

Indigenous Knowledge in Agriculture in Sri Lanka: Legal Aspects

The creation and the use of knowledge are two key factors that have been shaping the human civilisation over millennia. The history of the human civilisation is perhaps the history of human knowledge. It is common experience that those who possess knowledge lead the world.

One of the major components of the prevalent body of human knowledge is the knowledge that has been collectively created and developed by various groups of people, communities or nations. Such knowledge transmitted from generation to generation, spreads across diverse and many human endeavours such as medicine, healing systems, biological diversity and agriculture. The knowledge so created, developed and transmitted is generally called "traditional knowledge" and sometimes, "indigenous knowledge".

It is proposed in this work to examine briefly the legal framework related to traditional knowledge in Sri Lanka with special reference to agriculture. The phrase "traditional knowledge" used herein includes indigenous knowledge as well.

Indigenous Knowledge and Traditional Knowledge

The formation of a universally acceptable definition of indigenous knowledge may, due to its nature and complexity, not be possible. The indigenous knowledge is broadly identified as the knowledge created and held by the people, with their cultural distinctiveness, who are indigenous to a particular territory as against the people arrived in relatively recent past with

distinct and dominant culture¹. On the contrary, traditional knowledge covers the body of knowledge held by the members of a distinctive culture or sometimes the knowledge peculiar to such culture and the local environment in which it exists². In other words, traditional knowledge is the body of knowledge consisting of knowledge, skills, rituals, customs, practices and beliefs transmitted from generation to generation in the traditional context of the particular group of people irrespective of the prior territorial occupancy³. Consequently, traditional knowledge embraces the totality of the knowledge including indigenous knowledge concerning and related to traditional way of life. Traditional knowledge is generally group oriented and collectively held. It has its own evolution process - improvement and development within its cultural environment in the generation to generation transmission process. In consideration of our history, culture and traditions, the term 'traditional knowledge' is more suitable and justifiable in Sri Lanka.

International Status

There exists no international instrument on traditional knowledge⁴. However, certain international instruments carry some provisions in relation to traditional knowledge. For example, Article 8(j) of the Convention on Biological Diversity provides: Each contracting party shall, as far as possible and as appropriate "subject to the national legislation, respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional

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lifestyles relevant to the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices." This article does not provide for any legal framework in relation to traditional knowledge. It merely calls upon the contracting parties to respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity and their application. The ILO (International Labour Organisation) Convention 169 carries certain norms that the governments are required to follow in respect of the rights of the indigenous and tribal people such as developing measures to respect their social, cultural, religious and spiritual values.

Meaning

'Traditional Knowledge' does not have a specific or universally acceptable definition. It generally means the content or substance of knowledge that is the result of intellectual activity and insight in traditional context and includes the know-how, skills, innovations, practices, and learning that form part of traditional knowledge systems, and knowledge that is

embodied in the traditional lifestyle of a community or people, or is contained in written or codified knowledge systems passed between generations⁵. Traditional knowledge is not limited to any specific technical field, and may include agricultural, environmental, health care and medicinal knowledge, associated with genetic resources or other components of biological diversity, and know-how of traditional architecture and construction technologies. The agriculture in Sri Lanka is rich in traditional knowledge in many areas including the preparation of land, rearing animals, pest control and harvesting and post harvesting activities.

Need for a Legal Framework

The traditional knowledge represents a body of knowledge relating to almost every facet of human life including agriculture. It has a massive scientific, technological and economic value. The modern technology and commercial environment has opened various avenues for the misuse and the unauthorised exploitation of such knowledge, particularly by those who possess resources — financial and technological. The absence of a suitable legal mechanism to protect and manage such knowledge, internationally and in most cases nationally, has aggravated the situation. Moreover, traditional knowledge can, due to its scientific and technological value, also play a vital role in the economic growth of respective community or nation. Thus, the need for the introduction of suitable national laws and international instruments on the protection and management of traditional knowledge is increasingly acknowledged and recognised.

In Sri Lanka

Despite the fact that the people of Sri Lanka possess a vast volume of

traditional knowledge in many disciplines, Sri Lanka does not have a law relating to traditional knowledge, agricultural or otherwise. Thus, it is appropriate to examine whether there is any mechanism available within the existing legal system in Sri Lanka that can govern the traditional knowledge regime.

