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COMPARATIVE ANALYSIS: PROTECTION OF TCES (TRADITIONAL CULTURAL EXPRESSIONS) OF USA, FRANCE, CANADA, UK, JAPAN, KENYA, PHILIPPINES, PANAMA WITH INDIA

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I. Introduction:

A common consensus which the majority would settle on "*The past deserves to be preserved*", it stays in the memories of shared human experiences within these numerous indigenous communities and of individuals passed down from generation to generation and is externalized in diverse forms, expressions, traditions and rituals; one of such artistic mediums[2] is known as Traditional Cultural Expressions.[3] The key aspects for defining TCEs would include a) Presence of cultural value, which evolves overtime[4] b) Communal essence, the work cannot be attributed to only one individual, and c) dissemination through generations whether orally or through imitation. The system is a tangled web of cultural values and heritage representing a collective identity whereby the learning is transmitted from generation to generation within the same group.[5] Unfortunately, the authentic content has become a target for commercial misappropriation, whether distortion, mutilation or straight up duplication without recognition which has created waves amongst the legal fraternity and stakeholders of the heritage. Art revolutions have been heavily influenced by cultural exchanges in the past and will continue to inspire change, which is why its protection is indispensable in the current age of transmission.

The issues pertaining to garnering protection for TCEs and other Traditional forms of knowledge becomes quite ironical, considering the enormous amount of commercialized and scientific absorption of their knowledge, resources and diversity, by the world which has only resulted into exploitation and erosion of their culture. It is imperative to salvage these resources, knowledge and diverse forms of artistic expressions from commercialization in a manner which safeguards the benefits and ensure their return to the communities who are deserving.[6] TCEs embody the culture and its knowledge through creative expressions and are also recognized as 'Folklore'. Their dissemination is largely depended on oral and behavioral practices which are passed on through generations. WIPO[7] defines them to be two sorts, tangible and intangible whereby the traditional norms and culture are manifested through the process of creative intellectual efforts of individuals and the community. The cultural heritage, the social identity of the community are showcased through these expressions of folklore.[8]

The creativity and the growth of such TCEs is hindered due to unauthorized usage, duplication, imitation or commercial use which benefits third parties and not the creators of such content. Often

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[2] Albino, V. Traditional Cultural Expressions, Protection Beyond Intellectual Property Law. (2018, March 6). Retrieved December 26, 2022, from https://inventa.com/en/news/article/288/traditional-cultural-expressions-a-protection-beyond-intellectual property-law.

[3] Further referred to as TCEs.

[4] The presence of cultural value and content within TCEs is core principle, this factor makes all the differences for defining TCEs from traditional Knowledge ("TK") and other forms of cultural heritage.

[5] Martinet, L. (2019). Traditional cultural expressions and international intellectual property law. International Journal of Legal Information, 47(1), 6-12.

[6] The IUCN Inter-Commission Task Force on Indigenous People have stated that the cultures are replenishing faster than the people of such communities and the intellectual knowledge stored within such cultures, and cultural heritage is not being preserved as it should be.

[7] Stands for World Intellectual Property Organization.

[8]Singh R.K. (2016). Protection of Traditional Cultural Expressions/Folklore: International and National Perspectives. DLR. 8(1), pp. 19-31.

such use is culturally inappropriate and offensive or insulting in nature. The absence of any formal laws in developing nations especially concerning TCEs is questionable. The minorities have to bear the brunt of such prejudices time and again, the influence of the Western Culture predominantly in the colonized nations brought forth the exploitation of the cultural heritage which includes the likes of folklore and cultural expressions.

It is noteworthy that although customary laws are applicable for protection of TCEs, their respect does not warrant protection in every territory, implementation of uniform system is a must. Even though the concept of TK and TCEs are definable, the operational definition remains questionable.[9] WIPO's efforts through negotiations amongst its member states has not brought in the results as expected, due to inadequate levels of consensus amongst them. TCEs can be categorized to contain multitude of factors, its unique nature is what sets it apart from other forms of creations, and the same poses challenges which make it vulnerable for exploitation in the current environment.

Progression of Recognition and Protection of TCEs: A Historical Perspective

Historically speaking, the international developments have created an emerging trend towards recognition and protection of traditional knowledge and cultural content which includes TCEs. The term gained traction after being mentioned in certain international forums in with the advent of 21st Century, the two international instruments which mention TCEs, the first being CCD[10] under UNESCO's[11] regime, and the second being UNDRIP.[12] The representation in CCD was more of figurative than operational, it considers the cultural rights covered under the purview of Human Rights.[13] While UNDRIP not only recognized the rights of such communities[14], but also the Intellectual Property rights related to them. The Intergovernmental Committee, under WIPO which is concerned the TK, genetic resources and Folklore as a governing body which oversees the negotiations for implementing a standard instrument which ensures protection of these resources. The Bolivian Government raised an issue concerning folklore for the first time for making addition to the Universal Copyright Convention.[15],

Moreover, the evolution continued with the adoption of the Model Provisions[16] in 1982 which distinguished the term expression from 'work' as recognized under the copyright norms. Although after examining the clauses under the Model Provisions, it is observed that they have been highly influenced by the copyright system itself, the system of obtaining authorization prior to any action is followed.[17] Fundamentally, most experts would agree to extend the protection for TCEs under the copyright Law. The Berne Convention as amended in 1971, it had slowly gained traction to become part of customary international Law. In 1967, the Art. 15(4) was revised to include folklore, although the word was not used literally and covered under the ambit of unknown authorship.[18] Forms of literary and artistic works are extended the protection under the convention, while also being

[9] Oguamanam, C. (2019, November 2). *TK and TCEs Again under focus at 37th WIPO IGC*. Chidi Oguamanam. Retrieved December 28, 2022, from https://www.oguamanam.com/publications/2018-9-3/tk-and-tces-again-under-focus-at-37th-wipo-igc

[10] Stands for Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[11] Stands for General Conference of the United Nations Educational, Scientific and Cultural Organization.

