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TRADITIONAL KNOWLEDGE: A MOVEMENT FROM COMMONS TOWARDS PRIVATIZATION

Mayank Kapila

Assistant Professor, Amity Law School, Amity University, Noida, Uttar Pradesh. Pursuing Ph.D from Guru Gobind Singh Indraprastha University, Delhi.

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*Corresponding Author

Mayank Kapila

Abstract

Property resources were the main focus of the developed world in the past and knowledge or information resources remained outside the grab of property claims. However, in the due course of time, particularly in the last decade, the developed world realized the importance and potential of Traditional Knowledge (TK) as a worthy resource for creation of intellectual property. The developed countries tried to acquire the knowledge and genetic resources by defrauding the traditional communities under the garb of research expeditions or by use of force. This resulted in bio-piracy and one-way flow of genetic resources and traditional knowledge. Now the WEST is engaged in misappropriating the TK wealth of the developing world, where the traditional communities are largely unaware of misappropriation. While doing so, the West is neither acknowledging the traditional communities nor sharing any benefit with them. The debate relating to misappropriation of traditional knowledge has raised a number of important issues, which needs to be addressed in a proper way. Against this backdrop, this research paper seeks to consider the conflicting claims of the traditional knowledge holders and the innovators who create intellectual property which has ultimately led to the movement of traditional knowledge from a common property resource to privatization.

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INTRODUCTION

The general notion about traditional knowledge (TK) is that it is a community right which belongs to a particular traditional community. It has been evolved by the members of the particular community and has been used by them in their daily life. Communities develop traditional knowledge as collective knowledge and do not claim any personal rights on it. TK is developed as per the need of daily living, by using locally available resources and usually verbally passed from one generation to next generation.

Based on this assumption some people misconceive that it is a knowledge which is freely accessible to all. It is a knowledge that is in public domain and is therefore, open for all. This approach creates a problem for the TK Holders. This notion gives rise to a debate about the status of TK- *whether it is a Community knowledge or knowledge in Public Domain.*

Arguments are given from both sides. One sect of scholars supports privatization of TK i.e. of granting exclusive rights to the community concerned and on the contrary there is another sect which states that it should remain in Public Domain i.e. freely accessible to all. Let us discuss these conflicting stands.

2. TK as Common Property

Until the emergence of the Convention on Biological Diversity in 1992 and the FAO Treaty on Plant Genetic Resources in 2001, opinion had hardened in some quarters that the principle of common heritage of mankind regulated international transfer of plant genetic resources. Food grains were believed to be a part of common heritage as no single state, has ever been wholly sufficient to meet the food needs of its population. During twentieth century, the genetic resources were considered to be worthy due to increasing demand and decreasing supply. While organized crop breeding increased the demand for genetic resources, genetic erosion that accompanied agricultural modernization threatened the supply of those resources. The development of plant breeding, the expansion of Breeders' Rights, and the recognition of genetic erosion as a social cost of agricultural development seemed to portend the inevitable demise of common heritage. The apparent failure of the common heritage system to contain the degradation of crop genetic resources conforms to the Tragedy of the Commons scenario.

The opinion that plant resources as a part of common heritage is deceptive. The principle of common heritage is a recent development in international law and therefore, prior to that plant and genetic resources has always been subject to national jurisdiction of the country concerned. Furthermore, an examination of relevant state practices during the period of 1492-1960 accompanied by the opinion juris, shows that indeed, the concept of common heritage has no roots or support in customary international law. A careful analysis shows that States have always sought to protect and sustain their monopoly of and hegemony over economically useful plants. States always tried to keep economic useful plants out of reach of other States. Examples of State control over plants are legion. The French were so determined to retain their monopoly on the indigo dye trade that the export of indigo seeds from French Antigua was made a capital offence. Prior to the era of such treaties as the Convention on Biological Diversity, the government of Ethiopia embargoed the export of the coffee germ plasm. Furthermore, it was always difficult to obtain black peppercorns from India, and Ecuador did not freely supply cocoa germ plasm to other cocoa-producing states. Peru and Bolivia once made trade in quinine a government monopoly. No State could at that time have seriously argued that such actions violated international law.

Desperate and draconian measures were sometimes taken by States to maintain control over plants in their territory. For example, the Dutch, in order to maintain control over their global monopoly on the supply of the nutmegs, destroyed all nutmeg and clove trees in the Moluccas except those on three islands where they located their plantations. It was this tight control of the transfer of plant germ plasm that compelled some states to engage in audacious attempts to break the monopoly of other states on some plants of key economic importance. In some cases, some states sponsored or condoned criminal activities such as the smuggling of plants.

It is evident from the above instances and analysis that the undoubted powers of States to regulate access to and the use of plant life forms within their domain has always been inherent and intrinsic aspect of Statehood and therefore, the application of the concept of common heritage to plants and genetic resources is fallacious.

Further asserting that transfer of plants and genetic resources can be traced back to 1492 as part of the Columbian exchange is also not correct. As such a transfer was asymmetrical from colony to mother country and was more or less perceived as an internal affair of the colonial empires. In juridical and political terms, the colonial powers construed their tropical territories as part of the empire or of the larger metropolis. For example, germ plasm from British colonies in Asia and Africa was routinely transferred not only to the Royal Botanic Gardens in London but to other parts of the British Empire as if the latter were a single juridical entity, if not de jure at least de facto. Transfer was not conducted under the notion that plants constituted a free good and a resource for all people of the world. Therefore, Columbian exchange does not support the concept of common heritage.

However, with the rise of the Information Age, the flashpoint debates about property have moved from land to information. The public domain is now the cause célèbre among progressive intellectual property and cyber law scholars, who extol the public domain as necessary for sustaining innovation. This creative commons movement has highlighted the benefits of the public domain and has exposed the perils of proprietization. The advocates of the movement also argue in favour of placing TK and genetic resources in public domain. They contend that this will result in equal use of TK by all which ensures better utilization of their knowledge and resources which have, until now been under-utilised by remaining with a community. Further, the nature of TK makes it non-exhaustive (which is a wrong notion about TK) and therefore, it does not suffer from the dangers of its over-use. Some arguments made by public domain advocates- that intellectual property rights make creation too expensive and create "choke points" on innovation- can be voiced by Big Pharma and multinational agricultural enterprises against proposed property

rights in traditional knowledge and genetic resources: added costs may dissuade discoveries that help people. New claims for property rights are also dismissed based on liberty grounds: property in ideas, stories, and naturally occurring flora and fauna conflict with firmly embedded notions of free speech and access.

Traditional knowledge being a community right and a shared knowledge is kept out of the purview of TRIPs. This has led to a misconception that TK includes information falling in public domain. It is significant to note that the notion of 'public domain' has been used to serve as a tool to not only deny the claims of TK for IP protection but also as a tool by the bio-prospecting corporations to legitimize the free appropriation of what has come to be regarded as 'global commons'. However, this concept of 'global commons' is misapplied to TK and to regard TK as falling in public domain and that too in a state of *res nullius* is an incorrect proposition. Traditional Knowledge does not become an exploitable entity by falling in public domain. It is controlled by various sets of norms, either customary or religious, which govern the communities. Traditional knowledge and resources are controlled and managed by special normative systems of each community. Therefore, the concept of global commons is alien to TK; however, it can be regarded as being in the state of 'limited commons'. Regarding TK in state of limited commons signifies that vesting the rights of such knowledge either in the State or to the local community. Further this limited property regime implies that such knowledge would be available to the members of that particular 'State' or 'community', as the case may be, for free but at a price to those outside.

3. Towards Privatization

The answer to the Commons is privatization. Under the garb of public domain the WEST is engaged in misappropriating the TK wealth of the developing world of which the traditional communities were living in ignorance, and that too by neither acknowledging them nor sharing any benefit with these traditional communities. Today, the developing countries are demanding recognition of their TK by granting them private rights over their traditional knowledge and genetic resources. They are of the opinion that as TK is a community resource which they have acquired over a period from generations and which is governed by certain norms of the community, therefore there is no harm in denying them these rights in that respect. Granting them the rights would enable them to deal with the cases of misappropriation of their wealth more effectively and also would afford them a right to be indemnified or compensated for the wrong caused to them with respect to TK wealth. Therefore, they are now presenting a strong case towards its privatization. However, this case for privatization is also being misconstrued by the Western world. Their demand regarding private rights over TK is not about privatization as is understood in the capitalist society. It no where deals with private rights in the modern day sense as conferring on them absolute rights over the resources with no access to the third parties. Their claim includes a demand for 'enclosures' which just helps in restrictive access to the third parties. This idea of 'enclosure' ensures that no one can use/misuse the resources belonging to particular community without their consent. This will be effective in granting them right to recognition of and also the locus to ask for compensation in case of misappropriation of their resources without their consent.

Another philosophical argument (with very clear practical implications) in support of their contention is that when a resource is in public domain or is to be used 'in common'; it will lead to depletion of resources. Further, in such cases as the liability is to be shared by all, there is always a temptation for any individual to over-use such a resource to his individual benefit. The individual usually applies a simple calculation that by using the resource in a particular way the benefit which will accrue to him is much higher as compared to the loss which is a small fraction as the loss is to be borne by the community as a whole. Also as no individual takes the responsibility of managing the common property such a property is bound to be exhausted at a much faster rate. So to avoid such a situation, privatization of resources is the best option. Privatization is the answer to Tragedy of Commons.

4. Concluding Remarks

The threat of leaving TK in public domain is somehow same. The genetic resources and knowledge in common will also have to face the danger of over-utilization by the traditional communities along with the increasing population. Ultimately, this will lead to depletion of TK resources and also in disintegration or loss of normative system which existed in the communities. Therefore, there is a need for greater control over the resources which can be done through privatization.

But applying Hardin's solution to TK has its own problems. Firstly, there is itself a problem of identification of holders of TK, which will again prove to be a hurdle in determining that on whom the ownership/proprietary rights to be conferred. Secondly, once the holders of TK who earlier were regarded as Trustees after becoming the owner/proprietor of the TK will start abusing their position which will again lead to the destruction of the

normative system of the communities which has been prevailing there for Ages. Thirdly and the most important of all, is that creation of private rights on TK and genetic resources will lead to commoditization and will raise new challenges to the integrity and cohesion of the societies. This concept will again be welcomed by the MNC's and Bio-prospecting countries as it will now enable them to enter into lawful agreements with the holders of the TK and the result will be the same of over-use of genetic resources due to the greed of the Big Corporations to produce more to meet the requirements and demands of the present population. This will again lead to the depletion of the genetic wealth creating the imbalance in the bio-diversity. Therefore, Privatization of TK (in the strict sense- as proposed by Hardin) is not feasible in the light of above arguments, but the idea of enclosures is more realistic and can prove to be a perfect solution to protect the rights of the TK holding societies and also to check the problem of bio-piracy.

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