

FOLKLORE AND LAW: NAVIGATING THE PATH FOR 'RIGHTEOUSLY' PRESERVING CULTURAL LEGACIES IN INDIA: ANALYSIS UNDER IP LAWS AND INDIAN CONSTITUTION

Dr. Gunjan Chawla Arora*

Dr. Shriya Bhojwani**

Abstract

The Preamble to the Indian Constitution grants liberty of thought, expression, belief, faith and worship to all its citizens. These values mirror the Theory of Multiculturalism, by which State is obligated to protect one's cultural identity. One such example that best represents Multiculturalism in India is Traditional Cultural Expressions¹ and Traditional Knowledge.² While we have the Traditional Knowledge Digital Library, which protects indigenous knowledge and the GI Law which affords community rights for art, handicrafts, and architectural forms, and even culinary expressions, what we still await is a recognition for communities in India known for expression of their traditional folklore, especially dance and music, performance, ceremonies and even narratives. The WIPO considers Traditional Cultural Expressions (TCE's) as expression of one's traditional culture which mirrors the identity and heritage of a traditional or indigenous community and are practiced across generations. TCEs are integral to the socio-cultural identities of indigenous communities, embodying know-how and skills, thereby transmitting core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.³ The WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is

* Dr. Gunjan Chawla Arora, Assistant Professor of Law, Associate Head, Centre for Intellectual Property Rights Institute of Law, Nirma University SG Highway, Ahmedabad, Gujarat.

** Dr. Shriya Bhojwani, Assistant Professor, Institute of Law, Nirma University.

¹ A term which has been recognised by WIPO to denote the traditional communities which are right in cultural heritage expressions in the form of dance, art, music folklore, narrative, performances, etc. WIPO on Traditional Cultural Expressions <<https://www.wipo.int/tk/en/folklore/>>

² A term recognised by WIPO to denote the knowledge, skills, know-how, customary usages and practices developed and sustained in a community and passed on from one generation to the other, such that it comes to identify with the spiritual or cultural identity of that community. WIPO on Traditional Knowledge <<https://www.wipo.int/en/web/traditional-knowledge/tk/indexwledge>>

³ WIPO on Traditional Cultural Expressions <<https://www.wipo.int/tk/en/folklore/>>

negotiating an international legal protection regime for TCEs.⁴ This global initiative has stirred the need for India to recognize its multiculturalism in true letter and spirit. This paper attempts to evaluate the need for framing policy guidelines for TCE's in India. This may be enacted vide a Sui Generis Law, or alternatively, widen the ambit of Law on Geographical Indications to include Traditional Cultural Expressions alongside goods originating or practiced for generations in specific geographical locations in the country.

Keywords: *Traditional Cultural Expressions, Traditional Knowledge, IPR, Certification Marks, Collective Marks, Indian Constitution, Minority Rights, Indigenous communities.*

INTRODUCTION

The United Nations Declaration on the Rights of Indigenous Peoples, 2007⁵ which acknowledges equal human rights of indigenous peoples against cultural discrimination, in addition recognizes the rights of indigenous people to maintain, control, protect, develop intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including oral traditions, literatures, designs, sports and traditional games and visual and performing arts among others.⁶ Further, Article 31.2 enjoins the respective States with an obligation to undertake effective measures which provide for indigenous people to exercise their rights successfully.

WIPO defines “Traditional Cultural Expressions” and/or “Expressions of Folklore” as tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested.⁷ These include traditional music, performances, narratives, names and symbols, designs and architectural forms. These are said to be included as part of the broader connotation of Traditional Knowledge.⁸ Its several uses may include- commercial, industrial, customary,

⁴ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Forty-Sixth Session (Hybrid) <https://www.wipo.int/meetings/en/details.jsp?meeting_id=75328>

⁵ Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/wpcontent/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>

⁶ United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 31.1 <<https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>>

⁷ WIPO on Traditional Cultural Expressions <<https://www.wipo.int/tk/en/folklore/>>

⁸ WIPO on Traditional Cultural Expressions <<https://www.wipo.int/tk/en/folklore/>>

household, public health uses as traditional medicine and fair use for research and educational purposes. At the moment, there is no specific clause under any international instrument that seeks to provide any form of protection, preservation or conservation of these rights belonging to the traditional communities. Though there are ample debates on the fact that these cultural traditions are to be ‘preserved and safe-guarded’ as against ‘protection’ since it is a community based right and hence individuals from the community must be given an opportunity to exercise their discretion with respect to the manner in which these rights are to be exploited. This paper makes an attempt to suggest a sui generis protection under Intellectual Property for Traditional Cultural Expressions, including folk music, dance, stories, performances, etc., and further aligns the justification for seeking such regime under the Theory of Multiculturalism⁹ indicated under the Constitutional provisions.