[12] Stands for United Nations Declaration on the Rights of Indigenous Peoples.

[13] CCD reiterates that the TCEs are a subset of cultural Expressions, and that they are to have benefits of their own developments being a minority for distribution and dissemination of their art forms.

[14] To Maintain, control, protect and develop their heritage with their traditional forms of knowledge including science, technology and other resources.

[15] They strained the intensive transformation the traditional expressions were going through for commercial gains, and how such actions were harmful for the culture.

[16] Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Action.

[17] *Ibid.*

[18] India was the only nation which appointed a designated authority and notified the same to the concerned authority for the implementation of this provision.

recognized by TRIPS. The assessment clears that the protection the minorities seek for their works matches with the subject matter of copyright. While in 1996, a boon for performers was granted through adaption of the WIPO Performances Phonograms Treaty[19]. The WPPT extended the protection to performers of such expressions, but the folklore itself. Whether they are artistic or literary works, the moral rights with economic rights would rest with the performers, which would include TCEs. There are also the Draft provisions for TCEs by WIPO, which aims to safeguard the protection and preservations measures for such expressions.
An ethical consideration with parallel desire of certain scholars to create a systematic distribution of the income generated through the resources of such communal property would be hindered by the political influences in a developing nation which include questions regarding the traditional source itself and the distribution of revenues with legal obligations which bind the parties equally.[20]

The Contemporary Landscape of IP Protection:
The IP scope can be covered through the trifecta: The first covers the international scope of protection including Conventions, Agreements. The second is inclusive of domestic protection, the national laws of the concerned nation, and third consideration is the customary laws of the concerned community for whom the protection is being garnered.[21] The protection garnered to creations under the IP laws was developed during the period of Industrialization, these laws are considerate of those times and situations and heavily influenced by the Western approach. They continued to evolve with the perceptive need for technological advancements and its protection. In hindsight, the opposite approach is required for protection of TCEs and TK, these communities majorly from the developing nations have demanded similar protection for their resources.[22]

The Copyright Route: It is perceived that copyright comes closest to anchoring the protection deserved by TCEs. Its application is examined and the issues listed are as follows: a) The first concern is with respect to identity of the author, while TCEs originated years ago and have unidentifiable authors. These creations are not recognized by any one originator, but through the community.[23] The South Pacific Model Law provides for such cultural rights to its traditional owners, which considers individuals as well as communities as custodian of such TCEs. The customary laws can be respected through entrusting the rights with the custodian. The implementation of such model would be highly depended on the practical considerations, like the awareness about their own rights within the communities, their access to such sources and so on. The originality concern factors in that the creations much be the result of an intellect effort. If the requirement of originality is liberally interpreted, then it would result in claims from authors who are not part of the concerned community, which will ultimately result into more exploitation. So, if the courts were to liberally interpret the requirement of originality, and put forth effective limitation on holders of the copyright through domestic laws then TCEs only then the system will be suitable to accommodate these rights.
In co-relation with the first requirement, the ownership of such material under customary laws is not of an individual, it is communal in nature and the same is expected of the rights. There is a complex system already in place within such communities which are an obligation for the members of such communities, the contradiction of the concept of ownership and the communal usage of the right amongst the tribe creates a drift for effective application. In terms of exploring the requirement of

[19] Further referred to as WPPT.
[20] Llewelyn, D., Aplin, T. F., & Cornish, W. R. (2019). Part IV: The European Dimension and New Technologies. In *Intellectual property: Patents, copyright, Trademarks and Allied rights* (Ninth, Ser. Classics). Essay, Sweet and Maxwell.
[21] Sodha R. (2022). Legal Contours of Traditional Cultural Expressions in India. *IJLSI,* 5(2), 167-183. DOI: https://doij.org/10.10000/IJLSI.111450.
[22] Blake J. (2015). Cultural Heritage and Intellectual Property Law. International Cultural Heritage Law, Oxford Academic pp- 230-235. https://doi.org/10.1093/acprof:oso/9780198723516.003.0007
[23] Article 7.3 of the Berne Convention refers to pseudonymous works to which protection can be extended for fifty years after the death of the author, which would leave TCEs unprotected under its regime.

fixation, under the Berne Convention the pre-condition of fixation is not encouraged for domestic laws, and countries like France, Spain and so on have not considered this requirement for protection of their TCEs.[24] The appropriate route for protection of TCEs under IP laws was envisaged to be copyright law due to their similarities but the potential seems limited. The apprehensions regarding considering TCEs under the IP realm are valid, firstly the protection focuses on Individual Ownership while no formal individual ownership can be granted for TCEs, neither are they recognized by any domestic or international norms. Secondly, they deserve the protection considering the vulnerable position these communities are in, but the special nature of these rights expect a special form of protection which is not always a viable option.