Applicable and Alternative Fields

Certain areas of the current law can play somewhat active role in the protection and management of traditional knowledge. They are briefly identified as follows:

Intellectual Property Law

The term 'Intellectual property' embraces a set of legally enforceable rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.⁶ It includes the rights relating to the areas such as literary, artistic or scientific works, performances of performing artists, phonograms, broadcasts, inventions, industrial designs, trademarks, service marks, commercial names and designations, protection against unfair competition,⁷ geographical indications, new varieties of plants, undisclosed information and layout designs of integrated circuits.⁸

The law of intellectual property concerns, among other things, subjects that are covered, rights attached to those subjects, acquisition of such rights and scope, management and enforcement of the acquired rights.

Intellectual property is the result of intellectual activity in the industrial, scientific, literary or artistic fields. Traditional knowledge is also the result of creative efforts of the people flowing from time immemorial. Consequently, intellectual property

law has an important role to play in the field of traditional knowledge. The Intellectual Property Act No. 36 of 2003 governs the current intellectual property law in Sri Lanka. There is a strong international mechanism to protect intellectual property in more than one country, particularly under the international instruments administered by the World Intellectual Property Organisation (WIPO) and the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) under the World Trade Organisation (WTO).

Some fundamental issues

In analysing the existing intellectual property system in the context of traditional knowledge, a few fundamental issues concerning the subject necessarily arise. The intellectual property system is generally based on individual or private ownership and centres on commercial purposes. On the contrary, traditional knowledge is largely in community or common ownership. The commercial purposes are, as we in Sri Lanka experience, mostly alien to traditional knowledge. It is therefore uncertain whether the existing intellectual property system has any application to traditional knowledge. The issue as to whether the particular holders of traditional knowledge can be treated as the 'owners' of such knowledge within the meaning of the present legal definition of 'ownership' is important and may result in other related legal issues. It is arguable that there are no owners of traditional knowledge and there are merely the holders or possessors of traditional knowledge. In the case of community or common ownership, the question as to who actually constitute that community or nation demands careful examination. The demarcation of

the nature and the scope of the legally enforceable rights that the owners of traditional knowledge are entitled to, the mode of acquisition of such rights and the enforcement of the acquired rights are some other crucial issues. The persons who have the status to go to Court, the nature of desirable remedies and in the case of payment of compensation, those who are actually entitled to such compensation need careful attention. Certain items embraced within the meaning of traditional knowledge may spread across many national boundaries as well as through a whole region. In such event, the issues relating to ownership and enforcement of the rights attached to traditional knowledge would be further complicated. The term of protection of most of the intellectual property rights currently lasts only for a limited period of time. The rights relating to traditional knowledge cannot be so restricted to a limited term of protection. A large volume of traditional knowledge has been open to general public for centuries. The formation and enforcement of legal norms and practices in respect of creations that are open to general public are bound to be a hard exercise. The protection and management of traditional knowledge may be subject to different legal and customary norms in different communities or nations who hold traditional knowledge. Certain rituals and arts are associated with religions and are not expected to be performed or used in all contexts. They cannot be acquired, used and enforced by everybody. Such diverse approaches would make the task of producing a reasonable harmonised legal mechanism more difficult. The effectiveness of national laws as an instrument for the protection of traditional knowledge in the absence of recognised and respected international norms is

doubtful. The collection and documentation of traditional knowledge is not an easy exercise. The proof of the content of the particular traditional knowledge and its owners, without collection and documentation, is not easy either. The developments based on or related to traditional knowledge would create further theoretical and practical difficulties. One such major issue is whether the current concept of innovation can have application to the innovations involving traditional knowledge.

Application of existing intellectual property system

On the one hand, the application of various objects of intellectual property to traditional knowledge faces certain difficulties common to many of these objects or peculiar to a particular object. On the other hand, certain objects have potential as an active mechanism for the protection of traditional knowledge. The following observations can be made in this regard:

Copyright

The copyright law⁹ cannot be the correct mechanism for the protection of traditional knowledge. It concerns the economic and moral rights of the individual authors or the owners of original literary and artistic works, which are protectable for a specified period of time. Most of the traditional knowledge is the result of a continuous and impersonal process of creativity in a community and belongs to a community or nation in common.

Industrial designs

The subject covered under the law of industrial designs¹⁰ is a newly-created design that gives a new appearance to a product in industry or handicraft and serves as a pattern for a product. The traditional designs in agriculture do

not fall within the law of industrial designs, because they are not new as required under the law. The community ownership of traditional designs and the limited period of protection under the law of industrial designs are some other issues, which are hard to overcome under the current intellectual property regime. However, the designs of traditional artisans and handicraft producers who build upon traditions, but introduce their own original elements into these traditions may be protected under the law of industrial designs.

Geographical indications

The law relating to geographical indications¹¹ protects an indication which identifies a particular good as originating from a specific territory or a region or locality in that territory, where the given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. 'Ceylon Tea' and 'Ceylon Cinnamon' are two examples of geographical indications. The products involving traditional knowledge which fall within the ambit of geographical indications may be protected under the law of geographical indications. However, this law does not cover the entire range of subjects coming under the purview of traditional knowledge.

Undisclosed information

The law of undisclosed information¹² protects information, which is secret, has commercial value, actual or potential, because it is secret and is kept secret. Those who are affected by any unauthorised act of disclosure, acquisition or use of the protected information can seek the judicial intervention to prohibit the continuation of such act and to obtain compensation. The disclosure of such information is also a punishable offence. There may be certain instances where the

law of undisclosed information can accord protection to some areas of traditional knowledge, particularly where the particular traditional knowledge belongs to a specific person or family. However, this protection may be very limited in scope, because much of the information in the traditional knowledge regime is not secret. Moreover, the legal framework of undisclosed information is purely based on private ownership and commercial interest. Most of the holders of traditional knowledge in Sri Lanka, for example, do not use their knowledge for commercial purposes at all.

Unfair competition

Any act or practice that is contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition, which is unlawful¹³. The unfair competition law may counter unfair trade and industrial activities involving traditional knowledge such as unauthorised research on traditional knowledge or unauthorised exploitation of traditional knowledge so long as such activities fall within the ambit of the acts unfair competition. As this law concerns the acts of unfair competition in industrial or commercial matters only, it does not provide a viable regime for the protection of traditional knowledge as a whole.

Distinctive signs or indications

The law of marks - trademarks and service marks¹⁴ - concerns the law relating to signs or indications that serve to distinguish the goods or services of different enterprises. Thus, the law of marks has no role in the field of traditional knowledge except offering opportunities to those interested to protect their marks. Even though trademarks and service marks may not be in a position to offer any protection to traditional knowledge, certification

marks¹⁵ and collective marks¹⁶ may be useful as a protective device. A collective mark means any visible sign designated as such and serving to distinguish the origin or any other common characteristic of goods or services of different enterprises which use the mark under the control of the registered owner. A certification mark means a mark indicating that the goods or services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.

The genuine holders of traditional knowledge may, having registered particular mark as a certification mark, certify that the goods concerned satisfy the prescribed standards relating to origin, material, mode of manufacture, quality, accuracy or other characteristics. By means of a collective mark, for example, the group of people who owns the collective mark may show that a user of the collective mark is a member belonging to their group and has the authority to use the mark for the particular traditional knowledge related product. These marks may offer some kind of indirect protection in trade activities involving traditional knowledge but such protection does not address the real issues involved. The law of trade names does not also accord any kind of protection for traditional knowledge. A protected trade name means "the name or designation identifying the enterprise¹⁷ of a natural or legal person".

Patents

The law of patents¹⁸ deals with inventions. An invention is a practical solution to a problem in technology. An invention is patentable where it is new, industrially applicable and involves an inventive step. The law of

patents cannot provide a suitable solution for the protection of the scientific heritage of communities because such knowledge is not patentable. It is already known, and therefore, part of prior art and not new. On the contrary, the inventions based on or related to or derived from traditional scientific heritage may be protected under the patent law upon the fulfilment of the conditions of patentability.

Indirect application

Certain objects of intellectual property protected under existing law may help the holders of traditional knowledge to stop or discourage others from encroaching upon their rights and interests. For example, any attempt to patent traditional knowledge may be opposed under the patent law on the ground that the claimed invention is not new. The law of industrial designs may be used to defeat the attempts to register traditional designs as new industrial designs. The law relating to geographical indications may counter the attempts to misuse such geographical indications. However, it should be noted that the opposition proceedings in intellectual property offices and Courts are expensive and time consuming. The holders of traditional knowledge do not, in general, have competence and resources to take legal action against the infringers of their rights and interests mainly in foreign lands where the acts of infringement are common.

Expressions of Folklore

Agriculture in Sri Lanka is associated with some elements of the expressions of folklore such as *Goyam Kavi* and *Pel Kavi*. Certain rituals are also involved in agriculture in such areas as pest control and harvesting. Thus, the law relating the protection of the expressions of folklore can offer a legal mechanism in respect of the,

expressions of folklore involving agriculture in Sri Lanka. The expressions of folklore may be different from other areas of traditional knowledge which mainly concentrate on technology related knowledge. One may, however, argue that the expressions of folklore, though need a *sui generis* type of protection, are part of the traditional knowledge at least in broader sense.

Section 24 of the Intellectual Property Act offers a *sui generis* form of protection to the expressions of Sri Lankan folklore. Section 5 of the Act defines the phrase 'expression of folklore' as "a group oriented and tradition based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and (d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, handicrafts, costumes, and indigenous textiles". The expressions of folklore are protected, as provided under section 24 (1) of the Act, 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 and customary context without due authorisation of the competent authority - Director General of Intellectual Property.

Law Contracts

The law of contracts that governs the contractual obligations may help protect and manage traditional

knowledge to some extent though not very satisfactory. For example, the holder of particular traditional knowledge may, when he discloses such knowledge, enter into a lawfully binding agreement with the party that receives the information with regard to the areas such as the protection of the disclosed knowledge, its management and benefit sharing. Such agreements can be duly enforced.

Common Law

The English common law recognised that the unpublished information could be protected against breach of trust or confidence¹⁹. The Courts in Sri Lanka have followed the common law norms in dealing with matters of confidential information²⁰. Thus, the same principles can be applicable to the confidential information relating to traditional knowledge, where appropriate.

***Sui generis* Legislation**

As the existing legal regime does not provide for a reliable and efficient legal framework in respect of traditional knowledge, it is appropriate to introduce a special law relating to traditional knowledge²¹.

Concluding Remarks

Traditional knowledge in Sri Lanka, agricultural or otherwise, needs effective legal protection and rationalised management as soon as possible. The existing legal framework, intellectual property or any other law, is not competent enough to offer a viable and practical solution to all the issues involving the protection and management of traditional knowledge. All the same, some of the norms in the current intellectual property regime and other areas of the law can be used in the protection of various aspects of traditional knowledge. It would be advisable to make attempts to

use the current legal framework including intellectual property system and to put it into test in the process of finding suitable protective mechanisms. Such an attempt would demonstrate where the shortcomings of the existing system are and how they can be remedied and improved. Where the existing norms are not satisfactory, the introduction and implementation of new principles, including mechanisms for effective enforcement and management, is necessary. A *sui generis* form of law can be a progressive effort, but such law does not have application beyond the boundaries of the country. The active participation of Sri Lanka in the ongoing efforts of the international community in establishing an international mechanism, acceptable to all concerned, for the protection of traditional knowledge is therefore essential.

The areas such as nature and scope of the rights attached to traditional knowledge, mode of acquisition of rights, those who are entitled to acquire rights, management and enforcement of the acquired rights, due control of access to, and exploitation of, the protected traditional knowledge, sanctions against unauthorised access to, and exploitation of, the protected traditional knowledge and benefit sharing, when and if the protected traditional knowledge is exploited under authorisation, require careful attention in any *sui generis* form of law and international mechanism. The international cooperation and collaboration in monitoring infringement of traditional knowledge rights, benefit monitoring and sharing, dissemination and development of traditional knowledge should be promoted. The active participation of the holders of traditional knowledge in management and development and promotional activities are important.

At the same time, constructive measures are required to conserve

and promote the existing traditional knowledge, including collection and documentation, as traditional knowledge is fast disappearing due to many reasons. Such knowledge may belong to a particular country or nation or community but is of great importance to the entire human family. Traditional knowledge may be a long-lasting reward that its holders can offer to mankind. It should therefore be preserved and conserved for the benefit of not only its holders but also of the human family as a whole. The legal protection would be meaningless if at least the existing knowledge is not preserved and conserved.

Footnotes:

¹ See UNEP/CBD/COP/3/inf. 33 Annex 2., ILO Convention 169 (1989), UNEP/CBD/TKBD/ 1/3 (1997), UNEP/CBD/COP/ 4/10 (1998).

² *Ibid.*

³ Visit www.cbd.int/traditional_intro.shtml and www.wipo.int/tk/en.

⁴ The member states of the World Intellectual Property Organization (WIPO) are in the process of developing norms which may result in an international instrument on traditional knowledge. Visit www.wipo.int/tk/en.

⁵ www.cbd.int/traditional/intro.shtml and www.wipo.int/tk/en. See also WIPO/GRTKF/IC/16/5 Prov. (January, 23, 2010) for revised objectives and principles. Visit www.nipo.gov.lk for a document on proposals for a law for the protection of traditional knowledge in Sri Lanka.

⁶ Article 2 – The Convention establishing the World Intellectual Property Organization (WIPO) (Concluded in 1967 and amended in 1979).

⁷ *Ibid.*

⁸ The Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) of the World Trade organization (WTO), (1994).

⁹ Part II of the Intellectual Property Act No.36 of 2003.

¹⁰ Part III of the Intellectual Property Act No.36 of 2003.

¹¹ Part IX of the Intellectual Property Act No.36 of 2003.

¹² Part VIII of the Intellectual Property Act No.36 of 2003 – Section 160(6).

¹³ Section 160 of the Intellectual Property Act No.36 of 2003.

¹⁴ Part V of the Intellectual Property Act No. 36 of 2003.

¹⁵ Chapter XXVIII of the Intellectual Property Act No. 36 of 2003.

¹⁶ Chapter XXIX of the Intellectual Property Act No. 36 of 2003.

¹⁷ See S. 101 of the Act for the definition of an enterprise.

¹⁸ Part IV of the Intellectual Property Act No. 36 of 2003.

¹⁹ Prince Albert v. Strange (1849) 2 De G & Sm 652, Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd (1948) 65 RPC 203.

²⁰ Hentley Garments Ltd v. JSA Fernando (1980) 2 SriLR 145

²¹ Visit www.nipo.gov.lk for a document on proposals for a law for the protection of traditional knowledge in Sri Lanka.

Chief Seattle's Thoughts...

In 1854, "The Great White Chief" in Washington made an offer for a large area of Red Indians' land and promised a " reservation" for them.

Selected thoughts of Chief Seattle's reply published here. This has been described as one of the most beautiful and profound statements.

"We are part of the earth and it is part of us. The perfumed flowers are our sisters; the deer, the horse, the great eagle, these are our brothers, the rocky crests, the juices in the meadows, the body heat of the pony and man.....all belong to the same family"

"The rivers are our brothers, they quench our thirst. The rivers carry our canoes and feed our children. If we sell you our land, you must remember and teach your children, that the rivers are our brothers and yours, and you must henceforth give the rivers the kindness you would give any brother"

"This land is sacred to us. This shinning water that moves in the streams and rivers is not just water, but the blood of our ancestors. If we sell you land, you must remember that it is sacred and you must teach your children that it is sacred and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father."

"You must teach your children that the ground beneath their feet is the ashes of our grandfathers. So that they will respect the land, tell your children that the earth is rich with the lives of our kin. Teach your children that we have taught our children that the earth is our mother. Whatever befalls the earth befalls the sons of earth. If man spit upon the ground, they spit upon themselves."

"What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of the spirit. For whatever happens to the beasts, soon happens to man. All things are connected."

"This we know; the earth does not belong to man; man belongs to the earth. This we know; All things are connected like the blood which unites one family. All things are connected."

"Man did not weave the web of life. He is merely a strand in it, whatever he does to the web, he does to himself"

"Even the white man, whose god walks and talks with him as friend to friend, friend can not be exempted from the common destiny. We may be brothers after all. which the white man may one day discover; our god is the same god. You may think now that you own him as you wish to own our land; but you cannot. He is the god of man, and his compassion is equal for the red man and the white. The earth is precious to him, and to harm the earth is to heap contempt on its creator. The whites too shall pass; perhaps sooner than all other tribes, contaminate your bed and you will one night suffocate in your own waste"

"The destiny is a mystery to us, for we do not understand when the buffaloes are all slaughtered the wild horses are tamed, the secret corners of the forest heavy with the scent of many man and the view of the ripe hills blotted by talking wires"

Where is the thicket? Gone. Where is the eagle? Gone. The end of living and the beginning of survival"

(<http://www.kyphilom.com/www/seattle.html>)



Chief Seattle