SAFEGUARDING CULTURAL DIVERSITY UNDER THE INDIAN CONSTITUTION

India is a country with diversity, and we proudly preach unity in diversity. Diversity lies among the people following different religious ideologies, cultural beliefs, languages, ways of living, etc. The existence and protection of this social identity are very sacred to the people belonging to the community. Their cultural existence, beliefs, and way of life are close to their heart, and they pompously propagate them in the free Indian democracy. Our democratic structure is the most vibrant one, letting citizen enjoy their uniqueness, express their ideologies, follow their cultural beliefs, promote their culture, and these different cultural practices have been a USP for the Indian government to promote trade, business, and tourism in India. Numerous foreigners are attracted to various indigenous folklore and are lured to invest in the same. These traditional cultural expressions include artistic work, poetry, traditional beliefs, music, storytelling, pottery, jewellery, carvings, rituals, handicrafts, mythology, folk dance, carpet designing, weaving, folk songs, instrumental music, textiles, and other things intrinsic to any indigenous community.¹⁰ These expressions are an important asset of the community and are passed from generation to generation verbally. It becomes essential for the legal system to protect these cultural expressions as they portray the entire existence of a community. Unfortunately, the Indian legal system has not fully protected these cultural expressions, which are the community’s right. It has become a practice that people in power and with necessary

⁹ Pandey, Sanjay Kumar, Constitutional Perspective of Multiculturalism in India (February 15, 2007). Available at SSRN: <https://ssrn.com/abstract=963563> or <http://dx.doi.org/10.2139/ssrn.963563>

¹⁰ Singh Kumar Rajnish, “Protection of Traditional Cultural Expressions/ Folklore: International and National Perspectives”, 8(1)DLR(2016).

monetary resources are able to exploit people living in the community by utilising the community's traditional cultural expression for profit-making, paying a meagre amount to the community. The indigenous folk culture should not be used without the permission of the community, where it belongs, and also in case when the same is used for any business purpose, the members of the community must be made a party in the profit sharing. People belonging to the community must be given this opportunity to be employed, enabling them to choose their strong suit instead of opting for any daunting task.

The Indian Constitution does not directly talk about intellectual property rights, but the existing IPR laws get their constitutionality from articles protecting the right to business, profession, occupation, trade, the right to property, and other directive principles of state policy, talking about economic policies and economic equity.¹¹ Concerning the right to protect and conserve one's culture, the constituent assembly members have been considerate enough to draft special provisions for the protection of the rights of minorities and the tribal population in India. The Constitution under Article 29¹² grants minorities, who are the citizens of India, the right to conserve their distinct culture. The article heading talks about the protection of the interests of minorities, but the content in the article provides the right to any section of the citizen having a distinct language, script, or culture of its own to conserve the same.¹³ The Article has been ambiguous about the intention of the constitution makers. The constituent assembly debate shows that the drafting committee, despite the advice given by the constitutional advisors to include the term minority in the main content of the article, intentionally chose the words "any section" to give it a wider meaning and to grant protection to the maximum number of people. The judicial intervention in the case of *Ahmedabad St. Xavier's College Society v. State of Gujarat*¹⁴ settles the legal proposition, where the Honourable Supreme Court held that even the majority can exercise their rights granted under Article 29 after proving that the majority population is a minority in the state where they claim this right. This means that, hypothetically, even the Gujaratis can claim protection in any other state where they are in the minority. Also, in *Dayanand Anglo Vedic College v. State of Punjab*¹⁵, the court upheld the right of minorities to protect and conserve their culture under Article 30¹⁶ of the Indian Constitution. Therefore, the section that falls under the classification of minorities can, through Articles 29 and 30,

¹¹Shubhangi, "Intellectual Property Rights and Indian Constitution", Legal Service India, E-Journal, [Intellectual Property Rights And Indian Constitution \(legalserviceindia.com\)](https://legalserviceindia.com), last accessed on 2nd August 2024 at 5:10 pm.

