



TRADITIONAL CULTURAL EXPRESSIONS AND ITS PROTECTION IN INDIA: A CRITICAL LEGAL ANALYSIS

Dr. Upankar Chutia*

Assistant Professor, Alliance School of Law, Alliance University, Central Campus, Chikkahadage Cross, Chandapura-Anekal, Main Road, Bengaluru, Karnataka 562106.

Corresponding Author Email: upankarsls@gmail.com

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Abstract

Traditional Cultural Expressions (TCEs) includes songs, tunes, arts, tales as well as the traditional practices of a community or group of persons in a society who holds, nurtures, and transmits it over one generation to another. These TCEs are also popularly known as folklores, or the expressions of folklores which are generally transmitted orally. It is also sometimes referred to as the mirror of a society, as it generally talks about the working of the society, praising nature or sometimes transmitting traditional knowledge expressed through different mediums. Various international organizations such as UNESCO and WIPO have been constantly working on its prevention and protection mechanisms and also requested its member countries to incorporate the same in their domestic regime. These organizations also established the fact that, communities holding and nurturing the folklore are the custodians and the rightful holders of the TCEs. As these are transmitted orally with no adequate documentation, it makes the protection mechanism more difficult. Speaking about the current folklore protection regime in India, this generally comes under the Copyright Domain, as those works are more inclined towards artistic, literary, and dramatic works. Yet, the present regime keeps all these TCEs in the public domain, as its creation is more than 60 years old. This makes it more vulnerable to illegal economic exploitation and distortion of the cultural heritage. Such a vacuum in the legal regime hinders the moral as well as the economic rights of its rightful holders. Furthermore, the development of technology such as the internet, CD, broadcasting etc. supplemented the legal vacuum, enabling some in taking undue advantage of commercial exploitation. Hereby, the research will critically examine the need for a sui-generis legislative mechanism in India as recommended by WIPO through various Inter-governmental Committees.

Keywords: Traditional Cultural Expressions, Cultural Heritage, Folklore, Rightful Holders, Sui-generis, Copyright, Legal Vacuum.

Introduction

“Our rich and varied cultural heritage has a profound power to help build our nation”

-By Nelson Mandela

Since few decades, the global communities and nations are apprehending the importance towards protection and preservation of Traditional Cultural Expressions (TCEs) or popularly known as Folklores and there have been numerous attempts to define TCEs. Their aims were ordinarily to bring a multidimensional and clearer understanding which can significantly describe TCEs with its deeper understanding of its nature and its interface with the society at large. Looking at the wider scope of TCEs, it can also be categorized as an inherent part of the Traditional Knowledge that has been existent till date, due to the continuous usage and practices such as art, song, tune, literature, tale and other knowledge, that reflects the insight of a certain culture and tradition belonging to a certain society or a community. TCEs are generally understood to be describing the working of a society or a community and the rich heritage which includes the knowledge it holds.

To present a better and a more generalised understanding of those expressions or TCEs, authors, researchers, as well as the activists working in this arena has all come to the consensus that the origin of folklore or TCEs creation is unpredictable as it is mostly oral in nature. Whereby, its existence could only be perceived through the practices or through the insight into the indigenous progress brought into existence and preserved consciously or unconsciously, and developing itself with the changes of the society. Thereby TCEs are perceived to be the mirror of a community or a society. It is also sometimes described as the depiction of the journey of the cultural evolution that has been inherent or an inalienable part of the person belonging to that society or that community. These forms of arts, tunes,

dances, riddles, poetry, songs, myths, etc. formulate the greater cultural heritage of that community which are developed through centuries among the members or stakeholders. The most and widely accepted definition of TCEs or Folklore is the definition from the World Intellectual Property Organisation (WIPO) which states, “Traditional cultural expressions (TCEs), also called ‘expressions of folklore’, may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.”

It is very well said that, members in a community may come and go, but those expressions of Folklore or TCEs will remain forever, it is also referred to as a soul, which never dies or fades away, but instead it develops itself with the passage of time. Those contributions and the continuous development process keeps those cultures and traditions alive and making it a Living Lore. It is generally linked with a community or group of indigenous people that have been developing, preserving and nurturing since generations, and are regarded as the custodians and rightful holders of those expressions. As it is seen that the TCEs are a significant and inalienable heritage of a certain community or a society, thereby the protection from distortion and preservation from illicit utilization becomes very crucial, as it may sometimes cause irrecoverable damages to those heritage without proper protection mechanism in place.