The most important flaw of the system is the tenure of protection granted, under copyright there is no indefinite protection for such expression which is what the communities sought.[25] The international norms set the minimum standard of protection i.e. 50 years, while it opens the opportunity for the member states to extend such protection is necessary. The Pacific Island Model Law, as well the Model provisions of 1982 do not stipulate any limit of the duration of the protection.[26] Under TRIPS,[27] there are some limitations concerning copyright protection which means that expressions can be protected but not ideas, methods, operational procedures or other such concepts, through a purposive interpretation which is also liberal in nature, the copyright law can be the right option. [28] Under conventional norms of copyright law, through case laws[29] it can be established that modern forms of expressions under TCEs which are confined by the 'originality' concerns are interpreted to be protectable even when they are adapted from traditional ideas of literature or art.[30] The protection of secret TCEs poses an entirely different challenge, and the correct method to protect is seemingly non-disclosure. But under some jurisdictions, the opposite is conferred, the disclosure of the same warrants a higher degree of protection to the said secret TCEs.[31]

The Trademark Route:

The most concrete example of the Trademark model is the European Union, which is home to some indigenous communities. The spiritual and cultural plays a pivotal role in creating bonds within the communities and the scared nature of such forms seek protection from getting '*Lost in Translation'*. TCEs are ever evolving, they change overtime and modify themselves which again hinders the very purpose of examining what TCEs are eligible for protection and which ones are not. The wide scope of traditional cultural heritage includes TCEs, TK and intangible cultural heritage within its ambit.[32] Trademark law protects the goodwill and reputation attached with the TCEs. These communities and their identities are associated with TCEs for which trademark protection seems to blend in seamlessly.

[24] Cross J.T. (2010). Property Rights and Traditional Knowledge. PER/PELJ. 13(4).

[25] As the subject matter in question has a history, and has been with the community for a considerably longer duration, granting it protection only for some years would defeat the very purpose of the debate.

[26] The law for TCEs in Panama also makes no mention of the duration of the protection.

[27] Stands for Trade-Related Aspects of Intellectual Property Rights.

[28] Dwivedi A. and Saroha M. (2005). Copyright Laws as a Means of Extending Protection to Expressions of Folklore. Journal of Intellectual Property Rights. Vol 10, pp 308-314.

[29] In Australia such conclusions have been arrived at in M, Payunka, Marika and Others v. Indofurn Pty Ltd 30 IPR 209 and in Bulun Bulun v R & T Textiles Pty Ltd (198) 41 IPR 513. While China also shares the same consensus as stated in the case of Decision of Beijing Higher People's Court, Case No. 246, 17 December 2003.

[30] Under conventional norms of copyright law, through case laws it can be established that modern forms of expressions under TCEs which are confined by the 'originality' concerns are interpreted to be protectable even when the adapted from traditional ideas of literature or art.[30] The protection of secret TCEs poses an entirely different challenge, and the correct method to protect is seemingly non-disclosure. But under some jurisdictions, the opposite is conferred, the disclosure of the same warrants a higher degree of protection to the said secret TCEs.[30]

[31] The Australian Court's opined under Foster vs. Mountford (1976) 29 FLR 233, a community was able to protect publication about their sacred sites and images as well objects with cultural and religious values when it was disclosed to the authority in good faith. Such policy would help in furthering the protection spectrum for such communities.

[32] Olteanu, L. (2021) Riding on the Coat-Tails of Traditional Cultural Expressions. Int J Semiot Law 34, 861–891. https://doi.org/10.1007/s11196-020-09725-6

The challenges posed in terms of rendering protection to TCEs under trademark law, there has to be a commercial purpose linked with the mark, the mark would be registered on First come and First serve basis which might result into exploitation by third parties who wish to contest the rights and benefits of the communities.[33]

Additional Options: Apart from these straight-jacket forms of protection, industrial design can also protect the outward appearance of a TCE product. While Geographical Indications, a method of protection under the domestic legislation shelters the products which are recognizable from their geographical origin and are traditionally manufactured. TCEs cannot be wholly shielded from infringement[34] under the conventional system of protection. The issue of 'public domain' with respect to such commodities are a considerable step back from rendering protection to them, and does not prioritize or respect the customary norms under which TCEs are generally protected.[35]

II. TCEs in the Developed Nations: The US, UK, France, Canada and Japan Model

Legislative Scope of Protection:

The US Model under its Constitution permits protection of TCEs but with a narrow scope. The Fair use exception is a huge part of the system for creation of a balanced system and protection for their First Amendment Rights. Some experts conclude that human rights protection are better equipped to curb misappropriation while others consider that protection of TCEs cannot be simply justified through property considerations. Under the US Model TCEs can only be protected when they are used for commercial purposes and the protection granted is for a limited duration. Determination for subjective factors like whether TCEs with a higher spiritual value be granted a higher protection are detrimental in the current environment. Proposed systems of protection under the US regime include trademark and geographical indications, as they do not share the rigid set of requirement as provided under the copyright law.[36]

The advantage in the US system is that other laws also provide for a protection mechanism like the unfair competition or consumer protection or marketing laws seems to play a pivotal role in rendering solutions, like the Indian Arts and Crafts Act[37] read with the Enforcement Act of 2000 of the US mentions the unfair advantage angle which the courts are already familiar with.[38] The trademark law in the US extends a defensive mechanism of protection for TCEs by not granting protection to entities which are identified as non-indigenous. Although under practical studies, it has been noted that the system is ineffective in actually protecting the TCEs. The answer to that system is having a database which can be used before grant of trademarks, and upgrading the certification procedure though collective change, as the system was violating the provisions of the Lanham Act which acknowledges the communities and their connection to TCEs and works for prevention of such violations.[39]

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[33] Vezina B. (2014). Topic 10: TCEs: Existing protection, Gaps and Approaches to Fill the Gaps, WIPO Practical Workshop. Retrieved on 24th December, 2022 from https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_14/wipo_iptk_ge_14_wipo_presentation_10.pdf.

[34] The risks involved include erosion of cultures, loss of economic value, decrease in the cultural assets which form part of the social and cultural identity of the community.

[35] *Ibid.*

[36] Bussey, A. (2014). Traditional Cultural Expressions and the U.S. Constitution. Buffalo Intellectual Property Law Journal, 10, 1-33.

[37] The Act of 1990 protects the artisans from Native American communities by ensuring authentic distribution of such artefacts which are governed by the Board authorized under the Act.

[38] WIPO. (2003). Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore. Background Paper, WIPO. Retrieved on 29th December, 2022 from https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf.

[39] Awopetu R. (2020). In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property. Emory Law Journal. 69, 4. pp-745-765.

In Japan, the basic Act on the Promotion of Culture and Arts[40] of 2001, defines culture and concerns itself with policy decisions. The Japanese culture evolved more especially after the World War, it is pertinent to note that all these cultural changes have taken place after huge events in each nations whether it be a war or colonization, the degree at which culture were affected under such social conditions clearly indicate that there cannot be a one size fits all model for protection of TCEs. It is impressive to note that the policy decisions in Japan were made by the persons working in the concerned profession, in arts and cultural positions in Japan in case of BAPCA. Different organizations have come up under the Act which oversee and play a crucial part in smooth governing. The policy decisions under the Japanese regime are considerate of all the stakeholders involved, and wishes to apply a balanced approach to promote TCEs.[41]

Japan has also been a victim of modernization in terms of loss of its culture during the emergence of Western culture and industrialization. This evolution has negatively impacted the traditional expression.[42] Japan's delegation representing the nation during WIPO's discussion presented their contentions over the issue while highlighting that the generally recognized conceptual definition of TCEs does not define its scope or the terms which results into an inflexible interpretation. The concerns with respect to the beneficiaries are categorized into creations with no origins, region-based origins, national level of recognition of communal creations or traditions, community which share the same contemporary beliefs and lastly immigrants. The benefit-sharing model whereby some experts suggest that due to lack of representation of the local communities, the state may serve as proxy opposes the very idea of protection for such communities. The real objective which is sought for through this protection, whether its scope includes only economic benefits or also the moral rights? In reality, there is more on the line then just recognition and benefits, the traditional and cultural values and their implications are also important. The concept surrounding infringement of the moral rights is yet to be defined. Japan strongly opposed the notion of a just a right-based protection, it intends to create a balance between the rights of the holders and the public interest, the legality can be determined through these limitations.[43]

As a matter of policy in Canada, the protections of TCEs as a subset of TK is covered under their existing regime. The enacted legislations pertaining to copyright, trademark, Patents, Industrial Design cohesively work as the instrument to grant protection to such expressions. Marks, authentic labels[44], trademarks for traditional names or symbols are protected under the prevailing law which produce goods and impart services under it. Specifically for content concerning TCEs, such communities have the Copyright Act whereby their creations[45] are extended the protection. Its notion regarding potential gaps and misconceptions under this system are highlighted but no concrete solution has been established. Although, the nation wishes to draft its law in inclusive and accommodating manner, the exploration of the basic issues remains at its core, and not much has been accomplished.[46]

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[40] Further referred to as BAPCA.

[41] Kawamura Y. (2018). Experts in Cultural Policy-Making in Japan: Two Expert Networks and the Making of the Basic Act on the Promotion of Culture and the Arts (BAPCA). Bulletin of Faculty of Humanities, Seikei University No. 53. Retrieved on 29th December, 2022 from https://www.researchgate.net/publication/326606420_Experts_in_Cultural_PolicyMaking_in_Japan_Two_Expert_Networks_and_the_Making_of_the_Basic_Act_on_the_Promotion_of_Culture_and_the_Arts_BAPCA.

[42] Hirai N. (1999). TRADITIONAL CULTURES AND MODERNIZATION: Several Problems in the Case of Japan Institute for Japanese Culture and Classics, Kokugakuin University. Retrieved on 27th December, 2022 form http://50.87.196.182/wp-content/uploads/2016/08/Traditional_Cultural.pdf.

[43] IGC, W. I. P. O. (2021). *Comments on the list of issues from Japan (TCES/EOF) [general remarks*]. WIPO. Retrieved December 27, 2022, from https://www.wipo.int/export/sites/www/tk/en/igc/docs/japan_tce.pdf

[44] For example, Genuine Cowichan, The First Nations Logo, or the Igloo Tag TM.

[45] Like wooden masks, jewelry, art in form of sculpture or cravings and sound recordings or music, which are also protected through the trade secret and NDA route.

[46] Branch of Communication and Marketing. (2020, July 20). *Government of Canada*. Government of Canada, Innovation, Science and Economic Development Canada, Office of the Deputy Minister, Communications and Marketing Branch.