¹²Art. 29(1), India Constitution

¹³Art. 29(1), India Constitution

¹⁴*Ahmedabad St. Xavier's College Society v. State of Gujarat*, AIR1974SC1389.

¹⁵*Dayanand Anglo Vedic College v. State of Punjab*, 1971AIR1737.

¹⁶Art. 30, India Constitution

protect their traditional cultural expression. A similar analogy can be drawn for the tribal community in India. To protect the interest, safeguard the customary practices, and grant complete autonomy to the tribal population, an exclusive chapter vis-à-vis Part X¹⁷ was incorporated into the Constitution, providing for the administration of scheduled and tribal areas. Article 342¹⁸ authorises the President of India to declare any tribe or group to be a tribal community, and Parliament can, by law, include them in the list of tribal communities. Further Schedule V¹⁹, the government has the power to administer and control any scheduled areas and scheduled tribes, and normal laws won't apply to them if they infringe on their customary practices. Similarly, Schedule VI²⁰ of the Constitution empowers the tribals to elect an autonomous council that has all the power to make rules for the protection of their customary laws, and normal laws won't be applicable to them. Thus, the tribal population has the liberty to preserve their cultural rights.

Sadly, the position is not the same for the rest of the Indian population, who do not fall into the above two categories. The Grundnorm²¹ does not expressly provide a right to protect the community's cultural expressions when it comes to the rights of the majority population, but instead, it has to be derived through various articles when read in consonance with each other. Starting with Article 19(1)(a),²² which provides freedom of speech and expression to all its citizens. The word expression includes all sorts of artistic works and cultural expressions. Article 19 (1)(g)²³ provides for the freedom to practice any profession, occupation, or trade, and the restriction attached to this article allows the author or the inventors to enjoy the fruits of their creation. The directive principles under Article 39(b)²⁴ and (c)²⁵ bestow a duty on the state to ensure that the resources are not concentrated in a few hands, but rather it is allocated in a manner that serves the common good. It provides for the protection of traditional expression for the common benefit of the community as a whole. Moving to Article 43,²⁶ which casts an obligation on the government to ensure that all workers get an adequate living wage and work in a decent environment. Unfortunately, these rights are unenforceable by virtue of

¹⁷Part X, India Constitution

¹⁸Art. 342, India Constitution

¹⁹Sch. V, India Constitution

²⁰Sch. VI, India Constitution

²¹Hans Kelsons Theory of Grundnorm

²² Art. 19(1)(a), India Constitution

²³ Art. 19(g), India Constitution

²⁴ Art. 39(b), India Constitution

²⁵ Art. 39(c), India Constitution

²⁶ Art. 43, India Constitution

Article 37²⁷, and they have been labelled as socio-economic rights. The members of the assembly had a debate regarding the justiciability of these directive principles, but it was hard to bring them to a consensus regarding the same. Therefore, like Articles 32²⁸ and 226²⁹, which facilitate a citizen to file a writ before the Supreme Court or any High Court in India for violation of any fundamental rights, no such provision is there for the directive principles of State Policy. The absence of constitutionally recognised provisions for the enforcement of socio-economic rights has given the liberty to ignore these rights. Also, under Part IV A³⁰, Article 51a (f),³¹ a fundamental duty is cast on the citizens to value and preserve the rich heritage of our culture. Through the mentioned articles, we are able to derive that all citizens have a constitutional right to protect and conserve their cultural identities, propagate their cultural expression, and make a livelihood out of it.