Lately, it is seen that folklores or TCEs such as songs and tunes are very widely being utilized in different arenas such as remixes in Bollywood as well as other Indian songs. It is such a big hit among the audiences that, producers of those songs are in high

demand and urge to bring more of those Lores in their upcoming songs. As those songs and tunes utilized by those producers are mostly oral in nature, thereby tracing the origin becomes very difficult, furthermore the songs and tunes utilized might not be popular within other communities, enabling the singers to utilize the songs and tunes without any credit to the origination of that songs. In many other scenarios it is seen that, it is illicitly being portrayed as composed and written by that person. These practices prompts one to question the protection and the preservation mechanism present in India currently, although it being such an important aspect of a society.

Presently, the TCEs such as the songs and tunes are regulated under the copyright regime in India i.e The Copyright Act, 1957 as they fall under the category of musical and sound recording works. Although these provisions are well equipped to protect the musical and sound recording works but the protection of TCEs are put into public domain as they extend the monopoly period granted i.e. lifetime of the author and 60 Years. This makes the copyright regime ineffective in protecting and preventing from abuses. It being a Living Lore, and it is always developing, thereby putting it in public domain will be unjustified. Looking into the nature of folklores, it needs a new jurisprudence or a new understanding to bring a new protection and preservation regime.

Moral rights and benefit sharing of folklores among its custodians

As mentioned above, it is well established that the community holding the TCEs nurturing and preserving it are regarded as the custodians and rightful holders. Its existence brings them closer and binds together and creates the sense of oneness among them. Thereby, alienating them from the rights and the benefits arouse of their commercial utilization will also be unjustified as it will question the foundation

and existence of that community. They being the custodians of such works or knowledge, also have right, as well the duty to regulate the ways of utilization of those expressions. Hereby, it can be said that the community should also be shared with any benefits which arose out of the commercial utilization of such TCEs. This concept of community benefit sharing will substantially help in the growth and further development, as well as preservation.

Recently, the concept of community benefit sharing is gaining more attention in diverse fields such as environmental laws as well as under traditional knowledge. For instance, as a part of polluter pay principle, wherein the person has to pay compensation to the indigenous community whose life were dependent on that biodiversity if any environmental damages has been caused due to the commercial exploitation of those resources. Another instance of the utilization of this concept is The Convention on Biodiversity, 1992 (CBD), which mandates benefit-sharing for any resource or knowledge usage that is part of Traditional Knowledge. The Nagoya Protocol, which provides fair and equitable benefit-sharing, is an excellent illustration in this regard. The Protocol contains important measures pertaining to indigenous group's traditional knowledge and genetic resources. It recognises the community's rights to these resources. The Protocol also requires that anyone willing to use any resources belonging to the communities must obtain prior informed consent (PIC) from those communities. This means that anyone desiring to use any such resources belonging to the indigenous communities for commercial purposes must first obtain consent from the community. It further requires that any commercial benefits derived from the utilisation of such genetic resources linked with Traditional Knowledge shall be distributed fairly and equally to the communities of origin. The Protocol further stipulates that fair and equitable benefit-sharing to the community should be based

on Mutually Agreed Terms (MAT) between the resource's owner and user. The Protocol requires all governments to abide by it and implement it into their national legislation.

Several member countries have adopted similar provisions based on the Protocol, such as India's Biological Diversity Act, 2002, which provides for PIC, MAT, and fair and equitable benefit sharing based on the use of resources that are linked with Traditional Knowledge. Associating above to the Folklore protection, which is not that different considering their characteristics. Folklore and Traditional Knowledge are often associated with each other, since they emerge from the same realm of the community, i.e., from a group's norms and beliefs. The notion of community benefit sharing thereby could be extended to folklore based on the interlinks between them. Furthermore, folklores are regarded to be a part of the Traditional Knowledge, wherein the Traditional Knowledge denotes the whole knowledge the community holds, while Folklores refers to those knowledge including forms of art, music, tales, songs, etc.

