

# **CULTURAL EXPRESSION AND THE LAW OF GEOGRAPHICAL INDICATIONS IN INDIA: A SOCIO-LEGAL STUDY**

Dissertation submitted to National Law University and Judicial Academy, Assam  
in partial fulfilment for award of the degree of  
ONE YEAR LL.M. DEGREE PROGRAMME

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June, 2023

**CERTIFICATE**

This is to certify that **JYOTIRINGA PUZARI** has completed his dissertation titled “**CULTURAL EXPRESSION AND THE LAW OF GEOGRAPHICAL INDICATIONS IN INDIA: A SOCIO-LEGAL STUDY**” under my supervision for the award of the degree of **ONE-YEAR LL.M. DEGREE PROGRAMME** of National Law University and Judicial Academy, Assam.

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## DECLARATION

I, **JYOTIRINGA PUZARI**, do hereby declare that the dissertation titled “**CULTURAL EXPRESSION AND THE LAW OF GEOGRAPHICAL INDICATIONS IN INDIA: A SOCIO-LEGAL STUDY**” submitted by me for the award of the degree of **ONE YEAR LL.M. DEGREE PROGRAMME** of National Law University and Judicial Academy, Assam is a bona-fide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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## ACKNOWLEDGMENT

At the outset, I would like to extend my earnest gratitude to my research guide and supervisor, Dr. Debasis Poddar, Professor of Law, National Law University and Judicial Academy, Assam for providing me with the insightful idea that served as the foundation for this dissertation. His invaluable support, guidance and unwavering commitment throughout the journey of my dissertation have been instrumental in shaping the outcome of this research endeavor. I am thankful to him for providing me the knowledge and insightful suggestions with regards to the area of law that has greatly enhanced the quality of my dissertation.

I would like to express my appreciation to all the esteemed Faculty members who have played a significant role in enriching my academic journey. Their extensive knowledge, guidance, and thought-provoking discussions have greatly expanded my understanding of the subject matter and broadened my perspectives.

Furthermore, I would also like to extend my heartfelt gratitude to the Administrative staff, the Librarian and the staff members of the Library and IT Section at the National Law University and Judicial Academy, Assam. Their remarkable collaboration and support in locating relevant resources for my research have been immensely valuable.

Lastly, I would like to convey my deepest thanks to my family, friends and seniors for their unwavering support and encouragement. Their love, patience, and motivation have been indispensable throughout this endeavor.

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## TABLE OF CASES

### *National Cases*

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1.	<i>Imperial Tobacco Co. v. The Registrar of Trademarks</i>
2.	<i>Mohan Meakin Breweries Ltd v. The Scotch Whisky Association</i>
3.	<i>Scotch Whisky Association v. Golden Bottling Ltd</i>
4.	<i>Scotch Whisky Association v. Pravara Sahakar Karkhana</i>
5.	<i>Subhash Jewellery, represented by C.V. Dayanandan Sole Proprietor v. Payyannur Pavithra Ring Artisans and Development Society and Others</i>
6.	<i>Tea Board, India v. ITC Limited</i>



## TABLE OF STATUTES

### *National statutes*

YEAR	NAME OF THE STATUTE
1950	Constitution of India
1957	The Copyright Act
1970	Patents Act
1999	The Geographical Indications of Goods (Registration and Protection) Act
1999	Trade Marks Act
2000	The Designs Act

### *International Statutes*

YEAR	NAME OF THE STATUTE
1883	Paris Convention for the Protection of Industrial Property
1886	Berne Convention for the Protection of Literary and Artistic Works
1891	Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods
1958	Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
1961	International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations
1994	Agreement on Trade-Related Aspects of Intellectual Property Rights
1996	WIPO Performances and Phonograms Treaty
2003	Convention for the Safeguarding of Intangible Cultural Heritage

*Regional Statutes*

<b>YEAR</b>	<b>NAME OF THE STATUTE</b>
1957	Peru Law No. 27811
1977	Mali Literary and Artistic Property Ordinance
1997	Philippines Indigenous Peoples Rights Act
2003	Geographical Indication Protection Act
2005	Ghana Copyright Act
2006	Ecuadorian Intellectual Property Law (Consolidation No. 2006-13)
2014	Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs
2016	Trademark and Geographical Indication Law (No. 20 of 2016)

## TABLE OF ABBREVIATIONS

ACRONYM	ABBREVIATION
&	and
AIR	All India Reporter
art.	Article
Bom	Bombay
Cal	Calcutta
CWWS	Chakhesang Women Welfare Society
Del	Delhi
Dept.	Department
Ed.	Edition
ed.	editor
eds.	editors
GI	Geographical Indication
Govt.	Government
i.e.	that is
ICE	Intangible cultural expressions
ICH	Intangible cultural heritage
IGC	Inter-Governmental Committee
ILO	International Labour Organization
INR	Indian Rupees
IP	Intellectual Property
IPAB	Intellectual Property Appellate Board
IPR	Intellectual Property Rights
Ltd.	Limited
n.	note
NEI	North-East India
No.	Number

ACRONYM	ABBREVIATION
para	Paragraph
R&D	Research and Development
Sec.	Section
Ss.	Sections
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TRIFED	Tribal Co-operative Marketing Development Federation of India Limited
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States of America
USPTO	United States Patent and Trade Mark Office
v.	versus
viz.	in other words
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## CHAPTER 1 : INTRODUCTION

### 1.1 Research background

The beliefs, customs and knowledge of different cultures and communities are often expressed through traditional cultural symbols like art, music, festivals, dance, drama, culinary techniques and handicrafts among many others. They are considered to be the ‘cultural expressions’ of a community. India, a nation recognized for its many cultural traditions and identities, has a wide range of expressions specific to its geographical areas. These cultural expressions, which range from festivals and ceremonies to traditional dances and music, capture the spirit and legacy of the communities that have fostered them for decades.

Protecting cultural expressions is essential for encouraging creativity, nurturing an array of traditional perspectives, and assuring the conservation of our cultural legacy. The Geographical Indications (hereinafter GI) legislation<sup>1</sup> of India has long offered protection to cultural expressions but in forms of products such as handicrafts, textiles, visual art etc., whereas cultural expressions can also be found in intangible forms<sup>2</sup>. But, the protection of the intangible forms of cultural expressions (hereinafter ICE) has remained a complex and uncharted territory, that too within the framework of GI. Scholars argue that the existing legal framework on GI places the majority of its emphasis on tangible goods and products, and thus completely ignores the subtle and intangible nature of cultural expressions, owing to its existing subject matter and scope<sup>3</sup>. Due to this oversight, these cultural expressions in question are now open to the possibility of being misappropriated and used for commercial gain. Unscrupulous people and organizations have a tendency to take advantage of these cultural expressions in order to make a profit

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<sup>1</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>2</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014) 90.

<sup>3</sup> Michael Blakeney, ‘The protection of traditional cultural expressions by geographical indications’ in Irini Stamatoudi, *Research Handbook on Intellectual Property and Cultural Heritage* (Edward Elgar Publishing Limited 2022).

from them, but they do so without recognizing or paying the communities who were responsible for their creation in the first place. For instance, in order to create albums that are guaranteed to reach number one on the charts, major recording companies and production houses of music frequently combine traditional music with electronic music and rhythms, which was originally played using traditional instruments. At many times, these traditional songs which may encompass oral traditions, knowledge or cultural elements of a community; are also used by these companies. Therefore, the marginalization of cultural expressions from the scope of GI has had negative impacts on the communities that are involved, putting their economic well-being as well as the preservation of their traditional knowledge and abilities at risk.

The current Geographical Indications (GI) legal framework in India, that is the GI Act of 1999, primarily centers on safeguarding ‘goods’ or ‘products’ including handicrafts, textiles, agricultural products, and natural products that possess distinct associations with particular geographical regions.<sup>4</sup> This limited definition raises significant socio-legal questions regarding the recognition of intangible cultural expressions. It is important to acknowledge that intangible cultural expressions possess the ability to embody the fundamental essence and identity of their geographical origins, much like a product recognized under geographical indication. For instance, within the classical dance traditions of India, such as *Kathakali*, *Bharatanatyam* and *Odissi*, one can observe the utilization of techniques, gestures, and musical compositions that are specific to particular regions. The evolution of these dance styles has taken place over a significant period, mirroring the cultural heritage of the respective regions. Analogous to the aforementioned, geographically distinctive nuances and accents are noticeable in conventional music styles such as *Carnatic* music and *Hindustani* classical music. But the dearth of adequate protection to these community based creations; such expressions are prone to be misused or misappropriated. Therefore, the researcher opines that there is a scope to take into account the intangible forms of cultural expressions within the

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<sup>4</sup> Sec. 2 (e), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

framework of the GI legislation<sup>5</sup>, given the potential of GI protection in increasing the self-sufficiency of the indigenous societies. In order to bridge this gap in the legal framework, strong protective measures aimed at preservation and advancement of India's cultural heritage must be taken into account.

The present research study focuses on the limited legal recognition and protection given to cultural expressions, and they are not sufficiently protected by the present IP laws in India, despite the fact that they are important assets in terms of intellectual property and are drivers of cultural heritage. Because of this, these expressions are open to the risk of intellectual property infringement, abuse, and misappropriation. As a result, the goal of this research is to analyze the legal and socio-cultural complications of this gap and recommend if appropriate methods could be taken to adequately protect and preserve traditional cultural expressions of all forms in the domain of the Indian GI legislation, which is believed to be the best IP tool to accommodate interests of the indigenous community engrossed in the making of traditional cultural expressions (TCEs). In addition, this research will investigate whether or not a separate *sui-generis* (one of its own kind) law is a feasible option, as an alternative.

In order to provide a thorough solution to this research problem, a multidimensional approach will be employed. The research will make use of a socio-legal framework that integrates legal examination with socio-cultural perspectives, particularly from the North-Eastern region of India (NEI). Furthermore, the research will look up or investigate the global standards and legal structures of nations that have effectively integrated ICEs into their laws aimed at their protection and preservation. The goal is to extract valuable lessons and insights applicable to the Indian socio-legal context.

This research carries substantial significance as it can make a treasured contribution to the continuing discourse on the safeguard of intangible cultural heritage (ICH), TCEs and India's legal framework for Geographical Indications (GI). By highlighting the socio-cultural value of cultural expressions, the study aims to raise awareness about the

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<sup>5</sup> Teng-Fei Ma, Chang-Wei Chai & Tseng-Wei Chao 'On the Study of the Sustainable Development of Intangible Cultural Heritage of Indigenous Peoples' Diets—Take the Protection of Geographical Indications as an Example' (2022) 14(19) SUSTAINABILITY <<https://doi.org/10.3390/su141912803>> accessed 25 May, 2023.

necessity for comprehensive legal reforms that take into account the unique characteristics of cultural expressions, including those belonging to the realm of intangible cultural heritage. This paper thus aims to offer valuable insights, opinions and suggestions to policymakers, legal practitioners, and stakeholders, with the goal of bridging existing lacunas and preserving India's diverse cultural heritage. The research will take account of legal analysis, case studies, and a review of practices from different countries throughout the world. The findings will enhance scholarly understanding of the intersection between cultural expressions and intellectual property law.

## **1.2 Statement of Problem**

This study focuses on the research problem concerning the existing legal framework for Geographical Indications (GI) in India and its inadequate recognition and protection of intangible cultural expressions (ICEs). While the GI Act, 1999<sup>6</sup> has been effective in safeguarding physical goods associated with specific regions, it misses the mark to adequately address the significant aspects of ICEs for which question(s) pertaining to safeguarding their authenticity, integrity, and cultural significance arises. In the absence of sufficient legal safeguards, these culturally significant expressions are susceptible to the perils of misappropriation, dilution, and commodification. Furthermore, the lack of explicit legal provisions aimed at safeguarding and preserving intangible cultural expressions (ICEs) results in communities being deprived of adequate measures to protect their cultural heritage and traditional practices. The central research problem of this study is to look into potential solutions for addressing the disparity of protecting ICEs within the present legal framework concerning GIs in India and investigate if a *sui-generis* law for ICEs is another viable solution to this problem.

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<sup>6</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).



### 1.3 Review of Literature

- [1] **Pinaki P. Baruah** and **Debasis Poddar** in their book<sup>7</sup> present a thorough analysis of the core values and other fundamental concepts that form the basis of traditional cultural expressions, with a specific emphasis on their cultural and legal significance within Indian society. The authors discuss the intersection between intellectual property law and cultural heritage as well as the significance of traditional knowledge in India. They offer a comprehensive analysis of the various legal frameworks and policies that govern traditional cultural expressions, globally including the laws of India. The book demonstrates a remarkable level of expertise in providing a nuanced comprehension of the various types of ‘traditional cultural expressions’ that are widespread in India. The authors investigate the wide spectrum of cultural heritage in India, which includes various forms of music, dance, folk narratives, and handicrafts. Furthermore, the literature conducts a comprehensive analysis of the extant legal frameworks and statutes in India that are designed to protect customary cultural expressions. The research scrutinizes the role of IPRs in safeguarding the aforementioned forms of creative expression. The authors delve into the challenges posed by the commercialization, appropriation, and misappropriation of customary cultural expressions. The authors put forth prospective tactics for protecting cultural expressions that surpass the limitations of the intellectual property structure.

This book represents a comprehensive examination and has been deemed an essential resource for academic research. The literature provided the researcher with an in-depth understanding of the legal framework surrounding traditional cultural expressions in India, as well as the fundamental knowledge pertaining to 'traditional cultural expressions'.

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<sup>7</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014).

[2] **V.K Ahuja** in his book<sup>8</sup> provides a far-reaching review of the legal aspects that govern intellectual property rights (IPRs). The publication encompasses a comprehensive analytical examination of various branches of intellectual property rights in India. Each chapter in this book delves into the in-depth study of the provisions of the Indian legal framework pertaining to the IPRs, including ‘Geographical Indications (GI)’ based on the 1999 legislation.

The chapter on Geographical Indications immensely helped the researcher to realize the rationale of using and protecting geographical indications, its functions as well the historical background of the legal developments in India pertaining to GI. The subsequent descriptions and analysis of each of the provisions of the statute<sup>9</sup> along with references of significant case laws and international treaties helped the researcher to articulate the summary of the law concerning GI in Indian IP landscape. Furthermore, the researcher took help of the new chapter added to the third edition of this book, namely the chapter on ‘*Protection of Traditional Knowledge and Bio-diversity*’ which favored the researcher to understand concepts of co-related terms such as, TK and TCEs. Along with it, the chapter discussed upon the importance for legal framework for the ‘preservation, protection and promotion of traditional knowledge’ which enriched the researcher with the basic knowledge in this area of study.

[3] **Irimi Stamatoudi** in her edited book<sup>10</sup> compiles various scholarly articles that investigate the complex correlation between intellectual property rights and cultural heritage, both tangible and intangible forms. This handbook offers a comprehensive analysis of the challenges, legislative frameworks, and policy discussions related to safeguarding and administering cultural heritage in a world that is progressively digitalized and globalized.

The researcher relied on particular sections/ articles of the book to conduct his research. The relevant articles furnish a comprehensive survey and chronological

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<sup>8</sup> V.K Ahuja, *Law Relating to Intellectual Property Rights* (3<sup>rd</sup> Ed., Lexis Nexis 2017).

<sup>9</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>10</sup> Irimi Stamatoudi (ed), *Research Handbook on Intellectual Property and Cultural Heritage* (Edward Elgar Publishing Limited 2022).

background of law concerning intellectual property and cultural heritage, accentuating the development and intricacies of these two interrelated fields. It investigates the function of IPRs in preserving cultural heritage and investigates the challenges and contradictions that emerge between protective measures and the necessity for cultural exchange and accessibility among all. The articles in this book helped the researcher to understand the importance behind safeguarding traditional knowledge and cultural heritage as well as ensuring fair participation of indigenous communities in concerned decision-making process.

[4] **Daphne Zografos** in her book<sup>11</sup> provides a perceptive examination of the continuing debates pertaining to safeguarding traditional cultural expressions (TCEs). The chapters explores the intricate inquiries surrounding the appropriateness of applying intellectual property rights (IPRs) as an instrument for safeguarding traditional cultural expressions (TCEs), including the efficacy of implementing such protective measures. The author acknowledges the apprehensions voiced by holders of TCEs and developing countries with a rich cultural heritage and introspects on the necessity of adopting a well-rounded legal policy or strategy that considers both the cultural importance and communal entitlements of groups associated with their own cultural expressions (TCEs). The researcher took help of the sixth chapter of the said work which strictly studied upon the scheme of protection and preservation of TCEs with the law of geographical indications.

[5] **Pier Luigi Petrillo**'s edited book<sup>12</sup> is a remarkable, insightful and comprehensive collection of articles that scrutinizes the legal structures pertaining to the preservation of intangible cultural heritage on a global scale. From an academic standpoint, the comparative approach employed in this volume is highly commendable along with the book's notable focus on emerging issues and

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<sup>11</sup> Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar Publishing Limited 2010).

<sup>12</sup> Pier Luigi Petrillo (ed), *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective* (SPRINGER 2019).

contemporary challenges within the realm of intangible cultural heritage. The researcher took help of this literature to understand and provide an account of the global legal structure that safeguards the intangible cultural heritage (ICH), before and after the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. The comparative analysis in Chapter 5 of this research is inspired from this piece of literature.

- [6] **Prof. (Dr.) V.K Ahuja *et.al.*** in their book<sup>13</sup> effectively navigates the procedures associated with obtaining Geographical Indication (GI). The focus of this handbook is on handloom, handicrafts, and agricultural produce, with the aim of meeting the needs of individuals, particularly those from the North East India (NEI) region, who aspire to obtain a GI tag for their products. This book/ guide showcase authentic instances of objects/ products from the NEI region that have been granted the GI label, thereby facilitating an improved understanding of the concept of GI. Particularly, this book has provided the researcher with the knowledge of the GI tagged products from the parts of NEI and therefore, enabled the researcher to further ponder upon the notion of protection of intangible cultural heritage from NEI amidst the existing GI provisions in India, which forms the cornerstone of this study.
- [7] **Vandana Singh** in her book<sup>14</sup> presents a comprehensive analysis of legal issues related to GIs. The author acknowledges the notion of GI which recognizes the distinct and special significance of specific places, encompassing their intrinsic environmental factors that influence product quality, as well as their historical and cultural associations that contribute to a unique proficiency in crafts or skills. The text provides a comprehensive analysis of the legal framework pertaining to geographical indications. It delves into the concept of geographical indications, the legal mechanisms and procedures for protecting traditional knowledge and unique natural products, international agreements, and the process of registration of a GI in

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<sup>13</sup> Prof. (Dr.) VK Ahuja and others., *Handbook on the Geographical Indications (with special focus on North-East Region)* (DPIIT-IPR CHAIR, NLUJAA 2022).

<sup>14</sup> Vandana Singh, *Law of Geographical Indications- Rising above Horizon* (1<sup>st</sup> Ed. Eastern Law House 2017).

India. The researcher was able to formulate their research study on the subject matter of geographical indications (GI) with the aid of chapters in this book that expounded on the following: the community's entitlement to GI, the definition of GI, the historical evolution of laws and regulations governing GI, the provisions of the TRIPs Agreement, India's GI Act and case studies of registered GIs in India.

The researcher found the chapter pertaining to indigenous knowledge and the role of GI in the promotion and protection of traditional knowledge to be highly informative and perceptive.

- [8] **Mira Burri** in her article<sup>15</sup> explores the relationship between intellectual property and cultural heritage, highlighting the challenges and inconsistencies that arise when applying existing intellectual property regulations to protect cultural expressions. The article explores the complex governance framework and varying interests of key stakeholders in this specific context. The article critically examines the limitations of various forms of intellectual property rights and assesses the feasibility of amending current legal frameworks or developing new strategies to safeguard intellectual property. The researcher deems the article in question to be both informative and enlightening.
- [9] **Dr Irwin Lalmuanpuii Hnamte** in his article<sup>16</sup> emphasizes the growing concern regarding cultural appropriation and its adverse impacts on the culture and identity of distinct communities, such as tribal and local indigenous populations residing in North-East India. The author highlights the importance of recognizing the origin of historical and cultural artistic designs and the implications of neglecting to do so, which may suggest a lack of respect for the cultural legacy of the individuals or groups to whom the designs are attributed. The author's argument suggests that while legal frameworks pertaining to intellectual property may provide protection for individuals, there is a dearth of statutes that offer protection for entire

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<sup>15</sup> Mira Burri, 'Cultural Heritage and Intellectual Property' in Francesco Francioni and Ana Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

<sup>16</sup> Dr Irwin Lalmuanpuii Hnamte, 'Geographical Indications Act and Cultural Appropriation in Northeast India: Scope and Analysis' [2022] 5(2) IJLMH 137 < <https://doi.org/10.1000/IJLMH.112828> > (accessed on May 31, 2023).

communities. The author suggests that the implementation of the Geographical Indications Act could serve as an effective approach to preserving the cultural heritage of these communities.

[10] **Anselm Kamperman Sanders** in his article<sup>17</sup> endeavors to elucidate the dichotomous correlation between cultural expression and Geographical Indications. This is achieved by outlining how the latter can serve as a means of protecting the former. The author commences the discourse by emphasizing the potential of Geographical Indications (GI) in preserving cultural expressions, and consequently, in safeguarding the inherent cultural values. The author subsequently highlights the correlation between traditional knowledge and cultural expression, emphasizing how the former serves as an echo of the cultural values and beliefs of a given community. Ultimately, the author attempts to differentiate between the various types of traditional knowledge that can be effectively safeguarded via geographical indications (GI), and those that cannot, by drawing upon the subtleties inherent in traditional cultural expressions (TCE).

[11] **Rajnish Kumar Singh**, in his article<sup>18</sup> delves into the worldwide and domestic outlooks regarding the protection TCEs within the context of folklore. The author provides a thorough analysis of the legal position regarding this matter, both domestically and globally. Moreover, the author conducts a thorough examination of the existing legal structure, highlighting its constraints and suggesting prospective enhancements. The article delineates the historical progression of diverse facets pertaining to the formation of the legal framework, accentuating the modifications that have transpired over the course of time and furnishing an enhanced comprehension of the comprehensive advancements in this domain.

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<sup>17</sup> Anselm Kamperman Sanders, 'Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications' [2010] 13(2) The Journal of World Intellectual Property <<https://doi.org/10.1111/j.1747-1796.2009.00382.x>> (accessed on May 31, 2023).

<sup>18</sup> Rajnish Kumar Singh, 'Protection of Traditional Cultural Expressions/ Folklore: International and National Perspectives' [2016] 8/1 DLR <<http://www.dehradunlawreview.com/wp-content/uploads/2020/06/2-Protection-of-traditional-cultural-expressions-folklore-international-and-national-perspectives.pdf>> (May 31, 2023).

## **1.4 Research Aims**

The study aims to examine and evaluate the role of GI in providing protection and safeguard to traditional cultural expressions and identify the extent and scope of protection it can provide to intangible forms of cultural expressions. The researcher analyzes the existing deficits and shortcomings in the current legal framework governing GI in India with respect to the recognition and protection of cultural expressions.

The aim of the researcher is also to evaluate if it is possible to incorporate intangible cultural expressions into the GI law in India and further look for options if the former is not feasible. This evaluation will be conducted considering the best way of maintaining the preservation of culture, community empowerment, and sustainable development.

## **1.5 Research Objectives**

The research objectives of this present study are:

- [1] To critically analyze the current Geographical Indications (GI) legal framework in India and particularly evaluate its efficacy in identifying and protecting cultural expressions, with specific reference to intangible forms of cultural expressions (ICEs).
- [2] To analyze the socio-legal importance of cultural expressions and their status of protection in India.
- [3] To explore international practices and legal setting of countries that has successfully incorporated intangible cultural heritage within their laws and draw insights pertinent to the Indian context.

## **1.6 Scope and Limitations of the Research**

The study mainly emphasises on the Indian socio-legal scenario and the legal framework of Geographical Indications (GI) in India. It will explore the scope of protection and preservation of all forms of cultural expressions within the GI law. In order to achieve an in-depth understanding of the subject matter, the study will apply a socio-legal approach that integrates legal examination, socio-cultural perspectives, and case analyses.

However, this research has few limitations. They are:

- [1] The comprehensive coverage of all specific cultural expressions related to ICEs may not be feasible due to the extensive nature of the subject and the broad spectrum of ICEs. The study will utilize a representative sample to illustrate wider issues and considerations pertaining to Northeast India.
- [2] The study will be based on secondary sources such as literature, legal frameworks, and case studies, and will not include primary data collection methods such as surveys or interviews.
- [3] The researcher's analysis and synthesis of existing knowledge will serve as the basis for the proposed legal reforms and recommendations, which may require further verification and scrutiny.

## **1.7 Research Questions**

Following are the research questions of this research study:

- [1] What is the legal standing of traditional cultural expressions in India, especially within the legal framework of Geographical Indications?
- [2] What are the potential socio-cultural implications of inadequate protection of cultural expressions in India and what challenges may ensue as a result?
- [3] Whether there is any requirement to implement measures aimed at reforming or expanding the current legal framework for Geographical Indications in India to encompass intangible expressions of traditional cultural expressions?



## **1.8 Research Hypothesis**

*“The inclusion of all forms of traditional cultural expressions within the ambit of GI protection in India will enhance the overall recognition, protection and preservation of cultural heritage of communities.”*

The aforementioned hypothesis suggests that the scope of GI protection in light of traditional cultural expressions, if expanded to encompass intangible cultural heritage, then it shall be able to enhance the overall protection of the diverse cultural heritage of India and generate positive socio-economic outcomes and opportunities for the communities.