On the international front, India has been a strong supporter of the United Nations Declaration on the Rights of Indigenous Peoples. India in 2018 adopted the WIPO Performance and Phonograms Treaty (WPPT), which intends to protect the traditional cultural expressions. By virtue of Article 51(c)³², which makes the state duty-bound to respect the International Laws and Treaties and comply with the same, Indian Intellectual Property Rights Laws are framed in consonance with the TRIPS agreements. Similarly, we need laws for the protection of traditional cultural expressions in line with the model laws and rules for the protection of folklore or traditional cultural expressions framed by various International organisations like the United Nations Educational, Scientific and Cultural Organisation, and the World Intellectual Property Organisation. These model laws provide a full proof definition of the term cultural expression, including all forms of artistic practices, which are associated with any community's social identity and customary practices. This cannot remain an ignored area any longer. Article 27³³ of the United Nations Declaration on Human Rights and UNESCO's Convention on Safeguarding of Intangible Cultural Heritage bestow these community-based cultural rights as basic human rights, but these rights have been ignored for a long time, and are still not given the same attention as the other civil rights. It is shameful that today we are talking about Artificial Intelligence in almost all fields associated with human life, and still, we have failed to value and recognise these basic human rights. It must be valued now as true

²⁷Art. 37, India Constitution

²⁸ Art. 32, India Constitution

²⁹Art. 226, India Constitution

³⁰Part IV A, India Constitution

³¹Art. 51A(f), India Constitution

³²Art. 51(c), India Constitution

³³United Nations Declaration on Human Rights, 1948, art. 27.

democracy can only be achieved by not leaving the citizens at the mercy of those exploiting, but rather by granting them respect and recognition, as democracy and diversity are a happy marriage.

TRADITIONAL CULTURAL EXPRESSIONS: THE WIPO PERSPECTIVE

The 12th Session of the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge (TK) and Folklore, held in Geneva in 2008, considered IP protection for Traditional Knowledge. WIPO resorted to define the term TK to include agricultural knowledge, scientific knowledge, technical knowledge, ecological knowledge, medicinal knowledge, “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories, and art work; elements of languages, such as names, geographical indications and symbols and movable cultural properties.³⁴ Any item which was not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense, was considered to be excluded from the definition of TK.³⁵ Hence, during this session, Expressions of Folklore were considered as part of TK itself. In 2010, the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore, in its 17th session, resolved to arrive at a definition for the term Public Domain specifically in reference to the protection of TK and Traditional Cultural Expressions (TCE) or Expression of Folklore.³⁶ TK and TCE were agreed to be excluded from the definition of Public Domain in order to protect the former against unjust enrichment and misappropriation. The Committee proposed Traditional Knowledge Commons in order to restrict overlapping public domains or knowledge-sharing spaces. The Traditional Knowledge Commons would be a mechanism to provide for regulated access to TK. Public Domain would include publicly accessible information or intellectual properties which doesn’t otherwise infringe any legal right or obligation of confidentiality.³⁷ A differential understanding of the phrases- publicly available and accessible, publicly available but not accessible, accessible but protected, unprotected but not accessible- is to be made from publicly

³⁴ WIPO on Traditional Knowledge < <https://www.wipo.int/en/web/traditional-knowledge/tk/indexwledge>>

³⁵ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore Twelfth Session Geneva, February 25 To 29, 2008 The Protection Of Traditional Knowledge: Factual Extraction

³⁶ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore <<https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-2-en-the-wipo-intergovernmental-committee-on-intellectual-property-and-genetic-resources-traditional-knowledge-and-folklore.pdf>>

³⁷ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Seventeenth Session Geneva, December 6 to 10, 2010

available TK and publicly unavailable TK. The latter is the one which is not available for free rides or unjust enrichment. An identifiable Prior Informed-Consent (PIC) from the TK holder is to be considered as a pre-required mandate for benefit-sharing.³⁸

In 2018, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in its 37th Session at Geneva, scripted the gaps with respect to the Protection of Traditional Cultural Expressions.³⁹ TCE were agreed upon to include both pre-existing materials from the past and contemporary expressions of traditional cultures together with their adaptation, imitations, revitalisations, revivals and recreation. Further, in order for a cultural expression to be considered a traditional creation, it must be identified with a living tradition and community which still bears and practices it. There must be excluded from the connotation of tradition-based creation, any aspect of ‘ownership’, despite the fact that it may have been developed by an individual. A traditional creation must exhibit a shared sense of communal responsibility, identity and custodianship.⁴⁰

