REVIEW ARTICLE

Traditional Knowledge as a Protected Form of Intellectual Property Rights in Nepal: A Law and Policy Assessment

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ABSTRACT:

A serious discourse is built around the world for proper and better protection of traditional knowledge associated with intellectual property rights. Traditional knowledge was considered as a leftover subject in intellectual property governance since the IP has been a talk of the town. Nepal is rich in terms of traditional knowledge associated with indigenous communities largely used in the medical sectors or what we generally name with “home-grown medicines”. There is a lack of proper protection and also incentives for these communities and researches have shown that there are also possibilities of conflict over ownership over such knowledge. The traditional knowledge not only benefit particular stakeholders rather in an extended way, it creates values for the nation and ultimately a global asset in the intellectual property regime across the world. The IP Policy, Law and Regulations need further incorporation of elements such as tenure of protection, mode of protection, access and benefit, etc. as the subject of traditional knowledge specifically used for medicinal purposes. This paper is based on a theoretical analysis of law, policies, rules, cases and practices for the protection of traditional knowledge in Nepal. This paper has further analyzed the position of existing umbrella clauses as seen in intellectual property laws for the said purpose.

Keywords: Access, benefit-sharing, law, policy, protection, promotion, traditional knowledge.

INTRODUCTION:

Before 1883, the protection of IP as the subject of law and policies was limited to national territories and was very exclusive and protective and work is seen as a form of protection of intellectual property associated with traditional knowledge (TK).\(^1\) The autonomy of the state over the IP resources specifically on Traditional knowledge and similar others were limited to the state and its apparatus like legal institutions and law enforcement agencies. The international recognition and protection of IP began with the adoption of the Paris Convention for the Protection of Industrial Property of 1883. It was noted that the Convention was a response to the expansion of cross-border trade in the late 19th century. In response, the Paris Convention {Article 2(1)}\(^2\) and the Berne Convention for the Protection of Literary and Artistic Works of 1886\(^3\) {Article 5(1)} introduced the principle of national treatment. The principles of reciprocity, mutual recognition, and most favored nation have also since been introduced into international law, including within the framework of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) (Article 4).\(^4\)

The protection of TK at the national level is based on the principle of national treatment.
and this principle is applicable in context when the national laws are in force. Similarly, the principle prior informed consent, holders of traditional knowledge, traditional cultural expressions, or genetic resources should be fully consulted before their knowledge is accessed or used by third parties. Most of the TK holders or associates are not aware of the economic benefit attached to it and even the state has tremendously failed to disseminate its economic values to the concern IP holder. Most of the developing countries are rich in traditional knowledge but failed to develop a proper protection mechanism hence there is a dilemma about how to benefit should be shared out of the exploitation of such resources. The IP law domain moves around a proper balancing between the interest of right holders and the general public. As per this notion, holders of traditional knowledge, traditional cultural expressions, or genetic resources receive an equitable share of the benefits that arise from their use and more concentration needs to be done to the health sectors. The use may be for the public benefit incurred by nationals or state or any third party based on the established notion of IP specifically associated with TK. The utility values of TK are also expressed in forms of benefit-sharing on use of it. Some of more TK associated with Turmeric (Curcuma longa Linn.), Neem (Azadirachta indica A.uss.), Basmati Rice (Orya sativa Linn.), Kava (Piper methysticum Forster), Quinoa (Chenopodium quinoa Willd.), Hoodia (Hoodia gordonii (Masson) Sweet ex Decne) and others are merely an example of it.

These plants will be protected under the IP regime but the knowledge that has been passed through generations and generation for uses of these plants need stronger protection regime. In each case, the knowledge held by indigenous and local communities was crucial in the subsequent pharmaceutical use of these plants, yet in each case, this contribution was not initially recognized or rewarded. Hence, the dual protection and benefit of these plants are not well studied. The most appropriated definition of TK is presented in Convention in Biological Diversity, 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. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly practical, particularly in such fields as agriculture, fisheries, health, horticulture and forestry. Similarly, Nepal’s Draft Bill on Access to Genetic Resource and Benefit Sharing (AGRBS 2002) defines TK as the body of knowledge, practices, skills, innovations and technology belonging to, within and among local and indigenous communities and individuals associated to utilization, conservation and commercialization of biological resources.

This definition is also reflected in country richness in terms of medicinal plants used for various purposes. Nepal is very rich in terms of medicinal and aromatic plants. The database of Nepal covers 1,624 species of plants belonging to 938 genera and 218 families. These are found in either a wild or cultivated state. Nearly 300 species of medicinal and aromatic plants are commonly used in Ayurvedic preparation. This figure may be increased. Few landmark cases are reflecting the global values and considering TK as global assets of the nation such as, in turmeric case.

In 1995 the US Patent Office granted a patent for turmeric, a substance used for cooking and healing in India. The Indian Council for Scientific and Industrial research (CSIR) opposed the application, claiming “prior art.” The CSIR presented documents from “ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association,” proving that the healing properties of turmeric had been in use for thousands of years in India. The patent was ultimately rejected because of the challenges.

Similarly in Neem the TK value was given importance by the international IP governance.

Similarly the patenting of neem was another long drawn fight for India. W.R. Grace, along with the US Department of Agriculture, filed for a patent for neem for as anti-fungal product with the EU Patent Office. This patent was eventually revoked after six years when, at a hearing in Munich, the manager of an Indian Agricultural company proved that he had been using the neem extract for the same purpose several years before the patent was filed. The corporate vice president of W.R. Grace earned India’s resentment when he dismissed the Indians’ knowledge of the plant’s uses as “folk medicine.”
This trend shows that the developed nations are using the natural, herbal, medicinal resources of developing countries and patenting them. The developing countries are not getting recognition either any substantial benefit of it. The traditional knowledge associated with indigenous communities principally deserves protection, recognition, benefit, sharing and also a proper reflection on the global IP Traditional Knowledge Database. Nepal is far behind developing such a scheme hence most of the indigenous knowledge or traditional knowledge used for medicinal purposes is not well surveyed and its IP importance is neglected. There is the possibility to have conflict over the ownership of traditional knowledge with India because most of our TK is their also and most of their TK is ours also. Hence in long run, the government needs more protection regimes and policies rather than merely having traditional intellectual property laws. The next section will deal with traditional knowledge from a global perspective.

**Protection of Traditional Knowledge in the globe**

Every branch of human knowledge which is open to inquiry by traditional methods—medicinal and herbal, agricultural and ecological, technological, cultural, literary and artistic knowledge of indigenous communities and which are generally transmitted orally across generations is called TK. The utility of traditional knowledge has surpassed different fields and is not necessarily connected with medicines but the way Ayurveda or traditional healing or medicinal engagements are seen required much more protection from IP infringements. The customary cost and methods applied for its uses and protection are also duly acknowledged by the international communities and have timely reflected in each other IP-related legislation. The growing commercial uses of it have also made it vulnerable to it and further possibilities of misappropriation and exploitation by third parties. Hence a strong initiation is there for the universal protection of traditional knowledge. Few African nations like Costa Rica, Kenya, Peru and Zambia have their specific laws for it while others are striving to have laws on it. Few nations are rich on TK and also in due course of protection can provide an economic boom.

The protection of TK has been expanded from Universal to regional legal instruments like the Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions was adopted in 2010 by the 19 member states of the African Regional Intellectual Property Organization (ARIPO). TK as the subject of IP at the international or universal flagship of World Intellectual Property Organization (WIPO) have been seen since 2010 with establishment of the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore. Considering the complexities of the expression of TK, the international negotiations at WIPO are focusing on developing a customized or *sui generis* system of protection for traditional knowledge.

To develop a *sui generis* system, policymakers can build on the existing legal frameworks. For example, Article 8(j) of the Convention on Biological Diversity (CBD) requires parties, subject to their national laws “to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”. Similarly, the Nagoya Protocol to the CBD on Access and Benefit Sharing deals with traditional knowledge associated with genetic resources and addresses issues like prior and informed consent, equitable remuneration and maintenance of community laws and procedures as well as customary use and exchange. Likewise, the UN Declaration on the Rights of Indigenous Peoples (Article 31) provides for the rights of indigenous peoples to “maintain, control, protect and develop”, among other things, their traditional knowledge and genetic resources as well as their IP over such knowledge.

Hence there is a strong need for bringing international legislation for strong protection and promotion of traditional knowledge based on mutual benefit and shared responsibilities of a member state of WIPO. Nepal is also a Member of many international instruments for intellectual property purposes. Hence next section will deal with Nepal’s position in IP law and Traditional Knowledge.

**Protection of TK in Nepal**

The Constitution of Nepal 2015 establishes the responsibility of the State to formulate “a common development concept for socioeconomic transformation and justice and rapid economic progress and prosperity of the country”. The Constitution has also upheld the policy for innovation and development, priority to local technology, skill and similar others. It has further asserted the intellectual property rights
under the fundamental right (Article 25) chapter and duly reflected in Directive Principles and State Policies also. The
2011 Industrial Policy has also identified the protection of IP rights in its substantial section.27 The current IP regime consists of the 1965 Patent, Design and Trademark Act (2022) which repealed 1936 and Copyright Act 2022.28 Some other legislation such as the Competition Promotion and Market Protection Act 2007, the Customs Act of 2007 and the Foreign Investment and Technology Transfer Act 2018 are some related legislation to the protection of IP regimes in Nepal. Nepal has become party to Paris Convention for the Protection of Industrial Property 1883 in 2001 and Member to WTO in 2004 as well as a party to Berne Convention for the Protection of Literary and Artistic Works 1886 in 2006 and received Membership of WIPO in 1997. This shows the strong inclination of the government of Nepal for the issues of intellectual property and its protection.

The Ministry of Industry, Commerce and Supplies is the line agency and leads the legislative process for the IP regime and also there is an inter-Ministerial TRIPS Coordination Committee as chaired by the above-mentioned Ministry. The DOI is the designated body for the patent, design and trademark registration, renewal and cancellation while the Copyright Registrar’s Office as in the Ministry of Federal Affairs as established under the Parliamentary Affairs and Culture Constituent Assembly administers the Copyright related IP regime. Similarly, the Intellectual Property Office in the Ministry of Industry, Commerce and Supplies administers the patent. The strength of IP laws also equally depends on the strength of multiple institutions like responsible entities for science and technology and innovation, agriculture, education and health and others too. This equally depends upon the willingness of the government agencies and also law enforcement agencies. The DOI has established 9 different sections such as industrial property section, repatriation, industry registration, foreign investment approval, company registration and facilities and incentives along with some others.

The line agency has formulated and finalized a new Intellectual property Rights (hereafter IPR) Policy in March 2017 to accommodate the new changes and dynamics of globalization and new inventions. This policy has aimed to bring new perspectives to draft Law on IPR which is still under consultation and moving to the different Ministries for their respective feedback and comments. Under the existing legal regime, the Ministry of Culture, Tourism and Civil Aviation oversee the issues of copyrights issues while the Ministry of Industry, Commerce and Supplies looks after patent and trademarks issues. The draft policy has aimed to establish a single government entity for the enforcement of IPR rights and related issues. This policy is considered as one of the remarkable shifts from the traditional protection of IP rights in Nepal. Some of the objectives of the policies are:-

- To encourage protection, promotion and development of IP
- To develop a balanced IP system
- To create awareness about the social, economic and cultural aspects of IP
- To encourage the commercialization of IP
- To strengthen the legal, administrative and human resources to ensure protection and enforcement of IP.

These are some approaches as explained in the policy to achieve above those mentioned objectives are like, first, it aims to revise the existing legal framework, recognize and enact law related to geographical indications, petty patents, traditional knowledge/culture, integrated circuit, plant variety protection, trade secrets and biodiversity. Second, it aims to introduce various programs to create awareness and promote intellectual property rights and third, the policy addresses the need to curb IP infringement and recommends revising penal provisions under the existing legal framework. The policy establishes a National Intellectual Property Council consisting of members from civil society, ministries and experts to facilitate and advise on policy issues and also new emerging trends on IP world like artificial intelligence and others. The policy has encouraged establishing the Public-Private Partnership (PPP) for the promotion and protection of intellectual property rights. Similarly, the technological transfer is also encouraged from the developed nation for the protection of intellectual property rights. The government has shown a positive response to convert it into a piece of law as soon as possible. Some of the fundamental reflection in policy is like:

• Intellectual Property Office- Ministry of Industry, Commerce and Supplies
• Intellectual Property Tribunal or IP Court- Facilities of IP Court in High Court
• Human Resource Development –Public-Private Partnership collaboration
• IP promotion Fund
A simple survey has been made whether the intellectual property rights associated with traditional knowledge are a subject of protection beyond national territories in the forms of investment issues. Nepal has signed six bilateral investment treaties and out of them, four are in force. These all investment treaties have kept the subject matters of intellectual property including traditional knowledge as a subject of protection in investment sectors. None of these treaties have specially mentioned the issues of traditional knowledge as subject matters of protection in terms of investment subjects.

<table>
<thead>
<tr>
<th>Agreement</th>
<th>IP Protection</th>
<th>Definition</th>
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<tr>
<td>France- Nepal Bilateral Investment Treaties, 1983.</td>
<td>Yes</td>
<td>Copyright, industrial property rights (such as patents, licenses, trademarks, designs and industrial models), technical procedures, registered names and the clientele;</td>
</tr>
<tr>
<td>Germany- Nepal, Bilateral Investment Treaties 1986.</td>
<td>Yes</td>
<td>Copyrights, industrial property rights, technical processes, trademarks, trade names, knowhow and goodwill;</td>
</tr>
<tr>
<td>India- Nepal Bilateral Investment Treaties, 2011.</td>
<td>Yes</td>
<td>Intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;</td>
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CONCLUSION :
Traditional knowledge is a valuable asset of the nation. Nepal is rich in terms of varieties of traditional knowledge used for medicinal purposes and largely is seen in the sector of Ayurveda. Admitting the fact that, there is convincing research done from the perspectives of medicinal science on uses and utilities of such knowledge by the government of Nepal meanwhile very little work is done from legal perspectives to provide protection and promotion of such knowledge as subject matters of intellectual property rights. The protection of herbs and plants is equally significant as like protection of such substances in the form of IP. The global race over parentification of such resources of developing nations is creating tussles and confrontation among the nation and most of them are exploiting such resources. There is a need to have inter-departmental coordination and cooperation for the proper uses and protection from exploitation, misappropriation by third parties in issues of traditional knowledge. The current protection regime of IP in Nepal is inadequate for traditional knowledge and associates. The fundamental reason for such inadequacy is lack of proper specific laws for traditional knowledge. The melding of Ayurveda knowledge and law will strengthen the protection of traditional knowledge and also provide the benefit of these communities. A proper survey is needed and time to create a national database of it.

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9 AGRBS, Draft Bill on Access to Genetic Resources and Benefit Sharing (In Nepali), HMG/N, Ministry of Forest and Soil Conservation, Singhadurbar, Kathmandu, 2002.
13 Ibid.
20 The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) undertakes text-based negotiations to finalize an agreement on an international legal instrument(s) for the protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).
22 Article 8(j) - Traditional Knowledge, Innovations and Practices available at https://www.cbd.int/traditional/.
23 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way.

26 Ibid.

27 Available at https://www.unescap.org/sites/default/files/symposium11-s5-ojha.pdf.


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