Prior Informed Consent (PIC) can be justified in the case of Folklore, since both are owned by the community, and ethically speaking, the right-holders have an inherent right to know whether any of their works are being used by others. The PIC in reality, will bring out the work's openness and authenticity, as well as recognise that it belongs to a specific community. It will also operate as deterrence to TCEs distortion, as the PIC will contain approvals for the type of usage the user is requesting, and it is evident that the community will only grant permission if it finds it appropriate. On the other hand, the Mutually Agreed Terms (MAT) will also aid in the effective implementation of the principle of fair and equitable benefit sharing. The MAT agreement will serve as a contractual obligation between the holders and users, requiring the user to

share the benefit arising out of economic exploitation emerging from the work with the community at large. Also the contractual agreement will act as a mechanism to regulate the misuse or distortion of the Folklores. The PIC and MAT methods of fair and equitable benefit sharing have now been effectively applied by most of the nations towards Traditional Knowledge as the framework is backed by their domestic legislations. However, there are no clear-cut laws in place for folklore, resulting in its unlawful use. The UNESCO and WIPO model law provides for this, however it is ambiguous towards its implementation as most of the countries like India do not have an appropriate legal framework in this regard. This has aided in the delay in the application process, despite the fact that it has been more than thirty years, and the incorporation of the model legislation since its formation has not been as effective as it was anticipated.

Till date most countries including India, lacks legislation to protect and preserve folklore, and there is a lack of recognition of existing folklores and the nature of folklores within their communities. These facts and information as disused, shows the urgent necessity to design a new model law that addresses the aspects that have not been addressed in previous models and is based on the experiences of nations. Furthermore, while nations introducing PIC and MAT systems into their domestic legislations, the community's opinion at the grass-roots level will play a great role. Also to actualize the implementation of the same, separate local authorities shall be formed to oversee and to assist or serve as an intermediary between both the user and the community at large.

Need for sui-generis protection of TCEs in India

Some of the oldest folklore has perished in modern times due to a lack of proper diligence in this matter and insufficient

legal protection in India is putting other available folklores under constant threat of extinction. There are a number of initiatives aimed at providing effective methods and mechanisms for the protection and preservation of community's rights, one of such initiative is of World Intellectual Property Organization's (WIPO). According to WIPO Intellectual Property (IP) protection regime of folklores can be of two types, 'Defensive Protection' and 'Positive Protection'. Positive protection here aims to grant rights for promoting community's traditional knowledge outside their arena, whereas defensive protection focuses on providing protection to traditional knowledge and rights against access to such expressions or traditional knowledge by people from or outside the community for any commercial gain. There are various other provisions in international arena which talks about protection of such traditional cultural expression and one of such is the Paris Convention on Industrial Property which mandates to protect the Traditional Knowledge against outside encroachment and exploitation.

The Inter-Governmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Folklore (IGC) was established in the year 2000 under WIPO. Its primary goal is towards preserving Traditional Knowledge and Folklore expressions as well as the aspects of access to genetic resources, with a focus on benefit sharing. With the establishment of the IGC, it has created a venue for open conversations with nations trying to protect the traditional knowledge and folklores. It has raised international awareness on the critical issues, and several remedies have been presented under it. It has initiated numerous research and analysis in this regard, including the technical studies and fact-finding missions (FFMs). In order to develop a defensive system for the conservation of genetic resources and traditional knowledge and folklore, the IGC has proposed various technological

improvements. It has also brought nations together in sharing their experiences in the protections of folklore and traditional knowledge as well as the experiences of the difficulties they faced in enacting the same in their domestic legislations. Their experiences actually helped other countries and researchers to look deep into the lacunas and provide for better and workable solution for the same.