The WIPO Diplomatic Conference on Intellectual Property and Genetic Resources, Traditional Knowledge and Genetic Resources associated with Traditional Knowledge, 2024⁴¹, enjoins upon the member states a mandate for compulsory disclosure in patent applications for inventions which are based on Genetic Resources and/or associated Traditional Knowledge. This, too, refers to a broader aspect of TCE as falling under Traditional Knowledge. Hence, there is no such legal parasol which seeks to elaborate and discuss the requirement for preserving the cultural heritage of WIPO member countries, which lies in the traditional cultural expressions. Countries across the globe have provisioned for the protection of traditional cultural expressions originating in their respective states under the comprehensive umbrella protections covering copyrights, trademarks and geographical indications. Despite this, there is considerable exploitation which is otherwise possible, owing to the absence of specific legal norms which seek to protect the rights of these traditional communities. The

³⁸ UNEP/CBD/WG-ABS/8/2, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing

³⁹ Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) < <https://www.wipo.int/documents/d/igc/docs-en-igc-mandate-2024-2025.pdf>>

⁴⁰ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Thirty-Seventh Session Geneva, August 27 To 31, 2018 The Protection Of Traditional Cultural Expressions.

⁴¹ Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources Geneva, May 13 To 24, 2024 WIPO Treaty on Intellectual Property, Genetic Resources And Associated Traditional Knowledge < https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf>

Beijing Treaty on Audiovisual Performances, 2012,⁴² which grants performers of folklore a right under Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1886,⁴³ provides a mechanism for the international protection of unpublished and anonymous works, including TCES.⁴⁴

Proposing a sui generis regime for Traditional Cultural Expressions: a critique under the existing IP regime:

The WIPO in its Intergovernmental Committee debates have focused on the distinction between Protection vis-à-vis Preservation, Safeguarding or Promotion. IP regime specifically provides for two forms of protection- Positive and Defensive. In the former, a positive exclusive right to use and monopolise the IP granted is endowed upon the creator/author of the work. In the latter form of protection, a third party is excluded from engaging with the IP protected and accruing any commercial benefits from unauthorised use and exploitation of the said IP, such that any unjust enrichment and misappropriation is averred.⁴⁵

Preservation and safeguarding TCE under traditional forms of IP regime may not be a feasible form of protection. In fact, every form of IP bears a USP which may be adapted for the purpose of creating a sui generis regime for TCE protection. Some of such relevant forms of preservation may include the following aspects of other IP forms:

- a) There is a line of commonality between the protectable subject matter of Copyrights and TCE, as both of them deal with forms of literary, dramatic, musical, and artistic works. The difference between them, however, relates to the nature of the intangible right conferred. While Copyright is a private ownership right, Traditional Cultural Expressions are community-oriented rights which are handed down from one generation to another, either orally or by imitation, such that they reflect the cultural or social identity of the said community. The commodification of cultural expressions by a third party by way of copyrighting adaptations of original cultural expressions is an aspect of major conflict between the two. Despite the fact that the subject matter of

⁴² Beijing Treaty on Audiovisual Performances <<https://www.wipo.int/treaties/en/ip/beijing/>>

⁴³ Berne Convention for the Protection of Literary and Artistic Works <<https://www.wipo.int/treaties/en/ip/berne/>>

⁴⁴ WIPO Beijing Treaty on Audiovisual Performances (2012) <https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html>

⁴⁵ Daphne Zografos and Hai-Yuean Tualima, Cultural Heritage, Traditional Knowledge and Intellectual Property in Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges, 2017, 218-228 <<https://www.jstor.org/stable/10.1163/j.ctv2gjws2.13>>

TCE is similar to that of copyright, claiming private ownership would not be a feasible option. Copyrights are granted for a specific term after which the said work falls into the public domain. When it comes to TCE, it may be argued that these traditional expressions already exist in the public domain. They require preservation and safeguarding of the said expressions against unwarranted or unauthorised commercial exploitation. Protection is granted against an exclusive right to be exercised against an unauthorised third-party use, whereas the essence of preservation and safeguarding TCE is to ensure that commercial benefits are equally derived and shared with the communities which are recognised to have been associated with the origin of the said TCE. Preservation is to grant exclusive rights of use and grant a license for their party's use of the TCE. However, from Copyrights, the concept of Copyright Society Licensing may be borrowed for the protection of TCE. Every such community which is recognised as having a TCE which they have been practising for antiquity may be provided the right to preserve their rights by way of registering their community as a society or an association, which would further have the power resembling that of a copyright society. Such communities would have the right to reproduce, use and further grant the use of such TCE to a third party willing to pay a royalty as part of the right under the license to use the TCE. This preservation regime may further be supported by the access and benefit sharing rights concept wherein the profits and commercial benefit accrued to the licensee is to be shared with the TCE community, in order to further enrich the criteria of preservation and safe-guarding rights of the members of the community to exercise their rights over the TCE.

