CHAPTER 3

INDIGENOUS PEOPLE AND THEIR RIGHTS

3.1 INDIGENOUS PEOPLE

Indigenous people are also called “first people and aboriginal people”. Indigenous people are those “who were living on their lands before settlers came from elsewhere. They are the descendants of those who are inhabitant of a country or a geographical region at the time, where people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means”. The term indigenous people can be used to describe “any ethnic group of people who inhabit a geographic region with which they have the earliest known historical connection, alongside immigrants who have populated the region and are greater in number”.

Indigenous people “in many parts of the world do not enjoy their fundamental rights in the state in which they live to the same degree as the rest of the population”. Presently, they are “non dominant sections of the society because of their poverty and illiteracy”. It has been estimated that “the number of indigenous people are approximately 300 million and they are spread in 70 countries from Australia to the Arctic. More than half of them live in China and India, some 10 million in Myanmar and 30 million in South America. The vast regions of Asia contain the majority of the world's present-day indigenous people, about 70% according to International Working Group on Indigenous Affairs (IWGIA) figures”. The “most substantial population is in India, which constitutionally recognizes a range of scheduled tribes within its borders”. These various people “collectively referred to as Adivasis or tribal people, number about 68 million as per 1991 census figures, approximately 8% of the total population”.

There is “no universally accepted legal definition of indigenous people”, although several “attempts at defining indigenous people have been made by scholars, development practitioners, and legal experts”. As an agenda of political action at the international level “the term indigenous was first introduced by the International Labour Organisation (ILO) in 1957”. In that year, ‘International Labour Organisation’ adopted ‘Convention No.107, 1957’, “concerning the protection and integration of indigenous and other tribal and semi tribal population in independent countries”. This convention
has been ratified by about 30 countries including India. Hence, its provisions are enforceable under international law.

The convention considers tribal social formations as a less advanced social formation which is a transitory phenomenon. But, in the context of gathering ecological crisis and predatory thrust of modernization, it is now realized that tribal social formations have elements of permanence, which are valid for entire human community. Partly responding to the change of intellectual-moral climate, International Labour Organisation adopted a new convention, Convention No. 169 of 1989. In this convention, the concept of indigenous has been delinked from the concept of tribe, though by implication they have been treated as analogous. Any reference to stage of advancement has been removed. ‘Convention No. 169 defines indigenous people as “those who have descended from population that inhabited a country at the time of conquest, colonization, or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”. This definition, to some extent, explains the term indigenous people in a wider sense.

The concept of indigenous has become more complex through a series of moves carried out by forums ancillary to United Nations. In 1982, ‘the Sub Commission of Human Rights Commission on Prevention of Discrimination and Protection of Minorities’ set up a ‘Working Group on the Indigenous Population’ without defining who the indigenous people are. However, at that time, one working definition was available with the United Nations given by Martinez Cobo who was appointed as Special Rapporteur. The definition proposed by Cobo is usually “accepted as authoritative”. The rapporteur defines “indigenous communities, people and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal systems”.

The definition “emphasizes the centrality of the attachment of indigenous people to their territories”. It also “stresses the historical continuity of their existence on their ancestral
territories”. Finally, it “indicates that they are determined to transmit their ancestral territories to future generations”. Hence, indigenous people are those who “used to inhabit, continue to inhabit, and wish to keep their strong attachment to a defined territory. This binding tie to territory is the crucial element of indigenousness of any group of people”. Hence, these definitions talk about their cultural entity.

International Labour Organisation Convention No. 169, 1989, emphasizes “indigenous people are indigenous on account of their descent from the population which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries”. When the ‘Working Group of Indigenous People’ was constituted by ‘the United Nations’ in 1982, it was established against the backdrop of this definition. In 1983, the scope of the definition was expanded to “remove colonial subjugation of a country at any time in history as a condition for locating indigenous people in that country. Later on the definition was reworded, again in the name of Cobo”.

Five elements in this new definition are as follows

a) Invasion and colonial subjugation of the country at any time in history
b) Historical continuity from pre invasion and pre colonial period
c) Feeling of being distinct from neighboring societies
d) Determination to maintain ethnic identity and territorial rights
e) Self identification as indigenous

Indigenous people are “not even aware that they are indigenous”. Their lives are “spontaneously attuned to their environment. They chant, play bamboo flutes, and pray in ways unique to this particular tribe; the copyrights for the music and lyrics are unwritten and belong to all members collectively. Their carved bone fishhooks have a unique twist created by a process passed from father to son in the families of master carvers”. The knowledge is passed down from fathers to son thus from one generation to other orally. This knowledge is termed as traditional knowledge of these indigenous communities.

3.2 TRADITIONAL KNOWLEDGE

Due to advancement of science and technology, radical changes have been ushered in the way of living of human beings. Till recently, richest man was oil worker now he is knowledge worker. The knowledge is considered as source of power. Knowledge, now,
is not only the source of power, but also primary source of property. Knowledge available through centuries to communities regarding all aspects of life is termed traditional knowledge. The traditional knowledge is also called the indigenous knowledge.

There is no concise definition of traditional knowledge. It has been defined in so many ways depending upon the particular context in which it occurs. In simple words, traditional knowledge means the knowledge developed and possessed by the traditional people, who are living in the forest, relating to all the fields. ‘The Convention on Biological Diversity (CBD), 1992’ defines traditional knowledge as “knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”. This definition seems to be more constructive rather than elaborative. It defines traditional knowledge relating to “conservation and sustainable use of biological diversity”.

The ‘World Intellectual Property Organisation (WIPO)’ defines traditional knowledge as “traditional based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition based innovation and creations resulting from intellectual activity in the industrial, scientific and artistic fields”.

‘WIPO’s modal provision for National laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action, 1982’, defines the traditional knowledge as “expression of folklore which means productions consisting of characteristics elements of the traditional artistic heritage developed and maintained by a community of or individual reflecting the tradition artistic expression of such community”.

The ‘model law for the protection of traditional knowledge and expressions of culture’ defines the traditional knowledge as the “knowledge that has been developed or acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative and recreational purpose”. It says that traditional knowledge is a knowledge which “has been transmitted from generation to generation and that is created and held collectively”. At the international level, the ‘Netherland Organization for International Co-Operation in Higher Education’ explains the traditional knowledge in following ways
a) Indigenous knowledge is the local knowledge that is unique to a given culture or society. It is the basis for local level decision making in agriculture, health care, food preparation, education, natural resource management and a host of other activities in rural communities.

b) Indigenous knowledge is the information base for a society, which facilitates communication and decision making. Indigenous information systems are dynamic and are continually influenced by internal creativity and experimentation as well as by contact with external systems.

c) Indigenous knowledge is the knowledge that people in a given community has developed over time, and continues to develop. It is based on experience, often tested over centuries of use, adapted to local culture and environment, dynamic and changing.

The ‘Director General of United Nations Educational, Scientific and Cultural Organization’ has remarked in this connection

“the indigenous people of the world possess an immense knowledge of their environment, based on centuries of living close to nature. Living in and from the richness and variety of complex ecosystems, they have an understanding of the properties of plants and animals, the functioning of ecosystems and the techniques for using and managing them that is particular and often, detailed. In rural communities in developing countries, locally occurring species are relied on for many, sometimes all, foods, medicines, fuel, building materials and other products. Equally, people’s knowledge and perceptions of the environment, and their relationships with it, are often important elements of cultural identity. It is systematic information that remains in the informal sector, normally they are in unwritten form and preserved in oral tradition rather than in the form of documents”.

So, traditional knowledge “reflects the aesthetics, beliefs, history, ethics and traditions of a particular group of people”. The basic feature of the traditional knowledge is that, it is “not created or produced systematically. But it is created or produced collectively or individually in relation to one’s cultural and traditional environment”. Besides, traditional knowledge “represents cultural values of a particular group”. In other words, traditional knowledge “evolves over a period of time by contributions of members of a particular society. Modified, enlarged and enriched, it becomes a valuable knowledge for the particular society since it is tested through use over a period of time. It is, generally, an attribute of a community intimately linked to a particular socio-ecological context through various economic, cultural and spiritual activities”. The definition of traditional knowledge used by the ‘World Intellectual Property Office’, includes, “indigenous knowledge relating to categories, such as agricultural knowledge, medicinal
knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork”. Thus, traditional knowledge includes a broad range of subject matters. Many observers prefer to “apply the term traditional knowledge narrowly to knowledge held by tribal population that live outside the cultural mainstream of the country in which these people are settled, still others would claim that such conceptual approaches are unnecessarily narrow, in the sense that traditional knowledge is not necessarily local and informal”.

Traditional knowledge is “not static, but inherently dynamic”, as it “evolves in response to challenges posed by the environment. The changing social environment alters its form and content, thus, it is subject to a continuous process of verification, adaptation and creation. Traditional knowledge encompasses the entire field of human endeavor”.

This kind of knowledge refers to the long-standing practices and locally developed innovations preserved and utilized over centuries by communities. It is generally passed down by “word of mouth from generation to generation and most of the part is undocumented”. This knowledge, which spans a variety of sectors, can be expressed through stories, legends, rituals which were codified in ancient scriptures or those which have been passed down through generations by word of mouth.

Process leading to the creation of traditional knowledge “may not be formally documented in the way that much scientific and technological information is recorded”. The “apparent non-systematic manner of creation of traditional knowledge does not diminish its cultural value, or its value from the point of view of technical benefit”.

Traditional knowledge, which is an outcome of intellectual activity across centuries at the community level, is collective knowledge as against individual proprietary knowledge protected by the modern system of intellectual property protection. Whilst the “vast majority of the knowledge is old in the sense that it has been handed down through the generations, it is continually refined and new knowledge developed”. This knowledge cannot be separated from the traditional people. Traditional knowledge “encompasses the wisdom, knowledge, and teachings of these communities and such knowledge typically distinguishes one community from another”. For some communities, traditional knowledge takes on a personal and spiritual meaning. Traditional knowledge can also “reflect a community's interests. Some communities depend on their traditional knowledge for survival”.

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Traditional Knowledge is “essentially culturally oriented or cultural based”, and it is “integral to the cultural identity of the social group in which it operates and is preserved”. Traditional knowledge is an “open-ended way to refer to tradition-based literary, artistic or scientific works, performances, inventions, scientific discoveries, undisclosed information, and all other tradition-based innovations and creations resulting from intellectual activity”. Tradition-based refers to “knowledge systems, creations, innovations and cultural expressions, which have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its territory, and are constantly evolving in response to a changing environment”. It tends to be developed in a way that is “closely related to the immediate environment in which traditional communities dwell, and to respond to the changing situation of that community”. Traditional knowledge is holistic in nature. Indigenous people consider their traditional knowledge inseparable. It is said to be “rooted in the spiritual health, culture, arts, crafts, dance and language of the people”. It is a “way of life of traditional people” and cannot be separated from them. According to indigenous people, any separation amounts to disrespecting their beliefs and spiritual values.

Traditional knowledge is not necessarily indigenous. Term traditional knowledge should “not be understood as denoting or even connoting notions of antiquity, stagnation and immutability”. As the ‘Four Directions Council of the First Nations of Canada’ has pointed out “what is traditional about traditional knowledge is not its antiquity but the way it is acquired and said. In other words, the social process of learning and acquiring which is unique to each indigenous group lies at the heart of its traditionality. The knowledge is traditional because it is “created in a manner that reflects the traditions of the communities, therefore, not relating to the nature of the knowledge itself, but to the way in which that knowledge is created, preserved, and disseminated”.

The cultural and intellectual heritage of indigenous people “comprises the traditional practices, knowledge, and ways of life unique to a particular class of people. The guardians of an indigenous people’s cultural and intellectual property are determined by the customs, laws and practices of the community and can be individuals, a clan or people, as a whole”.

The challenge of applying or adjusting existing intellectual property rights to traditional knowledge and expressions of culture is caused by “the special characteristics, such as,
collective ownership, non material form, and oral transmission, presumed existence in the public domain, communal origination” and absence of an identifiable author. So at the outset, traditional knowledge can be defined as “knowledge, innovation and practices of indigenous and local communities around the world, developed from experience gained over centuries and adopted to the local culture and environment, which is transmitted from generation to generation”. At a general level, traditional or local knowledge is the knowledge which does not fit in the western paradigm of science. It is knowledge which has evolved and is evolving on a continuous basis. It, “includes, the knowledge of indigenous people but it is not limited to these specific categories”. It covers the “knowledge of farmers concerning wild and domesticed biodiversity”. It, also, includes the “knowledge of therapeutic combinations of plants as well as processes for extracting relevant properties from plants”. Developing countries possess most of the world’s biodiversity. These countries are the “source of generic resources (such as medicinal plants) of great value for agriculture and industry. Traditional farmers in particular have contributed and still contribute to the continued improvement of plant varieties and to the preservation of biodiversity”.

3.2.1 TRADITIONAL KNOWLEDGE OF INDIA

The Indian way of life in ancient times was based on the philosophy of ‘omnipresent, omnipotent and omniscient God’, the almighty, meaning there, one’s presence (existence), potential (that is, the skills and capabilities, acumen and endeavor etc.) and knowledge were nothing but an expression of God’s will, without which nothing was possible. When everything was a result of God’s will, so thought the man, there was hardly anything that he could think of and claim as his own because for man in India, the knowledge that he had acquired had actually been blessed by God to serve the mankind. Thus, he would never go public claiming, as does the modern man, the inventor-ship or authorship of things or works, but would attribute everything to God’s will. The Ancient Indian philosophy of Vasudheva Kutumbukum has inspired Indians to share their knowledge with the world as they have treated the world as their family. Indians have always shared their knowledge with everyone as they have believed this as God’s will. The Vedas also prescribe the view of sharing knowledge with all. The
Vedas contain knowledge about ways of life, nature and plants. This knowledge is freely available to the world. That is, also, one of the reasons for its misappropriation. In India, traditional knowledge has been “used for centuries by indigenous and local communities under local laws, customs and traditions”. This knowledge is integral to the cultural identities of the “social group in which it operates and is preserved”. In India, there are fifty three million tribal people and they belong to five hundred and fifty tribal communities and each tribal community possesses one or other sort of traditional knowledge. India is having eight percent of bio diversifiable and traditional knowledge resources of the world. In “international market, share of the medicinal plants related trade is at United States dollars sixty billion per year and which is rapidly growing” at the rate of seven percent annually.

Biodiversity of India amounts to “approximately 12.53% of the global biodiversity. India covers about 2.5% of the world’s land area and accounts for 7.8% of the recorded species of the world including 5,500 plants and 91,200 animals”. India is one of the seventeen megadivers countries and houses world’s two diversity hotspots, namely “eastern Himalayas and the Western ghats” because of the presence of tropical rain forests that are typically the richest habitats for the species. India is also acknowledged centre for rich crop diversity and is considered to be place for 167 important cultivated plant species and 320 wild species. India has rich biodiversity over 6,500 species of the medicinal plants. Forests cover 23.68 per cent of India’s total geographical area and provide optimum conditions for survival and conservation of the genetic and species diversity.

The immense “biotic wealth of India has approximately seven thousand species reportedly used for the medicinal purposes mostly for the extraction of rare drugs”. Utilization extent shows that there are “about over 0.36 million Ayurveda practitioners, 29.7 thousand Unani and 11.6 thousand Siddha specialists in India. Village based health traditions are, still, carried on by housewives, birth attendants and vaid-hakeems (herbal healers), making it seventy percent of the health care needs of India which is dependent on the medicinal plants”. Such biodiversity rich regions or hotspots are found in “various continents across the globe and harbour flora of immense medicinal importance".
3.3 IMPORTANCE OF TRADITIONAL KNOWLEDGE

Traditional Knowledge is a form of basic research and it derives its market value from future innovations that are applications of the basic traditional knowledge. To quote from the World Intellectual Property Office Report,

*Intertwined within practical solutions, traditional knowledge often transmits the history, beliefs and traditions of a particular class of people. For example, plants used for medicinal purposes also often have symbolic value for the community. Many sculptures, paintings and crafts are created according to strict rituals and traditions because of their profound symbolic and/or religious meaning.*

The “role of traditional knowledge with its spiritual, cultural and economic value is being increasingly recognized today”. Traditional knowledge has been “used for centuries by indigenous and local communities under local laws, customs and traditions”. Such knowledge “encompasses the totality of all knowledge and practices whether explicit or implicit, used in diverse facets of life. This knowledge, which is the result of community’s cooperative efforts, 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 development”. The diverse and rich body of knowledge held and practiced by local and traditional farmers, concerning the users of plants for food, medicinal and other purposes is of immense global value and significance. Traditional knowledge is rooted in the spiritual healthy culture and language of the people. The continued use of traditional knowledge and its modification in response to societal dynamics of all its holders is relevant for the perpetuation of the culture, identity and lifestyles of its custodians. According to ‘World Intellectual Property Office’, “up to eighty percent of the world’s population depends on traditional medicine for its primary health needs”. It has been estimated that the “present world market of sixty billion dollars on herbal products is expected to grow to over five trillion dollars by the year 2020”. For those comprising the “poorest segments of developing country societies, traditional knowledge is indispensable for survival”. In fact, the traditional classical health system of China, India and Japan are based upon ancient texts. The biological diversity comprising the plants and animals for tropical countries is worth more than twenty billion pounds a year to
major pharmaceutical companies and unfortunately, very little money has gone back to the developing world. The interest of multinational corporations in exploiting the treasure of traditional knowledge has been “stimulated by the importance of traditional knowledge as a lead in new products development”.

Indigenous people have discovered a vast array of medicinal plants and are still using many of these from generations. ‘World Bank Report (1998)’ has shown that 25% of medicines come as contribution from indigenous knowledge world. Of the estimated “2,50,000 to 5,00,000 plant species in the world, more than 85% are in environments that are traditional homes of indigenous people. Of the 119 drugs developed from higher plants, in the world market today, an estimated 74% were discovered from a pool of traditional knowledge” derived from medicinal plants, the knowledge of which had gained from indigenous people amounted to US $ 433 billion.

Traditional knowledge is “sometimes used to develop commercial products, such as, new pharmaceuticals, herbal medicines, seeds, cosmetics, personal care and crop protection products”, For example, traditional medicine may be used to “guide the screening of plants for medically active compounds or traditional crop varieties may be used to develop new commercial crops”. The companies involved in “Research & Development do use this knowledge for commercial exploitation and extracting their property”.

The new landraces and breeds were considered to be a part of nature and were not used for individual profits, rather these were treated as common resources for common good. The contribution of public and private sector institutions in industrialized countries tend to be considered patentable innovations, while the role of indigenous and local communities in developing and conserving land races or traditional healer’s knowledge of medicinal plants are undervalued.

Raw biological materials and genetic resources in products and process that have uses in medicine and therapeutics, cosmetic and beauty products and food and agricultural fields are being commercially exploited without authorization and benefit sharing. The significance of role of traditional knowledge in a global economy has well expounded by the Non Government Organisation, ‘Rural Advancement Foundation International’ stating that “eighty percent of the world’s people depend upon indigenous knowledge for their medical needs and possibly two third of the world’s people could not survive without the foods provided through indigenous knowledge of plants, animals, insects,
microbes and farming systems”. It is an established fact now that traditional knowledge plays an “important role in the global economy and is valuable not only to those who depend on it in their daily lives but also to modern industry and agriculture”. The value and contribution of traditional knowledge is immense in the field of pharmaceutical and medical sciences.

3.4 RIGHTS OF INDIGENOUS PEOPLE

During the past twenty five years, “International law has displayed steady progress in identifying and protecting indigenous peoples’ rights”. The ‘United Nations Committee for the Elimination of All Forms of Racial Discrimination’ has mentioned about rights of indigenous people. It established that “Governments should be sensitive towards the rights of persons of ethnic groups, particularly, their right to lead lives of dignity, to preserve their culture and to share equitably in the fruits of national growth with the right to engage in such activities, which are particularly, relevant to the preservation of the identity of such persons or groups”.

The ‘United Nations Working Group on Indigenous Population’ was established on the basis of the ‘Economic and Social Council Resolution 1982/34’. The group began working in 1985 on a “Draft Declaration on the Rights of Indigenous People”. The declaration took “two decades to evolve, and its final form”, the ‘United Nations Declaration on the Rights of Indigenous People, 2007’, is a “long and complex document with a preamble and 46 articles, divided into nine sections”. It “recognizes a wide range of basic human rights and fundamental freedoms of indigenous people”. Among these are the “right to unrestricted self-determination, collective right to the ownership of lands, territories, and other natural resources, and the rights to maintain and develop their own political, religious, cultural, and educational institutions and to protect their cultural and intellectual property”. The declaration highlights the “requirement for obtaining free, prior, informed consent of affected indigenous people regarding activities of any kind that may affect them and their territories”. It specifies the “requirement for fair and adequate compensation for violation of the rights recognized in the declaration”.

The “key opposition to the contents of the draft came from several states that challenged the right to self-determination, which they thought would damage state sovereignty and territorial integrity”. The ‘Human Rights Council’ adopted the declaration in 2006, and
the ‘General Assembly of the United Nations’ adopted it on September 13, 2007. The adoption of the declaration indicates that the “international community is committing itself to the protection of the individual and collective rights of indigenous people. The declaration will carry a considerable moral force. This document has the distinction of being the only declaration in the United Nations that was drafted by the rights-holders themselves, that is, indigenous people”. Some of the recognized rights of indigenous people are as follows

3.4.1 Right of Self-Determination

The right to self-determination can be referred to as a “standard of governmental legitimacy” which guarantees the realization of human rights as well as their application with regard to the governing institutions. In other words, the principle of self-determination “establishes the norms and institutions which reflect the political will of people and at the same time enables their economic, social and cultural development”. In this context, two normative approaches derive from the substantive aspect of the principle, “external self-determination and internal self-determination”. While, “external self-determination confers people the faculty to constitute a new political order through the expression of their political will”, internal self-determination refers to a mechanism that guarantees people the realization of their human rights before the sovereign state.

The ‘International Covenant on Civil and Political Rights’ and the ‘International Covenant on Economic, Social and Cultural Rights’ share common provision that provides that “all people have the right of self-determination”. By virtue of that right, they “freely determine their political status and freely pursue their economic, social and cultural development”. This right to self-determination has been given the “most prominent place in the human rights instruments”. The ‘United Nations Office of the High Commissioner for Human Rights’ has provided a general comment i.e. “an authoritative pronouncement on the right to self-determination”. It observed that “the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of the individual human rights and the promotion and strengthening of those rights”.

The ‘United Nations Declaration on the Rights of Indigenous People’ provides that “indigenous people have the right of self-determination. By virtue of that right they can freely determine their political status and freely pursue their economic, social and
cultural development”. The right of self-determination of people is a fundamental principle in international law.

3.4.2 Right to Use Natural Resources

Indigenous people’s “traditional or ancestral territories are usually located in regions where natural resources have, still, not been fully tapped on a commercial scale”. But “with the demand for energy, water, minerals, and food, thousands of hectares of forest and wetlands are being cleared and converted into reservoirs, factories, mines, and fields of corn or rice”. Such expansion of development into the ancestral lands of indigenous people has raised the issue of “who has the control over natural resources on such lands”. This issue had ignited a wide-ranging debate in the United Nations during the revision of International Labor Organization’s Convention No. 107, 1957. In that convention, most of the states insisted that the “state owns its natural resources and that the state has the right to decide how to explore and exploit such resources for the benefit of its citizens”. However, International Labor Organization’s Convention No. 169,1989, by “distinguishing between the right of land ownership and the right to use land, established that a state could own and use land in the territory recognized as its own territory, but that such state rights do not supersede the rights of indigenous people”. ‘International Labor Organization Convention No. 169, 1989’ imposes duty on “member states to protect rights of indigenous people in the natural resources in their lands. These rights include the “right of these people to participate in the use, management and conservation of these resources”. In addition, International Labor Organization Convention No. 169 has a “specific provision on sub-surface resources providing that if the State retains ownership of the sub-surfaces or rights to other resources”, Government shall devise procedure to consult indigenous people as to what extent their rights can be restricted or “prejudiced before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands”. The people concerned shall “wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities”. Thus, ‘International Labor Organization Convention No. 169, 1989’, recognizes indigenous people’s “traditional form of land ownership as a source of property and clearly affirms that states should protect the right of indigenous people to collective ownership and should include them in any
exploration, extraction, and management of natural resources in their ancestral lands and ensure that they receive from those their fair share of benefits”.

The ‘United Nations Declaration on the Rights of Indigenous People, 2007’ deals with “indigenous people’s proprietary right to land in much clearer language” than that of International Labor Organization Convention No. 169. Article 26 of the United Nations Declaration takes a “very wide approach by putting together notions of ownership, possession, and use”. The United Nations declaration provides the “right to own, use, develop and control the lands, territories and resources that indigenous people possess by reason of traditional ownership or other traditional occupation or use, as well as, those which they have otherwise acquired”. Hence, even though the United Nations Declaration does “not specifically refer to collective property rights, it clearly recognizes indigenous people’s traditional form of land tenure”. However, “the issue of collective rights is not uncontested”; for example, “the United Kingdom issued a statement soon after the adoption of the 2007 declaration stating that it would not accept the concept of collective right. The “United States of America, Australia, and New Zealand have expressed similar opposition to the recognition of collective rights”.

Nevertheless, the text of the declaration clearly affirms that States have to recognize indigenous people’s customs, traditions, and land tenure systems whether they are based on individual or collective rights”.

One difficulty with the “reception of indigenous customary laws by national jurisdictions comes from the fact that indigenous people usually rely on the long-term possession of territories supported by folklore, genealogies, rituals, and cultural practices as both record and proof of their ownership over the territory”. In 1992, the Australian High Court in Mabo v. Queensland recognized a “common law of property rights held by aboriginal inhabitants in their historically occupied territories”. This judgment “displays the court’s willingness to recognize native title as both communal and emerging from traditional laws of indigenous tribes. The importance of this approach is that it was premised on the native perspective of the human-environment relationship when considering a tribe’s land rights”.

The Supreme Court of Belize in 2007 in Arurelo Cal v. Attorney General held “the national government must recognize the indigenous Mayans’ customary tenure to land and refrain from any act such as giving rights to logging and land for hydroelectric projects on traditional Mayan lands that might prejudice the value, use, or enjoyment of
this property”. The Chief Justice of Belize stated “British colonial and subsequent acquisition of land in Belize did not abrogate the Mayan people’s primordial rights to their land”. Referring to Delgamuukw v. British Columbia, the Chief Justice stated “indigenous title is now correctly regarded as sui generis. This means that the very fact that original people inhabited a land over time confers land title to them”. This is the first judgment with reference to the United Nations Declaration on Indigenous People. The “evolution toward the recognition of collective rights to land at the international level mirrors the development of the indigenous right to collective property at the national level”. The recognition of indigenous people’s “collective form of territorial ownership is, now, found in national constitutions and legal systems”.

Although there are “signs of an evolution toward the recognition of indigenous people’s rights to collective ownership, human rights law unfortunately, still, focuses largely on private, individual property”. The view that states “exercise territorial sovereignty and that individuals within a territory hold private property rights is strongly present in domestic jurisdictions”. Despite many recent changes, the “right to property is still far from encompassing indigenous people’s land ownership concepts, as it remains embedded in its western origins and appears incapable of accommodating other approaches”.

### 3.4.3 Right to Use Land as a Cultural Right

Human rights law has “developed in a manner that favors indigenous people’s rights to use their ancestral lands as a part of their fundamental right to enjoy their own culture and to sustain it for future generations”. In terms of indigenous people land rights this result in the “legal recognition of indigenous people’s specific cultural attachment to their traditional territories”. The right of indigenous people to use their lands also “refers to their ability to access the resources that sustain life as well as to the geographical space necessary for the cultural expression and social reproduction of the group”.

International law recognizes the “dual nature of cultural rights”. On the one hand, “cultural rights cover arts, sciences, and local knowledge and on the other hand, the term means respect for cultural differences. Such differences exist among groups or collective identities”. Thus, “from a legal perspective, culture is a way of talking about collective identities”. Human rights law recognizes that “landholding systems constitute
a central aspect of indigenous people’s cultures, providing a key criterion of
indigenousness. In this paradigm, protection of ancestral land becomes crucial for the
sustenance of a cultural system, and without such protection, it is difficult to maintain
collective identity of an indigenous group”.

Despite the growing recognition of traditional knowledge as a “valuable source of
knowledge”, it has generally been regarded under “western intellectual property laws”
as “information in the public domain, freely available for use by anybody”. Moreover in
some cases, “diverse forms of traditional knowledge have been appropriated under
intellectual property rights by researchers and commercial enterprises without any
compensation to the knowledge creators or possessors”.

3.5 BIODIVERSITY

Biodiversity or biological diversity as a slippery term encompasses not only wild flora
and fauna, but also domesticated plants and animals. The “diversity in the living present
on the earth, collectively in land, water and air is called biological diversity or
biodiversity.” Biological Diversity Act, 2002, passed by Indian legislature, “defines the
term biological diversity as the variability among living organisms from all sources and
the ecological complexes of which they are part and includes diversity within species or
between species and of eco system”. Thus, biodiversity does “not mean the various
species of plants and animals only but it encompasses the ecosystems in which it is
found and the interrelationship between various species”. Indian biodiversity is “one of
the twelve mega diversity regions of the world and constitutes seven percent of world’s
flora”. It comprises about eight percent of world’s known biodiversity in two percent of
entire global space occupied. The emerging intellectual property rights regime poses
“serious threat to biodiversity and cause apprehension to the traditional farmers as to
their rights in recent years”. Enforcement of intellectual property rights on agriculture
also raises the debate on the utilization of the world’s biodiversity, raising questions
,such as, who should control it, how to utilize it; who should have the right to genetic
resources derived from it”. In India, the farmers, tribes, herbalists and fishers folk have
great contribution to the biodiversity which they have conserved and used from time
immemorial.

Indigenous societies often “possess unique body of cultural and environmental
knowledge”. The “preservation and investigation of specialized indigenous knowledge,
particularly, in relation to the resources of the natural environment with which the society is associated, is an increasingly sought-after goal of both the indigenous and the societies who thereby, seek to identify new resources and benefits”. For some people, indigenous people have often been “victims of biopiracy, when they are subjected to unauthorized use of their biological resources, of their traditional knowledge about these biological resources, of unequal share of benefits between them and a patent holder”.
Biopiracy also “denotes to unequal share of benefits between a patent holder and the indigenous community whose knowledge or resource has been used”. The person “who commits bio-piracy enjoys the maximum benefit at the cost of the indigenous people’s knowledge, as these people are unaware of the importance of their traditional knowledge”. Normally, “biotech companies commit bio-piracy, when their work is based on natural varieties”, which are found in developing countries among indigenous people. The “multinational companies use the country’s biological and intellectual wealth without getting permission from the communities who have developed this knowledge”.

Biopiracy and patenting of indigenous knowledge is a “double theft because first, it allows theft of creativity and innovation and second, the exclusive rights established by patents on stolen knowledge steal economic options of everyday survival on the basis of indigenous biodiversity and indigenous knowledge”.

Biopiracy, thus, means “not only a resource flow of diverse forms of flora and fauna, but mainly, the appropriation and monopolization of traditional population’s knowledge and biological resources”. It results in the “loss of control of traditional population over their resources and can have implications for their livelihood and food security”. Biopiracy is a concept which “does not have recognition in international law” but conveys the sense of frustration of a number of traditional knowledge holders and developing countries with reference to the existing legal framework.

3.6 EXPLOITATION OF RIGHTS OF INDIGENOUS PEOPLE

Since the adoption of ‘the Universal Declaration of Human Rights, 1948’ intellectual property has been considered “a fundamental human right of all people”. Only recently, however, has the “need to protect, preserve and provide for the fair use of indigenous intellectual property, traditional knowledge, entered the domestic and international
debate on intellectual property rights”. Indigenous people have been concerned about the ‘unlicensed use of their knowledge by non-indigenous groups and the exploitation by corporate entities of their knowledge that has been developed over centuries’. Because of rapid advancement and growth of science and technology, the ‘very survival of traditional knowledge is at stake’. The ‘localized knowledge, which communities have possessed since time immemorial, has been facing tremendous strain in hands of multinational companies’. The cultural survival of communities is under threat as the local languages and cultures have been greatly affected. There is “lack of respect and appreciation for such knowledge”.

Traditional knowledge has always been an “easily accessible treasure” and thus, has been “susceptible to misappropriation” as it is “conveniently assumed that it is in public domain”. Indigenous knowledge and property rights belong to the group rather than to any individual or corporation. The “problem with indigenous intellectual property rights is that they are informal and unwritten, which makes it easy for outsiders to violate them. But indigenous intellectual property rights deserve respect. Simple respect for human rights imposes on civilized societies a moral obligation to treat indigenous intellectual property rights as though they were formally registered. Indigenous intellectual property rights should be thought of as comparable to aboriginal land title, not written down or formally registered, but deserving of moral respect and entitled to legal protection”.

One important “difference between developed societies and indigenous societies is that developed societies focus on the rights of individuals”. Indigenous societies are often so “naive that the concept of rights is foreign to them, but if rights are recognized, then individual rights are far subordinate to the rights of the group as a whole”. In a developed society, “intellectual property rights belong to individuals and are seen as a way for an individual to protect his private property rights against other individuals and also against the society or the government”. But an “indigenous society has such strong group cohesion that the rights of the group are vastly more important than the rights of the individual, and intellectual property belongs to the group”. Under indigenous customary laws and practices, communal interests are given priority over individuality. “Ownership of traditional knowledge and expressions of culture” is, therefore, a collective, as opposed to an individual phenomenon.
Undoubtedly, indigenous people and local communities have “shared much of their knowledge and resources with the global community. Indigenous communities have traditions of sharing. Healers, in general, have spiritual obligations to heal the sick and have shared their healing knowledge”. Indigenous people have “strong traditions of reciprocity”. They argue that much of the “historical appropriation and use of traditional knowledge has not occurred with reciprocity”.

The protection of traditional knowledge has become a mainstream issue in recent times partly because of concerted efforts by indigenous people all over the world and partly because of the great economic potential as evidenced by the massive research and development investment by multinational companies to commercialize traditional knowledge, especially medicinal knowledge. The number of businesses that derive large profits from the production and sale of goods obtained from traditional knowledge is increasing.

It is observed that in the context of weak bargaining position of indigenous knowledge holders, viz-a-viz, large and powerful commercial enterprises will more, often, than not be one sided and grossly unfair to the former. In any case, most, if not all, indigenous knowledge is considered to be already in public domain and hence, commercially, heritage of mankind. The world is increasingly being made aware that this free rider or public domain syndrome is causing untold financial and cultural harm to indigenous owners of traditional knowledge. Existing intellectual property laws are strongly tilted towards the “unambiguous identification of owners, indigenous knowledge holders are conveniently ignored and therefore, left out in the cold”. The legal protection provided under the current intellectual property system is purely economic, whereas, the interests of indigenous people are closely linked to the self-determination and only partly economic.

3.7 CONCLUSION

Protection of traditional knowledge is an enormous challenge for modern intellectual property law. Traditional knowledge is generally “associated with biological resources and is invariably an intangible component of such a biological resource”. Traditional knowledge has the “potential of being translated into commercial benefits by providing leads for development of useful practices and processes for the benefits of mankind”. The valuable leads provided by traditional knowledge “save time, money and
investment of modern biotech and other industries into any research and product development. Logically, therefore, a share of such benefits should accrue to the creators and/or holders of such traditional knowledge”. Some countries have “specific legislation protecting this kind of knowledge”, while some other countries feel that their existing intellectual property rights regime protect such knowledge.

Many “expressions of folklore and several other forms of traditional knowledge do not qualify for protection because they are too old and are, therefore, in the public domain”. The author or inventor is often a “large group of people and the same creation or invention may have several versions”.

Western societies, in general, had not recognized any significant value of traditional knowledge. They had also not recognized obligations associated with its use. These societies looked at traditional knowledge as information which was freely available for use by anybody. The concept of any compensation to the creators and possessors of traditional knowledge also does not exist. It is only recently that “western science has become more interested in traditional knowledge”.

Loss of traditional knowledge also could be due to the advent of new technologies. In India, for example, the Bhotiya tribe inhabiting higher altitudes in Garwal Himalayas traditionally dyed their wool using herbal dyes, which were available in their vicinity. These dyes were fast and cheap. But with the development of road network in the formerly inaccessible areas, synthetic dyes from the markets of the Punjab became easily available to this community, at much cheaper rates. Thus, the availability of synthetic dyes brought the traditional wool dyeing technique to the verge of extinction. The process of fusion is necessary but it has to be slow and steady without destroying the identity, culture and tradition of the tribes.

The “products based on traditional knowledge are important sources of income, food and healthcare for large parts of the population in developing countries in particular, and, in turn, for their sustainable socio-economic development”. The local communities or individuals “do not have the knowledge or means to safeguard their property in a system, which has its origin in very different cultural values and attitudes”. The communities have a “storehouse of knowledge about their flora and fauna, their habits, their habitats, their seasonal behaviour and the like, and it is only logical and in
consonance with natural justice that they are given a greater say as a matter of right in all matters regarding the study, extraction and commercialization of the bio-diversity”.

Indigenous people are “seeking to protect their traditional knowledge and practices from commercial exploitation”. As “science and technology advance while natural resources dwindle, there is increased interest in appropriating indigenous knowledge for scientific and commercial purposes”. As the ‘World Bank’ has noted, “in the area of intellectual property, one size does not fit all”. The ‘Global Knowledge Conference’ in 1997 emphasized the “urgent need to learn, preserve and exchange traditional knowledge and encourage its role in local and national development”. The development of new technology and the new use of traditional knowledge based products today is the “major threat to the survival of many of these communities”. It is “possible today to bring out new products or find out new use of existing products based on traditional knowledge utilizing the technological developments. The industries get protection for these products through the formal intellectual property laws”.

With the “advanced intelligence and scientifically supported technologies biological resources are being exploited as a result in the last few decades, human activity has ended up causing large scale loss of biodiversity”. The extinction of species has accelerated manifold over its natural rate which no human can replace. Therefore, the extinction is forever and here lies the importance for its protection.