The UK comparatively has only the principal legislation under which such protection can be imparted to TCEs. Surprisingly, a developed nation like the UK had no independent delegation for representation at the 35th IGC Meeting held. The legislation of The Copyright Designs and Patents Act of 1988 extends such veil of protection in its Chapter 48, Section 169 provides for Folklore and unpublished work under anonymous identity. It recognizes the work of authors not residing in the country, and assume the copyright for such work. Specifically, for musical works the protection is provided for u/s 61 which purports that the protection for folksongs can be done through archiving the production as per the instruction of the designated body, but there are conditions preceding the extension of such rights. Furthermore, these conditions set the record straight for the scope by including only works which are unknown, or unpublished and it does not violate a pre-existing copyright, and is not part of any prohibited practices by any performer.[47] Even after strong deliberations following the policy concerns surrounding TCEs and TK, the experts predict that unless the UK is obligated to enact a legislation through international norms, the same will not see the light of the day. The UK's position as a developed nation implies that such approach should already have been set in motion,[48] but from the current pace is foreseen that unless a strong trade partner requires such set the same can only be extended the bilateral trade agreements, otherwise the scope is dim for TCEs.[49] The French have been in the middle of a tremendous cultural and historical evolution in Europe, and although their culture has influenced the west whether it be fashion, food, travel or any other forms of human expression, there is no primary legislation which governs the protection of TCEs under their regime.[50]

III. The Landscape for protection of TCEs in the Developing Nations: The Panama Kenya, and Philippines Model

Panama has strongly advocated for protection of TCEs,[51] even Philippines has been at the forefront to customize a *sui-generis* legislation to cover the dynamic scope and need concerning these communities. Amongst the developing nations, the approach taken by the Central American nation of Panama is remarkable. It has set an example for developing nations to delicately deal with the subject matter. A *sui generis* system known as "Special System for the Collective Intellectual Property Rights of Indigenous Peoples" protects the rights of its indigenous communities.[52] Article 3 considers under its purview the traditional dresses worn by the men and women of these communities, and even mentions any technical points of the said attire shall be registered for the purposes of record and protection. Article 4 on the other hand, has a wide scope by recognizing the collective right of such tribes in their musical forms, performance, oral or written forms of expression, or any tradition which forms part of their culture through historical or planetary expressions. Article 5 takes a commercial approach by bearing in mind the tools and techniques of manufacturing their artistic creations whether it be the material, or a blend of the domestically available raw materials.

Retrieved December 28, 2022, from https://ised-isde.canada.ca/site/intellectual-property-strategy/en/introduction-intellectual-property-rights-and-protection-indigenous-knowledge-and-cultural.

[47] WIPO. (2018). Traditional Knowledge Laws: United Kingdom. Scope of Protection. Retrieved on 25th December, 2022 from https://www.wipo.int/tk/en/databases/tklaws/articles/article_0095.html.

[48] Even the developing nations like Brazil and India considerate of protection of genetic resources, only the basic rights are extended under the UK legislation.

[49] Lambert, J. (2018, April 3). *What is traditional knowledge and how far is it protected in the UK?* What is Traditional Knowledge and how far is it protected in the UK? Retrieved December 29, 2022, from http://nipclaw. blogspot.com/2018/04/ what-is-traditional-knowledge-and-how.html.

[50] Zimmermann K.A., and Gordon J. (2022). *French culture: Customs & traditions*. Live Science. Retrieved on 25th December, 2022 from https://www.livescience.com/39149-french-culture.html.

[51] Davis De L.C.R. (2002). "Régimen Especial de Derechos de Propiedad Intelectual de los Indigenas de Panama", *IGC IV Session of WIPO*, WIPO/GRTKF/IC/4/INF 4.

[52] Panama has recognized and is home to indigenous tribes like Kuna, Ngöbe and Buglé, Emberá and Wounaán, Naso and Bri-bri people under Panama Law No. 20 of 2000.

Article 6 collectively protects the rights of these people and stays true to the authentic and original nature of the works concerned. The huge debatable issue regarding the beneficiaries has also been addressed in the legislation under the scope of protection, the local bodies have been entrusted to provide right of use and market the art forms of such communities under Article 15. Under Article 20, the industrial reproduction for any form protected under this legislation is prohibited unless the same is permitted through the concerned authority and express permission of the community involved. The legislation further provides for exceptions and limitations to the protection granted and especially consider the most marginalized communities and its people and work collectively towards rendering them a profitable form of protection. Small scale crafts artisans are exempted from the act, who are fully depended on earning the living through replication of these art forms, and reside in the designated areas as described in the Act.[53] The requirement of originality is not mentioned in this special system of protection for TCEs. Even before the drafting of the Tunis Model Law, nations like Kenya had a system of protection for folklore[54] in place which reflected the importance given to such resources.[55] Interestingly, only the laws of Panama[56] and Philippines[57] mention customary law within their legislations.

Under the protection availed in the Philippines for the TCEs, which include different forms of bamboo instruments, textile cloths, and other forms of folk crafts, the constitution has incorporated certain supportive provisions for the betterment of the communities. There is emphasis on national unity, creation of regions where common characteristics are shared amongst the people to promote and create awareness, the responsibility of the same lies on the state. The 1997 Act, is a comprehensive legislation whereby the first part is discussing the state policies, while defining the subject matter. U/s 34 of the Act the cultural and intellectual rights are recognized, which comprises of performing arts, literature and scriptures, languages and other orally transmitted traditions. It prioritizes customary law and instills the concept of prior informed consent, the rules cohesively set the tone for the implementation of the legislation. Community ownership is recognized, customary laws are respected, competent authority is set up, is all round a well-documented legislation although there were mixed reactions while enactment of the law.[58]

The Kenyan Model went through a significant reform in 2016 through implantation of a *Sui generis* system, whereby the copyright Board in collaboration with the government has to maintain a repository for traditional knowledge, similar to the lines of the Indian system. Unlike India, Kenya has implemented a defensive mechanism to prevent non-indigenous people from acquiring IP rights under its regime. There are restrictions on the derivative use of such resources as well, and the concept of prior informed consent been incorporated.[59] Although, on practical terms the success of its implementation has not been assessed, but the pro-activeness of the nation showcases their interest in protecting its communities and resources.[60]

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[53] Provision from Special System for the Collective Intellectual Property Rights of Indigenous Peoples.