- b)** The Law on Trademarks deals with brand identification, distinction and objectivity among consumers with respect to goods and services. The purpose of trademarks is strictly commercial. Hence, Trademark may not be a feasible regime for protecting TCE as these expressions are neither goods nor services. The objective of a Trademark is to ensure that consumers are able to distinguish between the goods and services of one proprietor from those of another. However, TCES are expressions which cannot be considered for commodification. These TCES provide a nurturing experience which can only be felt by the communities. Since India is a diverse country, every specific state is known for a specific form of TCE originating within its territories. These are meant for promotion. In fact, a major aspect of tourism industries is to promote the experience of the rich cultural heritage which is peculiar to one specific state. Further, every cultural expression coming from a specific geographical location is meant to be

enjoyed and experienced equally by others. There is not meant to be any competition between the communities when allowing access to their TCE to the general public. Consumerism is absent in the case of community access and benefit sharing. TCE would be safeguarded and preserved on the basis of ‘equitable opportunity of being experienced’.

- c) TCE and Geographical Indications both are community rights. However, while the former deals with cultural expressions in the form of folklore, music and dance, performances or stories, meant to be experienced and enjoyed, the latter deals with only goods originating in specific geographical locations. GI as a community right is in itself a weak form of IP which is incapable of being holistically protected and safe-guarded against any infringement as in most cases a community may not be able to get the knowledge of any apparent infringement or even of the fact that as a community, they need to take protection under the GI regime. However, one aspect of GI, which is registration of communities as a Registered association or community capable of being recognised by way of a collective registration mark, is something which can also be adopted for preserving the rights of TCE communities. Every such TCE community belonging to a specific state may be registered as a Collective Association under a collective registration mark distinctive and distinguishable to an extent that it indicates the TCE of a specific community. This may be a viable form of preservation regime for the TCE.
- d) Similar to the TKDL, there could be a digital library for all the TCE belonging to and coming from specific indigenous or local communities who have been practising a traditional cultural creation for a considerably longer time than reckons back to antiquity. Such Digital Library would fulfill two objectives: (1) Preserving and Safe-Guarding the rights of communities against misappropriation and unjust enrichment, thereby furthering the benefit-sharing obligations; (2) Granting recognition of several TCE’s belonging to different indigenous communities across the country and, (3) Strengthen the Constitutional obligation to preserve and safe-guard rights of communities forming the basis of India’s culture and heritage.

CONCLUSION

The WIPO Diplomatic Conference to Conclude an International Legal Instrument relating to Intellectual Property, Genetic Resources (GR) and Traditional Knowledge (TK) associated with Genetic Resources held in Geneva from May 13 to 24, 2024 addresses the interface

between Intellectual Property on one hand and Genetic Resources and Traditional Knowledge on the other for Indigenous people and local communities. However, its objectives are located more around a new disclosure mandate for patent applications which claim protection for inventions based on GR and/or associated TK. Contracting parties signing the Treaty are obligated to disclose the country of origin or source, or identity of the Indigenous people or local community of the GR and/or TK.⁴⁶ The Treaty fails to fulfil the obligations of preservation and safeguarding the TK or GR available with such communities, thereby further rendering the benefit-sharing clause redundant. Merely disclosing the identity of the community would not serve the purpose, as Prior Informed Consent for making use of the information is not the same as a mandate for mere disclosure. Hence, India should strive towards navigating a broader regime for preserving and safeguarding the rights of indigenous and local communities as preservers of Traditional Cultural Expressions under Intellectual Property Law, read with the Constitutional rights of cultural and heritage communities.

⁴⁶ Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources Geneva, May 13 To 24, 2024 WIPO Treaty on Intellectual Property, Genetic Resources And Associated Traditional Knowledge <https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf>