

and punitive damages.⁴⁶ These regimes have removed the hurdle of proving negligence on the part of the manufacturer and consequently made product liability claims much easier.

Conclusion:

Based on the comparative study of selected jurisdictions, it is recommended that strict product liability should be introduced against physical damage caused by ‘defective’ products. This approach will ease the process of litigation against manufacturers and contribute to provide a better legal remedy for consumers in Sri Lanka.

Protection of Traditional Knowledge - a polycentric issue; A Sri Lankan perspective

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Background and Nature of the Issue

The South Asian region has been blessed with a rich heritage of Traditional Knowledge (TK). TK is generated by societies in the ‘laboratory of life’ and is continuously tested, evaluated and used over a period of time. As per the WIPO definition “TK refers to the content or the substance of knowledge resulting from intellectual activity in a traditional context”. TK in a broad sense can include knowledge related to agriculture, ecology, medicine and expression of folklore. The protection of TK has become a ‘hot topic’ though there is not much knowledge about it and there is no sound protecting mechanism in Sri Lanka. In recent years, the incidents of misappropriation of TK and patenting of TK-based inventions in Western countries such as the *Kothalahimbutu case* have directed our attention to this issue. In this context, this study intends to identify the reason why such knowledge does not receive appropriate protection under the existing legal system and

⁴⁶ For instance, Part I of the Consumer Protection Act of 1987 of the UK allows product liability claims against the manufacturer of a faulty product for personal injuries. Similarly, section 402A of the Restatement of (Second) of Torts of 1977 and Restatement of (Third) of Torts of 1999 (USA) and The Consumer Protection Act of 2008(South Africa) are significant. Further, cases such as *Abouzaid v. Mothercare (UK) Ltd.* 2000 All ER (D) 2436, *Ceiba-Geigy(Pty) Ltd v Lushof Farms(Pty) Ltd* [2002] 2 SA 447 (SCA) and *Wagener & Cuttings v Pharmacare Ltd & Others*, [2002] 1 All SA 66 will be analyzed in this regard.

explores the possible ways of protecting TK taking into consideration its past and present endeavours.

Objective of the Research and Methodology

This research discusses a number of legal and policy issues surrounding the protection of TK that would be relevant for future negotiations. It is a qualitative research based on secondary data analysis. Primarily, it is intended to test the hypothesis that “the existing legal system of the country does not provide adequate protection for TK”.

Discussion/ Outcome

Existing IPRs and TK

On the surface, TK does not readily lend itself to present-day IP protection because it does not directly yield 'innovation' in the conventional sense of the term. When it comes to a patent regime, it could be used mainly for the protection of technical solutions that are industrially applicable and universally novel and involve an inventive step. TK would probably fail to fulfill the criteria because by and in its very nature, TK has been known for long. Similarly, a trade mark would only be able to protect TK-generated products. On the other hand, geographical indications, perhaps, is a good instrument to protect TK-based designations of origin. Arguably, provisions against unfair competition may also be used to protect undisclosed TK, for instance traditional secrets kept by natives and indigenous communities that may be of technological and economic values.

The Adequacy of the IPR regime in addressing the issue

As has been observed, the IP regime does not adequately protect TK against misappropriation by western societies. Due to the continued sharing of the TK over generations, it is already considered by western world as “public domain”. Hence, a good proportion of TK may not be patentable. Nevertheless, it would create bad feelings among rights holders even if it is legal from a western point of view. The TRIPs Agreement in its present form and scope primarily responds to the needs of industrialized countries. It does not offer much to TK based communities. Therefore, the present IP regime does not reflect the legitimate concerns of the TK-rich countries.

Possible ways of Protection:

Negative protection

Negative/ defensive protection means the ‘exclude’ (exclusion) of the unauthorized use by third parties of a protected TK. Considering the world experience, there are several methods of realizing this approach such as ‘disclosure of origin’ i.e. the compulsory disclosure of genetic resources and associated TK in patent applications and ‘TK- prior art databases’ which would simply be used to improve the efficiency of prior art searches.

