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# Legal Contours of Traditional Cultural Expressions in India: A Critical Analysis

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RAVISHA SODHA<sup>1</sup> AND DIMPLE JODHA<sup>2</sup>

## ABSTRACT

*Traditional Cultural Expressions have become 'talk of the town' in the intellectual property' legal domain. The intergovernmental committee of WIPO 2020/2021 has vowed to discuss and determine the status quo, protection measures and legislative requirements over the existing contours. With the ongoing discussions, valuable decisions are expected by the end of this year. Traditional Cultural Expressions have a huge scope and dynamic assortments in a country like India. With cultural ethnicity and diversity at its zenith, there is not only a ground for flourishing of the traditional cultural expressions in all their forms, but also a dire need of panacea in form of effective protection and conservation measures. The contemporary scenario points towards a requirement of a sui- generis law relating to Traditional Cultural Expressions, so comprehensive that it embraces all the species of this genus in entirety. The most pertinent question of the hour is as to what should be the common grounds of recognizing traditional cultural expressions as 'an umbrella term' and by an analysis with this in mind, the limitations of the existing law over the subject surface out. Various countries have taken up measures so as to devise a mechanism but they can only pose as guidelines for India's diverse situation. The limitations are multifarious in nature from legal and societal viewpoints, so much so that the available legislation over the subject is deficit and not of an all-encompassing nature. This paper thus analyses the lacunae of the existing law and attempts to provide possible solutions for the same.*

**Keywords:** *Geographical indications; TCEs; traditional knowledge; WIPO.*

## I. INTRODUCTION

Culture and traditions are the pillars of social existence of an individual in the Indian society and denote their 'way of life'. Culture is manifested in the form of beliefs, thoughts, faith,

religion, customs, traditions, etc. and has been intrinsically linked to the way an individual identifies himself as a part of the society.<sup>3</sup>

In a country like India where culture is an expression of 'being' of individuals, where it gets

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<sup>3</sup> M Haralambos, SOCIOLOGY Themes and Perspectives (41<sup>st</sup> edn, Oxford 2012) 3.

associated to them right from their birth; it is unfathomable to link it to intellectual property from the point of view of recognition of merely its occupational use. "Property" is a possession<sup>4</sup> and the usage of this possession is up to the will of the individual. "Intellect" in the form of traditions and customs are a part of heritage and history.<sup>5</sup> For certain individuals, they give the sense of a unique identity apart from it being associated to the occupational expression. It is more deeply connected to the inherited know-how that various families or groups of individuals protect. It being unique and restricted to the skill of a set of families, can be better protected as a part of Traditional Cultural Expressions (*hereinafter* referred to as *TCEs*).

*TCEs* are also referred to as "Folklore" or "Expressions of Folklore" (*hereinafter* referred to as *EF*) and "Traditional knowledge" (*hereinafter* referred to as *TK*). In the global community, *TCEs* were known as "folktales". The word "folktales" refers to the divination of a collective's cultural traditions, stories, and rituals.<sup>6</sup> "Folktales can also be referred to as "Folklore".<sup>7</sup> *EF* is a form of manifestation of the culture in form of poems, paintings, stories, rituals, songs, etc. of a set of communities which

by means of successive progression have vowed to protect it and pass it on as a part of their folkways, etc. for e.g. *Rudaali* tribe' women are known for their role of being the mourning ladies at funerals; etc. In *TK* for e.g. *Kalbeliya* dance by *Kalbeliya* tribe of Rajasthan; traditional extraction of *Fenni wine* of Goa; *Rogan Art* of Gujarat, etc. the practices seem to be those dating back to the earliest civilizations. There is another aspect of "traditional cultural speech"<sup>8</sup> which refers to the linguistics that describes the work of native groups and traditional cultures commonly referred to as *Boli* not necessarily meaning dialect or a sub- language but a bit more due to its cultural significance; however, it is not explicitly labeled.

The WIPO has used *TCEs* and *EF* interchangeably and this is because the agenda of bringing *TCEs* as a *sui- generis* law is not a novel concept. It has been in pipeline for more than two decades now. What earlier discussions entailed were mainly linked to the *TK* aspect of *TCEs* and it is only now that the umbrella term of *TCEs* is being used and efforts are being made to define them.<sup>9</sup>

<sup>4</sup> Michael Fosmire & David Radcliffe, INTEGRATING INFORMATION into the ENGINEERING DESIGN PROCESS, (2014), 70.

<sup>5</sup> Vera Albino, "Traditional Cultural Expressions, a Protection Beyond Intellectual Property Law" *Inventa International*, (6 March 2018) <<https://inventa.com/en/news/article/288/traditional-cultural-expressions-a-protection-beyond-intellectual-property-law>> accessed 15 July 2021.

<sup>6</sup> Black's Law Dictionary, (8th edn, 2005) 1586.

<sup>7</sup> Stephen Winick, "He Coined the Word 'Folk- Lore': The Old Folk- Lorist" (Folklife Today American Folklife Center & Veterans History Project ISSN

2692-1731, 22 August 2014), <https://blogs.loc.gov/folklife/2014/08/he-coined-the-word-folk-lore/> {accessed 15 July 2021.}

<sup>8</sup> UNESCO, "Restoring biodiversity reviving life" (The UNESCO, Courier Many Voices, One World) <<https://en.unesco.org/courier/2019-1/indigenous-languages-knowledge-and-hope>> accessed 15 July 2021.

<sup>9</sup>Policy Document, (Intergovernmental Committee on Intellectual Property and Genetic Resources (*hereinafter* referred to as *IGC*). Traditional Knowledge and Folklore XII Session, Geneva, February 25 To 29, 2008).

### (A) Types of TCEs

In many countries *TCEs* for the purposes of brevity, kind of protection available and clarity are divided into two types<sup>10</sup>- the tangible and intangible parts. The difference between them is literal i.e. to say that, tangible *TCEs* are articles of craftsmanship and intangible are the idea or knowledge behind it; however, they are not always separable. The best example of this can be understood from the point of view of textile industry. Intellectual Property Rights (*hereinafter* referred to as *IPRs*) relating to the textile industry are not just limited to copyrights and trademarks.<sup>11</sup> The textile industry involves all the processes, right from manufacturing cloth from threads to actual designing, and culminating it into a finished product of apparel etc., belonging to a type of fashion trend. It involves patenting (if manufactured by way of a new technology/ green technology, etc.), copyright (relating to the blueprints of the actual procedure), design (scheme of colors, etc. if unique), trademark (linking it to a unique brand) as well as geographical indication (if it owes its origin and processing value to a particular geographical area). Thus, there can be an amalgamation of different kinds of *IPRs* in a single setting. But when traditions and culture take part in such a setup, each activity is taken up to enunciate and protect the expression of that

community as a whole, thus highlighting the pertinent need of protection of *TCEs*.