The purpose of this research study is to scrutinize, investigate, and evaluate a range of variables with the objective of supporting or refuting this hypothesis.

## **1.9 Research Methodology**

In this particular research-study, a doctrinal research technique was employed as the methodology of research. The research conducted for this work is both descriptive and analytical in character. This study, thus, attempts to provide a comprehensive and in-depth account of the subject matter under research, primarily through an analysis of the socio-legal issues pertaining to the topic.

In addition, there are certain aspects of comparative research as well as case-studies in this study. It is basically a library-based research where the resources available in the library, both offline and online, have been used. This research study makes use of both primary and secondary sources of information, such as National and International statutes, International agreements or treaties, court decisions etc. and these constitute the primary sources. On the other hand, books, reports, journals, and online articles have facilitated this research as secondary sources of data.

To ensure that the authors of any words or ideas that the researcher has incorporated into the study are properly credited, the ‘OSCOLA 4<sup>th</sup> Edition’ citation method has been used in this research-study.

## 1.10 Research Design

- [1] The first chapter titled ‘**INTRODUCTION**’ presents a comprehensive summary of the research study. This introductory section of the research paper provides an overview of the background and context of the study; identifies the research problem, outlines the research objectives and questions, explicates the significance of the research, and delimits the scope and limitations of the study. The research methodology has also been clarified. This section also provides an overview of the relevant literature pertaining to the topic at hand, as well as the perspectives of researchers on the subject matter.
- [2] The second chapter titled ‘**CONCEPTUAL OVERVIEW OF GEOGRAPHICAL INDICATIONS AND CULTURAL EXPRESSIONS**’ is focused on understanding the meaning of cultural expressions. It significantly delves into the notion of intangible cultural expressions (hereinafter ICEs). The present discourse explores the significance of geographical indications (hereinafter GI) and their inter-relationship or its legal connection with cultural expressions.
- [3] The third chapter titled ‘**INDIA’S LEGAL FRAMEWORK ON GEOGRAPHICAL INDICATIONS**’ presents an in-depth review of the Geographical Indications of Goods (Registration and Protection) Act of 1999 in India, highlighting its key provisions and examining its scope and limitations. It delves into an analysis of the difficulties and obstacles encountered in safeguarding cultural expressions under the existing legal structure.
- [4] The fourth chapter of this research titled, ‘**EXAMINING THE ROLE OF GEOGRAPHICAL INDICATIONS IN PROTECTING CULTURAL EXPRESSIONS OF INDIA**’ is the crux of this study. It places great emphasis on expounding upon the scope and extent of protection that GI can provide to cultural expressions in India. This chapter begins by demonstrating the socio-cultural significance of TCEs in India and the concerns of protection and preservation. Then the researcher delves into analyzing the legal perspective(s) behind protection of TCEs wherein the role

of government policies, laws and IPRs, including the role of GI is vividly discussed. It examines issues pertaining to the violation, misappropriation, and unauthorized usage of cultural expressions and investigates the benefits and efficacy of GI protection as a legal recourse in circumstances similar to the ones under consideration. One of the subchapters in the study pertains to the examination and evaluation of cultural expressions and intangible cultural heritage, as well as their status within the context of India. The text presents an assessment of global initiatives that have recognized and protected intangible cultural expressions (ICEs) and proposes suggestions on how India can gain insights from these approaches to incorporate them effectively.

The present chapter endeavors to assess whether the current legal framework in India concerning GI necessitates amendment or instead, an autonomous statute i.e., *sui-generis* law regulating TCEs, significantly dealing with the protection of IP rights associated with intangible cultural heritage may be a more suitable alternative. To evaluate this situation, the researcher presents some case studies from the NEI region, which illustrates the success stories of GI-registered TCEs, especially handicrafts and textiles from the region and further examines the extent to which GI law can actually protect certain intangible forms of cultural expressions from the area who may possess the potential to be a GI.

- [5] The fifth and the final chapter of this research titled, ‘**CONCLUSION AND SUGGESTIONS**’ summarizes the findings from the research study. It offers a brief conclusion for each research question and examines the hypotheses put forth in the study. This chapter also attempts to put forth some suggestions and recommendations after analyzing the ‘findings of research problem’.

## **CHAPTER 2 : CONCEPTUAL OVERVIEW OF GEOGRAPHICAL INDICATIONS AND CULTURAL EXPRESSIONS**

The objective of the chapter is to introduce a theoretical framework that can enhance understanding of the intricate relationship between Geographical Indications (GI) and traditional cultural expressions (TCEs).

### **2.1 Overview of cultural expressions and geographical indications**

#### 2.1.1 Cultural Expressions

The role of 'culture' is paramount in the origin and evolution of societies. Culture plays a fundamental role in conferring value and meaning to the continuing existence of a society. It is regarded as the 'way of life' of people as a thriving culture brings people together by creating a sense of pride and identity in them. Every society across the globe observes their unique set of culture. The cultural practices and traditions function as a mechanism for people to establish a link with their heritage, ancestors, and society thereby fostering a sense of dignity and shared inheritance.

Culture significantly serves as a medium for both social interaction and self-expression. Various forms of creative expression, such as language, arts, literature, music, and dance, enable individuals to effectively communicate their thoughts, emotions, and ideas. Cultural expressions are a powerful tool for preserving and transmitting knowledge, historical events, and societal values across generations.

The term 'cultural expressions' refers to creative forms that represent or communicate the culture and knowledge of a social group in a comprehensible manner. They represent artistic and intellectual expressions which embody and symbolize the traditional culture and knowledge of a community or a geographical area.<sup>19</sup> Various forms of cultural expressions, including but not limited to folklore, literature, music, crafts, theatrical performances, religious practices, dance, and art, serve as intellectual creations that

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<sup>19</sup> Rajnish Kumar Singh, 'Protection of Traditional Cultural Expressions/ Folklore: International and National Perspectives' [2016] 8/1 DLR.

convey traditional beliefs and practice. Cultural expressions are produced by individuals belonging to a specific community residing in a particular geographic area, which may include tribal, ethnic, or regional social groups. These expressions encompass traditional beliefs, customs, religious and sacred practices, as well as lifestyle perspectives. Such expressions of culture demonstrate the fundamental nature of the cultural legacy of the given society.<sup>20</sup> These expressions embody traditional knowledge, cultural properties and traditional lifestyles of indigenous local communities; thus they are synonymously termed as traditional cultural expressions (TCEs).<sup>21</sup> Traditional Cultural Expressions (TCEs) are a fundamental aspect of the cultural and societal identities that are intrinsic to indigenous and local communities. They encompass skills, knowledge and conventional principles that have been passed down through generations.

The popular belief that tradition solely requires the act of replicating and imitating established practices is imperfect as it also holds the ability to generate new ideas and concepts while adhering to the traditional framework. The creation of manifestations related to cultural heritage is an ongoing and continuous process. The organic nature of culture necessitates growth and development for its survival, with tradition serving as a foundation for future progress.<sup>22</sup> Traditional artists, craftsmen and practitioners of traditional knowledge (TK), who adhere to traditional methods consistently present new perspectives and experiences in their artistic endeavors. Therefore, it can be ascertained that the multifarious expressions of traditional knowledge, heritage and culture often act as a source of creativity for indigenous, local, and other cultural communities; which makes traditional cultural expressions a subject matter of intellectual property (IP). An example of this would be handicrafts and textiles that represent the artistic or cultural heritage of a particular community.

Since cultural expressions possess the character of an ‘intellectual property’, they are considered to be economic assets of a community which ultimately can generate income

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<sup>20</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014) 22.

<sup>21</sup> *ibid*, 23.

<sup>22</sup> Barry Bergey, ‘A Multi-faceted Approach to the Support and Conservation of Folk and Traditional Culture’ (International Symposium on Protection and Legislation of Folk/Traditional Culture, Beijing, December 2001).

and livelihood for the members of the particular community. Even IP studies show that many cultural artefacts that hold significant value in developing nations have successfully expanded beyond their national borders and established a strong economic presence in developed nations' markets.<sup>23</sup>

The word TCE is often used synonymously with '*folklore/ expressions of folklore*'.<sup>24</sup> William Thomas coined the term 'folklore' in 1846 to encompass customs, manners, superstitions, ballads, and proverbs.<sup>25</sup> Generally, the notion of folklore means traditional beliefs, myths, tales, and practices of a group of people, transmitted orally.<sup>26</sup> According to WIPO, 'expressions of folklore' refer to distinctive elements of the traditional artistic heritage that have been developed and maintained by a particular community.<sup>27</sup> TCEs on the other hand refer to artistic creations that originate from the ideas of individuals who express creative symbols through verbal, artistic, or material forms. This knowledge is transmitted orally or in writing from one generation to another within a society.

Therefore, it can be observed that traditional cultural expressions encompass a broad spectrum of subject matter, which in turn facilitates discussions regarding their protection and preservation under various legal frameworks, including IPRs such as Geographical Indications (GIs).

The Model Provisions drafted by WIPO and UNESCO in 1982 provided a definition for TCEs which is also referred to as 'expressions of folklore'. It stated that 'expressions of folklore' are "*productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by an individual reflecting the traditional artistic expectations of such a community*".<sup>28</sup> The draft text delineated four

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<sup>23</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore* (2004) < <https://www.wipo.int/publications/en/details.jsp?id=285>> accessed on June 2, 2023.

<sup>24</sup> Baruah & Poddar (n 20) 23.

<sup>25</sup> Singh (n 19) 22.

<sup>26</sup> Leena Desai, 'Traditional Cultural Expressions' (*Lexology* 30 November 2012) <<https://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635>> accessed on June 2, 2023.

<sup>27</sup> Singh (n 19) 23.

<sup>28</sup> Sec. 2, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 <<https://www.wipo.int/export/sites/www/tk/en/docs/1982-folklore-model-provisions.pdf>> accessed on June 2, 2023.

distinct categories of ‘expressions of folklore’, which encompass verbal, musical, performative, and tangible forms of expression. Verbal expressions include folktales, poetry, stories, and riddles, while musical expressions encompass folk songs and instrumental music. Expressions by action refer to folk dances, plays, and artistic rituals, while tangible expressions encompass folk art, drawings, paintings, carvings, sculptures, pottery, woodwork, metalwork, and other related forms of artistic expression.<sup>29</sup>

Significantly, WIPO provided a restatement of the previously mentioned definition of ‘expressions of folklore’ (Model Provisions, 1982) in order to establish the parameters of what qualifies as TCE in its 2005 revised document<sup>30</sup>, specifically under Article 1 of its text. It stated that that TCEs are “*any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or manifested which are products of creative intellectual activity, including individual and communal creativity*”. It also delineated four categories or genres of TCEs, in similar lines with the 1982 Model Provisions. TCEs involving verbal, musical and theatrical performance are classified as ‘intangible forms of cultural expressions’.

Furthermore, TCEs are component of the wider umbrella term, known as Traditional Knowledge (TK). In a broad sense, traditional knowledge encompasses both the substance of knowledge itself and traditional cultural expressions, which may include unique signs and symbols that are closely associated with TK.<sup>31</sup>

### 2.1.2 Geographical Indications

In our daily lives, we come across certain brand names that are universally acknowledged for their association with products of distinctive features and quality, marked for their local origin and the inherent qualities that symbolize their place of origin. There exist certain commodities that are intrinsically linked to particular geographical regions, such as *Darjeeling Tea*, *Scotch whisky*, *Swiss Watch* and *Champagne*. The common attribute

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<sup>29</sup> Ibid.

<sup>30</sup> WIPO-IGC, The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles (WIPO/GRTKF/IC/8/4) 2005.

<sup>31</sup> Traditional Knowledge’ (WIPO)

<[https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20\(TK\)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity.](https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity.)> accessed on June 2, 2023.

among these terms relates to their geographical connotations or their semantic role in indicating regions, localities, or territories. The salient attribute of these terms is their inclination to imply goods rather than their origin or authenticity. The uniqueness of these commodities is attributed to the association between their qualitative characteristics and the geographical attributes of their region of production.

A geographical indication (GI) is a sign used on commodities that originate from a particular geographical location and exhibit characteristics or a reputation that are inherently linked to their geographical location.<sup>32</sup> GI establishes a connection between a product and a specific geographical location. The utilisation of geographical indications signifies that a particular product exhibits specific attributes or is recognized for its reputation linked to its place of origin. GIs are not restricted to indicating the source of goods through the use of geographic names, such as those of cities, regions, or countries. Symbols may also be employed as GIs, provided that they are able to convey the origin of the relevant goods without explicitly naming their place of origin.<sup>33</sup>

GI is a category of intellectual property right, as acknowledged under Article 1(2) of the TRIPs Agreement. Even if GIs are used as signs and symbols to designate products originating from a specific geographical region, they are distinct from Trade Marks. Trademarks are distinctive signs or symbols used for the purpose of differentiating and identifying specific products or services within the marketplace. GIs and trademarks serve the purpose of communicating the source of a product or service, thereby facilitating the association of a specific standard of quality with the product or service by consumers. Trademarks serve to identify the origin of goods or services, not in terms of geographical location, but rather in relation to a particular business. In the case of collective marks, they identify an association and its members.<sup>34</sup> The GI designation functions as an assurance to consumers that the product they are purchasing possesses particular attributes or benchmarks by virtue of the authorized reputation of the GI with

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<sup>32</sup> Maria Paola Rizo and others, *Geographical Indications: An Introduction* (WIPO 2021) 6.

<sup>33</sup> Kasturi Das, 'International Protection of India's Geographical Indications with Special Reference to "Darjeeling" Tea' [2006] 9(5) *The Journal of World Intellectual Property* <[https://www.researchgate.net/publication/229932857\\_International\\_Protection\\_of\\_India's\\_Geographical\\_Indications\\_with\\_Special\\_Reference\\_to\\_Darjeeling\\_Tea](https://www.researchgate.net/publication/229932857_International_Protection_of_India's_Geographical_Indications_with_Special_Reference_to_Darjeeling_Tea)> accessed on June 1, 2023.

<sup>34</sup> Vandana Singh, 'A study of law of geographical indications as an IPR and tool for economic development' (Department of Law Thesis, University of Delhi 2011).



which it is affiliated.<sup>35</sup> Conventionally, a trademark is constituted by a fanciful or arbitrary sign that is employed by its proprietor or a duly authorized person. The assignment or licensing of a trademark is viable regardless of the assignee or licensee's geographical location, as the trademark is linked to an organization or company rather than a particular geographical area. In comparative terms, the sign used to denote a geographical indication generally corresponds with the appellation of the geographical area where the product is produced or with the name by which the product is acknowledged within that place. The utilisation of a geographical indication is deemed admissible for any individual who complies with the prescribed criteria and manufactures the commodity within the assigned geographical area of origin. Nonetheless, due to its association with the specific place of origin, it is not feasible to allocate or authorize a geographical indication to an individual or entity that is not affiliated with that location or is not part of the authorized producers' group.<sup>36</sup>

Conventionally, the term "geographical indication" has been employed to designate names that identify agricultural or similar products as originating from specific geographical regions where they are grown and produced, and where they acquire their unique features or reputation.<sup>37</sup> However, the term GI is commonly linked with two additional concepts, specifically 'indication of source' and 'appellation of origin'. These concepts were integrated into international agreements that preceded the enactment of the TRIPS Agreement. While the Paris Convention and the Madrid Agreement allude to the idea of 'indication of source', they do not provide an exact explanation of the term. The Paris Convention gives references to both "indications of source" and 'appellations of origin', which may suggest a certain level of resemblance between the two concepts. A distinction, however, is present between these two terms, namely 'appellations of origin' and 'indications of source'. The former refers to the inherent features or characteristics of an item that have been influenced by its geographical environment, while the latter

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<sup>35</sup> Lambert Botha, *Multilateral Issues Relating to Geographical Indications* (TRALAC Trade Brief Agri, 2004), 1-2.

<sup>36</sup> Rizo (n 32) 11.

<sup>37</sup> Irene Calboli, 'Expanding the Protection of Geographical Indications of Origin under TRIPS: "Old" Debate or "New" Opportunity', (2006) 10 Marq. Intell. Prop. L. Rev. 185 <<https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1445&context=facscolar>> accessed on June 2, 2023.

exclusively indicates the geographical source of the product, devoid of any supporting qualities. The concept of ‘appellations of origin’ requires a connection to be established between the product and its geographical origin, which includes elements such as climate, soil, and traditional production techniques. On the other hand, ‘indications of source’ exclusively require that the product has its origin in the place of origin indicated.

Art. 22.1 of the TRIPs Agreement provides a distinct definition for GI, which contrasts with the term ‘appellations of origin’ as outlined in the Lisbon Agreement. According to the TRIPs definition, a GI can be understood as “... *indications which identify a good as originating in the territory of a Member [of the World Trade Organization], or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*”.<sup>38</sup> This definition suggests that the attribution of a product's quality, reputation, or other distinguishing characteristic to its geographical origin is deemed essential. On the other hand, the definition of ‘appellations of origin’ as provided under Art. 2 of the Lisbon Agreement, suggests that they refer to the name of a product's geographical origin through the use of its place name. It is noteworthy that several traditional names, which do not pertain to geographical locations but rather denote a commodity in association with a specific place, are safeguarded as appellations of origin pursuant to the Lisbon Agreement.<sup>39</sup>

Both appellations of origin and geographical indications serve the purpose of offering information to consumers about the origin of a product and its associated characteristics or quality. The fundamental distinction between the two concepts concerns the degree of association with the place of origin. In the context of appellations of origin, it is imperative that the quality and attributes of a product are primarily attributed to its geographical location. This includes the sourcing of raw materials and the manufacturing process that takes place within the designated region.

On the other hand, it is significant to note that geographical indications require solely a singular parameter concerning the origin of the commodity, which includes traits such as

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<sup>38</sup> Art. 22 para 1, Agreement on Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994, entered into force 1 January 1995).

<sup>39</sup> Rizo (n 32) 11.

its quality, uniqueness, characteristics, or reputation. Furthermore, it is optional for the final production process of a product that holds a geographical indication to take place within the designated geographical region.

Therefore, establishing a correlation between the specific attributes of a product and its designated geographical denomination is of utmost importance. It is essential to provide an explanation of the relationship between the geographic location and various characteristics such as quality, reputation, or other relevant factors, when one seeks a GI on its product.

In recent times, GIs have thrived as an interesting tool of IPR. They have been proved to be useful when it comes to protection and promotion of community interests of a particular geographical region. GIs serve as an instrument to protect and enhance the unique characteristics associated to a specific region, covering its traditions, culture, human resources and the surrounding environment. GIs have supported communities in marketing strategies as well, thus pushing their economic development. From being a mere indicator of source, GIs have helped establish brands of certain products. The geographical origin of products and their specific characteristics have become a focal point for consumers, who are willing to pay a high premium for the authenticity and uniqueness of such products. This has been a growing trend among consumers to prioritize the geographical origin and specific characteristics of the products they purchase. GI products in this manner, facilitates the creation of local employment opportunities. This, in turn, may serve as a deterrent to rural exodus and instead promote tourism and investments from interested people.

The ultimate benefit conferred by GI is that it provides the best means to preserve TK and TCEs from unauthorized use, unfair competition and deceptive trade practices. The use of GIs has the potential to yield beneficial results for indigenous communities, as it can serve as a means of encouraging the commercialization of their traditional knowledge and cultural expressions, while simultaneously facilitating economic growth that is rooted in traditional knowledge.<sup>40</sup>

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<sup>40</sup> Rizo (n. 32) 17.

## 2.2 Legal frameworks on Cultural Expressions and GI

### 2.2.1 Cultural Expressions

The international discourse surrounding the legal safeguarding of cultural expressions was initiated in the 1970s. During the early 1970s, the United Nations (UN) engaged in discussions and initiatives aimed at preserving traditional cultural heritage.<sup>41</sup> These efforts encompassed a range of potential approaches, including the utilisation of customary laws of indigenous communities, the establishment of national and regional agreements, and the drafting of regulations and guidelines within the international law arena. The contemplation of devising a unique and distinct law was also taken into account. During this time frame, various multilateral organizations and programmes undertook efforts and involved themselves in safeguarding and conserving the cultural heritage and intellectual property of indigenous communities. These entities include UNESCO, WTO, UNDP and several others. Despite international efforts to address the issue of protecting traditional cultural expressions (TCEs), there remains a lack of a universally binding legal instrument that establishes regulations and standards for countries to uniformly draft rules pertaining to this matter. Over time, various model provisions have been established, resulting in varying degrees of protection for national laws. A limited number of nations recognize the matter of TCEs or cultural heritage within their respective domestic legal systems. Certain nations have advocated for the implementation of standards outlined by the intellectual property system to provide safeguarding measures for traditional cultural expressions. Only a handful of countries have implemented comprehensive sui generis laws with the objective of establishing regulatory system benchmarks. The absence of coherence is thought to have arisen from the incongruity between regulatory frameworks and customary practices that are inherent to the TCE matter.

The protection of traditional cultural expressions or folklore of indigenous communities is a domain that has been evolving. Many international instruments have been suggested

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<sup>41</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014) 45.

as a means of resolving the diverse issues raised by both custodians of cultural expressions and legal scholars. The approach towards it has been two-fold. There is a viewpoint held by some individuals that current intellectual property systems provide adequate protection for TCEs. They believe that additional protective measures or methodologies are unnecessary or inapplicable. The proponents of this viewpoint advocate for the establishment of a distinct and well-defined set of procedures and/or regulations that are legally supported, in order to balance the current intellectual property rights. The second group of proponents advocate for *sui generis* methods.<sup>42</sup>

Nonetheless, today the existing global and regional instruments can be classified into two heads, namely:

- [1] IPRs as safety mechanism.
- [2] Protection through UN's organizations and agencies.<sup>43</sup>

There has been several **IPR based conventions and treaties** drafted and signed by member countries with a pledge to incorporate TCEs and acknowledge their issues concerning protection and preservation; from a legal perspective. Some of the significant international instruments are discussed briefly, as follows.

#### **[1] Berne Convention for the Protection of Literary and Artistic Works, 1886**

This international convention (hereinafter Berne Convention) was ratified in 1886 and it pertains to legal acknowledgement and protection of creative works (in the domain of literary and artistic works) and the rights of their authors or creators. The rights comprise of the means to use and control how such creative works can be used, by whom and on what terms.<sup>44</sup> This convention included TCEs which were expressed in literary and artistic formats, only after its amendment in 1967. The amended clause<sup>45</sup> aimed to recognize literary or artistic creations whose authors cannot be identified by introducing a

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<sup>42</sup> Irwin Lalmuanpuii Hnamte, 'Protection of Traditional Cultural Expressions of Indigenous Peoples A Comparative Study (Dept. of Law thesis, University of Delhi 2021).

<sup>43</sup> Baruah & Poddar (n 41) 48.

<sup>44</sup> WIPO, 'Berne Convention for the Protection of Literary and Artistic Works' <<https://www.wipo.int/treaties/en/ip/berne/>> accessed on June 1, 2023.

<sup>45</sup> Art. 15(4)(a), Berne Convention for the Protection of Literary and Artistic Works, 1886 (signed on 9 September 1886, entered into force 5 December 1887).

new category of works known as "folklore." It stated that, "*in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of the country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.*"<sup>46</sup> Accordingly, it is necessary for the country to appoint a competent legal entity to act as a representative for the anonymous author, with the presumption that said entity will assume the obligation of safeguarding and upholding the author's rights. Upon examination of the 'identity' aspect, it becomes apparent that the 'expressions of folklore' adhere to the guidelines delineated in the Berne Convention with respect to anonymous works, given that said folklore is the product of communal ingenuity that has been transmitted across generations without any attribution to the original author.

Nevertheless, this international convention proved to be ineffective and faced criticism on various fronts. The fundamental criticism pertained to the emphasis placed on individual users and their exclusive rights within the provisions of this legal instrument, which is incongruous with the collective nature of folklore or expressions. The absence of a clear mention of folklore within the provision(s) or the scope of the definition has generated uncertainty among people. The absence of a clearly defined set of procedures or regulations, as well as the absence of any mention of the community's rights regarding the expressions of folklore, was concerning as well. Furthermore, Article 7(3) specifies that the protection of a work of an anonymous author will terminate fifty years after the work has been legitimately released to the general public. However, the provision of a restricted duration of protection for traditional cultural expressions may not align with the perspectives of traditional communities that have preserved their knowledge and cultural heritage for a long time. Although the rights to folklore were not ensured indefinitely, there is a prevailing sentiment among communities to secure permanent safeguarding for their cultural heritage. This is because the protection of folkloric material is perceived to

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<sup>46</sup> Ibid.

be in the interest of the community as a whole, rather than individual creators, and the community's existence is not bound by temporal constraints.<sup>47</sup>

**[2] International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961** (hereinafter Rome Convention)

According to the Rome Convention, it was mandatory for the contracting states to ensure safeguarding of the rights of the performers and also to prohibit any unauthorized transmission or dissemination of their performances to the general public. The issue at hand pertains to the potential inclusion of TCEs within the scope of this international agreement. This is based on the premise that performers who possess the ability to express folklore may be able to access protective benefits with ease. However, such was not the scenario. The Rome Convention's definition of 'performers'<sup>48</sup> was characterized by a strict and inflexible interpretation. The scope did not encompass individuals who engage in the performance of traditional customs and beliefs. The definition of folklore has constrained the extent and breadth of safeguarding measures pertaining to it. The use of neighboring rights in this particular case was not feasible as well. The only way out was to expand the horizons and generate flexibility in the definition of *performers*.

**[3] TRIPs Agreement, 1994<sup>49</sup>**

The TRIPs Agreement outlines the minimum standards of protection that must be afforded by each member states when it comes to the primary areas of intellectual property. The key elements of protection are explicitly delineated, including the specific subject matter that necessitates protection, the rights that are to be granted, the permissible exemptions to those rights, and the minimum span of time for which protection must be sustained. Art. 14 of this international agreement, which provides for the 'protection of performers, producers of phonograms (sound recordings) and

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<sup>47</sup> Joe Moran 'Cultural studies and academic stardom' (1998) 1 *International Journal of Cultural Studies* 103.

<sup>48</sup> Art. 3(a), [2], 'International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (signed on 24 October 1961, entered into force 18 May 1964).

<sup>49</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994, entered into force 1 January 1995).

broadcasting organization' specifically mentions that performers possess the ability to impede the fixation of their unfixed performance and monitor any unauthorized commercial reproduction of said fixation. Performers have the ability to impede the wireless broadcast and dissemination of their live artistic performance in the absence of proper authorization. Notwithstanding the absence of a well-defined delineation of the concept of 'performer', this stipulation is commonly construed as encompassing individuals who engage in performance-oriented cultural expressions. Consequently, the TRIPs agreement provides substantial protection to Traditional Cultural Expressions (TCEs) through this particular provision.<sup>50</sup>

#### **[4] WIPO Performances and Phonograms Treaty (WPPT)**

The WIPO Performances and Phonograms Treaty, ratified by the WIPO Member States in December 1996, confer legal rights to performers of traditional cultural expressions. This concept was frequently denoted by the term "neighboring rights". Individuals who participate in the tradition of folklore derive enjoyment from the moral rights that are linked to it. This WIPO treaty grants a range of economic rights to performers and producers. However, it should be noted that the protective provision stipulated in the WPPT is limited in scope, as it only pertains to those forms of folklore that are capable of being rendered through song, performed by a third party, and captured in a recording. WPPT does not provide protective measures for expressions of folklore that are physically manifested i.e., the tangible expressions of folklore, such as traditional textiles and handicrafts.

Now if we look into the protective mechanisms adopted by UN's specialized entities we find that in 1989, the International Labour Organization (ILO) initiated the first step to safeguard TCEs under the guidance of the United Nations administration. This was accomplished through the adoption of **ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, 1989**. Several noteworthy provisions in relation to TCEs are outlined in this convention, such as:

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<sup>50</sup> Baruah & Poddar (n. 41) 52-53.



- [1] Art. 5(1) which states that the social, cultural, religious and spiritual values and practices of indigenous communities should be legally recognized and protected. Additionally, the difficulties encountered by these groups, both collectively and individually, must be given appropriate consideration.
- [2] Art. 13 that states that it is imperative for governments to recognize and uphold the cultural and spiritual significance of the lands or territories that are occupied or utilized by the concerned indigenous people(s). This provision emphasizes on the significance of the interrelationship shared between indigenous communities and their respective land they occupy or use, as it is tied to their culture and history.
- [3] Art. 23 recognize the importance of handicrafts, rural and community-based production and traditional activities of indigenous people n preserving their culture and achieving economic autonomy.

It is noteworthy that UNESCO and WIPO have been actively engaged in the field of traditional cultural expressions and cultural heritage for a considerable period of time. The **Tunis Model Law on Copyright for Developing Countries**, a collaborative effort between WIPO and UNESCO in 1976, was established as an initial attempt to protect expressions of folklore. It provided a unique method of legal protection that differs from traditional copyright laws. As per the legal definition(s), the term ‘folklore’ pertains to cultural expressions that have their genesis in a specific nation or ethnic community and are transmitted across generations that follow.<sup>51</sup> The aim was to safeguard these cultural artefacts, which are considered essential to a nation's legacy, without any time-based limitations.<sup>52</sup> This law granted economic<sup>53</sup> and moral rights<sup>54</sup> to traditional cultural expressions and established a governing body responsible for managing and enforcing these rights. The Tunis Model Law offered a distinctive means of protecting indigenous cultural expressions that were distinct from the copyright legal framework. The Tunis

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<sup>51</sup> Sec. 18, Tunis Model Law on Copyright for Developing Countries, 1976.

<sup>52</sup> *ibid*, sec. 6(2).

<sup>53</sup> *Id* sec. 4.

<sup>54</sup> *Id* sec 5(1).

Model Law has received limited acceptance owing to its excessively extensive ambit of protection and availability.<sup>55</sup>

In 1982, WIPO and UNESCO laid down the **Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action**.<sup>56</sup> These ‘Model Provisions’ set out rules and regulations that countries can incorporate in their national laws to grant the desired protection to folklore or cultural heritage. The aforementioned ‘Model Provisions’, comprising 14 sections, underscored the establishment of a unique legal framework that enables the implementation of a safeguarding mechanism for expressions of folklore, while concurrently maintaining equilibrium between protection and sustainable development. The Model Provisions seek to distinguish TCEs from the domain of copyright protection and introduce a *sui generis* legislation due their unique subject matter. They introduce ‘expressions of folklore’ as a separate concept. The Provisions require third parties to obtain prior authorization before using ‘expressions of folklore’ for commercial purposes or in non-traditional settings; except for purposes limited within the community or for research and preservation by individuals without any commercial motives. Fair use of cultural expressions and heritage is allowed provided they are for educational purposes or depiction in some literary works. The protection encompasses in all forms of folklore or cultural expressions, including intangible forms of expressions like verbal, musical, or theatrical. However, the dearth of a straightforward distinction in the Provisions pertaining to the authoritative body responsible for safeguarding the entitlements of expressions of folklore has engendered uncertainty in this regard. The dispute resolution mechanism was challenging as well. Moreover, the limited scope of ‘expressions’ as defined in the Provisions creates differing interpretations and presents obstacles to their effective implementation.<sup>57</sup>

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<sup>55</sup> Irwin Lalmanpuii Hnamte, ‘Protection of Traditional Cultural Expressions of Indigenous Peoples: A Comparative Study’ (Department of Law thesis, University of Delhi 2021).

<sup>56</sup> WIPO ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982’, <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=184668](http://www.wipo.int/wipolex/en/text.jsp?file_id=184668)> accessed on June 1, 2023.

<sup>57</sup> Hnamte (n. 54) 61.

During the period of 1997-1999, WIPO and UNESCO collaboratively took significant efforts to come up with a binding legal framework pertaining to TCEs. In April 1997, the **WIPO-UNESCO World Forum on the Protection of Folklore** was held in Phuket, Thailand, wherein numerous concerns and issues pertaining to intellectual property and folklore were deliberated. During the meeting, a ‘Plan of Action’ was implemented which outlined the necessity for new international standards aimed at safeguarding TCEs from misuse and misappropriation legally, as well as, discussed upon the significance of achieving a harmonious equilibrium between the community's ownership of cultural heritage and the use of such expressions of folklore by others.<sup>58</sup> Subsequently, in pursuant to this ‘plan of action’, WIPO and UNESCO organized four **Regional Consultations on the Protection of Expressions of Folklore** in 1999.

Between 1998-1999, WIPO carried out **Fact-Finding Missions**, referred to as "FFMs," to determine the intellectual property (IP) standards and preferences of traditional knowledge (TK) holders. The aim was to gather information regarding traditional knowledge, encompassing TCEs such as handicrafts, textiles, art and other forms of tangible cultural expressions. These ‘missions’ were completed in a total of 28 countries, commencing in May 1998 and concluding in November 1999.<sup>59</sup>

The **WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore** (hereinafter WIPO-IGC) was a major initiative taken in 2000 by the member states of WIPO. The IGC was involved in a thorough examination of current national and regional frameworks for safeguarding cultural expressions, encompassing both traditional legal mechanisms and sui generis systems. The Committee has made significant advancements in tackling the policy and practical connections between the intellectual property systems and the interests and requirements of individuals who possess traditional knowledge and safeguard cultural heritage. The negotiation rounds of IGC have been ongoing since the year 2000. However, the committee has yet to reach the stage of drafting a potential treaty that could be presented at a diplomatic conference.

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<sup>58</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore* (Background Paper No.1, 2003) 23.

<sup>59</sup> *ibid*, 24.

The draught recommendations put forth by the Committee contain specific provisions that hold great importance in the effort to safeguard traditional cultural expressions. Art. 2 of the proposed provision stipulate that the exclusive right to TCEs and their protection ought to be conferred upon the indigenous peoples and traditional communities associated with said cultural expressions. In contrast, Art. 6 suggest the implementation of a registration procedure for TCEs that possess significant spiritual and cultural value. Art. 8 of the draft provisions stipulate civil and criminal remedies options available to owners of TCEs in response to allegations of misappropriation and infringement by unauthorized parties.<sup>60</sup>

The 'Gap Analysis Report'<sup>61</sup> of the Intergovernmental Committee (IGC) of WIPO has recognized a minimum of ten concerns pertaining to the safeguarding of Traditional Cultural Expressions (TCEs) and folklore on a global scale. The study conducted a 'Consolidated Analysis'<sup>62</sup> of the suitability of sui generis frameworks in safeguarding traditional cultural expressions (TCEs).

### 2.2.2 Geographical Indications

The history of the development of laws on geographical indications has been a significant one. Over time, there have been numerous global conventions, treaties, accords and agreement(s) that aimed to enhance and safeguard the protection of geographical indications (GI). Geographical indications have conventionally been regarded as a form of intellectual property. France was the pioneer in implementing a comprehensive system for safeguarding Geographical Indications (GIs), which subsequently served as a model for the development of domestic laws and international agreements. The protection of wines in France was first established in 1824 by means of legislation aimed at preventing fraudulent labelling. The aforementioned legislation additionally established punitive

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<sup>60</sup> Baruah & Poddar (n 41) 62.

<sup>61</sup> WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis* (WIPO/GRTKF/IC/37/7), 2018.

<sup>62</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (2003).

measures for individuals who, with the intention of deceiving, misrepresented the source of their product as that of the authentic producers.<sup>63</sup>

The **Paris Convention for the Protection of Industrial Property** that was adopted in 1883 introduced for the first time the matter of safeguarding geographical indications (GI) on an international level, albeit with limited scope. This was the first international agreement that differentiated an "indication of source" from the more comprehensive category of Trade Mark was established. The Convention provides protection for industrial property, including 'indication of source' and 'appellation of origin', as stated in Article 1(2). These forms of industrial property are entitled to the principle of national treatment under Article 2. However, the efficacy of national treatment in safeguarding foreign geographical indications is limited.<sup>64</sup> Articles 9 and 10 of the Convention, in its essence, significantly requires the confiscation of a good that bears an illegal label which features a false indication of source or which uses a misleading identity of the producer or the manufacturer. Moreover, Art. 10 of the Convention is dedicated exclusively to geographical indications (GIs) and outlines more extensive measures to combat the importation of goods that bear inaccurate indications of origin. The Paris Convention also adopts a broad strategy for safeguarding indications of origin, which is rooted in the notion of unfair competition. According to Article 10*bis*, the member states of the Paris Convention are required to provide effective protection against unfair competition. Nonetheless, it is commonly construed that the provision does not explicitly pertain to instances of misrepresentation regarding the geographic origin of a product.<sup>65</sup>

After the Paris Convention, there were several endeavors to enhance the degree of collective protection provided to indications of source and appellations of origin. These efforts resulted in the ratification of the **Madrid Agreement for the Repression of False**

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<sup>63</sup> N.S. Gopala Krishnan, Prabha S. Nair & Aravind K. Babu, 'Explaining the relationship between Geographical Indications and traditional knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia' (2007) ICTSD <[https://www.iprsonline.org/ictsd/docs/Gopaletal%20-%20GIs\\_TK.pdf](https://www.iprsonline.org/ictsd/docs/Gopaletal%20-%20GIs_TK.pdf)> accessed on June 1, 2023.

<sup>64</sup> Ronald Konak, 'From GATT to TRIPS – The Agreement on Trade Related Aspects of Intellectual Property Rights' in Friedrich- Karl Beier & Gerhard Schrickes (eds.), *Studies in Industrial Property and Copyright Law* (18, Max Plank Institute for Foreign and International Patent, Copyright and Competition Law, 1996).

<sup>65</sup> Vandana Singh, 'A study of law of geographical indications as an IPR and tool for economic development' (Department of Law Thesis, University of Delhi 2011).

**or Deceptive Indications of Source on Goods** of 1891 (hereinafter Madrid Agreement) and the **Lisbon Agreement for the Protection of Appellations of Origin and their International Registration** of 1958 (hereinafter Lisbon Agreement). Additionally, a dedicated section on geographical indications was incorporated into the **TRIPS Agreement** in 1994.

The **Madrid Agreement** provides that “*all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries*”<sup>66</sup> The law prohibits the use of any form of commercial indications that have the potential to mislead the public regarding the origin of the goods, in relation to the sale, display, or offer for sale of said goods. Moreover, the aforementioned agreement outlines regulations regarding the appropriate procedures for seizure and designates the authorized entity responsible for implementing such actions. This international agreement provides safeguard against misleading indications of origin. The Madrid Agreement does not confer safeguarding to appellations that are categorized as "generic" in character.

The **Lisbon Agreement** of 1958 is under the administration of the World Intellectual Property Organization (WIPO). Art. 2 of this international agreement safeguards appellation of origin, which refer to the geographical name of a country, region, or locality used to identify a product that originates from that area and whose quality or characteristics are primarily attributed to the natural and human factors of the geographic environment. The Lisbon Agreement was established to enable the international system of registration and protection of appellations of origin through the 'Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958'. Its primary objective is to facilitate the international protection of ‘appellations of origin’.<sup>67</sup> The International Register of Appellations of Origin is maintained by the International Bureau, which is responsible for the official notification of the registrations to the other Contracting States. Through the use of one single and uniform registration procedure, the

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<sup>66</sup> Art. 1(1), Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1891 (April 14, 1891).

<sup>67</sup> Singh (n 64) 80.

system offers the protection of ‘appellation of origin’. According to Art. 3, a registered appellation is safeguarded against infringement or replication, even if it is utilized in translation or in conjunction with terms such as ‘kind’ or ‘type’. Additionally, as per Article 6, the appellation cannot be considered as having become generic in a Contracting State as long as it remains protected in its country of origin.<sup>68</sup>

During the year 1990, the **WIPO Committee of Experts on the International Protection of Geographical Indications** deliberated on the necessity of an entirely new treaty to tackle the insufficient international protection of GIs. The extant provisions of the Paris Convention were restricted in scope, and the degree of acceptance of the Madrid Agreement on Indications of Source and the Lisbon Agreement was limited. In order to address the aforementioned constraints, a new international treaty was suggested. In order to garner universal appeal among the nations represented in the Paris Convention, the notion of ‘GI’ was implemented as a substitute for both ‘appellation of origin’ and ‘indication of source’ within the treaty. The new idea was perceived as sufficiently comprehensive to encompass pre-existing ways of protection. Furthermore, a perceived necessity arose for an entirely new global system of registration that would garner greater acceptance compared to the Lisbon Agreement. The underlying principle was that nations ought to possess the autonomy to elect the mode of protecting GIs within their respective territories, as opposed to being obligated to adhere to a particular form of protection. The primary objective of the treaty was to offer efficient protection measures against GIs being transformed into generic terminologies and to ensure the implementation of such protective measures. During the meeting, the Committee of Experts deliberated on three primary topics, namely the subject matter of protection and the fundamental principles of protecting facets like conditions, content, enforcement, and dispute resolution. The Committee was unable to arrive at a unanimous decision regarding the aforementioned queries, and the delegations expressed divergent viewpoints. Certain individuals have conveyed their inclination towards a novel treaty, whereas others have exhibited hesitancy, particularly with regard to the incorporation of a registration mechanism or the

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<sup>68</sup> WIPO, ‘Summary of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958)’  
<[https://www.wipo.int/treaties/en/registration/lisbon/summary\\_lisbon.html](https://www.wipo.int/treaties/en/registration/lisbon/summary_lisbon.html)> accessed on June 1, 2023.

formation of the list of protected GIs. Consequently, the efforts towards the development of the new treaty were discontinued, and the subsequent meetings of the Committee of Experts were not convened.

The **TRIPS Agreement, 1994** has placed significant emphasis on the protection of Geographical Indications (GI). The inclusion of GIs within the realm of intellectual property rights bestows upon them a distinct acknowledgement as a type of IP protective measure. According to the terms delineated under Art. 22.1 of the TRIPS Agreement, the term 'geographical indication' can be comprehended as indications that serve to identify a product as originating from the territory of a member state of the WTO, or a specific area or locality within that jurisdiction, where a particular quality, reputation, or other distinguishing feature of the product is primarily linked to its geographical origin.<sup>69</sup> The aforementioned definition stipulates that a product's eligibility as a geographical indication can be established based on its quality, reputation, or other attributes, provided that they are primarily linked to the product's geographical origin. According to Article 22.2, interested parties should possess lawful measures to hinder the use of geographical indications that deceive the public regarding the origin of the product. Additionally, such usage should be considered an act of unfair competition as defined in Article 10bis of the Paris Convention. According to Article 23, concerned parties are entitled to legal measures that enable them to prohibit the use of a geographical indication that identifies wines that do not originate from the specific location indicated by the geographical indication. Article 24 encompasses several exemptions pertaining to the protection of geographical indications. These exceptions hold significant importance with regard to the additional protection of geographical indications for alcohol-based products such as wines and spirits.<sup>70</sup> The TRIPS agreement has been subject to criticism due to its limited scope in providing adequate protection for all goods registered under a GI, as it only establishes a minimum standard of protection. The TRIPS agreement provides protection solely to the producer in the event of an explicit act of deceiving the public by attempting

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<sup>69</sup> Art. 22 para 1, Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr. 15, 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>70</sup> WTO, 'Overview: the TRIPS Agreement' <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed on June 1, 2023.



to falsely advertise a good as a GI-protected good, and not in any other circumstance, with respect to goods other than wines and spirits. In the context of wines and spirits, it is expected that measures are taken by Members to safeguard products that are deemed eligible for protection, even if their misuse does not result in public deception. Several nations, inclusive of India have requested an extension to broaden the scope of the agreement to encompass more beneficial commodities, among other appeals.<sup>71</sup>

### **2.3 Interplay between GI and Cultural Expressions**

Till now, from the above discussion, we have come to know that the concern(s) over adequate protection of 'traditional cultural expressions' (TCEs) in both tangible and intangible forms, bears utmost significance and relevance in the present legal discourse. TCEs form the fundamental element of cultural pride and identity of many indigenous or tribal communities since it has been developed over time through generations of collective wisdom and knowledge.<sup>72</sup> The cultural expressions, language, and traditional knowledge of a community foster a sense of belonging and promote social cohesion. TCEs are characterized by the direct manual involvement of a craftsman or producer from a community who incorporates their knowledge and cultural beliefs into the finished product, resulting in distinct artistic and culturally decorative features that could represent religious and communal rhetoric and integrity. In contemporary era, there have been numerous incidents of economic exploitation, infringement, misappropriation, or misuse of traditional cultural expressions and 'symbols of cultural heritage' originally belonging to a tribe or community. The replication or cheap imitation of cultural artefacts, symbols, folk music, oral traditions, theatrical performances etc., for commercial purposes by third-parties has prompted inquiries regarding the level of safety and preservation of authenticity in them. A classic example of misappropriation that has gained notoriety in the current time has to be the reproduction of renowned '*aboriginal art*' from Australia on commercialized paintings, designs and printed fabrics by people outside of the

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<sup>71</sup> Suprateek Neogi, 'What Is Geographical Indication or GI' (*IPleaders* February 21, 2017) <<https://blog.ipleaders.in/geographical-indication-gi/>> accessed on June 1, 2023.

<sup>72</sup> Baruah & Poddar (n 41) 39.

indigenous Aboriginal community.<sup>73</sup> These actions have a tendency to diminish the distinct artistic and creative aspects of cultural expressions and undermine their value and sanctity. The increasing frequency of such events undoubtedly points to the justification needed for the enforcement of legal measures aimed at protecting and preserving cultural expressions.

Pinaki Baruah & Debasis Poddar in their book<sup>74</sup> has rightly documented five major reasons behind the need for legal protection of cultural expressions through legal measures viz., maintenance of cultural integrity; evading unwarranted enrichment of TCEs by third-parties; promotion of economic development of the communities; preservation of old traditional skills and practices from being obsolete; and lastly, conserving the moral right of attribution to the traditional indigenous communities who are the stakeholders of their respective cultural expressions. TCE holders also show their concerns over protection of their TCEs from inappropriate and offensive use that might result in distortion and mutilation of the value associated with the creative element of the TCE. At times, there exists a promotion of non-indigenous commodities under the facade of traditional names and symbols, leading consumers to erroneously associate the said product with the community in question and eventually dilutes their veracity.<sup>75</sup>

In this context, intellectual property law is supposed to have the potential to serve as the best tool for conservation and protection of traditional forms of creativity, i.e., cultural expressions through different framework(s); be it copyright law, trademark law, GI or patent law. The rationale behind this is that IPRs tend to provide a two-fold protection to intellectual creations; firstly, the securing of exclusive property rights on the intellectual creation in order to grant control over the commercial utilization which also provide further incentives to continue 'creativity'. Secondly, through the provisions of additional safeguards like moral rights, fair compensation and anti-unfair competition measures. Tradition-based creations, both in tangible forms and intangible forms are to be regarded as economic assets of a community; and IPR can help the communities with an

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<sup>73</sup> Kamal Puri, 'Protection of Cultural and Intellectual Property Rights of Indigenous Peoples' [1995] 7(1) National Law School Journal, 4 < <https://repository.nls.ac.in/nlsj/vol7/iss1/1/>> accessed on June 2, 2023.

<sup>74</sup> Baruah & Poddar (n 41) 39-42.

<sup>75</sup> Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar Publishing Limited 2010) 5.

opportunity to commercialize it for their socio-economic development. For instance, the act of promotion of TCEs like traditional handicrafts in the global market will serve as a means for such communities to showcase and strengthen their cultural distinctiveness while also contributing to the preservation of cultural diversity. IP protection will ensure that TCEs are not used without the wish or consent of the original custodians.

IPR can play a multifarious role in securing both moral and economic rights of the custodians of TCEs. It can aid in verifying the provenance of artistic and artisanal works, either through the use of certification trademarks or by addressing the issue of counterfeit goods being sold as genuine products, as per the regulations of unfair competition law.<sup>76</sup> IPR laws have been instrumental in proposing benefit-sharing mechanism for traditional cultural resources. This framework includes various administrative and legislative measures such as profit-sharing, royalty payments, technology access and transfer, product and process licensing, capacity-building of human resource and many more.<sup>77</sup>

IPR can also assist in the adequate protection of intangible expressions of TCEs encompassing the domains of music, dance and theatre; usually through copyright laws. However, the researcher in this study attempts to evaluate if such forms of TCEs can be included in the subject matter of GI or not, if we look into the broader realms of their definitions and characteristics. Nevertheless, we can estimate that the role of IPR/ IP law in safeguarding cultural expressions is immense, as demonstrated through the efforts of WIPO at promoting enhanced level of protection for TCEs by preparing policies and protocols in several international legal instruments, be it the ‘Model Provisions of 1982’ or the setting up of WIPO-IGC to discuss issues relating to TK and TCE.. Hence, IPR and preservation of cultural heritage are two sides of the same coin and there exists an interrelationship between them. This association, however, brings up a question to our mind which we cannot ignore and that is: “*to what extent can IPR safeguard TCEs and what would be the nature of protection?*” The problem arises when IPRs typically grant an entity with exclusive private rights over the work or creation but TCEs, on the other

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<sup>76</sup> WIPO, ‘Intellectual Property and Traditional Cultural Expressions/ Folklore’, 7-8 <[https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo\\_pub\\_913.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf)> accessed on June 2, 2023.

<sup>77</sup> Folarin Shyllon, ‘Cultural Heritage and Intellectual Property: Convergence, Divergence and Interface’ in William Logan & others (eds.), *A Companion to Heritage Studies* (1<sup>st</sup> Ed., John Wiley & Sons, Inc. 2016).

hand, are community-based cultural property and one individual cannot hold exclusive rights over cultural heritage.

Besides, the ambiguity surrounding intellectual ownership, use and control of TCEs between cultural institutions and indigenous people(s) is a matter of concern. For instance, if one tries to bring it under the purview of copyright law, we can come across the issue of individual 'authorship' and 'ownership' of the creative materials (TCEs). TCEs are based on age-old knowledge and traditions and the term of copyright is only 60 years after the death. But how do we determine who is the original author of a folk music, an oral folktale or a traditional production technique of a handicraft or textile? Will ownership be collectively granted to a community member or to a particular cultural institution such as museums and libraries that has housed the knowledge and legacy of the TCE? The characteristics of the relationship between copyright and TCEs are itself conflicting and contradictory to one another.

The researcher, however, opines that GI is the best IP tool at present which can commendably work towards the comprehensive protection of TCEs while securing the best socio-economic interests of the community associated with a TCE, as well. This use of GI law is often perceived by custodians and owners of TK & TCE as an effective means of protecting their intellectual property from unauthorized exploitation and safeguarding their creations from unwarranted third-party claims. The nexus between GI and cultural expressions is centered on their relationship with a specific local region or area. GI-tags are conferred upon products that exhibit an apparent connection with their place of origin, indigenous resources, and the surrounding environment. On the other hand, traditional cultural expressions are commonly associated with a specific geographical location where materials are produced or created using traditional techniques or infused with traditional values and practices, by a community of that particular area. Both of their values are associated with their place of origin or the knowledge of a community from a particular locality or region. A symbolic correlation is indeed present between them.<sup>78</sup>

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<sup>78</sup> Zografos (n 74) 165.

Upon examining the development of GI law on an international level, it becomes apparent that the first international agreement pertaining to the concept of GIs presented a comprehensive description regarding an 'appellation of origin'.<sup>79</sup> The term 'appellation of origin' has been extended to encompass ornamental products. TCEs, such as handicrafts, are considered ornamental products. This demonstrates the feasibility of TCEs being eligible for GI protection in accordance with the Lisbon Agreement.<sup>80</sup>

The TRIPs Agreement delineates the scope of traditional cultural expressions that may fall under its aegis by relying on the definition of geographical indications as stipulated in Article 22. Indications do not need to be names of places only. It can be words, phrases, or symbols that evoke a particular territory and for the matter, if a cultural expression's name itself is associated with place, then it will directly qualify for GI protection. In order to qualify as a GI under the TRIPs Agreement, it is necessary for the product's distinctive qualities, reputation, or other characteristics to be primarily linked to its geographical origin. Thus, it has been proposed that GIs offer an ideal balance between acknowledging the cultural importance and safeguarding the ensuing economic worth of TCEs while refraining from overly restricting intercultural exchange, which is vital for ongoing creativity. GIs have the potential to effectively serve the interests of the community. In the context of developing nations such as India, GIs can function as a form of insurance or protection for rural manufacturing, where producers may lack the necessary marketing skills, infrastructure, legal awareness, and other resources required for branding. Moreover, the distinctive characteristics of a GI could facilitate the acquisition of investments and financial assistance from various governmental entities, institutions, and rural banks, ultimately resulting in beneficial results for the community and enhancing their interests to a greater extent. Therefore, in the event of a lack of international *sui-generis* law that is aimed at protection and preservation of TCEs; GIs can be inferred to be the best legal apparatus available to safeguard them along with their socio-cultural significance in perpetuity.

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<sup>79</sup> Art. 2(1), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958 (WIPO) TRT/LISBON/001.

<sup>80</sup> Zografos (n 74) 166-167.

## CHAPTER 3 : INDIA'S LEGAL FRAMEWORK ON GEOGRAPHICAL INDICATIONS

### 3.1 Introductory text

We have understood that the concept of 'geographical indications' is entirely based on the association that the goods and the geographical area of origin share, to such an extent that reference of the place shall remind us that the particular good is from that region<sup>81</sup>. In recent years, GI has become a significant form of IPR, generally used in the area of trade and commerce owing to its countless attributes, including its function of a 'signifier of quality and authenticity' on the basis of the 'place of origin'<sup>82</sup>. This intellectual property right serves to safeguard the interests of both producers and consumers alike. Products that are registered under the GI system are considered to be authentic and genuine, as they are associated with a specific place of origin. This feature allows consumers to distinguish between counterfeit and genuine goods which ultimately aids in making informed decisions regarding the product's price, quality, and characteristics. Producers, on the other hand, are favored by the GI law as it promotes their goods in the market as ones enriched with authenticity, brand and quality because of the tag of the 'place of origin' on it. The forces of market create this demand and supply chain for the GI-registered products which ultimately boosts the income of the producers, create more employment among the producers and benefits in the socio-economic development of that particular region.

India, only in the year 1999, came up with the enactment of the *Geographical Indication of Good (Registration and Protection) Act* (hereinafter GI Act) with the aim to prevent unlawful use, sale and misappropriation of goods that are geographical indications. The law took effect on September 15 2003, simultaneously with the implementation of 'The Geographical Indications of Goods (Registration and Protection) Rules, 2002. The Act led to the establishment of the GI Registry by the Central Government. This registry has

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<sup>81</sup> V.K Ahuja, *Law Relating to Intellectual Property Rights* (3<sup>rd</sup> Ed., Lexis Nexis 2017) 437.

<sup>82</sup> Soumya Vinayan, 'Geographical indications in India: Issues and challenges—An overview' (2017) 20 J World Intellect Prop. 119.

jurisdiction throughout India and is located in Chennai. It provides a platform for producers to apply for the registration of their respective geographical indications. The administration of GIs is under the purview of the Controller General of Patents, Designs and Trade Marks, who also holds the position of Registrar of Geographical Indications.<sup>83</sup>

The GI Act of India is a significant legislative instrument as it establishes a legal structure that acknowledges and safeguards the unique attributes; quality and distinctiveness of commodities that originate from specific geographical areas within the country. The GI Act holds significant importance for India owing to its extensive range of cultures, rich heritage, and diverse traditional knowledge among communities of people. This legislation aims to ensure the safeguarding of IPRs belonging to indigenous communities, with a particular focus on individuals who engage in artisanal, performance, craft and agricultural activities. It facilitates the imposition of certain restrictions upon the unauthorized utilisation of their traditional knowledge and the misappropriation of their cultural expression. Through obtaining the GI registration, producers can safeguard against unjust competition and infringement of their intellectual property. The registered GI will give a unique identification of the product to be attributable to the producers from that particular geographical region. The provision of legal safeguards of this nature has the potential to facilitate economic development as well as augment and promote the practice of skills of sustainable agriculture and traditional craftsmanship in such areas.

This legislation encompasses varied ‘goods’, comprising of those originating from the agricultural sector, handicrafts, textiles, food items etc. The GI Act of India is a crucial component in preserving the nation's abundant cultural heritage and traditional knowledge as well. This legislative initiative offers several advantages, including the conservation of socio-cultural legacies of traditionally rural and tribal communities and the strengthening of India's reputation as a ‘hub’ for the creation of unique and authentic products for the fair and free trade among economies.

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<sup>83</sup> ibid 120.

### 3.2 Historical background

Prior to 1999, there was no law specifically that dealt with the idea of ‘geographical indications’ in India, until India became a party to the TRIPs Agreement in 1995. Common law principles were instead followed in this regard, such as the ‘passing-off’ action. Certain legislations such as the Consumer Protection Act 1986 and the Monopolies and Restrictive Trade Practices Act, 1969 were functional in checking upon unfair trade practices.<sup>84</sup>

The Indian judiciary has assumed a noteworthy role, mostly considering the absence of any enforced legislation aimed at the protection of GIs. The common law doctrine of passing off has been deemed appropriate for application in cases involving GIs within the Indian context. Injunctions have been granted by the courts to prohibit the defendants from engaging in the advertisement, sale, or distribution of goods, including wines and spirits that involve colorable imitation and unfair trading practices. These practices are aimed at exploiting the goodwill of goods or products that are inherently associated with a specific geographical area and are used in relation to particular goods originating from a given country, region, or locality.

The Delhi High Court in the landmark case of *Mohan Meakin Breweries Ltd v. The Scotch Whisky Association*<sup>85</sup> upheld the decision of the Registrar of Trade Marks, who declined to register the proposed trademark of the applicant for use on Indian-produced whisky. The trademark in question comprised the phrase ‘Highland Chief’ and a depiction of a gentleman’s head and shoulders, dressed in traditional Scottish highland attire, including a feather bonnet and plaid with tartan edging. This attire is a widely recognized symbol of Scottish origin.<sup>86</sup>

In another landmark case, that is the case of *Scotch Whisky Association v. Pravara Sahakar Karkhana*<sup>87</sup> the Bombay High Court allowed the plaintiff to restrain the

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<sup>84</sup> Vandana Singh, ‘A Study of Law of Geographical Indications as an IPR and tool for Economic Development’ (Law thesis, University of Delhi 2011) <<http://hdl.handle.net/10603/402473>> accessed on June 1, 2023.

<sup>85</sup> *Mohan Meakin Breweries Ltd. v. The Scotch Whisky Association*, AIR 1980 Del 125.

<sup>86</sup> Ahuja (n 80) 439.

<sup>87</sup> *Scotch Whisky Association v. Pravara Sahakar Karkhana*, AIR 1992 Bom 294.



defendants from marketing their whisky using the label 'Blended Scotch' alongside the image of a Scottish drummer adorned in a kilt or tartan and the term 'Drum Beater'. The Court found out that the defendants are engaging in the deliberate and intentional act of misrepresenting their product as "Blended Scotch," which is legally actionable. It should be noted that even unintentional misrepresentation is also subject to legal action. Unfortunately, the defendants have employed an unjust tactic by incorporating the phrase "*Blended with Scotch*" and engaging in a deceptive or fraudulent copy/ imitation and inequitable commercial practices in an effort to profit from the plaintiff's established reputation in the Scotch whisky industry.<sup>88</sup>

In another landmark case namely, *Imperial Tobacco Co. v. The Registrar of Trademarks*<sup>89</sup> pertaining to a trademark registration; the Calcutta High Court emphasized that words commonly used to denote a locality, country, or region cannot be monopolized as trademarks, unless the geographical term is employed in an arbitrary and fanciful manner to indicate origin or ownership, irrespective of its actual location<sup>90</sup>. Significantly in the absence of any prevalent legislation, the Indian judiciary has broadened the scope of legal protection towards Geographical Indications (GIs).

The importance and necessity of safeguarding Geographical Indications (GI) were actually brought to light in India following the legal cases and controversies involving Darjeeling Tea and Basmati Rice. The Basmati Rice controversy emerged subsequent to the granting of a patent to *RiceTec Inc.*, a US-based enterprise, in 1997 for a variety of rice that purportedly bore a resemblance to traditional Basmati rice of India. The decision elicited a strong negative reaction in India, given that Basmati rice holds significant cultural and traditional value in the region. The patent protection of Basmati rice was challenged by India, as well as several organizations and individuals, on the grounds that the term "Basmati" was generic and had been cultivated in the Indian subcontinent for generations, rendering it ineligible for patent protection. In 2000, *RiceTec's* patent

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<sup>88</sup> Tushar Kanti Saha & Nalin Bharti, 'Beyond Wines and Spirits: Developing Countries' GI Products and their Potential in WTO Regime with Special Reference to India' (2006) 11 J INTELLEC PROP RIGHTS < <https://nopr.niscpr.res.in/bitstream/123456789/3565/1/JIPR%2011%282%29%2089-97.pdf>> accessed on June 1, 2023.

<sup>89</sup> *Imperial Tobacco Co. v. The Registrar of Trademarks*, AIR 1977 Cal 413.

<sup>90</sup> Saha & Bharti (n 87) 92.

underwent a substantial decrease following an extended court battle and global campaigning, thereby recognizing the historical significance and extensive utilisation of Basmati rice in India. The patent office of the US disallowed the patent-holder from using the name ‘Basmati’<sup>91</sup>. This aforementioned legal dispute has brought attention to the imperative of defending traditional knowledge and cultural heritage against misappropriation.

Considering the *Darjeeling Tea* controversy, it pertained to the unauthorized marketing and use of Darjeeling tea, a kind of tea which is cultivated solely in the Darjeeling district situated in the northern region of the West Bengal, India. The issue at hand connects to the existence of multiple global enterprises that marketed goods which were not cultivated or manufactured domestically in Darjeeling. The aforementioned developments prompted India to recognize that protecting its Geographical Indications on a global scale undoubtedly necessitated their initial protection at the domestic level.

The enactment of the TRIPS Agreement by the World Trade Organization in 1995, which mandated that member states adhere to specific minimum standards of intellectual property rights protection, was a pivotal catalyst for the preservation and protection of products those were geographical indications. The TRIPS Agreement mandates that member nations of the World Trade Organization (WTO) must establish legal mechanisms to prohibit fraudulent or other inappropriate conduct in the marketplace with regards to the specified geographical source of commodities. Moreover, according to Art. 24.9 of the TRIPS<sup>92</sup>, in order for a product to receive GI protection in a foreign country, it must first be registered as a GI in its country of origin<sup>93</sup>.

Thus, in the year 1999, in order to fulfil the obligation under TRIPs, the GI Act came into force in India. The newly enforced GI Act now favored for registration of GIs and

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<sup>91</sup> Shyamkrishna Balganes, ‘System of Protection for Geographical Indications of origin: A Review of the Indian Regulatory Framework’ [2002] 6(1) J World Intellec Prop. 191; *See also*, Dr. Vandana Singh, *The Law of Geographical Indications* (1<sup>st</sup> Ed., Eastern Law House 2017) 195.

<sup>92</sup> Art. 24 (9), The Trade-Related Aspects of Intellectual Property Rights, 1995 states that “There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.”

<sup>93</sup> Ruchi Pant, ‘Protecting and promoting traditional knowledge in India: What role for geographical indications’ (2015) 14 IIED, London Working Paper < <http://pubs.iied.org/16574IIED>> accessed on June 1 2023.

enhanced protection to goods, be it natural, agricultural or manufactured. The Act has three primary objectives. The first objective is to enact a distinct legislation that adequately protects the welfare of manufacturers of commodities bearing geographical indications within the nation. Secondly, the objective is to deter unauthorized exploitation of GIs and safeguard consumers from fraudulent practices. Finally, the third objective is to protect the welfare of producers and manufacturers by preventing them from being deceived by erroneous claims regarding the geographic origin of products, thus encouraging financial well-being for producers and stimulating the export of goods with geographical indications into the foreign market.<sup>94</sup>

### 3.3 Key provisions of the GI Act

#### 3.3.1 Definitions

The Act defines ‘geographical indications’ in relation to goods only, as:

*“an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be”<sup>95</sup>.*

The definition is aligned with the one specifically provided in Article 22.1 of the TRIPs Agreement. It is also provided as a clause that any name that does not correspond to a country, geographical area, or local region within the said country may be deemed eligible for protection as a geographical indication, provided that all necessary criteria are met. This allows for the possibility of protecting 'symbols' beyond just geographical names. The interpretation of the term GI places emphasis primarily on tangible or material goods and their correlation with a particular geographical area. As a result,

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<sup>94</sup> Singh (n 83) 176-177.

<sup>95</sup> Sec. 2(1)(e), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

cultural expressions, mostly like oral traditions, rituals, festivals, music, dances etc., which incorporate cultural heritage, traditions and other socio-cultural elements of a place/ area are not explicitly incorporated within the scope as they lack a physical form.

It is worth noting that the TRIPS definition<sup>96</sup> employs a comprehensive reference to 'goods', whereas the GI Act of India provides a specific definition of the term 'goods' encompassing four categories, namely: 'agricultural goods', 'natural goods', 'manufacturing goods', and 'goods of handicraft and foodstuff'.<sup>97</sup> The aforementioned definition is not comprehensive but rather serves as an example. It is noteworthy that the TRIPS Agreement pertains to 'goods', whereas the Indian Act categorizes the said goods. Under this Act, an indication shall "*include any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies*".<sup>98</sup> The emphasis is still placed on goods and products.

The TRIPS agreement does not explicitly state whether the requirements stated are relevant solely to quality and characteristics that can be attributed to natural factors, or if they also encompass characteristics resulting from human factors. However, under the GI Act of 1999, there is no such ambiguity as the GI Act of India makes express mention of the attribute of 'human factors'. There is a provision which mandates that in order to register an application for GI, there should be a mandatory inclusion of information regarding the geographical environment that may encompass both natural and human factors that are inherent to the said region.<sup>99</sup> In accordance with Section 32(1) of the GI Rules, 2002; it is also mandatory for an application seeking a GI registration to include a comprehensive account of the human creativity and specialized skills fundamentally involved in that product. The inclusion of the term 'human factors' in the GI Act holds great importance, particularly in light of India's possession of a multitude of handicrafts and handloom products as forms of traditional cultural expressions, that are eligible for protection as GIs under the ambit of this legislation.

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<sup>96</sup> Art. 22 (1), The Agreement on Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994, entered into force 1 January 1995).

<sup>97</sup> Sec. 2(1)(f), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>98</sup> *ibid* sec. 2(1)(g)..

<sup>99</sup> *ibid* sec. 11(2)(a).

Under the GI Act, a ‘producer’ is someone who deals with production, manufacturing, processing or trading of ‘goods’; as defined under the Act. Yet, this legislation acknowledges the existence of two primary stakeholders. Two distinct categories of individuals in the context of property-ownership are commonly referred in this legislation, and they are ‘authorized user’ and the ‘registered proprietor’. An authorized user refers to an individual who proclaims to be the producer/ manufacturer of the products for which a GI has been officially registered. The authorized user (solely) is granted the exclusive privilege of using the registered geographical indication and holds the autonomy to initiate legal action against any individual who infringes the said indication. Additionally, the authorized user retains the ability to extend the duration of protection. It is recommended that all people involved in the production, manufacturing, distribution, and trade of goods register themselves as ‘authorized users’ of a registered geographical indication (GI). This registration serves to enhance the protection, market value, and brand promotion of the respective GIs.<sup>100</sup> ‘Registered proprietor’, on the other hand, refers to an association of individuals or producers, or any organization that is currently listed in the GI Register as the rightful owner(s) of the geographical indication.<sup>101</sup>

### 3.3.2 Registration process and its effect

The Registrar of Geographical Indications is the designated authority responsible for maintaining geographical indications in India. The registration procedure comprises multiple phases. The primary and fundamental step entails the submission of an application. In order to meet the requirements for registration, it is necessary for geographical indications (GIs) to adhere to the definition of the term as outlined by relevant legislation. According to Section 9 of the Act, the registration of specific geographical indications is prohibited due to various reasons such as the likelihood of

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<sup>100</sup> Ahuja (n 80) 450.

<sup>101</sup> Sec. 2(1)(n), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

causing deception or confusion, the presence of obscene or scandalous matter in the indications, or the illegality of their use.<sup>102</sup>

The registration of a GI requires the involvement of a representative body that advocates for the welfare and interests of the producers of the relevant goods. This particular entity may refer to an association comprising individuals, producers, or any established organization or authority operating in accordance with existing legislation. The individual or organization submitting the application must be a legally recognized entity and must be acting on behalf of the producer of the goods for which the application is being made. Organizations or associations lacking representation of producers are required to exhibit a willingness to represent the welfare of producers.<sup>103</sup>

The first stage entails the submission of the application. It is mandatory for the applicant to submit the application in three copies and affix their signature, or delegate authority to an agent for the same purpose. Apart from the submission of the application, it is mandatory to furnish a 'statement of case' and the prescribed GI-1 form. It is noteworthy that a singular application possesses the capability to encompass a multitude of 'classes' of commodities, with fees being mandatory for each respective category. In addition, it is crucial to include an affidavit that reflects the concerns of the producers or associations affiliated with the pertinent good(s).

As specified in the Act, the application is subjected to a preliminary review and evaluation process subsequent to its submission.<sup>104</sup> The examiner conducts a thorough examination of the application in order to identify any potential inadequacies or discrepancies. If any inconsistencies are detected, the applicant will be given a period of one month to rectify and resolve them. Upon completion of the initial evaluation, the Registrar engages in a collaborative effort with a team of experts to assess the authenticity and precision of the application that has been submitted. If any objections arise during the examination process, the Registrar will issue a Show Cause Notice to the

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<sup>102</sup> Ahuja (n.80) 445.

<sup>103</sup> Sec. 11(1), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>104</sup> Ss. 11 (5) – 11(7), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

applicant. The notification provides the applicant with an opportunity to respond or request a hearing within a period of two months. The Registrar is empowered to reject an application if an error is perceived on the part of the applicant. However, the concerned party who is applying for registration is provided with an equitable opportunity to present their argument before the decision is made. If the applicant is dissatisfied with the decision made by the Registrar, they have the right to file an appeal within a period of one month.<sup>105</sup>

Following approval, an application is officially released in the Geographical Indications Journal (as an advertisement) within the period of three months. The aim of this communication is to inform the public about the upcoming registration process of a good.<sup>106</sup>

It is permissible for an individual to file an opposition notice against a GI application within three months following its publication. It is imperative to adhere to the requirement of submitting the notice in three copies, and it is further necessary to furnish the GI-2 form alongside. Following this, duration of sixty days is allotted to the applicant to provide a counterargument, elucidating the foundation on which they are depending for their claim. In the event of a lack of response within the specified time period, it is likely that the application could be considered as having been abandoned. The Registrar provides both parties with the chance to present evidence and conducts an in-depth evaluation of all evidence before issuing a verdict on the acceptance of the application.<sup>107</sup>

The Registrar is vested with the power to authorize modifications, changes or revisions to the application, either prior to or following its acceptance. This ensures that any inaccuracies or necessary alterations can be rectified.<sup>108</sup> Following the approval of the application, the Registrar commences the registration procedure for the geographical indication. The application filing date is considered to be equivalent to the registration

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<sup>105</sup> Sec. 12, The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>106</sup> Ibid, sec. 13.

<sup>107</sup> Id, sec. 14.

<sup>108</sup> Id, sec. 15.

date. The Registrar is responsible for the issuance of a certificate to the applicant, which is affixed with the seal of the GI Registry.<sup>109</sup>

The validity period of a registered Geographical Indication (GI) is 10 years, and it may be extended by paying a renewal fee. Notification regarding the expiration date and renewal requirements is provided by the Registrar to the registered proprietor or authorized user. A failure of renewal may result in the removal of the geographical indication from the registry. The submission of an application for restoration can be facilitated by remitting the prescribed fees within a period of six to twelve months subsequent to the lapse of the latest registration.<sup>110</sup> If an individual is dissatisfied with the decision or verdict of the Registrar, they have the option to file an appeal with the Intellectual Property Appellate Board (IPAB) within a timeframe of three months. Following this, the Intellectual Property Appellate Board (IPAB) will evaluate the matter and issue a decision based on the substantive grounds of the appeal.<sup>111</sup>

Upon registration of a GI, both the authorized user and registered proprietor are entitled to certain rights. These rights cover the exclusive use of the indication in connection with the commodities it signifies, as well as the capacity to pursue legal action in instances of infringement. Nonetheless, the aforementioned rights are not without limitations and are susceptible to limitations that curtail the user's authority.<sup>112</sup>

An important feature of this Act is the ability of the Central Government to provide for additional protection to certain classes of goods under the GI Act.<sup>113</sup> As per the TRIPs Agreement, India bears the responsibility of prohibiting the usage of a Geographical Indication (GI) that denotes wines or spirits not originating from the place specified by the particular GI. This obligation holds true even if the good in question has a place of origin that is indicated on it, whether in translated form or accompanied by descriptors

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<sup>109</sup> Sec. 16, The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999); *See also* Rule 55, The Geographical Indications of Goods (Registration and Protection) Rules, 2002.

<sup>110</sup> Sec. 18, The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).

<sup>111</sup> *ibid* sec. 31.

<sup>112</sup> Nehal Wagle, 'Step by Step Guide for registration of Geographical Indication' (*IPleaders*, 26 October 2019) < <https://blog.ipleaders.in/geographical-indication-registration/> > accessed on June 1, 2023.

<sup>113</sup> Sec. 22(2), The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act No. 48 of 1999).



such as 'kind', 'shape', 'style', or 'like', among others. The protection provided by Section 22(3) of the GI Act of 1999, encompasses not only wines and spirits but also other types of goods that are deemed to be of national significance, subject to a contextual evaluation. Currently, there is a growing international call to expand the protection of goods to encompass additional product categories beyond the existing scope of wines and spirits.<sup>114</sup>

### 3.3.3 Infringement and Remedies

It is noteworthy that Section 22 of the GI Act states what constitutes infringement in regards to a GI. As per the given provision, an infringement of GI is committed by an unauthorized user of a registered GI when the alleged person would do the following acts:

- [1] Uses the GI in such a way that it implies the origin of goods to be distinct from their actual source or origin, thereby causing a misrepresentation of the true origin of the goods.
- [2] Uses the registered GI in such a manner that it constitutes unfair competition, just like as passing-off and it is deemed to be inappropriate as it is actually an act of misleading consumers into believing that the goods are linked to the registered geographical indication, when in fact they are not.
- [3] Uses the GI in a manner that is factually accurate in relation to the territory or region, but misleadingly suggests that the goods originate from the specific region associated with the registered geographical indication. Such an act also amounts to infringement.

The GI Act of India encompasses provisions for legal recourse (in the form of civil remedies) in case a registered GI is infringed by an unauthorized person. The remedies are:

- [1] *Injunctions*: The legal remedy of injunction encompasses both temporary and permanent injunctions. In addition, the court has the authority to issue an ex parte

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<sup>114</sup> Ahuja (n 80) 454.

injunction for several purposes, including the discovery of documents, preservation of infringed goods, documents, or other relevant evidence, and restraining the defendant from disposing of or managing their assets in a way that could negatively impact the plaintiff's ability to receive costs, damages or other monetary remedies that may be conferred to them.

- [2] *Damages or accounts of profits*: This remedy serves as a viable alternative. This treatment option serves as a viable alternative. The plaintiff is required to pick between two available remedies at a preliminary stage of the legal proceedings. This form of redressal may be declined if the defendant can demonstrate to the court that they were not aware and lacked reasonable grounds to believe that the GI of the plaintiff was registered at the time they made use of it. Additionally, if the defendant promptly ceased using the GI upon becoming conscious of the existence and nature of the plaintiff's registered right, this may also be taken into consideration.
- [3] *Delivery up of the infringing labels and indications*: The court holds discretionary power over the execution of this remedy. The court has the discretion to order a remedy based on the relevant circumstances presented.

Interestingly, an action of 'passing-off' is available in case of an unregistered GI.<sup>115</sup> It was observed in the case of *Scotch Whisky Association v. Golden Bottling Ltd.*<sup>116</sup> the plaintiff initiated a lawsuit alleging passing off against the defendant, who was engaged in the production and commercialization of a product named 'Red Scotch Whisky'. The plaintiff contended that the term 'Scot' or 'Scotch' constitutes a geographic indication as defined in Article 22(1) of the TRIPs Agreement, and serves to designate the origin of 'whisky' that is manufactured in Scotland. The court held that the defendant is liable to be restrained from passing-off its 'Red Scotch Whisky' as a produce from Scotland.<sup>117</sup> The aforementioned action can solely be accomplished through the implementation of legal injunctions, whereby the defendant shall be mandated to refrain from utilizing the terms 'Scot' or 'Scotch', or any analogous lexeme, in a manner that may suggest their

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<sup>115</sup> Ahuja (n 80) 468.

<sup>116</sup> *Scotch Whisky Association v. Golden Bottling Limited*, 2006 (32) PTC 656 (Del).

<sup>117</sup> Ahuja (n 80) 468-469.

equivalence to authentic Scottish whisky. The court not only issued an injunction but also awarded damages in the amount of Rs. 5 lakhs as requested by the plaintiff.

Under the GI Act, the acts of falsifying a GI or falsely applying for registration of a GI are construed to be criminal offences and thus they attract criminal penalties, such as – ‘forfeiture of goods’ and ‘search and seizure’. Sections 39 to 44 of the GI Act vividly describe the instances of a person that directly constitutes an offence under the said legislation. Section 49 similarly states that, in the event that the offender is a corporate entity, both the company as a whole and all individuals who bear responsibility for its business operations will be subject to liability.

Pertaining to infringement of a registered GI in India, the case of *Tea Board, India v. ITC Limited*<sup>118</sup> is a significant one. In this case, the plaintiff has alleged that the defendant knowingly and fraudulently violated their geographical indication (GI) rights by utilizing the registered GI '*Darjeeling Tea*' in an unscrupulous manner to name their private commercial establishment, '*Darjeeling Lounge*'. The defendants were claimed to have engaged in deceptive practices by implying that the products offered in their Lounge were sourced from the authentic geographical region, and their utilization of the GI name was deemed to be an inequitable commercial conduct. Under the Geographical Indication of Goods (Registration & Protection) Act 1999, the Tea Board initiated legal proceedings against ITC, among others, for violating its registered geographical indication (GI) by using the name "Darjeeling Lounge." The Tea Board claimed that such usage constituted an instance of unfair competition, including passing off and therefore, they filed for an order of injunction from the Court.<sup>119</sup> The Court, in response, acknowledged that not all cases of passing-off would be considered as unfair competition. The court explained that a registered proprietor possesses the ability to institute a passing-off lawsuit in the event that the GI is linked to the product with which it is exclusively affiliated under its registration. Thus, the Court concluded that the probability of deception or confusion was minimal.

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<sup>118</sup> *Tea Board, India v. ITC Limited*, MANU/WB/0277/2019.

<sup>119</sup> Rohan Dalbehera, 'Case Study: Tea Board of India Vs. ITC Ltd' (K&K February 22 2019) <[https://www.khuranaandkhurana.com/2019/02/22/case-study-tea-board-of-india-vs-itcltd/?utm\\_source=mondaq&utm\\_medium=syndication&utm\\_term=Intellectual-Property&utm\\_content=articleoriginal&utm\\_campaign=article#\\_ftn3](https://www.khuranaandkhurana.com/2019/02/22/case-study-tea-board-of-india-vs-itcltd/?utm_source=mondaq&utm_medium=syndication&utm_term=Intellectual-Property&utm_content=articleoriginal&utm_campaign=article#_ftn3)> accessed on June 1, 2023.

### 3.4 Cultural Expressions under the GI Act of India

After the deliberations in the second chapter, we have come to comprehend that in the legal parlance; ‘traditional cultural expressions (TCEs)’ or ‘*expressions of folklore*’ maybe categorized into two distinct classifications, specifically *tangible* expressions and *intangible* expressions. Tangible forms of cultural expressions encompass a variety of creative works, including drawings, designs, paintings, body art, carvings, sculptures, and other physical manifestations of cultural expression. Intangible forms of expressions (hereinafter ICE) refer to musical, dramatic and verbal forms of expression that serve to preserve the traditional values, history, and legacy of a community.<sup>120</sup>

The basic rationale behind GI protection is that these cultural expressions play a crucial role in the cultural and social identities of indigenous and native communities. These expressions embody a wealth of knowledge and skills and serve as a means of carrying core values and beliefs. The assertion is made that in order to promote creativity, increase cultural diversity and preserve cultural heritage; such cultural expressions must be protected within the legal framework in a nation.<sup>121</sup> Geographical Indications, being a collective IP right, pose as the best suitable legal tool to represent the interests of the community at best and simultaneously provide adequate extent of protection. The nature of protection would be in the essence that products (ones embodying traditional cultural expressions) that have been registered as a GI are considered to be authentic and genuine, as they originate from a specific place of origin. This feature will allow consumers to distinguish between genuine and fake or counterfeit goods and assist them in making informed decisions regarding the price, quality, and characteristics of the product. Consumers will exhibit a willingness to pay a significant premium for authentic products that possess a distinct geographical origin. In this way, the community is motivated to preserve their cultural heritage and thus, ancient traditional indigenous knowledge and cultural expressions are safeguarded from being obsolete. However, at present the law

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<sup>120</sup> Art. 1(i) (a), Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (WIPO-UNESCO), <<http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>> accessed on June 1, 2023.

<sup>121</sup> Arushi Gupta & Akhil Goyal, ‘Synthesis of IP and GI: Safeguarding the Heritage’ (*Manupatra* Mar 31 2021) <<https://articles.manupatra.com/article-details/Synthesis-of-IP-and-GI-Safeguarding-the-Heritage>> accessed on June 1, 2023.

says that all this is beyond the scope of protection for ICEs like folk music, dance, customary rituals, culinary skills etc.

Handicrafts in India are regarded as element of cultural heritage. These artefacts are the result of a craftsman's expertise, showcasing the creator's ingenuity and the cultural legacy that has developed over many generations in the tradition and culture of the community concerned with the particular artefact. Now, under the Indian legal structure of GI, handicrafts do come under the ambit of definition of 'goods' and they qualify to be protected as a GI, only if they maintain or keep up with all the necessary requirements for registration. TCEs only in the form of handicrafts and textiles are recognized and thus they are found in different classes of goods out of the 40 Classes of goods acknowledged under the Fourth Schedule of the Geographical Indications of Goods (Registration & Protection) Rules, 2002.

The legal framework governing Geographical Indications is closely associated with safeguarding traditional knowledge (TK) through the preservation of 'tangible' cultural expressions such as *Kullu* shawls, *Chakesang* shawls, *Chikankari* craft of Lucknow, Assam *Muga* silk textiles, among others. Out of the 420 registered GIs in India (as of 2022); 116 numbers of registered GIs are 'handicrafts'. The GI tag plays a very important role in creating brand equity for these indigenous producers.<sup>122</sup>

No doubt, this GI legislation in India can bring some cultural expressions under the purview of protection but, what about the other different forms of cultural expressions like folklore? The ambit of protection of intangible cultural expression is unexplored. It is a concerning topic as they are left behind without any level of protection. These intangible forms of cultural expression are not registrable under GI Act due to the exhaustive provisions and definitions pertaining to 'registrable' subject matter of GI. While there can be easy registration of handicrafts as a GI; the community dance or music for which the particular handicraft is used, despite being a unique cultural heritage lacks protection from the law.

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<sup>122</sup> Yashna Walia & Shreya Kumar, 'The Success and Failure of GI Tag in India: A critical analysis of the working of Geographical Indications of Goods (Registration and Protection) Act, 1999' [2020] 1 E-JAIRIPA < <https://cnlu.ac.in/storage/2022/08/15-Yashna-Walia-and-Shreya-Kumar.pdf>> accessed on June 1, 2023.

For instance, the *Purulia Chhau* masks of West Bengal are recently recognized as a GI (2018). It is a significant element of the *Chhau* dance performance (a form of cultural expression) which is performed as veneration to Lord Shiva by the people of the *Sutradhar* community in the specific area of Charida village of Purulia, West Bengal.<sup>123</sup> Now, we see that in the Bollywood film ‘Barfi (2011)’ starring Ranbir Kapoor and Priyanka Chopra Jonas, this dance was mimicked in a song from the movie. The masks were also used in that song. As per reports there was no attribution given to the community and the sense of use was not of the nature of traditional reverence. No legal suit was entertained and the community could not get any remuneration even when it was a clear-cut case of misappropriation by a third-party. Similarly, different folk dances like the *Koli* dance from Maharashtra; *Kalbeliya* and *Ghoomar* dances from Rajasthan; *Dumhal* dance from Jammu and Kashmir etc., were seen to be directly used in Bollywood movies and songs from a long time without any from attribution or credit to the original community.<sup>124</sup> The lack of IP protection in this case, showcases how vulnerable these forms of cultural expressions are in the legal landscape of India.<sup>125</sup>

The inadequacy of GI law in India is evident in its inability to protect intangible cultural expressions, which are intrinsic manifestations of the cultural heritage and legacy of various communities. This limitation restricts the protection of cultural property solely to tangible forms. The protection of GIs solely for those included in the approved GI Registry presents a significant challenge due to plenty of pending applications and the considerable amount of unregistered GIs that hold substantial potential. This specific situation raises apprehensions about the vulnerability of unregistered geographical indications, making them prone to economic exploitation and unauthorized utilisation.

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<sup>123</sup> Agni Amrita, ‘Purulia Chhau Dance and Chhau Mask: A Tryst at the Chhau-Jhumur Utsav’ (*TALeof2BACKPACKERS* Aug 25, 2021) < <https://www.taleof2backpackers.com/purulia-chhau-dance-chhau-mask/>> accessed on June 2, 2023.

<sup>124</sup> Amlan Chakraborty, ‘Missing Legal Protection for Traditional Cultural Expressions in India? : A brief write-up on issues concerning them at contemporary times’ (*The IP Press* May 7, 2020) < <https://www.theippress.com/2020/05/07/missing-legal-protection-for-traditional-cultural-expressions-in-india-a-brief-write-up-on-issues-concerning-them-at-contemporary-times/>> accessed on June 2, 2023.

<sup>125</sup> *Ibid.*

Individuals are not authorized to initiate legal action to impede the violation or seek compensation for the violation of an unregistered GI.<sup>126</sup>

The urgent necessity for action can be seen by the considerable volume of pending applications and unregistered geographical indications. The swift redressal of this issue and the implementation of adequate measures to safeguard these significant cultural and economic assets are imperative and a thought to ponder upon. GI being a collective right, should be able to reward the members of the community who have adhered to traditional skills and practices.<sup>127</sup> Therefore, this research study aims to examine and explore potential measures to reduce the disparity between ICEs and ‘adequate intellectual property (IP) protection’ within the present GI legislation, with appropriate legislative and policy measures.

### 3.5 Problems and Challenges

The demarcation of geographical areas and the representation of producers within the framework of GIs are subject to various ambiguities and inadequacies. Soumya Vinayan in her article<sup>128</sup> highlights that the Heritage Foundation's application for *Basmati* rice was declined on account of technical deficiencies and insufficient representation of cultivators. The rejection of the application for *Banjara* Handicrafts and Mirror work was attributed to inadequate representation of the Banjara community. The *Ganjam* Goat Ghee and *Poddar* Diamond applications failed to exhibit a fair representation of their respective producers.

The aforementioned cases illuminate the intricacies and deficiencies in delineating geographic regions and guaranteeing satisfactory inclusion of producers, emphasizing the necessity for improved accuracy and effectiveness in the GI law.<sup>129</sup>

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<sup>126</sup> Ahuja (n 80) 453.

<sup>127</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014) 90, 91.

<sup>128</sup> Soumya Vinayan, ‘Geographical indications in India: Issues and challenges—An overview’ [2017] J World Intellect Prop. 124.

<sup>129</sup> *ibid* 124-125.

The registration procedure is generally a lengthy one, leading to legal aid and financial requirements that surpass the capabilities of the majority of small producers. The pre-registration phase involves a range of expenses, including the mobilization of farmers, the registration of an organization responsible for applying for GI registration, and the hiring of a legal expert to develop the case. This process necessitates a significant amount of time to gather archival material to substantiate the product's origin from a specific geography and its essential characteristics. Typically, this procedure spans for a year. As time elapses, the expenses escalate significantly, leading individuals to occasionally discontinue or abandon their application(s). This particular undeniably laborious and demanding process is a challenge in the existing legal framework.

There are many post-registration challenges to this legal framework. For instance, if a TCE like a handicraft is registered, the protection is not automatically guaranteed with a mere registration. Stakeholders have to ensure that to keep up with the GI attribute, the quality, packaging, branding and originality of the handicraft should not be compromised; or else the counterfeiting goods will tarnish the repute of the GI registered good in the market. Hence, there is always a need for a proper vigilance forum in this matter. Furthermore, GI holder should monitor that no other entity passes off their products as the registered product. Cheaper versions of similar looking handicrafts can be found but it is the duty of the GI stakeholders to ensure none of this happens. If the mechanism for regulation and monitoring is fragile, and the implementation is below par, the benefits of the registration of GI are restricted.

There are other significant challenges that come with the post-registration of a GI good, here for instance, a handicraft. One such is the lack of awareness programs for artisans, craftsmen and people from the particular community or tribe as well as advertisements for consumers pertaining to the general information of the GI-registered handicraft or any other form of a cultural expression. Secondly, there is a dearth in the number of initiatives and schemes taken up by the state on R&D of such skilled craft. This should be taken into consideration too. Thirdly, there is no mention in the GI rules or regulations of a proper benefit-sharing mechanism between holders of the TK / TCE, i.e., artisans and producers of the handicraft and the traders.



The primary focus of the Act is centered on the identification and registration of GIs. However, it is deficient in providing explicit provisions to guarantee the fair allocation of benefits among the multifarious parties involved. The absence of benefit-sharing arrangements can potentially lead to the exploitation of communities, who may not receive economic benefits from the commercial success of the registered GI associated with their cultural heritage.

The GI Act provides protection for cultural expressions, also known as TCEs, with a specific focus on safeguarding "handlooms" and "handicrafts" as embodiments of the cultural and traditional values of the communities who are indigenous people to a region. However, numerous legal scholars contend that GI law only serves as legislation that safeguards consumers' interests by prohibiting unfair trade practices, rather than protecting the economic interests of traditional handicraft artisans against counterfeit products. As a result, this law is not being effective in preventing misappropriation and unauthorized usage, which can also occur in the digital environment.<sup>130</sup>

For such measures to be taken, it is imperative to revise the GI Act to incorporate clear provisions addressing these challenges and problems, including the issue of protection due on intangible forms of cultural expressions.

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<sup>130</sup> T. C. James, Namrata Pathak & Apurva Bhatnagar, *In-depth Study on Protection of Traditional Knowledge, Traditional Cultural Expressions and Plant Genetic Resources* (Research and Information System for Developing Countries-RIS, 2021).

## CHAPTER 4 : EXAMINING THE ROLE OF GEOGRAPHICAL INDICATIONS IN PROTECTING CULTURAL EXPRESSIONS OF INDIA

### 4.1 Socio-cultural concerns over protection of TCEs

The demographic map of India is notable for its vast socio-cultural diversity. The existence of this diversity can be traced back to the age-old traditions, cultural practices, rituals, oral narratives and knowledge-skill systems that various communities have practiced, nurtured and expressed in a multitude of ways in India. These representations of culture in verbal or artistic forms, for instance, results in the making of a variety of cultural expressions. The Indian society is enriched by a diverse range of cultural nuances, oral and literary traditions, folk art & craft, religious practices, ceremonies and festivities that are unique to each culture of a region. This contributes to the multi-cultural social fabric of India, creating a mosaic of cultural wealth. TCEs constitute a fundamental constituent of the cultural legacy of the communities inhabiting a specific geographic area. It is regarded as the intellectual representation of the 'folklore' related to that particular set of culture and beliefs.

Even in this modern age of globalization and urbanization, elements of cultural heritage and traditional knowledge still lives in the hearts and minds of the people belonging to villages and indigenous tribal communities. The indigenous tribal culture of India is widely regarded as a significant symbol of heritage due to its various manifestations, including tribal art and craft, agricultural knowledge systems, languages, medicinal practices, and architectural designs. These cultural elements have played a crucial role in India's glorious past and have been a key component of the country's composite culture.<sup>131</sup> The '*expressions of folklore*' has two distinct creative attributes; wherein it can be tangible manifestations like jewellery, clothes, visual art-forms like cultural masks, sculpture, architectural designs; handicrafts etc., and secondly, intangible manifestations like folklore, oral and literary traditions, religious practices, folk music and dance performances among many others. Each set of expressions has its own degree of

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<sup>131</sup> Pinaki P. Baruah & Debasis Poddar, *Traditional Cultural Expressions and the Law in India* (LAP LAMBERT Academic Publishing, 2014) 67.

uniqueness and distinctiveness in itself. These cultural expressions created or produced by members of the community such as weavers, artisans, craftsmen put in much of their creativity with a blend of the age-old knowledge of production and cultural beliefs into these artistic manifestations of culture. For instance, the motifs, colorful dyes and designs of *Chakhesang* shawls from Nagaland are believed to be an ultimate combination of *Naga* traditional beliefs and the weavers' intellectual creativity, knowledge of weaving and skills.

There are complex concerns surrounding the ownership of TCEs in relation to their prospective existence in the public domain. There is a perspective that contends that private ownership of TCEs is inappropriate given their status as a component of public life. It is assumed that individuals who are not members of indigenous communities possess the right to appropriate, utilize, and obtain unrestricted access to knowledge pertaining to the folklore and heritage of indigenous people, be it tribal communities or locals of a village.<sup>132</sup> The absence of a definitive 'author' and the predominant oral transmission of knowledge are contributing factors to this issue.

Nonetheless, this presumption renders the topic of TCEs susceptible to intentional or unintentional abuse and exploitation. Third-party commercial use of a particular expression without proper attribution and recognition to its original custodians is a common occurrence. The infringement of IPRs is evident in this scenario, as the utilisation of said property is predominantly carried out without prior consent or authorization. The original custodians are excluded from the benefits derived from that specific utilisation.

However, it is pertinent that public domain does not necessarily mean 'public availability'.<sup>133</sup> This statement can be substantiated by the example of Internet, a public domain resource, but within it not all contents are 'publicly available', as there exists IP restrictions, namely copyright. In this manner, it can be argued that IP ownership of a

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<sup>132</sup> Jammalal Purohit, 'An Analytical study of Legal Regime on Traditional Cultural Expressions under Intellectual Property Rights in India' (Dept. of Law, Thesis 2020).

<sup>133</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore* (2004) 13-14 < <https://www.wipo.int/publications/en/details.jsp?id=285>> accessed on June 2, 2023.

TCE by a community does not put the public domain to risks. Instead, the inter-relationship between public domain and cultural heritage is widely appreciated to be valuable as it opens many doors for opportunities with regards to creation and development of TCEs in perpetuity. It is believed that the ‘public domain’ status will allow the nourishment of living cultural practices and further revitalize the sources of creativity and innovation for the producers of cultural expressions.<sup>134</sup>

There are several socio-cultural viewpoints regarding protection and preservation of TCEs. While some suggest striking a balance between ‘defensive’ and ‘protective’ mechanisms of protection of TCEs wherein the rights of traditional holders of knowledge and custodians are protected and there exists a scope of development and dissemination of their knowledge and cultural expressions outside their group or society. This will enhance economy, facilitate innovation and promote cultural integration and exchanges among people across the state. However, unauthorized use and acts of commercial exploitation and misappropriation of TCEs owned by members of an indigenous community should be checked upon.

The ownership of TCEs also needs to be address in regards to exclusive private ownership or ‘community ownership’ from a social perspective. IP rights are generally economically motivated private rights, like copyright and patents. However, it is important to note that TCEs are the result of communal efforts and are therefore collectively owned. Collective marks and geographical indications tags are advantageous in protecting intellectual property as they ensure the perpetual safeguarding of the IP. A dilemma exists with regard to determining the optimal intellectual property mechanism for safeguarding traditional cultural expressions and granting ownership rights to their respective owners. Furthermore, the issue pertaining to the duration of the legal protection of TCEs through a conventional IP mechanism raises queries among relevant stakeholders.

There is a debate surrounding the extent to which the safeguarding of TCEs in the public domain can be guaranteed, even after compensating the holders of such knowledge. This

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<sup>134</sup> *ibid*, 14.

issue raises questions regarding the allocation of funds collected, given the multitude of indigenous groups asserting their claims. Moreover, the administrative and operational management of these funds would pose greater challenges, necessitating the establishment of appropriate authorities for the allocation of funds to the indigenous communities.

Cultural property holds immense value for communities, regardless of whether it pertains to historical or contemporary contexts. Their worth is considered to be immeasurable. It is widely acknowledged by societies that the knowledge systems, oral or literary traditions, as well as art and folklore of a particular tribe or community are in danger of becoming obsolete in the future.

The globalization trend, urbanization, commercialization and profit-driven practices of various establishments are certain factors that pose a threat to the integrity of artistic creations and performances within the realm of art and culture.<sup>135</sup> People seek out "living traditions" with the intention of monetizing them through various means, such as producing cheap replicas of traditional cultural expressions in a synthetic form, adding minor cosmetic changes to a traditional design or utilizing intangible folklore for commercial purposes. In situations of this kind, individuals who adhere to traditional artisanal, artistic, and performance-based vocations may encounter challenges in asserting their moral and economic rights over those commercial entities, if there is no legal protection available at their disposal. Furthermore, unauthorized commercial exploitation impedes the authenticity of cultural and social identity, as people strongly identify and associate their identity with their traditional knowledge and cultural expressions.<sup>136</sup> Such instances have a negative effect on preservation and protection of TCEs and it also harms the sustainability of local, self-sustaining traditional production units at the village level which affects the degree of rural economic development.

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<sup>135</sup> Baruah & Poddar (n 131) 64.

<sup>136</sup> Jannalal Purohit, 'An Analytical study of Legal Regime on Traditional Cultural Expressions under Intellectual Property Rights in India' (Dept. of Law, Thesis 2020).

## 4.2 Legal protection of TCEs in India

The distinctive characteristics of TCE have presented complications in safeguarding it. However, the Indian laws and policies have taken noteworthy approaches and efforts to enable the adequate protection of TCEs. These approaches are discussed as in the following manner:

### 4.2.1 Role of legislations and government policies

Currently, there is no distinct legal framework pertaining to TCEs; however, the current laws in India offer a degree of protection for TCEs.

#### **The Constitution of India, 1950**

Art. 21<sup>137</sup> of the Constitution, in its liberal interpretation, grant the owners of TCEs with the protective right to life and personal liberty. Art. 29(1)<sup>138</sup> provides for the adequate protection of the culture of minorities, as a fundamental right wherein the citizens have the right to conserve their distinct forms of script, language or culture on its own. According to the provision laid down under Art. 48A<sup>139</sup> of the Constitution, it is the responsibility of the State to implement measures that guarantee the preservation and improvement of the environment, as well as to establish mechanisms that promote the protection of the nation's forests and wildlife. This provision helps in a way as the many TCEs are produced using indigenous natural substances found amidst forests of the specific region. Furthermore, the indigenous population obtains the majority of their knowledge from said natural resources.<sup>140</sup>

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<sup>137</sup> Art 21, The Constitution of India, 1950.

**“Protection of life and personal liberty.**—No person shall be deprived of his life or personal liberty except according to procedure established by law.”

<sup>138</sup> Art. 29, The Constitution of India, 1950.

**“Protection of interests of minorities.**—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”

<sup>139</sup> Art. 48A, The Constitution of India, 1950.

**“Protection and improvement of environment and safeguarding of forests and wild life.**—The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

<sup>140</sup> Baruah & Poddar (n 131) 75.

Significantly, the fundamental duty of preserving, respecting, and safeguarding the rich heritage of Indian culture is placed upon every citizen of India by Art. 51A(f).<sup>141</sup>

The Government of India has implemented various initiatives and policies aimed at safeguarding traditional cultural expressions and the rights of their holders. Some noteworthy initiatives are briefly introduced here<sup>142</sup>:

- I. ***National Mission for Manuscripts*** was established in the year 2003 by the initiative of the Ministry of Tourism and Culture with the objective of documenting, preserving, and digitizing India's extensive collection of manuscripts. These manuscripts encompass a diverse range of themes, textures, and scripts.
  
- II. ***National Mission on Cultural Mapping of India***, an initiative launched in 2017 by the Ministry of Culture, with the intent of creating a comprehensive repository of art forms and artists within the country.
  
- III. ***Indira Gandhi National Centre for Arts*** undertook a significant effort aimed at safeguarding and conserving TCEs. The report titled *Cultural Mapping of India* was produced by the Centre in collaboration with UNESCO Programme on Cultural Industries and Copyright Policies and Partnership. The report provides comprehensive information on cultural industries that require safeguarding. This highlights the significance of safeguarding traditional designs, patterns, inferences, and shapes created by communities that are subsequently assimilated into the TCEs they generate. The purpose of this safeguard is to uphold the authenticity of the created product and guarantee that appropriate acknowledgement and remuneration are duly accorded to the holders or proprietors of TCEs. The Indira Gandhi Centre has implemented measures to digitally record TCEs such as manuscripts, audio recordings, visual arts, and performances.

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<sup>141</sup>Art. 51A(f), The Constitution of India, 1950.

“It shall be the duty of every citizen of India—(f) to value and preserve the rich heritage of our composite culture.”

<sup>142</sup> T. C. James, Namrata Pathak & Apurva Bhatnagar, *In-depth Study on Protection of Traditional Knowledge, Traditional Cultural Expressions and Plant Genetic Resources* (Research and Information System for Developing Countries-RIS, 2021) 69.

#### 4.2.2 Role of intellectual property laws

**The Copyright Act, 1957**<sup>143</sup> doesn't expressly mention anything about the protection of the "expressions of folklore" that would serve the interests of indigenous communities. Even after the recent 2012 amendment, folk music, art and other forms of folklore finds no mention in it. However, some significant provisions under this Act entail such interpretations which, in some way, cater to the interests of the traditional knowledge based producers. The meaning of artistic work, dramatic work, literary work and musical work, that comes under the primary subject-matter of the copyrightable matter in the Act<sup>144</sup> subtly incorporates works which fall under the ambit of TCEs. Sec. 31A requires the granting of a mandatory license for all types of works, whether published or unpublished, regardless of the author's identity. Furthermore, Sec. 38 of the copyright law recognizes the rights of performers, whereas Sec. 57 delineates the moral rights of authors, which empower them to assert their authorship and pursue legal remedies for any acts that could potentially damage their reputation or honour, such as distortion, mutation, or modification. These provisions may additionally protect traditional cultural expressions and the rights of those who act as their custodians.

However this Copyright Act of 1957 has certain limitations as well, which can impact the safeguarding of TCEs such as; the requirement of original author's identity; limited duration of copyright protection; individualistic approach upon the grant of economic and moral rights etc. The primary concern regarding copyright protection pertains to the subject matter that falls within its purview, which typically encompasses works that exhibit original ideas and are concretely expressed in a material form. This means that unless the intangible elements of a culture is culminated into tangible medium of expression, be it in form of an artistic, literary, musical or dramatic work; copyright will not subsist and thus, there shall be no copyright protection available. For instance, oral traditions, knowledge and styles of making art and craft will be considered as ideas.<sup>145</sup>

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<sup>143</sup> The Copyright Act, 1957 (Act No. 14 of 1957).

<sup>144</sup> Sec. 13, The Copyright Act, 1957 (Act No. 14 of 1957).

<sup>145</sup> Baruah & Poddar (n 131) 80.



The **Trade Marks Act, 1999**<sup>146</sup> provides for the safeguarding of goods by means of a unique symbol or mark. The function of a trademark is to differentiate an individual's products or services from those of others, and additionally facilitate customer identification and recognition of the source of said products or services. According to Sec. 29 of the Trade Marks Act of 1999, a registered trademark for traditional products is eligible for safeguarding against any unauthorized use. Trademarks are used as markers of origin and genuineness, but these particular aspects of trademarks are inadequate in providing adequate protection for cultural expressions. There are several reasons that can be identified - Firstly, it is observed that TCEs frequently comprise of generic or descriptive terms that are traditionally used by a cultural community or society. However, in accordance with Sec. 9 of the Trade Marks Act of 1999, the legal framework governing Trade Marks does not typically recognize generic or descriptive terminologies as they are deemed to lack distinctiveness and are not capable of distinguishing one product from others. The Trade Mark Act has been formulated with the purpose of safeguarding the products and services offered by a particular seller, company or commercial establishment, and conferring upon them the privilege of exclusive rights that signify individual ownership. Nevertheless, it is common for TCEs to be under community ownership rather than being linked to individual ownership. An additional noteworthy factor pertains to the inadequacy of India's trademark law in effectively dealing with the intricate issues associated with cultural appropriation. Sec. 29 of the Trade Marks Act of 1999 pertains to the infringement of the exclusive economic rights of a trademark proprietor. This occurs when a third party utilizes a mark on their goods that is deceptively similar or identical to the trademark in question.

The significant feature of the **Patents Act, 1970**<sup>147</sup> in regards to TCE is that, under Section 3(p) of the Act, an invention that is essentially derived from traditional knowledge or comprises a combination or replication of known properties that are based on traditional practices is ineligible to be classified as an invention. Thus, the Patents Act has no scope for protection of TCEs under its framework.

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<sup>146</sup> The Trade Marks Act, 1999 (Act No. 47 of 1999).

<sup>147</sup> The Patents Act, 1970 (Act No. 39 of 1970).

**The Designs Act, 2000**<sup>148</sup> encompasses specific attributes that may prove advantageous to diverse stakeholders of TCEs and tradition-based products such as handicrafts, jewellery, handloom textiles etc. The provision concerning the definition of ‘design’<sup>149</sup> is noteworthy due to its comprehensive nature, which encompasses traditional design elements utilized by communities in the creation of TCEs such as handicrafts or jewellery. As a result, such designs may be eligible for registration under this legislation. Registration of the TCE-based design will confer copyright protection and safeguard proprietary rights for the community, which is the rightful stakeholder of the said TCE.<sup>150</sup> As per Sec. 4 of the Act, which outlines the criteria for the cancellation of a design's registration, any concerned party has the right to contest and request the cancellation of the design. This provision can potentially offer protection to designs based on traditional cultural expressions from unauthorized misappropriation by third parties.<sup>151</sup> However, the Act exhibits a deficiency in incorporating the community perspective as perceived by TCEs, and in adequately safeguarding the interests of the custodian of that cultural expression.

#### 4.2.2.1 Role of Geographical Indications

The recognition of GI confers a unique characteristic to a particular good or product, enabling manufacturers to distinguish or set apart their products from other competing goods in the marketplace, based on the geographical area of origin.

Furthermore, GIs are known to enhance the socio-economic status of the community involved in the production of the respective craft or product. Upon registration as a ‘Geographical Indication’, a product such as a handicraft item would serve three distinct functions in accordance with its registered status.

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<sup>148</sup> The Designs Act, 2000 (Act No. 16 of 2000).

<sup>149</sup> Sec. 2(d), The Designs Act, 2000 (Act No. 16 of 2000).

<sup>150</sup> Topi Baser, ‘Protection of Traditional Cultural Expressions (TCEs/Folklores) in India within Intellectual Property Rights and Beyond’ (2012) 3 JOLT-INDIA 150.

<sup>151</sup> *ibid*, 157.

They are:

- [1] Give proper identification of the goods in regards to their association to the particular place of origin or locality where it is produced.
- [2] Provide the customers with the information regarding authenticity and quality of the said product or good over others.
- [3] Promote the goods of producers of a certain region and enrich the 'value of the product' itself.

The creation of a GI right would signify that within the jurisdictions where Darjeeling Tea is safeguarded, the manufacturers of *Darjeeling* Tea, which is a product registered under the GI Registry of India, possess the authority to prohibit the usage of the term '*Darjeeling*' for tea that is not cultivated in their tea gardens or does not conform to the guidelines specified in the GI framework of India. The primary objective of the GI right is to safeguard the interests of the producers, artisans, or craftsmen involved in the production of the registered GI item. This involves preventing unauthorized individuals from engaging in the misuse, misrepresentation, and exploitative commercial use of the geographical indication. Additionally, the GI right seeks to protect consumers from fraudulent sales and counterfeit items that imitates the product, that might be based on TCEs. GI also facilitates the *bona-fide* trade whereby producers of those products (infused with the intangible cultural elements like traditional knowledge and cultural beliefs) are rewarded handsomely for their use of knowledge, skill and labor in the production. The addition of a regional-specialty element into a GI product has the potential to enhance its branding and subsequently, its marketing efficacy.

The assurance of superior quality and authenticity of products that have been granted to a registered GI product has been observed to result in favorable financial gains. There is a willingness among consumers to pay a premium for the 'place of origin' of a product. This advantage would facilitate the expansion of new markets for the particular product, thereby augmenting its commercial worth in the market. Concurrently, there has been an observation that products registered under GI law acquire widespread recognition and prestige. Furthermore, the tourism industry experiences growth in proportion to the level of demand for these products. The hosting of cultural exhibitions, festivals, and various

commercial activities in the place of origin can significantly contribute to the promotion and market recognition of a GI.

Most importantly, GIs can actually contribute to the development of the rural economy. Regional producers and artisans are benefitted from the fact that the premium brand value of a GI-registered item increases the price of the good covering up the cost of production with profit-returns. They also create local employment, avert rural exodus and bring value to the specific region. The GI-registered items give proper acknowledgement of the TK used in the making of artistic heritage products, referred to as TCEs.

The collective nature of GI rights precludes the possibility of licensing or assigning such rights. Furthermore, the protection of a geographical indication is based on the link of 'product-quality-place' which effectively prevents the transfer of the 'indication' to producers located outside the demarcated geographical region.

In addition to generating profits and improving the economic status of the region of origin, GIs also confer prestige and acknowledgement upon the associated community, thereby encouraging them to safeguard their cultural legacy. This approach can aid in safeguarding and preserving traditional indigenous knowledge and expressions from becoming obsolete. The commercial attribute of this product presents an opportunity to attract investments, funds, and financial assistance from various organizations and banking institutions, which could potentially enhance the community's interests to a greater extent. This mode of acknowledgement could potentially draw the attention of the government, facilitating a platform for artisans and producers to engage in discourse regarding their grievances and challenges pertaining to protection and preservation within the rural economy. Most importantly, the 'GI-tags' would help recognize and reward the producers who toil hard and put in their skills and knowledge in the craft inspired by their respective cultures and for investing their time and efforts in creating such a genuine and unique product.

GI serves as a safeguard or security measure for emerging economies such as India, particularly in the context of production processes taking place in rural regions where producers may be unable to allocate resources towards branding due to limited marketing

expertise, inadequate infrastructure, and limited legal knowledge. The Geographical Indication tag holds significant value in establishing brand equity for the native producers. GI facilitate and support consumers in discerning and distinguishing genuine products within the marketplace, thereby impeding the infiltration of counterfeit producers into the market and safeguarding the welfare of consumers.

To exemplify the benefits of GI in light of a TCE, we can look at the success-story of *Chikankari* craft of Lucknow, which is a traditional style of embroidery from this region. In August 2008, after this craft was registered as a GI in the GI registry of India, the Government of Uttar Pradesh was allowed to initiate legal action against any manufacturer producing *Chikan* outside Lucknow and its periphery. Approximately 1.5 million people as of now involved in the production of this handicraft in the region of eastern UP alone, churning an annual turnover of nearly INR 18,000 crores.<sup>152</sup>

An additional significant illustration that highlights the advantages of GI registration is the instance of *Kota Doria* sarees. This distinctive cultural attire is crafted by a community residing in the Hadauti region spanning across the districts of Kota, Bundi, and Baran in the state of Rajasthan. Between 1990 and 2000, there was a notable fall in the production of *Kota Doria* textiles, which can be attributed to the emergence of cheaper substitutes in the market. There has been a significant decrease in the total number of people belonging to the weaver community, resulting in rural exodus. Subsequent to the successful GI-registration of the said textile in 2005, the revenue generated from the sales of genuine handcrafted *Kota Doria* sarees escalated significantly in comparison to those manufactured using mechanized power looms. A number of young weavers who moved to urban areas in pursuit of employment opportunities have recently returned to their old cultural profession of weaving by coming back to their hometowns. The earnings subsequent to the acquisition of GI registration have tripled in the span of two years. As a result of this development, the weavers were able to engage in

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<sup>152</sup> Aishwarya Chaturvedi, 'Is Geographical Indications Sufficient to Aid to the Indian Economy' (*Managing IP* October 2018) <<https://www.managingip.com/article/2a5brqcfb83rfpjt5b0g0/is-geographical-indications-sufficient-to-aid-to-the-indian-economy>> accessed on June 10, 2023.

price negotiations with the purchasers of the *Kota Doria* textile.<sup>153</sup> In the year 2020, the power loom copies of *Kota Doria* sarees are priced between INR 250-1000 per piece. On the other hand, the handcrafted and authentic *Kota Doria* fabric, which is registered under the Geographical Indication, is available at a starting price of INR 2500-3000 per piece. Over time, there has been a rise in the quantity of looms from 1,500 to 2,500. This has resulted in the employment of approximately 3,000 weavers who collectively contribute to the overall business revenue of approximately INR 85 crore on an annual basis.<sup>154</sup>

.With the advancement in technology and growth of capitalized economy, there has been massive reproduction and commercialization of works related to culture and folklore. Frequently, the use and application of traditional knowledge and cultural expression occurs without obtaining prior informed consent from the custodians. Additionally, there is a lack of acknowledgement and reverence for the socio-cultural identity and interests of the community. Commercial establishments draw upon the reservoir of folklore within the public domain.<sup>155</sup> The increasing number of incidents involving exploitation, misuse, and misappropriation has become a growing concern. If these concerns are not attended with a legal approach, there is a high probability of harm towards the cultural and socio-economic fabric of the society.

However, it has been witnessed that GI, to an extent, has been able to mitigate some of these concerns related to misrepresentation of cultural expressions and unfair competition in India. When the Chakhesang Women Welfare Society of Nagaland initiated legal proceedings against fashion designer Ritu Beri for the alleged misrepresentation of the GI-registered *Chakhesang* shawls during a fashion show held in Faridabad; it is observed that the GI framework helped the petitioners to substantiate their claims as the law itself allows registered proprietor or the authorized user to seek redressal against infringement of a registered GI. In a separate incident Ritika Mittal, a fashion designer, introduced her latest collection named Mora, which drew inspiration from the patterns and motifs found

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<sup>153</sup> Ruchi Pant, 'Protecting and promoting traditional knowledge in India: What role for geographical indications?' (2015) IIED Working Paper. <<http://pubs.iied.org/16576IIED>> accessed on June 12, 2023.

<sup>154</sup> Aarav, 'Kota Doria – Characteristics, Process, Popularity & Challenges' (*Kota City Blog* December 5, 2020) <<https://kotacityblog.com/kota-doria/#popularity-kota-doria>> accessed on June 12, 2023.

<sup>155</sup> Baruah & Poddar (n 131) 72.

in Chakhesang shawls. The GI framework facilitated the petitioners in seeking compensation for her alleged acts of misrepresentation and false attribution of the relevant GI-registered shawls.<sup>156</sup> Here, we see that GIs have the potential to serve as a viable solution for the conservation and advancement of cultural practices rooted in old traditions.

However, the feasibility of safeguarding TCEs through Geographical Indications (GI) is a matter of concern due to the current limitation related to existing protection of only the tangible aspects of TCEs, despite the presence of both tangible and intangible elements within them. As an example, the geographical indication (GI) protection will solely apply to a traditional textile, i.e., the tangible expression that showcases folklore, fable, or religious or a tribal legend. These intangible expressions, which are the basis for the expression's creation, rooted in traditional folklore and knowledge is not eligible for protection under GI, as per the international standards, including India's present GI law. In certain cases, people may also oppose the GI registrations of certain products that might carry religious or ritualistic sentiments of people attached to it.<sup>157</sup> In such cases it is important to look upon the necessity of effectively communication of information pertaining to GI applications among stakeholders.

But there is an urgent requirement to safeguard TCEs with intangible elements under the legal framework. The commercial exploitation of cultural expressions is an ongoing trend across various industries, including music and film industries. We observe that within the Bollywood music industry, musicians or producers amalgamate popular pop music with traditional musical styles and genres such as *Bhajans*, *Kirtans* which is actually derived from diverse communities. On the other hand the traditional music in its original form is considered to be ineligible for copyright protection as it has been transmitted orally and is considered a communal asset. The loophole here is that artists can benefit from

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<sup>156</sup> Dr. Irwin Lalmuanpuii Hnamte, 'Geographical Indications Act and Cultural Appropriation in Northeast India: Scope and Analysis' (2022) 5/5 IJLMH 141-142 <<https://www.ijlmh.com/paper/geographical-indications-act-and-cultural-appropriation-in-northeast-india-scope-and-analysis/#>> accessed on June 12, 2023.

<sup>157</sup> *Subhash Jewellery, Represented by C.V. Dayanandan Sole Proprietor v. Payyannur Pavithra Ring Artisans and Development Society and Others*,

intellectual property laws by recording mixed songs and preserving them in a tangible format like cassettes and CDs.<sup>158</sup>

The researcher, in the subsequent sections of the chapter, attempts to analyze the extent and manner of GI protection that can be provided to intangible elements of a cultural expression. It addresses how communities who frequently experience insufficient or nonexistent remuneration in relation to the benefits and earnings derived from the usage of their TCEs by third-parties. In the event that geographical indication protection is deemed inadequate, what alternative measures would be most effective to address this concern, especially in India? The answer is discussed after analyzing the context and subject matter of intangible cultural heritage and nature of intangible forms of cultural expressions.

### **4.3 Intangible cultural heritage (ICH)**

In the contemporary period of globalization, it has become increasingly imperative to guarantee the conservation and preservation of cultural traditions for generations to come. The traditional focus on efforts to preserve TCEs has been on physical cultural artefacts and natural resources. However, the concept of culture cannot be reduced solely to its tangible expressions like goods and products, as it is a dynamic and ongoing process of growth and transformation.<sup>159</sup> Thus, it is important to recognize the prominence of intangible cultural expressions in the domain of cultural heritage and legacy. In recent times, there has been a growing awareness among the global community regarding the necessity and significance of safeguarding Intangible Cultural Heritage (ICH) on an international level. This has led to the initiation of a legal procedure which culminated in the year 2003 with the adoption of the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage.<sup>160</sup> After that, numerous nations have demonstrated

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<sup>158</sup> David R. Hansen, 'Protection of Traditional Knowledge: Trade Barriers and the Public Domain', (2011) 58/ 4 Journal of the Copyright Society of the U.S.A. <<https://ssrn.com/abstract=1768004>> accessed on June 12, 2023. *See also* Richard Awopetu, 'In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property', 69/4 Emory Law Journal <<https://scholarlycommons.law.emory.edu/elj/vol69/iss4/3>> accessed on June 13, 2023.

<sup>159</sup> Federico Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples' (2011) 22/1 101 <<https://doi.org/10.1093/ejil/chr006>> accessed on June 15, 2023.

<sup>160</sup> *ibid.*



commendable endeavours to incorporate intangible cultural expressions within their legal frameworks, with the objective of safeguarding them by all possible means.

The intangible elements that make up cultural heritage refer to the non-material aspects of a culture that elucidate the values, beliefs and principles of a community or social group. Preserving cultural diversity and the social cohesion of a community is of utmost importance, which can be achieved through proper recognition, legal protection and perpetual conservation of their cultural expressions and traditional knowledge. We know what constitutes ‘tangible’ forms of cultural expressions. They are basically the final physical and visual manifestations of the aforementioned knowledge. Intangible cultural heritage (ICH), on the other hand, covers cultural expressions such as traditions, beliefs, oral narratives and knowledge that are transmitted across generations. For instance, the customs, rituals, social practices, traditional art and craft, and festive events celebrated and practiced by a cultural entity can be called as the ‘intangible forms of expressions’ of a community.<sup>161</sup>

Federico Lenzerini wrote in his article<sup>162</sup> writes on how the international community began to recognize that culture extends beyond tangible products and includes intangible aspects and simultaneously began to take efforts to safeguard cultural heritage. He demonstrates how the recognition of intangible cultural heritage ultimately culminated within the international legal discourse, till the adoption of the ‘Convention for the Safeguarding of Intangible Cultural Heritage’ by UNESCO in the year 2003.

In 1972, during the course of negotiations for the World Heritage Convention, a number of delegates raised apprehensions about the convention's restricted ambit and advocated for the inclusion of intangible cultural heritage. Colombia subsequently proposed a protocol with the objective of protecting folklore under the Universal Copyright Convention. The inspiration behind the preservation of intangible cultural heritage can be traced back to countries in Asia, Africa and Latin America, where there was a strong emphasis on the importance of dynamic cultural practices. Then in 1982, the ‘Mexico City Declaration on Cultural Policies’ was released, thus providing a more

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<sup>161</sup> Purohit (n 136) 40.

<sup>162</sup> Lenzerini (n 159) 103-107.

comprehensive understanding of culture. The statement acknowledges that culture encompasses a wide range of aspects, including not only artistic and literary expressions but also patterns of living, human rights, ethical frameworks, customary practices, and ideological convictions. The notion of cultural heritage encompasses a range of tangible and intangible expressions, including language structures, musical traditions, choreographic practices, ceremonial practices, and other associated modes of expression.

In the year 1989, UNESCO adopted the ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’, recognizing the standing of folklore as component of mankind's heritage and the emphasizing its role in shaping cultural identity. The recommendation mentioned earlier emphasized the importance of protecting folklore from various forms of threat.

During the 1990s, UNESCO initiated multiple endeavors aimed at preserving intangible cultural heritage. The *Living Human Treasures* program was an important project aimed at recognizing exceptionally talented individuals who preserve customs and trades, while also facilitating the transfer of their knowledge to future generations.

In 1998, the ‘Programme of the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity’ was launched by UNESCO. The aim of this initiative was to acknowledge outstanding instances of intangible cultural heritage that demonstrated cultural diversity and made significant contributions to regional as well as global development. The selected works of art were evaluated to possess outstanding value and were subsequently included in the ‘Representative List of the Intangible Cultural Heritage of Humanity’.<sup>163</sup>

It was in the year 2003, when UNESCO finally adopted the ‘Convention for the Safeguarding of Intangible Cultural Heritage (CSICH)’<sup>164</sup>. It has been ratified by 181 countries as of now, thus reflecting the global recognition of the importance behind preservation and protection of diverse cultural heritage in all of its form, i.e., both tangible and intangible. This Convention represents the international agreement towards

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<sup>163</sup> *ibid* 106.

<sup>164</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003) UN Doc. No. 42671.

the establishment of a legal, administrative, and financial structure for the protection of ICH.

Art. 1 stipulated that its primary aim is to ensure the “*safeguarding of intangible cultural heritage*”. In this case, safeguarding (according to the Convention), entails “*identification, documentation, research, preservation, protection, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage*”<sup>165</sup>. According to Art. 2, para 2, the Convention lists the constituents of ‘intangible cultural heritage. They include the following.<sup>166</sup>

*“(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.”*

The development of an international statute on ICH highlights that the preservation of ICH is a crucial element in safeguarding our cultural diversity; as in recent times, several kinds of expressions and manifestations of ICH are at risk of being compromised due to the effects of globalization, extensive commercialization and homogenization of culture. Some other factors may include insufficient support, recognition, and the lack of knowledge from people and authorities. Otherwise, the neglect towards ICH may result in permanent loss or the confinement of its practice (such as creation of folklore) to a bygone era.

#### 4.3.1 ICH and GI – The crossroad

The elements of ICH are synonymous with the contents of intangible forms of TCEs. The interplay between TCEs and the law of GI has already been discussed in the previous chapters. It says that cultural expressions may qualify under the ambit of GI protection only when they are in tangible forms, such as ‘handicrafts’ and possesses all the

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<sup>165</sup> Art. 2, para 3, Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003) UN Doc. No. 42671.

<sup>166</sup> *ibid*, para 2.

necessary qualities and characteristics attributable to the geographic region, human and natural factors including socio-cultural heritage of that region. Hence, it is suggested that GI may not be an appropriate means to safeguard cultural expressions such as oral traditions, social practices, performances, rituals, and festivities, as 'geographical indications' itself. One noteworthy aspect is that the law governing GI offers protection to goods, as long as there is a continued existence of the unique link between the cultural expression and the geographical place of origin. Typically, intangible cultural aspects, such as customary production techniques, oral traditions, religious and cultural rituals or traditional artisanal skills linked to a particular geographic region, can be manifested in a tangible form of TCE, thereby conferring a distinct identity to the product and enabling its recognition as a GI.

Hence, it is implied that intangible elements of a product, which are crucial to its production or cultural identity, may be safeguarded together with that tangible product as a component of a GI. Thus, GI protection is indirectly provided to the ICE through the product. Some relevant examples of this approach can be found in regional GI laws such as the GI laws of Japan,<sup>167</sup> Indonesia<sup>168</sup> and Thailand.<sup>169</sup> In Japan, the scope of GI protection has been extended to “*non-edible agricultural, fishery or forestry products and products manufactured or processed using agricultural, forestry and fishery products*”<sup>170</sup> with a view to include the processed or manufactured products within the GI ambit in order to recognize, embrace and accept the knowledge, abilities, and techniques required to convert non-edible agricultural, forestry, and fishery resources into goods.<sup>171</sup> Similar to several nations that have ratified the TRIPs Agreement; Indonesia and Thailand also provides in their respective GI laws that ‘handicrafts’ embodying ICH can be protected as a registered GI. The importance of registering or submitting details of the characteristics of GI product or good in light of its uniqueness, historical significance and

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<sup>167</sup> Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs, 2014 (Japan).

<sup>168</sup> Trademark and Geographical Indication Law No. 20 of 2016 (Indonesia).

<sup>169</sup> Geographical Indication Protection Act, 2003 (B.E 2546) (Thailand).

<sup>170</sup> Art. 2, Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs, 2014 (Japan).

<sup>171</sup> Steven Van Uytsel, ‘When Geographical Indications Meet Intangible Cultural Heritage: The New Japanese Act on Geographical Indications’ in Irene Calboli & Wee Loon Ng-Loy (eds.) *Geographical Indications at the Crossroads of Trade, Development, and Culture* (Cambridge University Press 2017).

cultural elements associated with the region signifies that these intangible elements are important for GI-registration. Therefore, the only possible way to enhance the protection of ICH or intangible forms of cultural expressions (ICEs) through the law of GI is to register more categories of products that are essential components of oral tradition or a socio-cultural practice. An approach to broaden the definition of handicrafts is to incorporate terminology such as "products linked to cultural customs and traditions." This inclusion would expand the scope of handicrafts and enhance the definition. This will also ensure that that culture is preserved within the members of a community hailing from a particular community along with the know-how, skills and production techniques associated with the registered GI. Once the product is registered as the GI, these intangible elements will add to the authenticity of products and subsequently allow the producers to procure higher prices for their traditional good. Moreover, the act of awarding intangible cultural heritage through GI-tagged products empowers the community to exercise agency and authority over their cultural heritage. This enables them to dictate how the intangible aspects of their traditional cultural expressions are showcased, presented, performed and disseminated to a wider audience.

Nevertheless, there are some notable drawbacks to the registration of ICE as a GI. There is a growing concern regarding the potential increase in commodification and commercialization of cultural expressions. In order to satisfy market demand, there is a possibility that intangible cultural expressions may be misrepresented by being placed on products that are associated with contexts other than their original purpose. Over time, this phenomenon has the potential to erode the cultural significance and authenticity. An example of this phenomenon is the incorporation of ritualistic paintings and symbols into products that are not typically associated with religious purposes. The distortion and potential harm to the reputation of the cultural heritage cherished by the community can occur in such cases.

GI protection may inadvertently result in the exclusion of specific individuals or communities that possess their own unique variations or interpretations of the customary elements embodied in the product. It has the potential to exclude or marginalize individuals who do not conform to the established norms, which could result in the

disregard of a variety of intangible forms of cultural expressions within the community. This eventually will alter relationships those people have with their form of TCE.

Therefore, it is essential that we consider and address both the positive and negative sides to the use of GI as a protective measure to preserve intangible elements in a tangible form of cultural expression. There must be a balance between the acts of preservation of cultural authenticity with the benefits of GI protection and promotion. To achieve this, there is a need of thoughtful and inclusive strategies.

#### **4.4 North-East India and its TCEs – GI perspective**

North-East India (NEI) commonly referred to as the ‘Land of Seven Sisters’, is an intriguing place. NEI is connected to the rest of mainland India solely through the ‘Siliguri corridor’ (in West Bengal), which spans a distance of 22 kilometers and is commonly referred to as the ‘Chicken's Neck’.<sup>172</sup> NEI includes seven states, specifically Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. To its addition, Sikkim is the newest addition to this region (the 8<sup>th</sup> state) and is popularly acknowledged as the ‘brother’ of these seven states.<sup>173</sup> This geographical region has served as a convergence point for multiple cultures, faiths, and societies. This region is characterized by ethnic diversity and heterogeneity, with a total of 209 tribes and 192 distinct languages and dialects.<sup>174</sup> The region in question exhibits a high degree of linguistic and ethical diversity, relative to other areas in Asia.

The North-East region of India is widely recognized for its diverse cultural heritage and unique traditions, which are demonstrated through a wide range of artistic expressions, musical performances, dance styles, handicrafts, ceremonial practices, festivals, and culinary practices. Each state houses multiple indigenous communities who has their distinct cultural identity and practices and thus, the NEI perspective on TCEs is found to

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<sup>172</sup> ‘Introduction of North East’ (NEZCC, Ministry of Culture, Government of India) <<http://nezccindia.org.in/About/Introduction>> accessed on June 15, 2023.

<sup>173</sup> ‘History of North-East India’ (INDIAN CULTURE) <<https://indianculture.gov.in/north-east-archive/history-north-east>> accessed on June 5, 2023.

<sup>174</sup> NEZCC, (n 172).

be deeply rooted in the cultural identity and lifestyles of people from these indigenous communities.

The noteworthy feature of traditional cultural expressions (TCEs) originating from the NEI region lays in the amalgamation of centuries-old customs with modern-day lifestyle practices. The indigenous tribal or local communities in this region have adeptly conserved their heritage while simultaneously accommodating the influences of the modern world. People exhibit a willingness to embrace innovative ideas and novel creations into their traditional cultural expressions in order to enhance the dynamic socio-cultural milieu of the area. The visual art forms of NEI are renowned for their uniqueness and liveliness, with variations in style and presentation observed across diverse communities. For instance, the bamboo and crane craft of Assam, the wood carvings of Manipur, and the Thangka paintings in Arunachal Pradesh are some of the notable examples. Cultural expressions are utilized as a medium to portray or recount the stories, historical chronicles, and socio-religious beliefs of a particular society.

The communities within this region possess distinct customs pertaining to musical, theatrical and dance expressions. Various forms of musical and choreographic expressions, such as the Bihu dance in Assam<sup>175</sup> and the Thang-ta martial arts dance in Manipur<sup>176</sup>, hold significant cultural value and serve as integral components of communal celebrations, ceremonial customs, and storytelling traditions. These expressions of folklore tend to convey emotions, portray heritage and promote social cohesion amongst the members of their communities. The region of NEI is renowned for its multifarious rituals, religious practices, and festivities that are observed throughout the year. The cultural festivities serve to cultivate a shared sense of identity, thereby constituting an essential component of the indigenous communities' extensive cultural heritage and legacy. These events offer a medium for individuals to showcase their socio-

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<sup>175</sup> The *Bihu* dance is a folk dance from the Indian state of Assam related to the festival of Bihu. This dance form is characterized by brisk stepping, flinging and flipping of hands and swaying of hips represents youthful passion. See 'Bihu Folk Dance of Assam' (*Pushpanjali*) <<http://www.indianfolkdances.com/bihu-folk-dances-of-assam.html>> accessed on June 16, 2023.

<sup>176</sup> *Thang Ta* - is an ancient Manipuri Martial Art developed from the war environment of Manipur & created by the Meitei. It is ritual in nature and related to tantric practices. It is a performance involving sword and spear dance which is later converted into fighting practices. See 'Thang Ta - the Martial Art Dance of Manipur' (*Ok! NorthEast*) <<https://www.oknortheast.com/2010/12/thang-ta-martial-art-dance.html>> accessed on June 16, 2023.

cultural practices through various artistic expressions such as music, dance, and other performances.

The NEI perspective regarding TCEs places significant emphasis on the imperative to preserve, protect, promote, and socially recognize them. Indigenous communities strive for the preservation of their cultural heritage and reject any attempts by individuals outside their social group to denigrate or malign it, recognizing that it is not merely a source of entertainment or artistic pursuit. The TCEs are considered to be of great importance and sacredness to the individuals involved. The various forms of TCEs serve as the foundation for their creative output, as well as their sense of identity and harmony.

Therefore, in order to mitigate the risk of exploitation and misappropriation of their culturally significant knowledge, it is imperative to implement measures that facilitate preservation as well as safeguarding of TCEs. Additionally, it is crucial to provide avenues for socio-economic empowerment for individuals whose livelihoods are dependent on the production of these TCEs. The researcher, hence, in this sub-chapter highlights how GI as an IP tool plays a significant role in this regard.

It has been rightly established that GI facilitates the protection and preservation of TCEs. A GI-registered TCE is provided with a legal recognition as they are regarded to be unique products associated with a specific geographical region, thus ensuring the others about its authenticity and quality. The benefits of GI registration further assists in enhancing the commercial visibility as well as viability of these cultural expressions.

In light of this statement, the researcher in this sub-chapter will discuss few TCEs from NEI that has flourished in all aspects after the GI-registration. To maintain equitable representation, the researcher will present one example/ case study of a TCE from each of the 8 states that are already registered as GI and also, it will demonstrate few cultural expressions that are intangible forms of expressions which has utmost potential to be a GI, owing to its innate characteristics and qualities similar to that of a GI. These examples will analyze the link between GIs and ICEs and it will look into the possibility and benefit(s) of incorporating such expressions into the ambit of GIs in India.



#### 4.4.1 Case studies on successful GI registered TCEs

This section will mention significant TCEs such as handicrafts and textiles (which already comes under the ambit of the definition of a GI in India), from the states of NEI which are registered under GI Registry in India. However, it to be noted that states like Meghalaya, Tripura and Sikkim have no handicrafts or textiles registered as GIs to its name (as of 2023).<sup>177</sup>

Therefore, the relevant TCEs to be discussed here are: *Idu Mishmi* textile (Arunachal Pradesh), *Gamosa* (Assam), *Shaphee Lanphee* (Manipur), *Mizo Puanchei* (Mizoram) and *Chakhesang* Shawl (Nagaland)

##### [1] **Idu Mishmi textile/ handloom (Arunachal Pradesh)**

This textile, generally woven by women belonging to the Mishmi tribal community is a prized possession symbolizing their heritage and culture. It features knitting and sewing patterns that are associated with the folk culture of the *Mishmi* tribe, which is indigenous to the state of Arunachal Pradesh. The textile design integrates the traditional observations of natural elements made by the local community. According to the *Mishmi* community, the inspiration for the design of this textile has been derived from their revered spiritual entity, *Asi-manyolimili*.<sup>178</sup>

The ‘Idu Mishmi’ Textile is a type of handwoven fabric that serves as traditional attire for the *Idu Mishmi* tribe. It is typically worn by men in various styles such as *Atomajoh* and *Eton-dre*. The attire for women typically comprises of two distinct garments, namely the *thuma* which is worn below the waist, and the *etopolo* which is worn above the

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<sup>177</sup> ‘REGISTRATION DETAILS OF GEOGRAPHICAL INDICATIONS’ (Office of the Controller General of Patents, Designs & Trade Marks, Dept. of Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Govt. of India)  
<[https://ipindia.gov.in/writereaddata/Portal/Images/pdf/GI\\_Application\\_Register\\_List\\_22-05-2023.pdf](https://ipindia.gov.in/writereaddata/Portal/Images/pdf/GI_Application_Register_List_22-05-2023.pdf)>  
accessed on June 16, 2023.

<sup>178</sup> Prof. (Dr.) VK Ahuja and others., *Handbook on the Geographical Indications (with special focus on North-East Region)* (DPIIT-IPR CHAIR, NLUJAA 2022) 64.

waist.<sup>179</sup> It is produced locally by the members of the tribal community from their natural resources.

The textile has intricate designs which consist of different shapes and motifs. People from this tribe are skilled in the art of weaving which is a traditional form of weaving involving steps like winding the hank of raw material into yarn balls with the use of hands; preparing colours of the yarn ball; setting up hand looms to spin the yarn and weave the cloth according to size and requirements of the garment. The transfer of knowledge pertaining to the making of thread and the creation of intricate patterns through weaving was traditionally an oral tradition that was passed down from one generation to the next. Yet, the weavers and their community have assimilated the preconceived concept of their textile's warp plan, bands, pattern yarns, border yarns, and other elements. They have refined their approach to transform their conceptualized ideas into these textile designs.<sup>180</sup> Therefore, these textile designs are unique since they are intellectually manifested with a mixture of traditional and geometric elements.

Therefore, due to its uniqueness and authenticity, the Idu Mishmi textile was granted the Geographical Indication (GI) tag in 2019. Post GI-tag, the Idu Mishmi textile has emerged as a brand and weavers produce bag, purses, coats along with the traditional market which is extensively sold in the Indian market. These products bear the genuine 'Idu Mishmi' logo that ascertains its authenticity.

## [2] **Gamosa (Assam)**

The *Gamosa* is a culturally and socially significant artefact in Assam, symbolizing the indigenous heritage of the area. Consequently, the state has acknowledged it as a Traditional Cultural Expression (TCE). The *gamosa* functions as a tangible representation that depicts the diverse elements of a traditional discourse. *Gamosa* as a textile is a handwoven fabric that showcases intricate designs, traditionally produced by women artisans from the region of Assam. It is noteworthy that the manufacturing process of this textile is not constrained by factors such as religious beliefs, social class,

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<sup>179</sup> Government of India, 'Geographical Indications Journal No. 121 – Idu Mishmi Textiles' 35-36 (Geographical Indications Registry, 2019).

<sup>180</sup> Ahuja and others (n 178) 58.

or tribal association.<sup>181</sup> The practice of weaving is commonly associated with women, who have historically inherited and transmitted this traditional knowledge across generations.

The use of *Gamosa* is multifunctional and it is used in an Assamese household in their day to day lives. While it is primarily used as a shawl or a scarf, the literal meaning of the word 'Gamosa' translates to towel or a loincloth. However, every type of *gamosa* has its own set of designs and motifs, meant to be used in different occasions. Significantly, this piece of fabric is used in socio-religious festivities and ceremonies and also presented to elders, respected individuals and guests as a gesture of reverence and admiration.<sup>182</sup>

This has been a customary practice in Assam since time immemorial. *Gamosa* is used extensively during Bihu festivals. The Assamese community identifies their culture and heritage with *Gamosa* and it has emerged as a cultural symbol of the state. The *Gamosa* is a clothing artefact that features intricate red embroidery on a white woven cloth. This piece of art serves as a canvas for weavers to express their artistic abilities and creativity through the incorporation of various motifs.<sup>183</sup> The *Gamosa's* artistic and aesthetic value contributes to its economic value, as it is a sought-after item in the market. In this way, the *Gamosa* has become an integral aspect of the daily lives of the people residing in this region.

The GI Registry has recently (in December 2022) conferred the GI status upon Assam's *Gamosa*, in accordance with the year of application filing, which was 2017.<sup>184</sup> Prior to this GI tag, it was observed that Assam despite being the hub of handloom weavers and artisans, were not able to produce enough *gamosa* to address the market demand. The indigenous market experienced an infiltration of imported *gamosa* that were composed of

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<sup>181</sup> Trideep Borsaikia & Arunima Kalita, 'Scope for Branding Dora Baran Gamosa Through Intellectual Property Rights and Technology' (2022) Tezpur University Research Paper <<https://ssrn.com/abstract=4086261>> accessed on June 16, 2023.

<sup>182</sup> Akanksha Agnihotri, 'Gamocha, a symbol of the culture and identity of Assam receives GI tag' *Hindustan Times* (India, December 14 2022) <<https://www.hindustantimes.com/lifestyle/art-culture/gamocha-a-symbol-of-the-culture-and-identity-of-assam-receives-gi-tag-101671004759003.html>> accessed on June 16, 2023.

<sup>183</sup> 'Gamocha' (*Assam Info*) < <http://www.assaminfo.com/culture/1/gamocha.htm>> accessed on June 16, 2023.

<sup>184</sup> Agnihotri (n 182).

substandard material and featured imitations of the designs and motifs that are typically associated with the Assamese *Gamosa*. The absence of incentives and low revenue for the genuine weavers resulted in a decline in the overall production process. The weavers harbored apprehensions regarding the value of their expertise in the handloom weaving of this particular textile. Consequently, in order to cater to the demands of the market, they turned to the utilisation of machine-manufactured or synthetically produced *gamosas*.

The GI tag facilitated the adoption of the '*Gamosa* logo' as a branding strategy for the weavers' merchandise, thereby enabling them to restore their previously diminished reputation and recognition within the market. The GI tag has conferred a distinct identity upon the weavers, enabling them to be recognized as 'authorized users' and affording them legal safeguards against the unauthorized exploitation and misappropriation of their cultural heritage and identity. Weavers rejoice as they now believe the GI tag will check on the presence of cheaply imitated 'duplicate' *Gamosas* imported into the market. Customers will benefit from the GI tag on *Gamosa* as they will not be duped to buy these illegal products sold to them under the guise of Assamese '*Gamosa*'. Now, the weavers will be empowered as they now will receive good revenue as well as investments from government and third-party organizations who are working for the benefit of these weavers, locally called as '*xipini*' due to the unique branding of *Gamosas* offered by GI-tag.<sup>185</sup>

### **[3] *Shaphee Lanphee* (Manipur)**

The *Shaphee Lanphee* is a traditional cloth that is intricately woven and embroidered by the native Meitei women of Manipur. It holds a significant position as one of the distinguished Geographical Indications of the NEI. This traditional fabric is worn as a shawl since ages, and has it features ten distinct handcrafted motifs embroidered with cotton threads. The artefact is distinguishable by its distinctive black backdrop complemented by red borders. On occasions, it is bestowed upon warriors by the Meitei kings as a symbol of honor, esteem and reverence.<sup>186</sup> The textile exhibits a systematic arrangement of decorative motifs at uniform intervals, which signifies the association

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<sup>185</sup> Borsaikia & Kalita (n 181) 5.

<sup>186</sup> Ahuja and others (n 178) 105-106.

between the celestial entities and the king of the Meitei community. Furthermore, they function as symbolic depictions of parental figures. The floral motif located at the center of the item holds symbolic significance as it represents the Sun.<sup>187</sup> Interestingly; the motifs in this fabric are handmade using precise needlework. The entire production technique is in itself a unique one. Historically used as a type of shawl, nowadays it is also popularly worn as a waist coat with synthetic lining and also has been exported abroad as a garment.

The *Shaphee Lanphee* was granted the GI tag in the year 2014. The Govt. of Manipur, registered more than 1000 weavers as ‘authorized users’ during filing of the application and now, these authentic wear bear fruits of their intellectual labor and strive to be empowered to preserve their knowledge and culture associated with this fabric.

The establishment of an ‘Inspection Committee’ by the Manipur Government, consisting of officials from the Department of Handlooms and Textiles and other relevant stakeholders, has been a direct result of the implementation of Geographical Indication (GI) protection. The primary aim of this committee is to ensure the preservation of quality standards and promote the ethical utilisation of the "*Shaphee Lanphee*" GI tag.<sup>188</sup>

#### **[4] Mizo *Puanchei* (Mizoram)**

This textile is a type of shawl usually worn by women from the Mizo community. It bears exquisite designs and decorations. This garment is designed as a wrap-around dress that is secured by folding it down at the waist, thereby providing coverage for the lower half of the body. Typically, the dimensions of the fabric measure 65 inches in length and 45 inches in breadth. Women wear a blouse known as *Kawrchei* that features the design of *Puanchei* at the center front in a wide panel and at the sleeves, to complement the *Puanchei*.<sup>189</sup>

Artisans while weaving this shawl incorporate designs using cotton yarns (spun by hand as well) which are produced in handlooms; and thus, the name of this cloth is called

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<sup>187</sup> *ibid.*

<sup>188</sup> Ahuja and others, (n 178) 114-115.

<sup>189</sup> *ibid.*, 146.

*Puan*. Mizo Puanchei is woven in three pieces with the middle being the narrowest.<sup>190</sup> The uniqueness of Mizo Puanchei is predominantly ascribed to its planning and execution, in terms of design and production process. This particular handloom textile is widely recognized as the most vibrant among all the Mizo textiles. The Mizo Puanchei employs a specific palette consisting of seven unique hues, including red, green, blue, pink, yellow, black, and white. The *Puanchei* textile is produced through a meticulous weaving process that guarantees the concealment of all the pigmented yarns situated on the warp against the black and deep red woolen stripes.

The weaving art known as Puanchei is commonly acknowledged as the most outstanding artistic expression of Mizo women, owing to its inherent requirement for mastery in the areas of weaving, design, and color coordination. This clothing is worn by Mizo women during traditional festivals, weddings, and especially during the *Cheraw*<sup>191</sup> dance.

For these unique reasons, this clothing was recognized as a GI of Manipur in the year 2019. Post GI registration, the weavers of the community producing this particular clothing has been enrolled as ‘authorized users’. The Govt. of Mizoram established an ‘Inspection Committee’ who is tasked to monitor, review and maintain the quality of *Mizo Puanchei* textile.<sup>192</sup>

#### **[5] *Chakhesang Shawls (Nagaland)***

The members of the *Chakhesang* tribe of Nagaland produce this piece of clothing (textile) in the districts of Phek, Kohima and Dimapur situated in Nagaland. The donning of this specific attire bears socio-cultural significance among the community, as it is exclusively designated for significant events such as celebrations, rituals, and weddings.

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<sup>190</sup> ‘Mizo Puanchei - G.I-583’ (*Art and Culture Dept., Mizoram* August 16, 2021) <<https://mizoculture.mizoram.gov.in/page/mizo-puanchei-gi-583>> accessed on June 17, 2023.

<sup>191</sup> The Cheraw or bamboo dance is a traditional dance of Mizoram. In this dance form, bamboos are kept in horizontal or cross formation on the ground. Pairs of these bamboo staffs are held by six to eight people. The male dancers move these bamboos to a rhythmic beat while the female dancers move gracefully while stepping in and out of the bamboo formations. See ‘Cheraw: Bamboo Dance’ (*INDIAN CULTURE* May 4, 2017) <<https://indianculture.gov.in/video/cheraw-bamboo-dance>> accessed on June 17, 2023.

<sup>192</sup> Ahuja and others, (n 178) 155.

The shawls are adorned with motifs that hold significant cultural significance for the individuals belonging to this specific tribe.<sup>193</sup>

These shawls are predominantly woven by women in this community who pass down their knowledge of weaving and sewing to their daughter especially, from one generation to the other. These shawls are colorful, vibrant and have unique set of designs and patterns which also incorporates motifs inspired from local / folk culture of the tribe. These shawls portray different socio-cultural meanings as well. For instance, the *Thüpi khü* shawls, a variant of *Chakhesang* shawls, are gifted to the individuals who hold the highest honor in the tribe, as it symbolizes valor, strength and wisdom.<sup>194</sup> These shawls are prepared using cotton and other natural fibers found in the region as well as dyed using natural coloring substances. The *Chakhesang* community exhibits a profound understanding of the materials employed in the weaving craft, which is also endemic to the geographical areas where the ethnic group is located. The styles, mode of production, use of cultural symbols, patterns and designs etc., makes *Chakhesang* shawls unique and aesthetic. Hence, in the year 2017, the *Chakhesang* shawls obtained the GI tag under the aegis of *Chakhesang Women Welfare Society (CWWS)*.

Interestingly, in the year 2020, a legal action was initiated in the District Court of Phek, Nagaland, wherein a fashion designer named Ritu Beri and the Tribal Co-Operative Marketing Development Federation of India Ltd. (TRIFED), which operates under the Ministry of Tribal Affairs, Government of India, were accused of violating the registered Geographical Indication Tag (GI Tag). The plaintiff (CWWS) sought compensation for the alleged infringement.<sup>195</sup> In this case, the defendant, who is a fashion designer allegedly, organized a fashion show with the collaborative efforts of TRIFED in Haryana at the *Suraj Kund Mela* wherein the *Chakhesang* shawls were being misrepresented. The shawls which were GI-registered carried utmost cultural and social significance to the community as well as the GI protection enabled the ‘authorized users’ from the weaving

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<sup>193</sup> *ibid*, 176.

<sup>194</sup> Rovimeno Hoshi, ‘The Story a Shawl Tells’ (*Literary Journalism Blogger*, December 3, 2018) <<http://literaryjournalism18.blogspot.com/2018/12/the-stories-shawls-tell.html>> accessed on June 17, 2023.

<sup>195</sup> RK Dewan & Co., ‘Chakhesang Shawls woven into a suit?’ (*LEXOLOGY* October 2, 2020) <<https://www.lexology.com/library/detail.aspx?g=8cda64dd-af45-4b67-bd34-fab6cdeda511>> accessed on June 17, 2023.

community to prevent its use and sale by third-parties in an unauthorized manner. CWWS claimed that the portrayal of the shawls in the alleged *Mela* was an unauthorized action it ‘mocked’ the traditional culture of the tribe and therefore, the plaintiff claimed damages on grounds pertaining to wrongful use and misrepresentation of a registered GI. Pursuant to this, the District Court acknowledged the gravity of the situation and issued summons to both of the defendants to file written statements.<sup>196</sup>

Thus, we see that the registration of *Chakhesang* shawls as a GI indeed provided the necessary legal protection to the authentic stakeholders against misrepresentation and unauthorized use. Had there not been a registration of these shawls in the GI Registry of India, it would have been a difficult situation as the weavers would not have been able to claim their rights or even file a suit.

#### 4.4.2 Intangible forms TCEs in NEI – Examining the extent of GI protection

It is evident that GI law is conventionally associated with tangible products. The previous section expounded on how the cultural and traditional heritage of indigenous communities hailing from the NEI region has been improved through the GI-framework which facilitates the protection of the tangible elements of TCEs against unfair trade practice, misappropriation or public misrepresentation. However, one should not neglect the significance of the socio-cultural elements that inspired the creation of the tangible product.

The history and knowledge of the community from that specific geographical is itself rooted in that product which shaped the nature of the expression and additionally attribute it as unique and culturally significant. Significantly, we have known so far that the elements of traditional knowledge, tradition and history of a community gives shape to certain expressions like songs, dance or theatrical performance that members of the indigenous social group associate with their cultural legacy. Intangible forms of TCEs can be said to be those TCEs which embody the different skills, knowledge, practices, and expressions associated with the native people of the communities, thus forming part of the intangible cultural heritage of a community. These expressions are passed down

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<sup>196</sup> *ibid.*



from generations to generations orally. We see that the relationship between intangible cultural heritage (ICH) and GI has been debated over a long time. On one hand, scholars have advocated for the perspective that GI and ICH are fundamentally distinct from one another. On the contrary, academic experts have expressed their viewpoint that GIs may potentially have a favorable impact on ICH.

However, the pertinent question at hand is that how far can TCEs in intangible forms be protected under the GI regime. To examine the extent of GI protection applicable in context of intangible TCEs, few illustrations from the NEI region of India will be considered and analyzed.

*Bhaona* represents a traditional theatrical style that originates from the state of Assam. This form of performing art is renowned for its detailed shows that vividly depict sacred narratives and mythologies. *Bhaona* is a multifaceted art form that encompasses various elements such as music, dance, and theatrical narratives. The cultural performance is renowned for its ability to showcase the Assamese people's spiritual devotion and captivate spectators through intricate stagecraft, vibrant costumes, and appealing storytelling techniques. Generally it is a practice performed by the people belonging to the *Vaishnavite* culture, and this has emerged as an integral cultural expression of the religious character of the Assamese *Sattriya* tradition.

Mythological tales that are centered on the adventures and tribulations of various mythological characters form the crux of this theatrical drama, and as an ode to the characters themselves, the actors who partake in the dramatic expression of these tales wear vivid and vibrant masks and costumes to depict their characters. Without the specificity of the masks being used in this form of theatre; the *Bhaona* loses its character and significance. According to Assamese folklore, the first masks were introduced in the region of Majuli (predominantly known as the hub of *Sattriya* tradition in Assam) and used by the great saint of *Vaishnavism*, Mahapurush Srimanta Sankardev himself in his 'one-act theatre' titled *Cihna Yatra* (1468). This historical significance makes the masks, locally known as '*mukha*', an integral essence of the socio-religious heritage of the

Assamese community, passed down among its people over generations.<sup>197</sup> Likewise, the *Monpas* residing in Arunachal Pradesh exhibit a prevalent custom of designing masks. These masks made of wood and natural fibres are employed in different forms for diverse cultural activities, including folk singing and dancing performances, as well as storytelling.<sup>198</sup> The cultural tradition prevalent in Arunachal Pradesh, which involves the performance of dance and narration, is commonly referred to as *Aji Lhamu*.

*Aji Lhamu* involves the act of narrating mythical and mythological stories that are part of their socio-religious history. It holds significant cultural value in the state of Arunachal Pradesh. The *Monpa* tribe engages in this form of ‘performing art’ that combines elements of choreography and theatre. The performers employ masks made with vivid and descriptive elements; use captivating storytelling techniques and an enchanting fusion of musical and choreographic elements to fully engage the spectators in the culturally significant past of Arunachal Pradesh.<sup>199</sup> It can be argued that the masks that are native to the cultural heritage and customs of the *Monpas* in Arunachal Pradesh constitute a crucial component of the *Aji Lhamu* practice, which represents a form of intangible expression.

In Manipur, an ancient martial art is practiced and performed by the *Meitei* community over generations called as *Thang-Ta* (literally translates to ‘sword’ and ‘spear’). The performing art is a fusion of martial and spiritual elements that have been nurtured within the socio-cultural consciousness of the Manipuri community.<sup>200</sup> The practice involves the use of rhythmic music, techniques of swordsmanship, spear handling, and combat strategies and it is performed by members of the community to honour the history of Manipur’s warrior culture.

In Meghalaya, the *Wangala* festival is popular among the *Garos*. This *Wangala* Festival is a traditional celebration that commemorates the harvest season and pays homage to

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<sup>197</sup> Saswati D. Bordoloi, ‘The Mukha: The Mask Tradition of Assam with Special Reference to Samaguri Sattrā’ (2020) 2/1 CULT. SYNDR 27 <<http://dx.doi.org/10.30998/cs.v2i1.267>> accessed on June 18, 2023.

<sup>198</sup> Sonam Tsering ‘Brief Introduction on Artform’ (Dept. of Art & Culture, Tawang District, Govt. of Arunachal Pradesh) <<https://tawang.nic.in/art-culture/>> accessed on June 18, 2023.

<sup>199</sup> *ibid.*

<sup>200</sup> ‘Thang-Ta Martial Art of Manipur’ (IGNCA) <<https://ignca.gov.in/divisionss/media-centre/outreach/published-dvds/thang-ta-martial-art-of-manipur/>> accessed on June 18, 2023.

‘Saljong’, the deity associated with fertility and the sun. The festivity also known as ‘100 Drums Festival’ encompass dance performances wherein individuals of diverse age groups adorn themselves with vibrant attire and don feathered headgear as they execute synchronized movements in response to the rhythm produced by oval-shaped drums. During this festival, men engage in musical performances utilizing a variety of instruments such as drums, gongs, and flutes, including a rudimentary buffalo horn flute that produces sonorous harmonies. The *Wangala* Festival serves as a means for the Garo community residing in Meghalaya to conserve and promote their distinct cultural heritage. The exhibition displays the cultural practices and traditions of the area.<sup>201</sup>

If we examine the extent of GI protection in these expressions, we find that the handicrafts and textiles associated with these intangible forms of expressions can be recognized as a potential GI. For example, the masks or ‘*mukha*’ used in *Bhaonas* and *Ankiya Nats* in Assam by the *Sattriya* performers can be protected under GI, as they exhibit the potential to be one. It has a solid case of GI recognition owing to the unique socio-cultural attributes of this handicraft. The acknowledgement of *mukha* as a GI serves to safeguard the socio-cultural facets linked to the mask, encompassing the artistic and technical aspects of mask production that have been passed down orally through generations within the community. Additionally, the *Sattriya* tradition will be conserved in the long run through the GI-tagged mask. The cultural story-telling tradition of *Aji Lhamu* in Arunachal Pradesh through the use of ‘wooden masks’ depicting different mythical and mythological characters is unique in itself. Therefore, the GI recognition of masks will eventually protect and preserve this indigenous cultural expression of *Aji Lhamu* practiced by the Monpas. The headgears, clothing attire, items used in the martial art practice of *Thang-Ta*, if they exhibit attributes that can meet the requirements of a GI; then this tradition will be preserved along with such good. Moreover, if the martial art practice of *Thang-Ta* is depicted in textiles and other handicrafts; then it should be maintained that there is no cultural misappropriation. In similar lines, the handicrafts, jewellery, textiles etc. which are essential components of the performances associated with the *Wangala* festival can be protected and preserved through GI recognition.

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<sup>201</sup> ‘Wangala – The 100 Drums Festival of Meghalaya’ (Govt. of Meghalaya) <<https://meghalaya.gov.in/wangala>> accessed on June 18, 2023.

#### 4.5 Analysis of *sui-generis* law as an alternative option

According to *Oxford English Dictionary* (2<sup>nd</sup> Edition, 1989) the phrase '*sui generis*' means "of its own kind" and is generally used to denote or refer to unique or distinctive characteristics. In the legal sense, when used in the context of protectionist measure, it is a specific or individualistic system which has been formulated or which has been tailor made to apply or be accommodative of certain special attributes that may need protection. A discussion in this regard *vis-à-vis* TCE means that a *sui generis* system would inadvertently cause the formulation of a specific and special legal framework that would address the needs and concerns of the particular TCE in question, and these protections would be afforded over and above the protections that are provided by the traditional regime of intellectual property (IP). In other words, a *sui generis* protection to the TCE regime would lead to the levying of an alternative system of protection which is separate from the protectionism offered by the formal system of intellectual property rights within that legal system.

The pioneer of utilizing *sui generis* methods of forwarding protection to TCE was the Intergovernmental Committee (IGC), and the significance of this approach is also highlighted by the fact that WIPO also introduced a paper discussing the "elements of a *sui generis* system for the protection of TK"<sup>202</sup> and following this, many countries have undertaken efforts to utilize *sui generis* methods of safeguarding TK and TCE.<sup>203</sup>

*Sui generis* protections can be afforded to TCE in two ways. Firstly, the lawmakers may decide on the adaptation of a distinctive and new regime of intellectual property, which focuses on novel solutions and novel protections that do not exist within other legal regimes dealing with the same or similar subject matters; and secondly, it involves the adaptation of an existing regime of intellectual property<sup>204</sup> in a manner that is contextually new or unique.

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<sup>202</sup> WIPO Secretariat, 'Elements of a Sui Generis System for the Protection of Traditional Knowledge' WIPO/GRTKF/IC/3/8 (March 29, 2002).

<sup>203</sup> Baruah & Poddar (n 131) 103.

<sup>204</sup> .ibid.

*Sui generis* methods are utilized and relied upon because many countries, especially from Africa and Asia deem the existing IPR regime extremely inadequate in protecting the TCE and TK, since most of the frame-worked protections are done within the domain of copyright which is not at all adequate for forwarding the protections envisaged with regard to folklore. This stands especially true in the case of commercialization of the products borne out of folklore or TCEs, and proposals by these nations to modify and reinvent the existing IPR framework that deals with these issues countries across the globe have not yielded much positive result.<sup>205</sup> For example, in Ecuador, Article 7 and 9 of their IP law defined the meaning of folklore and highlighted the economic and moral protections that would apply to folklore respectively.<sup>206</sup> It is in this backdrop that countries have begun to rely upon *sui generis* methods of protection within the aegis of IPR to safeguard TK and TCE primarily, and before delving further into a discussion on the viability of these norms, it is pertinent to discuss the legal frameworks that have been developed in this regard by various international jurisdictions, and only once that has been explored can a proper critique of relying upon *sui generis* protections for safeguarding TK and TCE can be discussed properly.

#### [1] **Panama**

The nation of Panama developed the first *sui generis* protection system for TK and TCE in particular, and the same happened through the Collective Intellectual Property Rights of Indigenous Peoples Act, 2000, and the objective of this legislation, among others, was primarily the ‘*protection and defense of their cultural identity and traditional knowledge*’<sup>207</sup> This is interesting because Panama has always been a rich defender of its TK and TCEs, with the first legislative development in Panama with regard to the protection of TCE happened as far back as 1967, and the legislative framework in Panama for the protection of TCEs has seen fluid growth during the decades, with an approach towards safeguarding the TCEs that are “*pre-existing*” and “*capable of*

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<sup>205</sup> Irwin Lalmuanpuii Hnamte, ‘Protection of Traditional Cultural Expressions of Indigenous Peoples: A Comparative Study (Department of Law thesis, University of Delhi 2021).

<sup>206</sup> Art. 7 & 9, Ecuadorian Intellectual Property Law (Consolidation No. 2006-13).

<sup>207</sup> Collective Intellectual Property Rights of Indigenous Peoples Act, 2000 (Law No. 20 of 26 June, 2000).

*commercial use or utilization.*”<sup>208</sup> Interestingly, the 2000 legislation also recognizes the significance of those TCEs that have no authoritative origin or source of manifestation, and this is done through the bestowal of collective rights over “*indigenous cultural property*” on domains related to art, music and literature, and these elements are deemed to constitute the collective heritage of the entire people.<sup>209</sup>

## [2] **Philippines**

The Philippines Indigenous People Rights Act, 1997, which was formulated as an “*Act to recognize, protect and promote the rights of Indigenous Cultural Communities/Indigenous Peoples*”<sup>210</sup> focused primarily on the protection of the indigenous and cultural knowledge that had developed within Filipino society vis-à-vis medicinal plants and their values. The legislation recognized the pertinence of “*ancestral domains*” which were territories that covered not merely the physical aspect of the environment, but also included the “*spiritual and cultural bonds*”<sup>211</sup> and these were protected and given community ownership instead of private ownership, and it was held that these resources belonged to all generations, including the future generations, and therefore, they needed to be utilized in a sustainable manner.<sup>212</sup> Furthermore, in an interesting departure from the existing norm, the Filipino legislation also recognizes the collective nature of community intellectual property that has metamorphosed into TCE, and the State is obligated to ensure that the past, present and future manifestations of these cultural aspects are protected.<sup>213</sup>

## [3] **Peru**

In Peru, a legislation<sup>214</sup> was formulated for protecting the TK and TCEs of the country and this law accepts the rights of the indigenous Peruvian people to dispose of their

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<sup>208</sup> Hnamte (n 205) 53.

<sup>209</sup> Baruah & Poddar (n 131) 104.

<sup>210</sup> Philippines Indigenous Peoples Rights Act 1997 (Republic Act No. 8371 of 1997).

<sup>211</sup> *ibid*, at Sec. 4.

<sup>212</sup> *ibid*, at Sec. 5.

<sup>213</sup> *ibid*, at Sec. 32.

<sup>214</sup> Peru Law No. 27811 (2002).

traditional community knowledge in a manner that they deem fit.<sup>215</sup> The legislation is rooted in a five-fold division of objectives - Furthermore, it deems the rights afforded to the people vis-à-vis their community knowledge as “*indefeasible and inalienable*,”<sup>216</sup> and this is an interesting development since this fixes the absoluteness of the rights provided on one hand, and on the other hand, also cements the sacrosanctity of cultural traditional knowledge for the people. Finally, the legislation also obligates the possessors of the cultural knowledge to place their information in the public domain,<sup>217</sup> probably to ensure that the information does not remain merely limited to the members of a particular collective.

Apart from these nations, there have been multitudes of other regional laws with less detailed provisions, in which the TCEs have been protected through *sui generis* ways. One form has been through the recognition that the TCE and TK belongs to the State, with the State or the government exercising or enjoying ownership of the collective indigenous knowledge.<sup>218</sup> For example, in Ghana, the Copyright Law recognizes the traditional knowledge and cultural expressions are owned by the country, and are therefore the country’s heritage.<sup>219</sup> Similarly, in Mali, folklore is deemed to belong to the country as its heritage,<sup>220</sup> with ‘*folklore*’ defined as “*any work composed on the basis of elements borrowed from the national heritage of the Republic of Mali*”<sup>221</sup> Again, in Guatemala, indigenous folklore is protected by penalties, of both civil and criminal nature, and the Attorney General of Guatemala can provide a perpetual IPR protection to any item that falls within the ambit of ‘*indigenous cultural good*’ and which has since been registered.<sup>222</sup>

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<sup>215</sup> *ibid*, Sec. 1.

<sup>216</sup> *ibid*, Sec. 12.

<sup>217</sup> *ibid*, Sec. 13.

<sup>218</sup> Hnamte (n 205) 53.

<sup>219</sup> Sec. 5(2) Copyright Act, 2005 (Act 690) (Ghana).

<sup>220</sup> Kuruk Paul, ‘Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States’ (1999) 48 *American University Law Review* 769.

<sup>221</sup> Art. 8, Mali Literary and Artistic Property Ordinance, 1977.

<sup>222</sup> Baruah & Poddar (n 131) 105.

## CHAPTER 5 : CONCLUSION AND SUGGESTIONS

Culture is undeniably the most integral part of a society. It gives meaning to the legacy, values and identity of a community. Through the use of various forms of cultural expression such as language, art, literature, music and dance; the communities tend to communicate and portray their emotions, creativity and their cultural beliefs. These forms of expression are traditional in nature as they encapsulate their community's traditions and folk heritage. The interesting part here is that traditional cultural expressions, embodying both tangible and intangible forms of expressions, are not only just mere expressions of the customary skills, knowledge, art and principles that are passed down through generations in a community; they are also to be identified as 'intellectual assets' holding great economic value. The law of intellectual property rights has conventionally developed to reward the creators of such intellectual assets with exclusive rights over the use and to provide adequate defenses against misappropriation or misuse of these assets by others. Nonetheless, protecting and preserving cultural expressions through a legal framework require striking a balance between these defensive and protective mechanisms while ensuring the rights and concerns of the traditional holders. Considering all the conventional IPRs, geographical indications have best evolved, as a form of intellectual property right, to effectively address these issues related to the recognition and protection. GI has been instrumental in serving as an effective protective and defensive mechanism with the primary objective of preserving cultural expressions and ensuring the protection of community rights. The researcher studied this intricate relationship between TCEs and GI in light of Indian socio-legal scenario.

India is known for its diverse demographic map of India that showcases the rich cultural diversity present among different communities and tribes of the land. Despite the modern age of globalization and urbanization, traditional cultural expressions and indigenous tribal cultures continue to thrive in this land. It is because India has implemented significant measures through its laws and policies to safeguard them. However, there are certain constraints in the current intellectual property laws, as it has not been able to adopt a community-centric approach to ensure effective protection of TCEs. In addition to it, commercial exploitation and the production of low-cost replicas or synthetic



versions of cultural expressions are on the rise which has affected the authenticity and sustainability of traditions and cultural identity of several affected communities. However, the Indian GI framework in 1999 provides a sense of relief to these indigenous communities. The framework ultimately underscores the importance of accurate representation and preventing misrepresentation of geographical origins of goods. The law seeks to protect and promote goods, including handicrafts and textiles that bear unique attributes linked to its geographical origin in India. Apart from enabling the producers and manufacturers of varied goods to distinguish their product and protect them from replicas, GI has greatly benefitted the communities involved in producing them. As a community right, GI has contributed to the socio-economic development of the community in a multitude of ways, be it enhancement of the value of goods, generation of local employment opportunities, and mitigation of rural exodus. In addition to these economic benefits, it has been instrumental in protecting and preserving the cultural heritage and knowledge associated with the goods from unauthorized exploitation and use. The study has found the relevance in the case-studies mentioned in its chapters.

However, the scope of GI law in India is limited to an extent. It is silent upon intangible cultural heritage and the law principally focuses tangible forms of cultural expressions like handicrafts. Cultural expressions that are intangible in nature, such as folklore, oral traditions, and performing arts, do not receive legal protection under the framework, thereby rendering them vulnerable to exploitation and unauthorized use. But it is imperative to provide TCEs with intangible elements the necessary protection. The researcher primarily deals with this particular limitation out of several prospective limitations of the current GI framework of India

After assessing the crossroads between intangible cultural expressions and the scope of their GI protection, the researcher concludes that GI may not be suitable for intangible expressions in itself, but there exists a way of incorporating them within GI framework. The researcher here asserts that such elements can be indirectly safeguarded. There are several ways to achieve this which includes inclusive registration of more categories of products associated with oral traditions or socio-cultural practices. Expanding the scope

of handicrafts to encompass a wider range of practices can be another way that could potentially serve to safeguard cultural norms and heritage, thereby guaranteeing the incorporation of intangible aspects. The act of registering products as GI can augment their authenticity and provide producers with the opportunity to demand premium prices. Moreover, these practices would enable communities to exercise authority over the manner in which their intangible cultural expressions are exhibited and disseminated. To exemplify these arguments, several examples of intangible expressions from the NEI region are presented and analyzed. Here, the researcher concludes that traditional instruments, handicrafts, textiles and other products associated with the spiritual, history, heritage and cultural tradition of the performing arts need to be identified as a GI as soon as possible to help communities assert their rights over it and protect their significance and longevity, including preventing it from cultural misappropriation and misuse.

Nevertheless, the researcher also attempts to look at the regional practices of countries like Philippines, Peru and Panama and assess how well they have provided protection to TCEs in all of its forms through a *sui generis* law approach. Considering their effective measures, the researcher considers that India can take suitable lessons and insights from these model laws and simultaneously attempt to achieve the rights of stakeholders of TCEs, both tangible and intangible forms of expressions, by drafting a separate law for the protection of intangible cultural heritage and TCEs with due consideration put upon rights of communities over their TK, culture and spiritual values.

## 5.1 Findings

This section outlines the relevant findings of the research. It presents an analysis of the answers to the research questions presented, followed by an examination of the hypothesis.

[1] The first question is “What is the legal standing of traditional cultural expressions in India, especially within the legal framework of Geographical Indications?”

The answer to this question is; TCEs are acknowledged under the Geographical Indications of Goods (Registration and Protection) Act of 1999. The Act aims to prevent illicit use, sale, and misappropriation of ‘goods’ that are derived from a

definite geographical area and exhibit certain qualities or characteristics attributable to that origin. Under the definition of 'goods', the Act includes handicrafts and food stuff. Now, the definition of TCE as given by WIPO includes handicrafts within its ambit. Although the term "cultural expressions" is not explicitly used in the GI Act, its implementation is geared towards the preservation and protection of the wide-ranging traditions and cultural heritage of India. The Act acknowledges and protects goods originating from different cultures by registering them, thereby preventing unauthorized use of such names or goods by individuals not associated with said cultural group or community. TCEs specifically in the form of goods and their associated names are given the legal status and protection under the GI Act of 1999 and the unauthorized use or abuse of TCEs by others not associated with the GI. However, other forms of TCEs such as performances, oral traditions, rituals, songs etc., are beyond the scope of protection as well as subject-matter recognized under the current GI Act of India.

Hence, the tangible expressions of cultural heritage can only be designated as a geographical indication (in the form of a product originating from a particular geographic location) and be granted the protective measures outlined in various sections of the legislation.

- [2] The second question is “What are the potential socio-cultural implications of inadequate protection of cultural expressions in India and what challenges may ensue as a result?”

The answer is; the lack of adequate protection of cultural expressions in India would raise various concerns and issues which will affect the society to a large extent. The cultural expressions of a community foster a sense of belonging and promote social cohesion among the members of a community. The TCEs embody or represent the shared rhetoric of the community. In contemporary era, there have been numerous incidents of economic exploitation, infringement, misappropriation, or misuse of traditional cultural expressions and 'symbols of cultural heritage'. In India, there have been several instances where traditional dance performances of certain communities are directly being used in movies and songs without giving

proper attribution to them. At times, TCEs are being reproduced at a large scale using artificial method to make cheap imitations with minor cosmetic changes for the purpose of selling them in the market, and with that these third-parties tend to profit under the guise of an authentic producer or maker of the indigenous cultural product. The researcher also cited the case-study of misappropriation and misrepresentation of *Chakhesang* shawls by fashion designers. The lack of any legal protection would result in loss of its integrity as without any defenses available, the actual members of the community won't be able to claim their rights and restrain the unauthorized persons from further distortion, counterfeiting and falsification of their cultural expressions. In the absence of appropriate legal safeguards, there exists a potential for the gradual erosion or dilution of these expressions over time, due to insufficient preservation and protection. This loss of cultural heritage can have profound social impacts on communities. Furthermore, the economic significance of TCEs will be undermined in the absence of safeguards and this will likely increase unjust competition, replication, or intellectual theft, which may erode the economic worth of such creative works and deprive societies of their economic benefits. This will greatly impact the people who adhere to traditional artisanal and performance-based vocations. The market-use of traditional knowledge and cultural expression often transpires without the acquisition of prior informed consent from the custodians of TCE. Communities may be unable to prevent the commercialization of their traditional cultural expressions without proper legal recognition of their rights, even if they do not wish for their TCE to be used for commercial purposes. Moreover, the absence of legal safeguards can impede the capacity of communities to utilize their cultural heritage as a means of nurturing socio-economic upliftment.

Thus, the lack of appropriate legal recognition and protection of traditional cultural expressions would result in such consequences.

- [3] The third question is “Whether there is any requirement to implement measures aimed at reforming or expanding the current legal framework for Geographical

Indications in India to encompass intangible expressions of traditional cultural expressions?”

The answer is that the law of GI which has been conventionally associated with tangible products can protect certain intangible cultural elements when these products embody elements like the oral tradition, knowledge and beliefs in it. As far as Indian GI law is concerned, intangible expressions can be granted protection alongside tangible products. The catch is that in cases where these elements are essential to the creation or cultural significance of a product, they may be protected alongside the tangible product itself as part of a GI. Still, some measures can be taken to encompass various cultural elements within the Indian GI framework and this can be done in some ways.

One potential approach involves broadening the parameters of the definition of 'goods'. An alternative strategy for safeguarding intangible cultural norms and heritage involves the incorporation of a precise and comprehensive description of the term 'handicrafts' to encompass a broader spectrum of cultural practices and methods. The registration process can be simplified to facilitate indigenous community applicants in registering their products, thereby enhancing their authenticity and empowering them to become authorized users. This enables them to exert control over the presentation and distribution of their intangible cultural expressions.

Therefore, the research hypothesis of this study remains valid in the present context. This study provides evidence supporting the notion that the scope of GI can be modified or broadened to include intangible cultural elements within the framework of GI protection. The registration of products that incorporate cultural elements holds significant potential for effectively safeguarding the diverse cultural heritage of India.

## 5.2 Suggestions

Following are some suggestions to improve the situation of the protection of cultural expressions under the GI framework. They are as follows:

- [1] Awareness programs for traditional artisans and craftsmen especially on benefits of GI registration and advertisements for consumers pertaining to the information of the GI-registered cultural expressions which will further help to bring in policies, initiatives and schemes on R&D of such art and craft in the coming days.
- [2] Capacity building programmes for people belonging to indigenous communities, to teach them the importance and legal significance of protection and preservation of their cultural heritage. This has to start at the grass-root level so that it culminates into national initiative(s).
- [3] Proper vigilance and monitoring forum should be set up by authorized users and proprietors of a registered GI so that they can ensure no other entity passes off their products as the registered product. They can be entrusted with the task to look into the quality and originality of a product.
- [4] To enhance the accessibility and user-friendliness of the GI registration process for artisans and local communities, measures can be taken to streamline and simplify the procedure in order to reduce the procedural complexities.
- [5] Promotion of research and documentation of TCEs, including intangible forms of expressions from various parts of the country. This can be carried out with collaborative efforts from different local communities, non-governmental organizations and other government entities.
- [6] Establishment of a robust enforcement setup to adjudicate on cases pertaining to abuse and unauthorized exploitation of TCE-based goods registered as a GI.
- [7] Proper benefit-sharing mechanism can be incorporated in the legislation between stakeholders of TCEs as well as traders and middlemen. In such cases, it must be ensured that the small producers should be given sufficient amount of the profits earned.

Drawing on the experiences of nations that have enacted *sui generis* legislation to safeguard and conserve TCEs and TK, India has the potential to develop an equivalent legal framework by assimilating valuable insights and tailoring them to align with its unique socio-legal context.

The draft legislation may contain provisions pertaining to the definitions and descriptions of the subject matter; criteria for protection; identification of custodians and other participants of TCEs; term and scope of protection; ‘fair-dealing’ exceptions; registration procedural; establishment of enforcement authorities with mention of the sanctions and remedies available and many significant other provisions relevant to the *sui-generis* legislation of India.

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