Positive protection

Positive protection aims to protect TK by creation of positive rights that empower holders to protect and promote their TK. Property-right regime, i.e. creating IP rights over TK is one method of adopting positive protection. Creating Traditional Resource Rights (TRR) is another possible way of protecting TK. Moreover, implementing a liability regime in which original producers or providers are compensated through a benefit sharing agreement.

Other regimes

In considering other regimes of protecting TK, Article 8 (J) of the Convention on Biological Diversity calls on governments to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities in biodiversity conservation and encourage equitable sharing of benefits arising from the utilization of such knowledge.

Present Sri Lanka initiatives

The existing Sri Lankan legal system has failed to explicitly address the issue of TK, though there are several legislations such as IP Act No.36 of 2003 and Fauna and Flora Protection Ordinance amendment Act, No.22 of 2009 which play a supportive role of protecting TK. Most importantly, our attention should be paid to the proposed legal framework (2009) by the National IP Office. This working document has identified two categories of TK namely public domain and non-public domain TK. It creates positive rights for the holders of non public domain TK. Moreover, the proposed law provides for the registration of non-public domain TK on one hand, and creation of a data base for public domain TK on the other.

In considering the negative viewpoints of this initiative, first and foremost, it is unclear as to how the public domain and non-public domain TK could be demarcated. Another concern is whether there is a guarantee that the registered owner would not abuse the

community based TK. Moreover, if public-held TK are revealed by the relevant public officer in an unauthorized manner, it would create far-reaching legal repercussions.

Conclusion and recommendations

In this research, it has been identified that the protection of TK is a polycentric issue as it is a combination of several aspects. Hence, a holistic approach should be adopted to remedy the situation as the existing legal framework does not provide adequate protection for TK. It is suggested, therefore, to adopt the proposed framework avoiding the drawbacks and at the same time to use other interconnected legal principles to remedy any adverse effects. Remarkably, the 'Trusts concept' can effectively be utilized in this regard. TK in public domain can be protected under 'Public Trust Doctrine' while privately owned TKs are protected through 'Private Trusts'. For instance, 'San Hoodia Benefit Sharing Trust' was created for the San tribes in a benefit sharing venture with the South African Council for Scientific and Industrial Research. In Sri Lanka this can be done through benefit sharing as stipulated in Chapter II of Trust Ordinance, No.9 of 1917.

On the other hand, if the registered TK is abused by the one registered owner, then the other original owners of the TK can invoke a constructive trust as per Section 90 of the Trusts Ordinance for the financial gain that the registered TK holder obtained by breaching any fiduciary relationship. If a responsible public officer abuses the TK database for any personal gain, the public trust doctrine should be applied in ensuring his or her liability towards the citizens of the country.

The proposed legal framework should, therefore, be adopted as a multi-centric law subject to few alterations as we discussed above. At the same time, a 'Trust concept' can be used in any circumstance in filling gaps towards ensuring accountability. In conclusion, a carefully design protection regime for TK would undoubtedly help develop Sri Lanka in its drive to become the wonder of Asia.

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Modern Use of Trusts in Commercial Transactions: Possible Reforms in the Sri Lankan Trusts Law

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Abstract

Background

A trust involves a relationship wherein a person (the settlor) transfers property (movable or immovable) to another (the trustee) for its management and control for the benefit of someone else (the beneficiary). Most rules regarding trusts have been created based on aged old principles of equity and English cases. Trusts Law of Sri Lanka is contained in both statute and case law. The main legislation is the Trusts Ordinance, No.09 of 1917.

The concept of trust has spread into the commercial law and company law in commercial transactions. This paper identifies these recent developments in the trusts law in commercial transactions and suggests reforms for Sri Lankan trusts regime.

The Unit trust is the popular mode of trusts used in commercial transactions in many countries. A Unit trust is a trust where the unit holders can possess certain shares (units) and can direct the trustee to pay money to them according to the number of units. It makes a path for the general public to invest their money without all the typical risks. In Singapore, Business trusts have been used as innovative investment structures in international trade market. The business trust is designed to give investors direct exposure through the purchase of units which are tradable in the Singapore Stock Exchange. Especially it should be mentioned that business trusts have various advantages in capital