### (B) Is There A Need of Protection of TCEs? : Views

There are many nations including Australia, Canada, Gambia, Germany, etc.<sup>12</sup> which are of the opinion that *TCEs* need not be protected under a *sui- generis* law. The existing rules and regulations, or rather, the ratified law including national legislations are sufficient to hold effective protection of *TCEs* under trademark, patents, etc. as per their individual need and the nature of the article that needs to be protected. Some also believe that standard IP systems are also adequate. A third approach can also be detected that supports adapted, extended, or modified use of existing *IPRs* to satisfy specific needs.<sup>13</sup> This however, is a major misnomer. With the help of pertinent case studies, the limitations in the existing system of protection have surfaced which can either be rectified by major amendments in the existing *IPR* law or adoption of a *sui- generis* law, the latter being more feasible.

There is a second group of nations including Panama, Philippines, etc.<sup>14</sup> that believe that there is a pertinent need to establish and adopt novel and rather specific measures in the form of special law which can not only make the existing

<sup>10</sup> WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, (WIPO 2020) 15; WIPO Publication No. 933EISBN 978-92-805-2587-8.

<sup>11</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007 art 32.

<sup>12</sup> IGC, V Session, Geneva, (July 7 to 15, 2003).

<sup>13</sup> Peter Jaszi, "Protection of Traditional Cultural Expressions – Some Questions for Lawmakers"

(WIPO Magazine, 2017) 4, [https://www.wipo.int/wipo\\_magazine/en/2017/04/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html) accessed 15 July 2021.

<sup>14</sup> L.C.R. de Davis, "Régimen Especial de Derechos de Propiedad Intelectual de los Indígenas de Panama", IGC IV Session of WIPO, (December 2002), WIPO/GRTKF/IC/4/INF 4.

regime more apt but also design a new arena for the dynamic scope this concept holds.

This article consists of 3 parts: The 1<sup>st</sup> part discusses the existing International Law literature over *TCEs* and *TK*; the 2<sup>nd</sup> part deals with national laws pertaining to *TCEs* and the 3<sup>rd</sup> part provides the case studies and limitations in the existing regime thus highlighting the need for a sui-generis law.

## II. CONTEMPORARY SCENARIO: THE EXISTING REGIME FOR THE PROTECTION OF *TCEs*

The subject matter of protection under the *TCEs* passes the test of it being a part and parcel of intellectual property<sup>15</sup>, both in concept and form. It differs from case- to- case but what is common is the intrinsic cultural or traditional value it holds. The latest globalization trends have raised various questions upon the necessity of protection and recognition of *TCEs*. This has majorly occurred because of the inter- mixing of cultures and the movement of society towards a cultural change.<sup>16</sup> The WIPO timeline<sup>17</sup> suggests a gradual shift from recognition of *TCEs* as mere left-over rights to a concept devoid of

recognition. The 1967 amendment in the Berne Convention<sup>18</sup> holds importance in form of attaching value of ‘recognition of individuals’ as owners of *TCEs*. It however simply provided protection to those anonymous authors who could not be recognized or rather, those who could not be named. The persons thus entitled to enjoy this right could not be identified and the protection was commented to be vague. Presently, the Intergovernmental Committee (*hereinafter* referred to as *IGC*)<sup>19</sup> of the WIPO is working upon the recognition of *TCEs*.

The regime of *IPR* laws functions on three pillars mainly, the International Agreements, National Laws and the Customary Laws of Communities (for e.g. those prevalent in Native American Tribes<sup>20</sup>). The UN Declaration on the Rights of Indigenous People<sup>21</sup>, clearly provides for their right to maintain and protect *TK*, *TCEs* and other *IPRs*. It has further cast a responsibility upon the States to recognize and give protection to any such communities which may hold such rights.

<sup>15</sup> Convention Establishing the World Intellectual Property Organization (*hereinafter* referred to as *WIPO Convention*), (1967), art 2 (VIII).

<sup>16</sup> Booklet No. 1, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/ FOLKLORE, 2 (WIPO Publication No. 913(E), 2005).

<sup>17</sup> *Ibid* 3-4.

<sup>18</sup> Berne Convention for the Protection of Literary and Artistic Works, (Paris Text 1971), art 15 (4).

<sup>19</sup> “The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC – GRTKF”) was established by the WIPO General Assembly in October 2000 as an international forum

for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge (TK), genetic resources (GR), and traditional cultural expressions (TCE (folklore)).” - WIPO/GRTKF/IC/9/12 see Annex.

<sup>20</sup> Dalindyebo Bafana Shabalala, “Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes”, (2018) 51 (4) *Akron Law Review*, <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=2439&context=akronlawreview> accessed 15 July 2021.

<sup>21</sup> The UN Declaration on the rights of Indigenous People, 2007, art 31.

### (A) *International Bodies and Legislations*

The WIPO was established to deal with issues of intellectual property, in particular, work involving creativity and innovation.<sup>22</sup>

At present, the WIPO's IGC is working upon the following aspects relating to *TCEs*<sup>23</sup>:

- Agreement on the protection of Genetic Resources<sup>24</sup>, *TK*, and *TCEs* thereby ensuring a balance between the existing *IPR* law and effectuating its protection.
- Carrying out text- based negotiations so as to make it an umbrella concept (reaching a common ground and removing disparities in core issues of protection.)

The existing legislations on the subject includes more than 20 treaties out of which only 8 concerning India are mentioned below:

- *Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area*<sup>25</sup>: The said treaty stipulates a provision for the member states to formulate their own laws relating to *TK* and *TCEs*.
- *Convention concerning the Protection of the World Cultural and Natural Heritage*<sup>26</sup>: This was one of the first major steps taken towards the protection of *TK* and *TCEs* as for the first time a lot of considerations were made such as deterioration of *TK* and *TCEs* because of

evolving of social and economic scenarios; etc. The primary contention of the same highlighted the need to mainly protect the 'cultural heritage'<sup>27</sup> and little emphasis was put upon the cultural expressions of the communities that are living while conserving the same. Needless to say, the economic value of the *TCEs* to those communities, etc. was far from consideration. India ratified it in 1978.

- *Convention for the Safeguarding of the Intangible Cultural Heritage*<sup>28</sup>: In this particular treaty, UNESCO's recommendations on Safeguarding of Traditional Culture and Folklore, 1989 were for the first time effectuated. It was identified as "intangible cultural heritage"<sup>29</sup> and was constituted in such a way so as to include language, arts (performing), practices, rituals & festivals, *TK* and traditional craftsmanship. The mandate of introducing inventories and making new national legislations provide necessary protection and safeguarding was fruitful but not sufficient in the global scenario. Since intellectual property is in protection of idea, exclusivity of practice of *TCEs* and *TK* by a certain set of individuals could not be ensured by this convention solely. India ratified this in 2005.

- *Convention on Biological Diversity*<sup>30</sup>: This was mainly pertaining to *TK* and not *TCEs*.

<sup>22</sup> WIPO, Intellectual Property Handbook, (2008) <[https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf) accessed> 16 March 2021.

<sup>23</sup> WIPO, (IGC), LIX meeting, (2019).

<sup>24</sup> Background Brief no. 10, Intellectual Property and Genetic Resources, WIPO (2016).

<sup>25</sup> Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area, Ch 13, art 8.

<sup>26</sup> UNESCO, Convention concerning the Protection of the World Cultural and Natural Heritage, (UNESCO 1972).

<sup>27</sup> Ibid. arts 1-2.

<sup>28</sup> UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, (UNESCO 2003); MISC/2003/CLT/CH/14.

<sup>29</sup> Ibid art 2 (1).

<sup>30</sup> UNEP, Convention on Biological Diversity, (UNEP 1992).

India ratified this in 2004. According to this text, *TK* compatible with sustainable principles of usage was permitted to be safeguarded.<sup>31</sup> The customary use which led to conservational strategies was protected under *TK*. This convention highlighted the necessity of safeguarding biological diversity as its prime focus.

- *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005*<sup>32</sup>: The present *IGC* under the *WIPO* was established through this convention.<sup>33</sup> The convention comprehensively defined<sup>34</sup> *TCEs* and made provisions for safeguarding the same via national laws of the respective states; however with the ongoing negotiations at the *WIPO*, a better and much more reformed definition has been accepted and endeavor to reach a middle ground suggesting core ingredients of *TCEs* as an intellectual property are on the way.

- *Framework Agreement on the BIMST-EC Free Trade Area and its Protocol and the Declaration establishing the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation*<sup>35</sup>: India has signed this treaty with neighboring countries and protection

of *TK* is included as one of the areas of cooperation. This is a major step towards trade related policies of India concerning *TK*.

- *International Treaty on Plant Genetic Resources for Food and Agriculture*<sup>36</sup>: The *TK* pertaining to genetic resources for food and agriculture were given a protection as farmers' rights under this treaty.<sup>37</sup>

- *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*<sup>38</sup>: This is an important legislation upon the subject of *TK*. The principle of fair and equitable benefit sharing<sup>39</sup> for instances where it was not possible to have a prior consent of use was adopted apart from recognition of the inter-relationship between genetic resources and *TK*<sup>40</sup>, as to how they are connected and at times are a part and parcel of the same genus. Importance of the sustainable livelihood of the group of individuals protecting the *TK*<sup>41</sup> was also emphasized. Ownership and other rights of *TK* by certain local or indigenous communities was made a point of consideration<sup>42</sup>.

Clearly, the majority of the available texts concern *TK* and though the international

<sup>31</sup> Ibid. see Preamble; art 8.

<sup>32</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (2005); CLT-2005/CONVENTION DIVERSITE-CULT REV.

<sup>33</sup> Ibid art 23.

<sup>34</sup> Ibid art 4.

<sup>35</sup> Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), Framework Agreement on the BIMST-EC Free Trade Area and its Protocol and the Declaration establishing the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation, (2004).

<sup>36</sup> FAO, International Treaty on Plant Genetic Resources for Food and Agriculture, (2001).

<sup>37</sup> Ibid. art 9.2 (a).

<sup>38</sup> UNEP, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, (2010).

<sup>39</sup> Ibid art 5 (5).

<sup>40</sup> Ibid art 7.

<sup>41</sup> Ibid see Annex.

<sup>42</sup> Ibid. arts 12-17.

organizations have recognized the necessary requirements of safeguarding *TCEs* and *TK*, there have not been any substantial structural mechanism or premise made available for the recognition and thereby protection of the same. All the conventions talk about the safeguarding of *TK* and *TCEs* but no concrete boundaries are provided which would complete as to what must be subject matter of *TCEs* or *TK* and what necessary rights and legal contours must be added for recognizing the same. Also, the rights of individuals pertaining to ownership and exclusive use are not manifested in any of the said conventions.

**(B) Countries Other than India: References from the world**

- *African Countries:* The African countries are governed by their own IP laws and have collectively formulated the African Intellectual Property Organization<sup>43</sup>. It is a supporter of *sui- Generis* laws which can effectively realize the need of the diverse tribal

population of Africa.<sup>44</sup> Apart from the 1976 Tunis Model Law<sup>45</sup>, the WIPO consultations of 1999<sup>46</sup> was a major step towards the recognition of African *EF* protection.<sup>47</sup>

The African Charter on Human and People's Rights<sup>48</sup> recognizes the rights of the indigenous population to self-determine their cultural and ethnically diverse ways and this has also influenced the intellectual property regime in Africa.<sup>49</sup> What can be seen through the analysis of laws is that, the prime focus of protection is on *EF* and the *sui-generis* law in Africa is included in the respective legislations of the different copyright Acts of different regions such as Ghana, Botswana, Tanzania and so on.<sup>50</sup>

There is an ongoing debate as to adoption of an effective *sui-generis* mechanism so that the differences in the cultures can express a unifying voice of African diversity.<sup>51</sup>

Kenya has drawn attention when it comes to *TCEs*.<sup>52</sup> The National laws of Kenya<sup>53</sup>, including Constitution of Kenya 2010<sup>54</sup> provides for the

<sup>43</sup> OAPI, Agreement Revising The Bangui Agreement Of March 2, 1977 on the Creation of an African Intellectual Property Organization, 1977 art 2.