[54] The Copyright (Amendment) Act (1975) § 15 (Kenya), reprinted in 11 Copyright: Monthly Rev. World Intell. Prop. Org. 224, 225 (1975).

[55] Kuruk, P. (2020). "Chapter 5: Folklore, cultural heritage and traditional knowledge". *In Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Dec 28, 2022, from https://www-elgaronline-com.gnlu.remotlog.com/view/9781785368479/11_chapter5.xhtml.

[56] Busch A.F. (2015). Protection of Traditional Cultural Expressions in Latin America- A Legal and Anthropological Study. Munich Studies on Innovation and Competition. Springer Berlin, Heidelberg. 1. https://doi.org/10.1007/978-3-662-46770-1

[57] The Indigenous Peoples Rights Act (Republic Act No. 8371), 1997.

[58] Valsala P.V. (2002). National Experiences with the Protection of Folklore/Traditional cultural experiences: India, Indonesia and the Phillippe's. WIPO. Retrieved on 28th December, 2022 from https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf

[59] Section 18 of the Act.

[60] Pavis M. (2019). Kenyan Reform on Traditional Knowledge and Traditional Cultural Expressions: Two Year On. The IPKat. Retrieved on 31st December, 2022 from https://ipkitten.blogspot.com/2019/02/kenyan-reform-on-traditional-knowledge.html.

IV. The applicability of a Mixed Model: The Indian Landscape

Culture is the pinnacle of India's identity, its very core of international validation which sets it apart from other nations. A civilization which holds a significant cultural relevance and influence within the Asian continent, so intrinsically woven with rich and diverse groups of people residing here.[61] India is home to rich forms of crafts, handlooms, literature, art forms, and other practices which stem from such indigenous communities. TCEs have a massive scope for commercial success globally and India can be a hub flourishing its own ethnic and diverse culture through the means of effective system of protection and conservation tactics for its traditional practices. For traditional knowledge, India has implemented a fully operational protection system which can be modified and updated according to the need to become inclusive of concepts like TCEs to expand its scope and back that protection through a *sui generis* legislation, following the lead of other similar frameworks. Cultural mapping for creating a comprehensive guide and documenting them might be the solution on the fence.

A Primary Take on the Protection of TCEs in India:

Under the umbrella of the Constitution, there is no direct link between folklore and its protection but under Art. 29 there is mention of protection of minorities and their culture which can be extended through a liberal interpretation to TCEs. While Art. 29 also narrowly provides for right to conserve the culture, the general provision for protection of TCEs can be covered under Art. 51A(f) which essentially provides for duty of every citizen to preserve the Indian culture and heritage although the same is not been extended through enactment of any special legislation. Under the Indian IP regime, the only saving grace was historically considered to be the 1957 copyright Act and recognition of performer under it.[62] A more modernized solution is Geographical indications,[63] although in reality the actual knowledge is not protected under this head but the end product of such knowledge gains protection to a certain degree.[64] GIs[65] can serve as means to create confusion amongst the consumers, there is a disparity in successful application of the legislation in question amongst the states in the country. States like Karnataka, Maharashtra, Tamil Nadu prosper in their application while Goa, Arunachal Pradesh, Punjab lack in its implementation.[66] Apart from that there is no nodal agency to oversee the implementation, no enforcement mechanism directly applicable and the registration process also requires a push from the right direction.

The protection of rights of the tribal and indigenous community in India should be a priority, it is a lucrative opportunity which stems out of the natural diversity that India possesses. In its race to lead the Global South, the protection of traditional assets could serve as the next step. The Global North in the midst of absence of ecological ethics for the sake of economic dominance have contributed immensely in destroying the ecological resources and diversity.[67] The deliberate loss of ethnicity, rights and culture of such communities date back to the concept of discovery, which resulted into colonization.[68]

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[61] Malik A. (2007). Protection of traditional cultural expression: performing arts. Sangeet Natak Akademi, New Delhi. Retrieved on 28th December, 2022 from https://indianculture.gov.in/protection-traditional-cultural-expression-performing-arts.

[62] *Supra* 54.

[63] Geographical. Indications of Goods (Registration and Protection) Act, 1999.

[64] Johnsson, D. Z., & Tualima, H.-Y. (2017). Cultural Heritage, Traditional Knowledge and Intellectual Property. In A. Xanthaki, S. Valkonen, L. Heinämäki, & P. Nuorgam (Eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges* (pp. 218–228). Brill. http://www.jstor.org/stable/10.1163/j.ctv2gjwsw2.13.

[65] GIs can be recognized on the basis of the origin of the good in question, an identifying factor is the geographical location.

[66] Youkta K. and Nupur S. (2020). Issues and Challenges of Geographical Indication in India. EPRA International Journal of Multidisciplinary Research. 6, 10. Pp. 103-108.: https://doi.org/10.36713/epra2013

[67] The Global South is home to an estimate of 75% of biological resources which are part of generational knowledge and traditions, which are in need of a robust system of protection from the Global North.

[68] The irrecoverable loss of intangible factors enshrined in such cultures like scared practices, or sanctity towards their way of life were coercively pushed back to force colonized practices upon such communities.

The exploration for the subject matter is considerate of conformist methods already in place to protect and garner compensation for appropriation of such cultures, and their ineffectiveness to protect it from further exploitation especially for commercial gains. It is imperative to note the model of benefit-sharing which promotes giving of proportional profit to the source from which the genetic resource is derived, can be a correct path for setting examples for protection of TCEs.[69] To mitigate the effects of such exploitation, the answer could be reconstructing and recovering the TCEs through the experts of the field in collaboration with the elders of the communities which can establish a system for grant of compensation, a strategic way to document and carry on the legacy of such communities to sustain their culture. It would be a judicious investment; these violations can be attributed to the undocumented status of traditional art forms and require safe methods of transmissions as they live through folklore and elderly members of such communities. The Indian copyright extends the protection to performers, which also reflect upon the performers right to expression of folklore. The moral and economic rights are vested independently upon such performers u//s 38(b).[70]

The Diffusion Model of Protection: India has applied a *Sui Generis* method of protection of traditional knowledge through TKDL[71], which has facilitated a reduction in grant of patents which were recognized to be part of the Indian knowledge from several other patent offices.[72] The Model focuses on ascertaining protection on the basis of diffusion[73], which are divided in parts through different degrees like (1) Sacred, (2) Secret,[74] (3) Narrow Diffusion, and (4) Wide Diffusion. These parameters would systematically recognize the custodian of the TCEs to impart the benefit to them and also determine the degree at which the compensation is deserved. Although the model is not accepted universally by either sides of the spectrum, it's application even if flawed can be altered to fulfilled the initial standards of a *sui generis system.* This model caters to the urgent nature of protection needed for such TCEs which are not part of the public domain already, the communities need encouragement to not disclose their forms before they are ensured protection which will lead to documenting the art form, and the economic feasibility of the same will be highlighted.[75] It is noteworthy that such protection should be retrospective in its application, India being a signatory to the Nagoya Protocol is eligible to employ such system of protection through framing a legislative solution through WIPO or through a *sui generis* legislation as instituted in developing nations like Kenya.

India's intensive efforts for protection of traditional norms are currently covered under the Geographical Indications[76]. The 2021 report of the Review of the Intellectual Property Rights Regime in India by the Parliament[77], highlighted the inherent issues including lack of documentation, and need for a structured system. The goals included consolidation of the TKDL and more effective

[69] Schroeder D. (2007). Benefit sharing: it's time for a definition. *Journal of medical ethics*, 33(4), 205–209. https://doi.org/10.1136/jme.2006.016790.
[70] *Supra* 13.
[71] Stands for *Traditional Knowledge Digital Library*, a digitalized system initiative available in several languages and taken up through collaboration between the different Ministries under the Govt. of India. IP offices over the world have access to carry out prior art search during the process of patent exams like Australia, Canada, UK, US, German and the European Patent Office.
[72] WIPO. (2012). *About the Traditional Knowledge Digital Library*. Retrieved December 26, 2022, from https://www.wipo.int/meetings/en/2011/wipo_tkdl_del_11/about_tkdl.html.
[73] Based on the differentiated concept which was part of the Draft IGC (Inter-governmental Committee for IP issues on TK, CEs and genetic resources), documents presented in the 27th Session of WIPO in the year 2014.
[74] If the knowledge is scared or secret, the exclusivity of the rights increases, while if the material falls under narrow diffusion or wide diffusion, suggest that the knowledge is part of the public domain which provides more clarity while administering compensation in such matters.
[75] Canada as part of the Global North, has applied this model of benefit sharing and is successful in its implementation.
[76] Further referred to as GI.
[77] Reddy, V. V. (2021). (rep.). *Review of the Intellectual Property Rights Regime in India* (pp. 78–79). New Delhi, Delhi: Rajya Sabha Secretariat.

implementation of GIs as a means for protection. The Indian protection mechanism for GIs is inclusive of craftsmanship as well, while the EU system only includes agricultural and drinks within its scope while the same is in the midst of discussion for an update. India has over 400 GIs which explore a wide variety of products, from local foods to artisans crafts.[78] GIs are the closest for in terms of rendering protection while also following the traditional norms by recognizing its origin.[79] The international footprint of such products have started gaining traction through agreements like the India-EU Trade Investment Agreements. GIs have protected the textiles, different forms of fibers which have traditional significance which has been coupled with extending the protection through trademarks to detect producers and artisans of the craft concerned.[80]

Inherently the Indian system is riddled with hurdles like non-recognition of the term 'Indigenous', following the Indigenous and Tribal Populations Convention of 1957,[81] even when the convention has been modified and replaced in the year 1989[82] whereby other developing nations have taken steps to replace their current system, while India remains stagnant with its ILO 107 application. After assessment of the Indian system of protection, it can be concluded that the absence of positive means to protect culture and land of such minorities have greatly resulted into loss of diversity in the country. Some Tribal communities are not considered within the ambit of Scheduled Tribes, the application of a uniform system of protection, a normative framework[83] is the need of the hour.[84]

It is pertinent to note that the current system is not all-encompassing and clearly showcases an abyss of proper effective system, which can overlook the limitations set by the Indian social and legal concerns, and ultimately protect the interest of these communities. The concerns are multifaceted, cover numerous art forms, expressions which are an extension of an identity so unique that the only option suitable to protect such rights require special legislation.[85] Till, then the plausible solution is in the documentation which ensures acknowledgment of TCEs. A regulatory body which would governs and oversees effective implementation till a concrete system of protection can be formed. Research and awareness may also serve as additional step for pro-active implementation.

