a benefit-sharing arrangement, and enacting *sui generis* laws, are two options for putting this strategy into action.

The 'Bonn Guidelines' were the first worldwide regulations to guarantee that countries deliberately and efficiently deploy Access and Benefit-Sharing arrangements. (Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization,2002) Those regulations stressed the importance of countries developing a unified framework for Access and Benefit-Sharing that is appropriate for their jurisdiction. The 'Nagoya Protocol' is a much more focused view of the situation, which emerged to be entered into force in 2014. (The Nagoya Protocol on Access and Benefit-sharing,2010) It required stakeholders to cooperate in actions in accordance with their Access Obligation, Benefit-Sharing Obligation, and Compliance Obligation.

This study mainly highlights positive protection methods that third-world countries might build to safeguard their traditional knowledge through using the prescriptive approach, thereby facilitating the development of *sui generis* Laws. Moreover, it could be accomplished through revisions such as the addition of new compounds, improvements to existing laws, or perhaps even the elimination of particular provisions from existing regulations.

Peru is a third-world country that possesses an exceptional *sui generis* Law to safeguard Traditional Knowledge. Peru's special law was enacted to encourage the safeguarding of Traditional Knowledge and Indigenous Peoples' Collective Knowledge and traditions. Indigenous peoples are recognized as the custodians of traditional knowledge under the legislation. (Peruvian Law No. 27811, Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources, 2002). It already has introduced a wider concept of "indigenous peoples," which are described as aboriginal peoples with privileges that emerged before the foundation of the Peruvian State, who preserve their unique tradition, inhabit a distinct geographical territory, and recognize themselves as such. (Article 2, Peruvian Law No. 27811, Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources, 2002)

Panama is another third-world country holding a significant *sui generis* Law to protect Traditional Knowledge. A law implementing a special regime for intellectual property relating to indigenous peoples' accumulated knowledge as well as for the protection and defense of their cultural identity and traditional knowledge has been enacted in Panama. (Panamanian Law No. 20 of June 26, 2000, Special Intellectual Property regime upon collective rights of indigenous communities,2000) That legal framework in Panama safeguards the cultural heritage of locals and indigenous peoples, particularly when it comes to folkloric forms. The exclusive rights to generate, the right to avoid the commercialization of these commodities by outside parties on Panamanian soil, and the right to award licenses were introduced by this law. (Article 2 (x), Panamanian Law No. 20 of June 26, 2000, Special Intellectual Property regime upon collective rights of indigenous communities,2000) Notably, the Law stipulates the civil and criminal sanctions for abuses of the TK in Panama. All of these rights will only be awarded to indigenous peoples through the registration procedure of their collective rights. (Article 16, Panamanian Law No. 20 of June 26, 2000, Special Intellectual Property regime upon collective rights of indigenous communities,2000) According to Article 55 of the Law, when it relates to crimes involving misappropriation of Traditional Knowledge and replicating products



while abusing the knowledge of Panamanian indigenous communities, fifty percent of the fine would be allocated for the benefit of the National Treasure, as well as the other fifty percent would be allocated to the benefit of the respective community. (Article 55, Panamanian Law No. 20 of June 26, 2000, Special Intellectual Property regime upon collective rights of indigenous communities, 2000)

Furthermore, in terms of developing the *sui generis* legislation, it recognized numerous minimal levels of components that must be included in it, including the following: the aims of safeguard; extent of safeguard; requirements of safeguard; entitlements of safeguard: holders of traditional knowledge; the types of privileges to be awarded; how rights are obtained; how they are enforced; how privileges are ended up losing or discontinued; and resolution of disputes.

When analysing the existing legal regime of Sri Lanka, Traditional Knowledge is currently protected only in the form of folklore. Folklore is defined under Section 5 of the Intellectual Property Act, which is located in the chapter on copyright. (Section 05, Intellectual Property Act, No. 36 of 2003) Section 24 of the Act provides that expressions of folklore will be protected against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, and adaptation, translation, and other transformation when such expressions are made either for commercial purposes or outside their traditional or customary context. (Section 24, Intellectual Property Act, No. 36 of 2003) Despite this broad definition of the folkloric expression, safeguarding Traditional Knowledge in Sri Lanka presents a variety of challenges including the proving 'Originality' requirement which is an integral part of copyright. Furthermore, a difficulty arises in terms of ownership as well as the period of protection for folkloric expressions. When it considering that folklore expressions are original, the author should be identified. (Abeyesekere, The Protection of Expressions of Folklore in Sri Lanka)

Considering the above clarification, it is evident that the existing conventional Intellectual Property system does not adequately safeguard Traditional Knowledge in Sri Lanka and that there is a need for an extensive legal protection mechanism such as *sui generis* legislation to safeguard Traditional Knowledge.

CONCLUSIONS/RECOMMENDATIONS

In conclusion, this study recommends that Sri Lanka and other third-world countries should embrace a system for the regulation of traditional knowledge by enacting a *sui generis* legislation, in addition to offering legal clarity to both groups that possess traditional knowledge and other entities seeking to exploit it or facilitate benefit-sharing arrangements. Taking into consideration the numerous advantages that traditional knowledge has to provide, the goal of this kind of arrangement might be to make the content accessible for constructive utilization while also guaranteeing that community members are fairly compensated.



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