<sup>44</sup> UNESCO and International Union for the Protection of Literary and Artistic Property, *African Study Meeting on Copyright (Brazzaville, 5-10 August 1963)*: RADA/10.

<sup>45</sup> Tunis Model Law, 1976, s 18 sub-s (iv).

<sup>46</sup> WIPO-UNESCO AFRICAN REGIONAL CONSULTATION ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE, (1999).

<sup>47</sup> Supra Note 16, p 6.

<sup>48</sup> African Charter on Human and People's Rights, 1981, art 18.

<sup>49</sup> A Van Der Merwe "Can traditional knowledge be effectively covered under a single "umbrella"?" (SciELO South Africa ISSN 1727-3781 Jan 2010) [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812010000400002](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000400002) accessed 15 July 2021.

<sup>50</sup> Es Nwauche, "Protecting expression of folklore within the right to culture in Africa" (SciELO South Africa ISSN 1727-3781 Jan 2010) [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812010000400004#32a](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000400004#32a) accessed 15 July 2021.

<sup>51</sup> New York City Bar Association African Affairs Committee, "Legal Frameworks for Protecting Traditional Cultural Expressions In Western Africa", (23 Feb 2016)

<https://www2.nycbar.org/pdf/report/uploads/20073038ProtectingTraditionalCulturalExpressionsinWAFricaAFRICAN2222016.pdf> accessed 15 July 2021.

<sup>52</sup> Marisella Ouma, "Protection of Traditional Cultural Expressions in Kenya"

[https://www.wto.org/english/tratop\\_e/trips\\_e/colloquium\\_papers\\_e/2014/chapter\\_8\\_2014\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2014/chapter_8_2014_e.pdf) accessed 15 July 2021.

<sup>53</sup> Protection of Traditional Knowledge and Cultural Expressions Act, 2016.

<sup>54</sup> The Constitution of Kenya arts 260, 40 (5) .



protection of Intellectual Property including *TCEs*<sup>55</sup> and emphasizes that ‘culture’ is the basis of the country’s entire civilization.

India, being quasi- federal, cannot go with this approach since, in India, the diverse ethnicity and culture is uniquely protected by freedoms enshrined under the Constitution of India itself and though community laws may be given a separate legal footing, the same hold their own limitations. Freedom of movement would later on become a retrograde since the communities that segregate and cease to exist would make such laws redundant. The only achievement would be to find a common ground of protection so that efficacy and recognition can reach its zenith.

- China: China, like India has a rich historical relevance in its society. The present national laws of China are insufficient to provide protection to *TCEs*<sup>56</sup>. The proposed Model law, however supports recognition of the right of exclusive ownership of communities when it comes to *TK*.

The copyright regime in China was amended in 2008<sup>57</sup>, following the idea to include the benefit sharing concept. China’s law on Cultural

Heritage however proposes a criminal liability in certain cases relating to illegal conduct of investigations and abuse of power.<sup>58</sup> In case of any destruction of cultural heritage, civil liability is imposed.<sup>59</sup> Chinese law however does not recognize the importance of laws relating to infringement and passing off in economic aspects of the use of *TCEs*. Thus many authors suggest a *sui- generis* law requirement for China as well.<sup>60</sup> The provision of criminal liability enforces strict action and moderate use of the same can prevent infringement. Thus with defined contours of the law relating to *TCEs* and *TK*, India can effectively implement *IPRs* of communities as well.

- Panama: It is one of the few countries having its own sui-generis law relating to *TCEs* and *TK*.<sup>61</sup> It relates to the collective *IPRs* of the communities, providing protection to their identities, expressions as well as their customs and traditions.<sup>62</sup> The Act clearly sets out the names of the communities to whom protection is extended including their exclusive articles such

<sup>55</sup> Ibid art 11 (1), (2).

<sup>56</sup>Luo Li, Intellectual Property Protection of Traditional Cultural Expressions Folklore in China, (Springer, 2014) <[https://www.google.co.in/books/edition/Intellectual\\_Property\\_Protection\\_of\\_Trad/M-09BAAAQBAJ?hl=en&gbpv=1&dq=Intellectual+Property+Protection+of+Traditional+Cultural+Expressions+Folklore+in+China+++++by+++++Luo+Li&printsec=frontcover](https://www.google.co.in/books/edition/Intellectual_Property_Protection_of_Trad/M-09BAAAQBAJ?hl=en&gbpv=1&dq=Intellectual+Property+Protection+of+Traditional+Cultural+Expressions+Folklore+in+China+++++by+++++Luo+Li&printsec=frontcover)> accessed 15 July 2021.

<sup>57</sup>Lisa Jhang, “Protecting Traditional Cultural Expressions from a Copyright Perspective”, <https://ipo.org/wp-content/uploads/2013/03/LisaZhang.pdf> accessed 15 July 2021.

<sup>58</sup> Law of the P. R. China on Intangible Cultural Heritage, arts 38, 39.

<sup>59</sup> Law of the P. R. China on Intangible Cultural Heritage, art 40.

<sup>60</sup> Wenqi Liu, “Legal Protection for China’s Traditional Religious Knowledge” (6 September 2016)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwijnvizgu3xAhUUSX0KHVBhC3EQFjAAegQIAhAD&url=https%3A%2F%2Fwww.mdpi.com%2F20771444%2F7%2F9%2F116%2Fpdf&usg=AOvVaw1jHvS8W13joCBtIvt9Z0Xd> accessed 18 July 2021.

<sup>61</sup> Panama Legislative Assembly Law no. 20 of 2000.

<sup>62</sup> Ibid arts 1, 2.

as clothing<sup>63</sup>, traditional art<sup>64</sup>, music and instruments<sup>65</sup>. Moreover, a separate department for the registration of *TCEs* has been made<sup>66</sup> and apart from the protection of articles, rights pertaining to exclusive use and commercialization of products have also been provided.<sup>67</sup> The Act prohibits illegal imports and smuggling apart from infringement and passing off actions.<sup>68</sup>

This Act however does not define *TCEs* as an ‘Umbrella term’ for use in future. Any act, recognized for exclusive protection would be extended protection only after a successive amendment to the existing law.