V. Conclusive Remarks:

There is a clear divergence of opinions amongst the developed and developing nations. The developed nations are more inclined towards the application of the conventional protection system under the IP regime. In the midst of the numerous conceptual challenges, the cross-cutting contentions of the developing nations state that the IP regime is not well equipped to handle the moral, socio-ethical, and legal concerns of the TCEs. While in hindsight, the developed nations opine that the economic proposition and principles under the IP regime can cover the protection of TCEs. The contradiction does not end there, apart from policy and legal concerns, a significant distinction has to be set

[78] The variety include a wide array of foods like Basmati Rice, Alphonso Mango, Oranges from Nagpur, or Chappal (Slippers) from Kolhapur, Saris from Banaras, Liquor type known as Feni from Goa, Morel Mushrooms or even toys called Channapatna from Bangalore.

[79] UNESCO Intergovernmental Committee of the Intangible Heritage Convention. Information Sheet: Intellectual property. Policy Issue. Retrieved o 25th December, 2022 from https://ich.unesco. org/doc/src/Intellectual_property_EN.pdf.

[80] European Commission. (2022). Protection of Traditional Expressions and Cultural Knowledge in India. IT Helpdesk. Retrieved on 26th Dec, 2022 from https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/protection-traditional-expressions-and-cultural-knowledge-india-2022-09-26_en.

[81] The Convention is also referred to as ILO 107.

[82] The convention can also be referred to as ILO 169.

[83] Hapsari DRI, Hidayah NP, Fajrin YA, and Anggraeny I. (2021). Protection of Traditional Cultural Expressions as Intellectual Property in Indonesia: A Juridical-Sociological Review. Advances in Social Science, Education and Humanities Research. Vol. 590, pp-84-85.

[84] Chakrabarty, S.P., Kaur, R. (2021). A Primer to Traditional Knowledge Protection in India: The Road Ahead. *Liverpool Law Rev* 42, 401–427. https://doi.org/10.1007/s10991-021-09281-4.

[85] Zhang L. (2007). Protecting Traditional Cultural Expressions: From a Copyright Perspective, Philips IP Academy. Retrieved on 22nd December, 2022 from https://ipo.org/wp-content/uploads/2013/03/LisaZhang.pdf.

regarding economic considerations for the beneficiaries. Whether the indigenous communities, or the state are entitled to the benefits which stem from such creations? This is only factor whereby the concerns and answers of the majority match, the Global North and most nations of the opposition believe that the communities should be the beneficiaries, and in cases of the state involvement the conditions shall be set forth prior to its application. For certain African nations, India and even the developed nations, have highlighted the web of political satire which may influence the interests of the stakeholders involved, and how the beneficiaries should be separated.

The diffusive approach as discussed before is a preferable option for the Global South, overtime these TCEs and TK have become part of the public domain, their historical relevance may not be diminished but their value is. The benefit is calculated based on range of the material and its diffusion. The divide continues within the Global South, with the indigenous communities not endorsing this system which is believed to further diffuse their material and negatively impact the spiritual and cultural values. Ironically, even though the protection of the past is concerned, the potential claims with respect to the historic usage of such TCEs has not been at the forefront of the debate, the economic repatriation may be a plausible answer to the same. The opposing sentiments amongst the factions of the traditional approach, but these negotiations can only succeed when compromises are made, and sustained in its inevitability.

The Next Step: The need of the hour before it is too late is to have a tangible instrument to derive the minimum standards and principles from. An international effort that permits the communities and their domestic legislatures to work out their own solutions by considering their own socio-economic and political conditions and prevail a system which engages in promoting diverse approaches to fit the contextual needs of the nations. It is pertinent to note that hyper-fixation of the North over application of traditional IP norms, will only result into stalling the process. WIPO is governing and leading the debate for the subject matter, but considerable weightage still stands with the communities and domestic stands of the nations to protect their own. A *sui generis*[86] solution is the only solution, the natural course of turn demands such status to protect the TCEs and TK as projected. The main objectives for protection under IP laws should concentrate upon presenting lucrative opportunities, preserve the expression and prevent exploitation and unwanted use. Therefore, India may take inspiration from the already available draft models at international level, while being more inclined towards the models followed by the developing nations. It is noteworthy that the developing nations are pro-active in granting protections to their communities, while conventional forms of protection are being granted in the developing nations. Although, GIs have done a tremendous job at protecting the cultural gems through their place of origin, they cannot be considered as sufficient means to meet the end.

The application of a mixed model is deemed appropriate, considering the rudimentary issues raised under different jurisdictions as highlighted above, lessons can be learned from each such legislations and its implementation, the model cannot be successfully implemented in the first try, but the lack of efforts to protect the resources and TCEs from exploitation by hands of the Global North is unacceptable. Further, there is no perfect model which is most suitable for India from the concerned systems of protection, each nation has their own socio-economic, political, religious and historical aspects which are to be considered while making such law. The study does not endorse application of the IP regime simply upon the playing field of Indian TCEs, but it does advocate for implementation

[86] A *sui generis* solution may have certain key aspects which shall govern the TCEs, and shall include the objectives for the protection, the subject matter of protection, the parties which would be the beneficiaries, the scope of application, the limitations and exceptions in line with the established scope of protection. Apart from these aspects the legislation shall set the tenure/duration of the protection, or the same can be left unsaid as intended under the Panama Laws. While also setting up sanctions in the form of penalties for the decided forms of infringement of the right-holders, while also considering the question of retrospective application. And the extend of the application of the act, inclusion of foreign nationals or art forms and so on.

of a novel system which focuses entirely and singularly on the current subject matter. It is high time, that India as a nation showcase and implement its Constitutional principles, and take advantage of its '*Unity in diversity'* to secure the future of its indigenous communities and identify its status and contribution within the Indian economy.