



# Rights of Tribal Communities and Traditional medical Practitioners of Vaidis and Hakims on Traditional Knowledge: An Indian Context

Dr. Shashirekha Malagi<sup>1\*</sup>

## ABSTRACT

*The role of traditional knowledge with its spiritual, cultural and economic values is being increasingly recognised. Such knowledge has been used for centuries by indigenous and local communities under local laws customs and traditions. This knowledge which is the result of communities' cooperative effort is built on the foundation of past experiences and observations. The products based on traditional knowledge are important sources of income, food and health care for large parts of the population in developing countries in particular and in turn, for their sustainable, socio-economic developments. Protection of Plant Varieties and Farmers Rights Act, 2001 (PPVFRA) and Biological Diversity Act of India, 2002, is an attempt by the Indian Government to recognize and protect the rights of both indigenous people and traditional medical practitioners in respect of their contribution made in conserving, improving and making available plant genetic resources for development of new plants varieties. But due to illiteracy, socio economic backwardness, the said law is beneficial to only commercial plant breeders and not to tribal communities and traditional practitioners but there are some provisions for protection of traditional knowledge under Indian intellectual property laws. It is required to strengthen the PPVFRA and Biological Diversity Act of India, 2002, by strict implementation which shall create legal awareness in the indigenous people regarding their rights which are available to them under intellectual property laws and also protect the traditional knowledge of indigenous people in conservation of plant genetic resources.*

**KEY WORDS:** Traditional knowledge, rights of indigenous people and Traditional medical Practitioners of Vaidis and Hakims, conservation, environment, bio-diversity, sustainable agricultural practices, Protection of Plant Varieties and Farmers Rights Act, 2001 (PPVFRA) and Biological Diversity Act of India, 2002, The Patent (Amendment) Act, 2005

\* Assistant Professor of Law, Sir Siddappa Kambali Law College [Formerly University College of Law], Karnataka University, Dharwad, Karnataka. 580001

## Introduction

Traditional knowledge (TK) is integral to the identity of most local communities. It is a key constituent of a community's social and physical environment and, as such, its preservation is of paramount importance. Attempts to exploit TK for industrial or commercial benefit can lead to its misappropriation and can prejudice the interests of its rightful custodians. Indigenous people and local communities have developed an expansive body of traditional knowledge which plays a vital role in securing their cultural, spiritual, social, economic and environmental wellbeing. Protected, enhanced and transmitted over centuries, traditional knowledge forms part of and at the same time regulates and controls indigenous and local community knowledge systems as they serve present needs and respond to new challenges and opportunities. Traditional medical Practitioners of Vaid and Hakims, they are the identity of the culture of the country as well as the property of the nation. The rights of Tribal community and rights of vaid and Hakims has been discussed in this paper.

### Meaning:

Traditional Knowledge means the ideas, experiences, practices and information developed by indigenous communities.<sup>2</sup> Traditional knowledge includes information on the use of biological and other materials for medical treatment and agriculture, production, process, designs, etc.<sup>3</sup>

The term "traditional knowledge" refers to knowledge, possessed by indigenous people, in one or more societies and in one or more forms, including, but not limited to, art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs, literature.<sup>4</sup>

This knowledge is not documented but transported from one generation to another orally. This knowledge cannot be separated from the traditional people. Traditional Tknowledge can also be claimed on Traditional Knowledge. There are several definitions for "indigenous people," but it essentially refers to people existing under relatively disadvantageous conditions. Hence they are crippled economically and socially. Their cohesiveness as communities damaged or threatened, and the integrity of their cultures undermined.<sup>5</sup>

According to "Concise Law Dictionary" –Indigenous means ,Indigenous animals, plant etc, have always lived or grown naturally in the place, where they are as pposed to others.<sup>6</sup>

According to "Concise Law Dictionary" – Indigenous people means ,People who are originally or naturally inhabitants of a country<sup>7</sup>.

According to "Oxford Dictionary"-Tribe means , Race of People.<sup>8</sup>

<sup>2</sup> <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf>

<sup>3</sup> Traditional Knowledge and the Convention on Biological Diversity, <https://www.cbd.int/traditional/intro.shtml>, (Visited on 8.11.2022)

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

<sup>6</sup> P.Ramanath Aiyar, "Concise law Dictionary" 3<sup>rd</sup> e.d., (New Delhi: Lexis Nexis Butter warths Wadwa Nagpur, 2005)

<sup>7</sup> *Ibid*,

According to “Concise Law Dictionary” – Tribe means a social group consisting of people of the same race, who have the same belief, customs, languages etc and usually live one particular area, ruled by a chief.<sup>9</sup>

### **Importance of Traditional Knowledge**

Traditional knowledge has played an important role in vital areas such as food security, the development of agriculture and medicinal treatment. Traditional knowledge serves the medicinal needs of millions of people in developing countries, where access to modern health care services and medicine is limited by economic and cultural reasons. The indigenous communities have developed informal system of Seed production, which operates on the basis of the diffusion of the best seed available within a community. The knowledge of indigenous farmers relating to cultivated plants has helped in developing new plant varieties and for food security on global scale .Traditional knowledge can play an important role in resource management and environment management.<sup>10</sup>

### **The following are characteristics of indigenous people or Tribal Communities.**

- a) They live in small societies and may not have access to formal education. They are unaware of the worth of the knowledge they possess. Such communities are often found in developing and underdeveloped countries where there is a concentration of ethnocentric societies.<sup>11</sup>
- b) Most often, the knowledge in question will be known to the entire community and remains exclusively within it. However, within the society, the knowledge is in the public domain.<sup>12</sup>
- c) Occasionally, knowledge of a special skill or art is limited to a few members of the community.<sup>13</sup>
- d) The knowledge and its components are normally required for a regular lifestyle within the society. It is passed down through generations while still retaining its original individuality.<sup>14</sup>
- e) Knowledge present in one form, such as art, music, or folklore, can be developed into other forms more understandable to the rest of the world. However, these informal innovations do not get formal recognition.<sup>15</sup>

### **Reasons for the Protection of Rights of Tribal Communities and Traditional Medical Practitioners of**

#### **Vaids and Hakims, as follows:**

- a. Conservation concerns: The protection of Traditional knowledge contributes to the wider objectives of conserving the environment, bio-diversity and sustainable agricultural practices.
- b. Preservation of traditional practices and culture: Protection of Traditional knowledge would be used to raise profile of the knowledge and the people, who are entrusted with it, both within and outside of the communities.
- c. Prevention of appropriation by unauthorised parties and avoiding “bio-privacy”.

<sup>8</sup> Oxford advanced learner’s dictionary, 6<sup>th</sup> e.d., (Oxford University Press, 2002).

<sup>9</sup> Supranote (6), “Concise law Dictionary”.

<sup>10</sup> Scoping the Need of Mainstreaming Indigenous Knowledge for Sustainable Use of Bioresources in the Indian Himalayan Region, <https://link.springer.com/article/10.1007/s00267-021-01510-w>, (Visited on 8.11.2022)

<sup>11</sup> <http://www.ciel.org/Publications/UsingIPToProtectTraditionalKnowledge.pdf>, (Visitec on 1.7.2022)

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

- d. Promotion of use and importance of traditional knowledge for the purpose of further developments.
- e. Equity consideration: The custodians of the traditional knowledge should receive fair compensation in case of their indigenous knowledge is lead to commercial gain.

Indigenous people often believe that intellectual property law is neither a necessary, nor a desirable, means of encouraging innovation within their communities. As a consequence, they are sometimes easily willing to share this knowledge, which leads to its exploitation. This situation gives raise to concern because, although the original holders have not acquired any benefit, the exploiters have benefited from the knowledge.<sup>16</sup>

### **Indian initiatives for protection of Tribal communities and Traditional medical Practitioners of Vaid and Hakims**

For a Tribal, nature is like that maternal womb. The life style and Traditions of each tribal community seems to be unique and are related to the utilization of particular types of work. They strongly believe that, the forest provides food security for their livelihood. They have traditional ecological knowledge of plant species used for different purposes such as food and medicine. This knowledge was even passed through generation and it played an important role in the conservation and sustainable use of biodiversity. The tribals also have knowledge about in situ conservation of numerous plant species and landrace of cultivated species. This knowledge is the base for genetic wealth, which serves as feedstock for plant development and improvement progras and as a safety net for resource poor farmers in relation to risk in agriculture. The tribal's use a variety of plant species in their daily life and are well versed with knowledge of edible green, vegetables, fruits, seeds and other materials. They have clear knowledge about seasonal variations and availability of these edible and medicinal plants.<sup>17</sup>

### **Legislative Effort**

To deal with issues pertaining to protection of Traditional Knowledge Indian parliament had enacted the following three legislations:

#### *Traditional Knowledge under Biological Diversity Act of India, 2002*

Misappropriation of Traditional Knowledge and bio piracy of genetic resources are of great concern to many countries and indigenous and local communities. While these issues have been taken up within various multilateral forums such as the Convention on Biological Diversity (CBD), the TRIPs. Biodiversity plays an important role in the conservation of ecological stability and also involves protection of socio – ecological interests of people living close with nature. CBD recognizes the sovereign rights of states to use their own biological resources. The convention expects the parties to facilitate access to genetic resources by other parties subjected to a national legislation. Convention also asks the state parties to include within its legislation the right of indigenous communities for benefits accruing from the commercial use of their knowledge.

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*.

As a signatory to CBD India had committed to make a national legislation which provides for access to biological resources and benefit sharing. In order to fulfil this obligation Indian government has enacted the Biological Diversity Act in 2002. The Act provides for access to biological resources of the country with the purpose of securing equitable benefit sharing arising out of commercial use of those resources. The Act recognizes the Knowledge of local communities and emphasize on the need to protect them. Though the Act was primarily enacted for providing free access to biological resources of the Country by foreign national institutions and companies, it contains many restrictions regarding the same. A foreign national or a body corporate not registered in India is not allowed to use or obtain any biological resource occurring in India or any knowledge associated thereto for research or commercial utilization without the previous permission of NBA<sup>37</sup>. Section 4 of the Act restricts the transfer of results of any research relating to any biological resources obtained from India to any foreign nationals or corporate. Measures have been taken in the act to prevent instances of bio piracy by restricting any person from applying for intellectual property rights of any nature within or outside India for any invention based on any research or information on a biological resource obtained from India without previous approval of NBA<sup>18</sup>As mentioned earlier, the Act recognizes the need for sharing the monetary gain accrued from using biological resources or knowledge associated thereto with persons who have conserved these resources for years. National Biodiversity Authority has been empowered under section 21 to determine the ways and means of benefit sharing. Various means of benefit sharing include grant of joint ownership of IP rights with NBA or If benefit claimer can be identified, then with them, transfer of technology, location of production, research and development units in those areas which will benefit the lives of the benefit claimers or by setting up of venture capitals or monetary compensation to the benefit claimers. Another feature of the Act in relation to protection of TK is that it makes bio piracy a cognizable and non-bailable offence with a punishment of imprisonment up to five years and monetary compensation up to five lacks. The Act also provide for the establishment of a National Biodiversity Authority.<sup>19</sup>

#### *National Bio Diversity Authority*

Section 8 of the Act gives power to the Central government to establish a National Authority to look into the matters provided under the Act. NBA is required to facilitate the access to genetic resources giving due regard to benefit sharing. As provided earlier it shall be the duty of NBA to oppose any application for IP rights in any country for any invention using genetic resources or associated TK obtained from India. The protection, Conservation and Effective Management of Traditional Knowledge relating to Biological Diversity Rules, 2009 imposes a duty upon NBA to recognize existing forms of representative organizations of traditional community and when there is no such representative bodies NBA through concerned state authorities make arrangement for formation of representative organizations.<sup>20</sup>

NBA has to setup a fund known as the Traditional Knowledge Fund, which shall be used for the benefit of traditional communities and for the protection and conservation of TK by way of various welfare

<sup>18</sup> The convention on Biological Diversity, 1992 Art 8(j)

<sup>19</sup> Veena, "Traditional and Indigenous Knowledge," 1<sup>st</sup> ed., (Hyderabad: The ICFAI University Press, 2007).pg.8

<sup>20</sup> *Ibid*

measures. NBA has the discretionary power to give access to both documented or non documented TK. National authority is empowered to develop national strategies, plans and programs for conservation, development and sustainable use of traditional knowledge.<sup>21</sup>The Act can be regarded as a defensive strategy for protection of bio piracy; it is indeed an innovative legislation with adequate measures to safeguard the bio diversity and economic interests of indigenous communities.<sup>22</sup>

### *Traditional Knowledge under Protection of Plant Varieties and Farmers Rights Act 2001*

The Protection of Plant Varieties and Farmers Rights Act also provides for the protection of indigenous knowledge and also compensation for violation of indigenous people's rights.

Benefit Sharing. The use of farmer varieties to breed new varieties will have to be paid for. The revenue will flow to the National Gene Fund. Farming community should collectively rather than individually access this money, except in clear cases where an identifiable farmers' variety has been used. 'Farmers should have the right to decide how this money should be utilized or distributed. The method of fixing and realising benefit sharing should be made simpler and easier to implement.'<sup>23</sup>

Anyone is entitled to register a community's claims and have it duly recorded at a notified centre. This intervention enables the registration of farmers' varieties even if the farmers themselves cannot do this due to illiteracy or lack of awareness. If the claim on behalf of the community is found to be genuine, a procedure is initiated for the benefit sharing so that a sharing of profits made from the use of farmers' variety in a new variety goes into National Gene Fund.<sup>24</sup>

### *Right to Compensation for Undisclosed Use of Traditional Knowledge*

In cases when it is established that the breeder has not disclosed the source of varieties belonging to a particular community, compensation can be granted through Gene Fund.<sup>5</sup> any Non Governmental Organisation or any individual or a government institution may claim for compensation by making an application on behalf of a community in cases where the breeder has not disclosed traditional knowledge or resources of the community that he has used in his research.<sup>25</sup>

### *The Patent (Amendment) Act, 2005*

The TRIPS agreement signed along with WTO agreement in 1995 provides for making certain changes in domestic patent laws, for reaching a uniform system of legislations relating to patent throughout the world. In order to fulfil this obligation under TRIPS Patent Act was duly amended in 2005. This amendment introduced into Indian IP system certain new measures for protection of TK.<sup>26</sup>

All the above provisions are defensive in nature which can help to oppose any patent granted to an invention which is based on the knowledge available within the indigenous groups of this nation. But these

<sup>21</sup>www.biodive.org/convention/articles,asp,last visited on 10.01.2012

<sup>22</sup> *Ibid*

<sup>23</sup> The Protection of Plant Variety and Farmers Rights Act, 2001 sec2(a),21 and 41

<sup>24</sup> The Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

provisions are also not capable of covering the entire area covered by TK, which necessitates the need for a sui generis system for protection of TK.<sup>27</sup>

### **Rights of Traditional and Tribal Community, Rights of Vaidas and Hakims**

#### **Access to Biological Resources:**

Access to Biological Resources, Under Section 7 of the Biological Diversity Act 2002: Commercial utilization has been defined in section 2, which also specifically excludes.<sup>28</sup> As regards the rights of the people to access biological resources, the Act has classified people into two categories: one, the resident Indian Citizen and other, the foreigners including the non-resident Indian citizens. The same rule applies to access of biological resources by associating organisations and body corporate and all resident citizens and entities made up to them can have free access to the commercial use of the biological resources. In case of commercial use of the biological resources, the said person or entity has to intimate the concerned state Biodiversity Board prior to making such access.<sup>29</sup> However section 7, Provided that the provisions of this section shall not apply to the local people and communities of the Tribal, including growers and cultivators of biodiversity and vaidas and hakims, who have been practicing indigenous medicine.<sup>30</sup> “*Indigenous medicine*” means one or all of the three of medicine that is Ayurvedic, Siddha and Unani system of Medicine.

As regards the rights of the traditional and Tribal communities, Rights of traditional practitioners of vaidas and Hakims to access biological resources, the Act has given such rights because they conservers of biological resources and holders of knowledge and information relating to the use of biological resources. And they possess valuable knowledge of uses of biodiversity such as medicine, herbal remedies and vegetables, much of the knowledge of the status and dynamic of biodiversity also resides with the people at grass roots. So it is the duty of the state or government to protect the knowledge possessed by these people. Quality control of traditional medicine is critical and essential issue to be considered is assuring the therapeutic efficacy, safety and to rationalize their use in the health care. In almost all the traditional system of medicine, the quality control aspect has been considered from its inception itself by the “rishis”, expert saints in medicines and later by ‘vaidyas and Hakims’, who used these medications for treatment of the patients.

#### **Rights of Communities:**

The Protection of Plant Varieties and Farmers Rights Act also provides that if the people of any village or local community have contributed in the evolution of any variety then any person, group of persons or any governmental or non-governmental organization may on behalf of that village or local community file any claim attributable to the contribution of the people of the village or local community. The authority, after making necessary enquiry, if satisfied, will grant compensation to the applicant, which shall be deposited by the breeder of the variety in the National gene Fund.<sup>31</sup>

<sup>27</sup> *Ibid.*

<sup>28</sup> Dr.S.R.Myneni, “Law of Intellectual Property”, 5<sup>th</sup> ednt, (Hyderabad: Asia law house, 2009), p.541

<sup>29</sup> *Ibid.*

<sup>30</sup> The Karnataka Ayurvedic and Unani Practitioner’s Registration and medical Practitioners Miscellaneous Provisions Act, 1961.

<sup>31</sup> Section 41 of The Protection of Plant Varieties and Farmers Rights Act 2000

**Benefit Sharing:**

Benefit sharing in the context of registered variety means the proportion of the benefit accruing to the breeder of such variety for which a claimant shall be entitled. Where a breeder makes use of the genetic material registered in the name of various persons in the development or creation of a new variety, such persons can claim a share in the benefits accruing to the breeder as a result of commercial exploitation of the new variety.<sup>32</sup>In demining the benefit sharing of the claimant, the Authority will take into consideration the extent and nature of the use of genetic material of the claimant in the development of the new plant variety and the commercial utility and demand in the market of the variety in respect of which benefit sharing has been claimed. The breeder of such variety shall deposit the amount of benefit sharing so determined by the Authority in the prescribed manner in the National Gene Fund.<sup>33</sup>

**NGOs Efforts**

Several NGOs are also making efforts for developing data base and bringing the local art and culture on the national and international scenario. The society for Research and Initiative for Sustainable Technologies and Institute (SRISTI), Ahmedabad, Gujarat has been developing data base of traditional knowledge and innovation in close collaboration with local community members.

Rupayan an NGO promoted by late Komal Kothari of Rajasthan has done great efforts for preservation and recognition of rich heritage of art and culture of Marwar region of Rajasthan. Similarly, the Lok Kala Mandal of Udiapur, under the guidance of late Devlal Sombhar, has earned a great accolade for preservation of local art of Merwar region.

**Conclusion**

It is clear that the biological resources and knowledge of the indigenous and local communities would continue to be exploited by Indian corporations without their consent and without any sharing of benefits. It is unfortunate that there is no serious attempt at the international and national level to protect the violation of the rights of tradition and tribal communities, rights of Vaidis and Hakims. The attempt by the national and international bodies to protect the interest of indigenous people is still remain incomplete and the provisions of benefit sharing, seems to be far from reality. If we really concerned about the protection of traditional knowledge of indigenous and local communities associated with biological resources, we must introduce more provisions facilitating the national governments to take proper remedial measures to protect the traditional knowledge.

**Suggestions**

- Need to educate the indigenous people so that they can make best use of their rights.
- Non-Governmental organisation must be given support to safeguard the interest of indigenous people
- There must be constitutional and legal protection to safeguard the traditional knowledge possessed by the tribal population.

<sup>32</sup>Section 26 of The Protection of Plant Varieties and Farmers Rights Act 2002

<sup>33</sup> Section 45 of the The Protection of Plant Varieties and Farmers Rights Act 2002

- There must be adequate sharing of profit for utilizing the traditional knowledge for commercial purposes.
- Indigenous people who are engaged in the conservation of genetic resources of plant must be given reward.