- *Peru*: Peru has a comprehensive *sui-generis* law with respect to *TK*. Article 2 defines ‘collective knowledge’ to be the one originating from biodiversity and thus the scope is limited only to the knowledge derived from biological resources.<sup>69</sup> Commercial industrial application has also been extended<sup>70</sup>. This law also provides a procedure for application and acceptance of the same.<sup>71</sup> Licensing of knowledge<sup>72</sup> and its pertinent use by the licensee has been confined in well established contours.

- *Philippines*: Philippines’ law pertaining to *TCEs*<sup>73</sup> is another *sui-generis* law which

protects the rights of the native people of Philippines, divided into Indigenous Cultural Communities and Indigenous people.<sup>74</sup> This Act provides for ownership of land and region as the basis of protection and links *IPRs* to rights of Ancestral Domains.

The rights are similar to the ones available for Geographical Indications in India, however unlike India, access to the same in terms of ownership is linked not to the business or articles of value but to the land and its usage.

### III. *TCEs* AND LEGAL REGIME IN INDIA

In India, *TCEs* are a part of the domain of *IPRs* as defined in various cases by the Supreme Court.<sup>75</sup> USA formulated a new law pertaining to the Indian Arts and Crafts in 1998 and many regard it as a *sui-generis* type of law.<sup>76</sup> However, our own law in terms of *TCEs* as *IPRs* is yet to be formulated.

India is a land of traditions and cultures and there are thousands of communities and groups of people that have lived on its land. Not just the language but the rituals and traditions of people in India, are believed to change every 10 kilometers. Such rich diversity is a product of its rich and historically developed cultural heritage. The Constitution of India secures ‘liberty’ of

<sup>63</sup> Ibid art 3.

<sup>64</sup> Ibid art 5.

<sup>65</sup> Ibid art 4.

<sup>66</sup> Ibid art 7.

<sup>67</sup> Ibid arts 15, 16.

<sup>68</sup> Ibid arts 16, 20.

<sup>69</sup> Law No. 27811 on the Introduction of the Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources.

<sup>70</sup> Ibid art 7.

<sup>71</sup> Ibid art 20-21.

<sup>72</sup> Ibid title VII.

<sup>73</sup> Republic act no. 8371.

<sup>74</sup> Ibid s 2.

<sup>75</sup> The Institute of Chartered Accountants of India v. Shaunak H. Satya and Ors. (AIR 2011 SC 3336) Mangalore Ganesh Beedi Works v Commissioner of Income Tax, Mysore and Ors. (2016)2 SCC 556

<sup>76</sup> WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore, Background paper no. 1 , (May 2003) [https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo\\_pub\\_785.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf) accessed 18 July 2021.

‘expression’ to the citizens of India.<sup>77</sup> But governing the same under intellectual property law, is a long way to go. There are safeguards provided under the existing *IPR* law, however, the same are not sufficient.

#### **(A) TCEs and the Constitution of India**

Article 29 safeguards the right of conservation of such distinct culture that belongs to a minority of sections of citizens and thus can be related to *TCEs*. The interpretation of ‘conservation’ is linked to the right to establish and maintain educational institutions.<sup>78</sup> It however has been interpreted to include the right to agitate for the protection of the same, including political agitation.<sup>79</sup> This right along with the right contained in article 19(1) (g) protects the commercial rights of the *TCEs* holder as a citizen rather than a community. Article 51 A (f) casts a duty to safeguard and protect our culture. Thus clearly, the rights of individuals with respect to *TCEs* under the Constitution of India are limited in nature.

#### **(B) TCEs and Intellectual Property Laws**

*TCEs* include overlapping of intellectual property laws based on the circumstances of each and every case. The common element is mainly that the subject matter is an expression of Tradition or Culture as a whole.

While certain expressions including arts (performing), music, etc. find a place under the Copyright laws<sup>80</sup>, some are protected under trademark and patents (industrial use) and GI protect mainly those relating to a particular region.<sup>81</sup> The limitations are thus the key to finding proper solutions.

‘National Treatment’<sup>82</sup> is one important aspect of Copyright Law which safeguards *TCEs* in cross-border issues. This however, is not sufficient.

The Patents Act was amended in 2005<sup>83</sup> so as to extend protection to *TK* and Genetic Resources. This protection was negative in nature since the subject matter of *TK* was kept under non-patentable inventions.<sup>84</sup> It was regarded as a safeguard against internal disputes relating to ownership of a particular *TK* and not only did it restrict the proliferation of use relating to *TK* but also its scope under patenting. The provision as to notice of opposition<sup>85</sup> for non- acceptance of any such patent and subsequent revocation<sup>86</sup> is a positive protection, however the same restricts others from enjoying the *TK* that belong to one community. It, on the other hand, does not give any positive exclusivity of usage in a commercial sense.

The Plant Varieties Act protects the *TK* to a large extent and TKDL is one of the fruits of this law.<sup>87</sup>

<sup>77</sup> The Constitution of India, 1949, preamble.

<sup>78</sup> In Re Kerala Education Bill AIR 1958 SC 956.

<sup>79</sup> Jagdev Singh Sidhanti v. Pratap Singh Daulta AIR 1965 SC 183 (188); Rama Rao, VRV Sree v. Telugudesam Political Party AIR 1983 AP 96.

<sup>80</sup> Copyrights act, 1957, s 13.

<sup>81</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 s 2.

<sup>82</sup> Berne Convention, art 5 (1) rw a 7(8).

<sup>83</sup> Patents (amendment) act 2005.

<sup>84</sup> Patents Act, 1970, s 3

<sup>85</sup> Ibid s 25.

<sup>86</sup> Ibid s 64.

<sup>87</sup> WIPO, Protect and Promote Your Culture A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities, [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1048.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf) Accessed 18 July 2021.

The Biodiversity Act<sup>88</sup> has extended protection to *TK* arising from biological resources<sup>89</sup> and this is similar to the protection offered by Patents Act in a sense that a prior approval of the requisite authority is necessary.