Nations had incorporated various schemes of protection and one of such is the efforts through the amendments in their Copyright Laws that have been carried out with more or less effective means at national levels to provide protection and preservation of TCEs and rights concerning their respective owner/s (communities and authors/creators). Tunisia, Iran, Chile, Algeria, Senegal, Burundi, Central African Republic, Madagascar, Malawi, Niger, Panama, Angola, Lesotho, Dominican Republic, Rwanda, Nigeria, Indonesia and China are to name a few nations that have taken substantial efforts and launched reforms to include protection mechanisms into their existing legal systems, laying the groundwork for current notions and potential reforms relating to TCEs and other Traditional Knowledge. Initiatives were also taken to alter and strengthen present Copyright Law, which were undertaken at the Berne Convention and the Stockholm Diplomatic Conference in Paris to accommodate the rights relating to Folklore protection. The results of these efforts and actions show that enforcing Copyright Law in this extent is insufficient. Copyright Laws are found highly insufficient to provide an effective legal mechanism in cases of material form of recognition, duration of applicability, origin and basis, as well as ownership, as the present copyright law's jurisprudence is based on the individual's rights over its works but folklores are more of a community rights than that of a individual right which is more multidimensional in its nature, and the regime of copyright laws fails to address the same.

Another attempt was made through the United Nations Educational, Scientific and Cultural Organization's General Conference in 25th Session in Paris 1989 to bring out a universal definition for better understanding of folklore and traditional knowledge and its preservation measures at the national and international level. It termed the "universal heritage of humanity" to describe folklore, although this word eventually became riddled with legal complications. UNESCO further introduced the term "Living Cultural Properties", which includes the Oral and Intangible Heritage, and further UNESCO and WIPO came up with a joint initiative on IPR and safeguarding of folklores in 1989. In light of the application and outcomes of all of these activities, it is reasonable to conclude that these efforts were made in pieces and had little impact on the issue which fell short of their goals, leading to their classification as insufficient in overall capacity and strategy.

These ineffective systems puts forward towards a need for a "sui-generis" legal mechanism, in order to provide an effective measure to protect against any illicit exploitation of folklore. India in its advent towards bringing a sui-generis legislation, has to keep in mind the experiences of the nations in protecting Folklores or TCEs as well the problems they faced in execution. It should also look at the workable suggestions provided under the Fact-Finding Missions (FFMs) which are best suited for Indian legal system. In adhering to the same, the UNESO-WIPO model law or Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions- 1989 can be regarded as the base.

As seen above, a clear definition needs to be formulated, for which the definition provided by WIPO can be considered. Furthermore, there needs to be clear provisions on the requirements of Prior-Informed Consent (PIC) and Mutually

Agreed Terms (MAT) and to overlook through the implementations and executions of the provisions, various Central, State and District authorities needs to be established. Wherein, the district authorities shall deal in the grass-root level and act as the record keeping authority for all the Folklores originated in that district. There must also be stringent penal provisions for illicit utilization as well as for distortion of such cultural heritage. In addition to the above, digital archiving of Folklores can reduce the infringement to a greater extent. In this the Traditional Knowledge Digital Library or TKDL which has the archives of all the Traditional Knowledge in India, can be the motivation to create a Folklore Digital Library.

Conclusion

Folklores or Traditional Cultural Expressions (TCEs) have been unquestionably the foundation stones of present day communities, tradition, and cultural identities, both in their diversity and homogeneity. Arts, food, fashion, lifestyle, literature, social structure are all inextricably linked and based on passed-down traditional knowledge and behaviours from generation to generation, which are vital to a person's overall development in the modern era. Thereby protection and preservation of folklores are important.

In achieving the same there must be well-established regulations at place to protect and preserve folklore and folklore rights pertaining to associated communities, while keeping in mind the aesthetic and social value of folklore. There have been several efforts both nationally and internationally with prior attempts to protect within the prevalent legal systems though amendments, on the other hand, revisiting the protection regime of Copyright Laws at both national and international levels, but both did not show any substantial results. These attempts led towards the quests for a sui-generis legal regime as the nature of Folklore or TCEs

are multidimensional as their rights are community oriented rights, rather than individual right which could not be completely addressed by other prevalent regimes.

As discussed, India can bring a sui-generis legislation which can be based on the UNESCO and WIPO model law with a more workable definition, focusing on protecting the community's cultural heritage though incorporation of the Prior-Informed Consent and Mutually Agreed Term system towards any commercial exploitation, as well as in achieving the fair and equitable benefit sharing to the community of origin of those folklores. The legislation should also provide for establishment of various Central, State and District authorities towards implementation of the provisions and these authorities should only act as a mediator among the rightful holders and the user. Digital archiving of folklore like TKDL is also important as the legislation in itself, as the digital archives will bring transparency in utilization and identification of the rightful holders of such Traditional Cultural Expressions (TCEs).

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