#### IV. LIMITATIONS FOR THE PROTECTION OF *TCEs*

##### (A) *Inefficacy of Existing IPR Laws*

- *Geographical Indications*: the GI Act<sup>90</sup> safeguards *TCEs* to some extent. It was initially argued that *TCEs* in India can best be protected by the GI Act.<sup>91</sup> However, it does not extend to overseas requirements of protection. Since the importance of *TCEs* are linked to the community or the individuals that recognize such a culture/tradition, it is not a part of merely a geographical area. It cannot be said to be devoid of the same though. Not all kinds of *TCEs* include commercial products. Some include intangible assets too and those intangible assets such as languages or scripts or information, cannot be protected under GI.<sup>92</sup>

- *Copyrights*: *TCEs* have their major subject matter overlapping with that of Copyrights, i.e. original literary, dramatic, artistic and musical works apart from sound

recording and cinematographic films<sup>93</sup>. Culture is something which has become prominent after its continual use over the years and thus the originality does not exist in idea of performance but its association to a unique culture is what makes it unique.

What seems to be protected, lacks the ultimate novelty or exclusivity of the idea.<sup>94</sup> Since copyrights do not protect the idea of exclusive continual use for the sake of preservation of culture, *TCEs* cannot be effectively protected under Copyrights.

Apart from this, Copyrights mainly include economic and moral rights<sup>95</sup> and these rights do not suffice the case of *TCEs* and the exclusive right of commercial propagation is lacking. Due to the majority of material lying in the public, many adaptations have been taken up in different cultures. This is because Copyrights protect only unique elements and not the general ones. It does not concern itself with the style of the article but rather the article itself.<sup>96</sup>

The thing preserved by *TCEs* can have majority of its elements to be already known to the public but the unknown part is the rich culture associated to it.<sup>97</sup> *Kaalbeliya* dance form for instance, contains a dance form known to public

<sup>88</sup> The Biological Diversity Act, 2002.

<sup>89</sup> *Ibid* s 2 (c).

<sup>90</sup> The Geographical Indications of Goods (Registration & Protection) Act, 1999.

<sup>91</sup> Kasturi Das, "Prospects and Challenges of Geographical Indications in India", 13(2) *JWORLD INTELLECT PROP*.148, 156 (2010).

<sup>92</sup> Gopalakrishnan, N.S. et al, "Exploring the Relationship between Gis and TK: An Analysis of the Legal Tools for the Protection of Gis in Asia", ICTSD programme on intell.prop.rts.&sustainable dev.(2007).

<sup>93</sup> *Supra* Note 73.

<sup>94</sup> Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC112.

<sup>95</sup> P.V. Vasala G. Kutty, NATIONAL EXPERIENCES WITH THE PROTECTION OF EXPRESSIONS OF FOLKLORE/ TRADITIONAL CULTURAL EXPRESSIONS >>> India, Indonesia and the Philippines, (WIPO Study no. 2) [https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf) accessed 15 July 2021.

<sup>96</sup> *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>97</sup> *Payunka, Marika & Others v. Indofurn Pty Ltd*, 30 IPR209.

but the traditional value associated to it makes it a part of the cultural heritage.<sup>98</sup>

- *Patents:* Since novelty is an essential of patents<sup>99</sup>, *TCEs* cannot be registered under the Patents Act. Also *TK* is considered as a non-patentable invention and thus Patents Act offers no solace.

- *Designs and Trademarks:* Designs are only a small attribute of *TCEs*. Trademark is only for trade related marks<sup>100</sup> and thus the ambit of protection of *TCEs* is very small. Only those linked to unique businesses are protected under *TCEs*.

#### **Case study of Kaalbeliya dance:**

Initially considered as snake charmers, the *kaalbeliya* community is now known for its exquisite music and dance forms. The tattoo, attire, *Khanjari* instrument and *Poongi flute*, *Chang* used by the artists is recognized under UNESCO's List of Intangible Cultural Heritage.<sup>101</sup> The underlying nomadic culture has

received worldwide recognition and has enabled the artists to possess exclusive rights of performance and protection of their cultural diaspora.<sup>102</sup> They constitute the essential requirements of a *TCE*<sup>103</sup>. A protection under copyrights clearly would not have sufficed as the *Kaalbeliya* dance and songs were always incomplete without the cultural attribute.<sup>104</sup> And it is the cultural value that have led them to world recognition.<sup>105</sup> No claims whatsoever can be initiated of it to belong to state besides Rajasthan or a country other than India. Such a claim must also be provided to lesser known or less popular art forms that are *TCEs* so that their use may be made exclusive and the fruits of preservation may be available to only those who deserve them.

#### ***(B) Lack of Consolidation: Who decides what traditions need preservation?***

The traditions in India have both positive and negative effects upon the society. Some traditions are attributes of exploitation and hold a history of long-lasting oppression. One such

<sup>98</sup> Molly Torsen and Jane Anderson, INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES Legal Issues and Practical Options for Museums, Libraries and Archives, (WIPO 2010) [https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf) accessed 18 July 2021.

<sup>99</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2<sup>nd</sup> Edn.

<sup>100</sup> Background Brief No. 9, Documentation of Traditional Knowledge and Traditional Cultural Expressions, (WIPO 2016).

<sup>101</sup> UNESCO, *Kalbeliya folk songs and dances of Rajasthan*, <https://ich.unesco.org/en/RL/kalbeliya-folk-songs-and-dances-of-rajasthan-00340> accessed 218 July 2021

<sup>102</sup> Ayla Joncheere, "Kaalbeliya Dance From Rajasthan. Invented Gypsy Dance or Traditional Snake Charmers' Folk?", Cambridge University Press <https://www.cambridge.org/core/journals/dance-research-journal/article/abs/kalbeliya-dance-from-rajasthan-invented-gypsy-form-or-traditional-snake-charmers-folk-dance/07B324BBA1C0420870921E18154E5F0A> accessed 18 July 2021.

<sup>103</sup> Marc Askew, "The Magic List of Global Status: UNESCO, World Heritage and the Agendas of States," <https://www.taylorfrancis.com/chapters/edit/10.4324/9780203850855-10/magic-list-global-status-unesco-world-heritage-agendas-states-marc-askew> accessed 18 July 2021.

<sup>104</sup> SURBHI KATYAL, "10 TRADITIONS OF INDIA THAT FIND A PLACE IN THE UNESCO INTANGIBLE CULTURAL HERITAGE LIST"

<https://www.thebetterindia.com/24394/traditions-of-india-included-in-unesco-intangible-cultural-heritage-list/> accessed 18 July 2021.

<sup>105</sup> Ayako Iwatani, "the Kaalbeliya Dance as an articulated form of community memory", <https://nomadit.co.uk/conference/iaaes2014/paper/21110> accessed 18 July 2021.

example is of the *Rudaali* tradition. Though it holds cultural value, its need to be preserved is the pertinent question. This is just one example, there are many different cultural practices which would raise such questions and since intellectual property law is a special law, what is opposed to the general law could be preserved by this law.

#### Case study of Rudaali tradition:

The *Rudaali* women are a community who are paid mourners that cry at funerals in Rajasthan.<sup>106</sup> This was once regarded as a kind of ceremonial crying which was considered socially important in colonial times.<sup>107</sup> These women were marginalized and out casted.<sup>108</sup> This tradition has raised many questions about the oppression of *Rudaali* women and their links to widow banishing ideology. Since it is also a form of Cultural Expression having intrinsic economic value as it is the sole basis of livelihood of these women, and also since these women put up a performance of grief and dismay, it can be regarded as a part of *TCEs*. However, it needs to be considered, if such traditions need protection.

#### Case study of Jallikattu:

The Jallikattu Controversy is one of the major ones that raises questions about the preservation of cultural practice and its conflict with the rights of animals and existing Animal Conservation Laws. The case of *Animal Welfare Board of India*

v. *A. Nagaraj*<sup>109</sup> clarified the position and it was through this case that the protection of article 21 was extended to animals. It also provided five different rights to animals. The Act<sup>110</sup> had been enacted to safeguard the interests of animals and curb the age- old practices which cause harm to animals. To link the same through *TCEs* can be a conflicting exercise. Thus clear safeguards need to be employed in order to create a definitive regime.

#### **(C) Effects of Migration**

Migration of communities as a whole is not an issue of concern however, if certain members of the community cease to belong to it and decide to move out of it, the issue of protection of ownership would be major. Culture is not a fixed concept and confining it in the form of expressions is a limitation in itself. But the cause of protection is bigger than the effect of limitation.

#### Case study of Pak- Migrants of Rajasthan

There are a large number of migrants that reach Rajasthan from Pakistan every year with an urge to get Indian Citizenship. They contend that their forefathers were a part of Indian land and thus they belong here. Apart from their citizenship issues, they deeply crave to protect their art and culture. The migrants have their unique creations in the form of embroidery works, making quilts,

<sup>106</sup> Shreshtha Goswami, "The Women Who 'Have To' Cry For Everyone- Rudaali of Rajasthan" <https://edtimes.in/the-women-who-have-to-cry-for-everyone-rudaali-of-rajasthan/> accessed 18 July 2021.

<sup>107</sup> Anasuya Priyadarshini Pradhan, " Ceremonial Crying: The Colonial Projection" <http://ethesis.nitrkl.ac.in/4732/1/411HS1005.pdf> accessed 18 July 2021.

<sup>108</sup> K Ananthajothi & R Santhi, " The Metamorphosis of Women in Indian Society: A study of Mahasweta Devi's Rudali", <http://www.languageinindia.com/march2018/auseminar1/ananthajothinovelrudali1.pdf> accessed 18 July 2021.

<sup>109</sup> *Animal Welfare Board of India v. A. Nagaraj*, [(2014) 7 SCC 547]

<sup>110</sup> Section 11(b), Prevention of Cruelty to Animals Act, 1960.

pillow covers etc. which are native to them. The majority of them are a part of the *Bhil* tribe.<sup>111</sup> Such migrations are not uncommon between countries and intra- countries as well. Freedom of movement flourishes culture but at the same time becomes a limitation to the protection of *TCEs*.

***(D) Economic Value or Large Community Cannot Be The Sole Basis of Rejection***

The fact that *TCEs* hold an economic value, cannot be regarded as the sole basis of protection. *IPRs* are commercial in nature but the adequacy of commercial value or number of persons protecting the same is not an essential requirement. Little escapes the eye of the onlooker when exclusivity of practice is awarded.

*Case study of Rogan Art:*

The Rogan Art of the Gujarat Khatri family<sup>112</sup> is one of the vulnerable art forms that seek protection. It is known to be protected by a single Karta of the Gujarat Khatri family. It also holds a trademark<sup>113</sup> but the point of consideration is that it suffices as a whole to be a subject matter

of *TCEs* since it has a unique procedure and practice.<sup>114</sup> Needless to say that the number of persons protecting the community culture is very less.

***(E) Contours of Public Domain***

Not all *TCEs* are of an explicit nature. There are situations where certain information pertaining to the same is considered as sacred and meant to be kept hidden while some other *TCEs* require a stage for their proper management and preservation in the form of a museum, library etc..<sup>115</sup> These being put in a single ambit will only lead to conflicting claims. It is thus necessary to properly determine this ambit so as to link *TCEs* to intellectual property. This process is a complex one<sup>116</sup> and although UNDRIP recognizes *TCEs* as linked to *IPRs*<sup>117</sup>, the same is not enforceable as it lacks binding force.

Culture is originally a public concept and because of this, the novelty lies only in the intrinsic value of the culture which can be proved by the one using it undeniably for the longest period of time. As it is a part of the public domain<sup>118</sup> various adaptations of the same have

<sup>111</sup> Hindu Singh Sodha & Ashok Suthar, *FENCE BEYOND FENCING Dilemma of Pak Minority Migrants in India versus Regime of Rights*, (Royal Publication, Jodhpur, 2014) ISBN 9789382311485.

<sup>112</sup> Tree of Life Woven in the Air, <https://www.moowon.com/stories/tree-of-life-woven-in-the-air> accessed on 18 July 2021.

<sup>113</sup> Traditional Rogan Art with Device of Peacock (13 May 2021 Quick Company) <https://www.quickcompany.in/trademarks/2541117-traditional-rogan-art-with-device-of-peacock> accessed 18 July 2021.

<sup>114</sup> Shwetha R.G., “Revival and Application of Rogan Painting on Waterproof Reversible Denim Jackets”, (2017) *IJCRT* 5 (4), <https://ijcrt.org/papers/IJCRT1704241.pdf> accessed 18 July 2021.

<sup>115</sup> J. Anderson, “The Making of Indigenous Knowledge in Intellectual Property Law in Australia” *International Journal of Cultural Property*, 12(2);

E. Hudson, “Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer on the Management of Australian Indigenous Collections,” *Intellectual Property Research Institute of Australia, University of Melbourne*, 2006, p. 1-2.

<sup>116</sup> J.H. Merryman and A.E. Elsen, *LAW, ETHICS AND THE VISUAL ARTS*. Ch 3, Who Owns the Past? Kluwer Law International (4<sup>th</sup> ed., 2004); *The International Bureau of the Permanent Court of Arbitration, RESOLUTION OF CULTURALPROPERTY DISPUTES*. Kluwer Law International (2003).

<sup>117</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007, Art 31.

<sup>118</sup> Berne Convention Art 18 (1).

been made and consolidated to have become a part of distinct culture. This raises a question as to what must be included to have become redundant so as to offer exclusivity of practice to the one holding significance.<sup>119</sup> For e.g. folktales of *Panchatantra* have been a part of the public domain for a significant period of time. There have been various adaptations made in the story books of children that the original folktale itself having its own unique set of words cannot be traced.

It is difficult to curb the adaptations already made so as to ensure exclusive rights of the community of *TCEs*.

#### ***(F) Following the Trend: Novelty Restricts TCEs***

*TCEs* are not new and the trend is to move towards novelty. The world seeks what is new and regards the rest as out of fashion. *TCEs* are thus in competition with the ongoing trends.

#### ***Case Study of Feni Wine: Traditional Methods of Manufacturing***

*Feni* Wine is a Goa delicacy and the traditional form of extraction involves crushing of cashew nuts through a mechanical process, followed by fermentation and distillation. The *Feni* liquor is a pure form of Liquor which is sold locally as well as under brands. There are families in Goa that have prepared *Feni* wine traditionally for over generations now. Their process is unique and much more authentic but it has fallen into public domain for a long time now. With lack of

recognition, *TK* is vulnerable to fall prey to redundancy thus there is an urgent need to recognize such areas of *TCEs* and *TK* before they are hit by the wave of new technology. This does not retrograde the process of development but gives much needed attention to the labor of families that have strived to preserve the same.

#### ***(G) Ownership***

Ownership is a major issue under *TCEs*. It is difficult to assign ownership of *TCEs* to a group of individuals without valid proof of propagation. Further the rights of assignees and licensing mechanism is also linked to ownership. The WIPO has assigned recognition to *TCEs* from the point of view of member nations and not individuals themselves. This issue needs resolution through a *sui-generis* law itself.

#### ***(H) Time Period of Protection***

Another issue or limitation is that of assignment of time period of protection. Since *TCEs* and *TK* are of diverse natures, a single form of time period of protection and renewal of the same would not suffice. There is a need for recognition of a particular timeline so as to effectively protect and conserve the same.

#### ***(I) Recognized and Non- Recognized Communities***

Another limitation for protection of *TCEs* in India is that there are many communities which are not recognized as to form a part of *TCEs*. A *sui-generis* legislation cannot be effectively made without an analysis of the same. The idea

<sup>119</sup> WIPO Document “Expressions of Folklore—Document submitted by the European Community and its Member States”, WIPO/GRTKF/IC/3/11.



is not a recognition of communities but a step further. The oppositions in application process will be huge and the paradigm would shift from the recognition of *TCEs* to the recognition of the communities.

### ***(J) Tests of Authenticity***

Since there are no tests of authenticity to determine true and false nuances of a culture or tradition, it will be difficult to ascertain the veracity of the claims to recognition of a valid *TCE or TK*. This will further lead to limiting the process of preservation.

## **V. CONCLUSION AND SUGGESTIONS**

There is a huge scope for the protection of *TCEs* and *TK* in India. With the mandate of the WIPO, India can become one of the richest countries in terms of *TCEs* and *TK*. Since the subject of consideration i.e. *TCEs* as IPRs is raw and new, a lot of groundwork is needed in respect of the same. The limitations exist not only in the existing legal paradigm but also on the societal front. There are various issues pertaining to the rise, recognition and Protection of the *TCEs*.

In order to curb the limitations, the best possible solution can be in the form of a *sui- generis* law relating to *TCEs* in India. Recognition of *TCEs* as a new form of IPR can not only benefit the country but also ensure better implementation of the obligations arising from International Treaties and Conventions relating to protection of Cultural Heritage, thereby increasing India's reputation in the entire world. From the point of view of diversity in terms of culture and traditions, India can top the list and with a better

and crisp legal regime, it can set the best example for the world to follow.

### ***(A) Type of protection: Sui- Generis Mechanism***

- The kind of protection that we need to accord to the *TCEs* shall include both, the negative as well as the positive mandates. If possible the elements of criminal liability similar to those in Trademarks law can also be introduced. The positive protection will allow exclusivity of usage and the negative will involve actions for imitations and illegal infringement related acts of the general public.

- Ownership: Both individual and community ownership must be accorded to *TCEs*. The recognition of rightful owner can be based on authentic texts of prolonged usage and distinctiveness of the claim. This will resolve the issue of migration and also deny the possible fixation of culture in a certain place thus rather proliferating the same.

- The decision as to acceptance of proposal can be left to best adjudged by authorities holding experience from all walks of life so that the issue of efficacy of acceptance can be done away with. The basis of acceptance must be decided in accordance with public policy, morality and social validity so that negative traditions are sieved out.

- The essentials of *TCEs* would be decided on the basis of adjudging the best possible definition of it in a comprehensive manner and the protection of the element of culture/ tradition would be the test of distinctiveness. Through

*TCEs*, the Cultural or Traditional value would be made the basis of Intellectual Property.

- The economic value is intrinsic in intellectual property and thus only those capable of commercialization or scope of commercialization must be given protection.

- What has already been accorded to public domain can be revived if there is a ground for scientific research or improvement with respect to *TCEs*. With this, lost traditions can also be revived in a balanced and susceptible way.

- Novelty in technology is a successful trend because of its acceptance by the public. The local communities lack a platform for acceptance to reach them. Since the world is baffled by choices, anything possessing a significant relevance will stand out.

- The time period of protection must be adjudged on a case- to- case basis and in a more comprehensive way. The period of dormancy of any culture or tradition must also be taken into account while devising a mechanism for the same.

The *sui-generis* law will not only help in the recognition of *TCEs* but will draw the attention of the world at large to the downtrodden communities and tribes making them a part of the mainstream society.

Since the issue is still in its nascent stage, there is a lot of scope for research in law and sociology. With the help of positive efforts, *TCEs and TK* can be accorded the best legal base possible.

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