

VOICES OF TRADITION AND FOLKLORE: A COMPARATIVE INQUIRY INTO CUSTOMARY LAW AND THE QUEST FOR EQUITABLE KNOWLEDGE GOVERNANCE

Abstract

In the hushed alleys of Indian villages and the rhythmic chants of tribal heartlands, folklore lives, not in archives, but in memory, melody, and movement. As folklore lives and breathes across generations, shaped not by ink but by memory, it finds itself estranged in the world of modern legal systems that demand fixation, authorship, and originality. What cannot be copyrighted is cast into silence. What belongs to all is claimed by few. This is the crisis that breathes life into this inquiry: the dissonance between a living tradition and a rigid legal regime. The chapter pays particular attention to folklore, a category of traditional knowledge that resists neat classification within existing legal doctrines yet remains integral to cultural identity and intergenerational justice. The study critically engages with Indian intellectual property law, as well as relevant international legal instruments, to investigate the scope and limitations of current frameworks in protecting folklore. Unlike conventional forms of intellectual property, folklore is collective, orally transmitted, and constantly evolving—rendering it vulnerable under legal systems designed to privilege individual authorship, originality, and fixation. By examining how folklore sits uncomfortably within such doctrinal constraints, the chapter foregrounds the urgent need for a legal model that can account for its unique character and communal ownership. To that end, the research adopts an interdisciplinary doctrinal methodology, incorporating analysis of statutes, treaties, and case law, while also drawing upon anthropological and philosophical insights into the socio-legal

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nature of traditional knowledge systems. The study further evaluates the findings of the 161st Parliamentary Standing Committee Report, which lays bare the institutional and definitional voids that currently plague the protection of traditional and indigenous knowledge in India. Recognizing that conventional intellectual property frameworks fail to address the lived realities and cultural contexts of folklore, the study undertakes a comparative exploration of sui generis legislative models adopted in jurisdictions such as Kenya and Panama. The implications of this study are both juridical and societal. Ultimately, this chapter affirms that protecting folklore is not an academic indulgence, it is a moral and constitutional imperative in a plural, postcolonial democracy still learning to listen to its oldest songs.

Keywords: Folklore, Indian Knowledge System, Intellectual Property, Copyright, Sui- generis, Traditional knowledge

I. INTRODUCTION

A nation breathes through its people, their voices weaving its tale. India, though seen as a developing force in the swift currents of global economies, stands as an ancient titan in the realm of culture, heritage, and the timeless wisdom of traditional knowledge. From the echoes of Ayurveda, where kitchen herbs transform into remedies, to the spontaneous symphonies crafted in the warmth of village gatherings, the essence of India flows like an eternal river.

In the golden embrace of an afternoon sun dipping into the sea, a weary soul hums a tune—his joys and sorrows weaving into verses of a song. What began as an unassuming melody, birthed from the depths of lived experiences, soon transforms into a symphony of life. Across the heartlands of Bengal, the wandering Baul, unshackled by material desires, composes verses drawn from Tattva—Deha, Atma, Srishti, Prem, Bhav, and Guru—each capturing the essence of existence, each narrating the unseen truths of the universe. Their music, a window into the rhythm of rural Bengal, paints a world untouched by the frantic chase for wealth, where life moves not by the ticking of the clock but by the rise and fall of the human spirit.

Yet, the irony is cruel. These composers, poets of tradition, architects of intangible heritage, remain unnoticed, their art often dismissed as the voice of the ‘common’ folk. Living in simplicity, they seek no validation, their only concern a warm meal and a roof under which to rest. Unbeknownst to them, the melodies that rise from their hearts, the rhythms that shape their lives, are plundered in silence. Others capitalize on their creations, turning raw emotion into commodified art, reaping wealth from what was never theirs.

To them, intellectual property is an alien construct, its complexities beyond their world of daily survival. They do not fathom the theft, nor do they seek redress. But for those well-versed in the law, the injustice is evident. This chapter shall navigate the labyrinth of traditional knowledge, exploring the fate of folklore in India and the legal frameworks that seek to protect it and will analyse the lack if there is any. The discourse shall unravel the implications of intellectual property in safeguarding the soul of India’s heritage, questioning whether the law can truly shield what was never meant to be owned but always meant to be honored.

II. ESSENCE OF FOLKLORE

The absence of a universally accepted definition of traditional knowledge (TK) and folklore has led to considerable ambiguity regarding their scope and classification. The challenge lies in determining what elements should be encompassed within these terms and what should be excluded. In the Indian context, folklore is deeply embedded in the customs and practices of various communities, manifesting through diverse artistic and cultural expressions such as dance, music, painting, storytelling, and even certain beliefs that, although sometimes perceived as superstitious, often serve crucial roles in preserving both humanity and the natural environment. (Ministry of Culture, Govt. of India.) These artistic expressions are intrinsically tied to the regions from which they originate, yet regional identity alone is not the sole criterion for defining folklore. Folklore transcends geographical and socio-economic boundaries, existing in both developed and developing nations, in indigenous as well as non-indigenous communities, and within both urban and rural settings.

The legal protection of folklore necessitates a precise and universally accepted definition. While international efforts have been made to safeguard traditional knowledge and folklore, significant legal and conceptual uncertainties persist. One of the most fundamental and unresolved questions is the formulation of a clear, legally binding, and globally recognized definition of folklore.

Traditional knowledge (TK), as broadly understood, encompasses the knowledge, innovations, and practices of indigenous and local communities that have evolved over centuries through experiential learning and adaptation to specific cultural and environmental contexts. This knowledge spans multiple domains, including art, dance, music, medicine, folk remedies, biodiversity conservation, plant variety protection, handicrafts, designs, and literature. (World Intellectual Property Organization, 2003)). As an integral component of cultural heritage, TK is collectively owned by the community rather than by any individual, forming an essential part of its identity and historical continuity.

Folklore, as a distinct form of TK expressed through artistic and performative mediums, includes verbal expressions, musical compositions, dramatic enactments, and tangible cultural artifacts. These expressions are not merely artistic creations but are reflections of a community's shared experiences, values, and traditions, passed down through generations. (Kutty & Valasala, 2002) Given their intergenerational nature, folklore expressions function as markers of cultural identity, reinforcing the collective heritage of the community and positioning them as communal assets rather than personal properties. (Kutty & Valasala, 2002)

The legal discourse surrounding folklore remains complex, necessitating a more structured approach to its recognition and protection. Addressing these challenges requires not only a comprehensive legal framework but also an interdisciplinary understanding of folklore's socio-cultural significance, ensuring its preservation in an era of rapid globalization and commercialization.

III. URGE FOR PROTECTION

Having examined the legal intricacies of defining folklore, the next pressing question is whether it merits legal protection. At first glance, the need to safeguard folklore—whether in the form of painting, dance, music, or storytelling, may seem questionable. However, to justify such protection, one must first understand the fundamental basis upon which rights are granted.

Judith Jarvis Thomson, in her seminal work *The Realm of Rights*, contends that rights serve as moral constraints that govern the treatment of individuals by both institutions and other individuals. (Thomson, 1990) Their necessity arises from the inherent dignity of human beings, ensuring protection against arbitrary interference. Rights function to uphold personal autonomy, guarantee justice and fairness, and shield individuals from oppression and exploitation. The historical development of rights resonates with the ideals of the natural law tradition, where jurists sought to mitigate absolute power by establishing a balance between individual liberties and social order. (Thomson, 1990) Salmond encapsulates this notion by defining a right as an "interest recognized and protected by a rule of justice." (Thomson, 1990) If the *raison d'être* of rights is to prevent exploitation, protect ownership, and guard

against arbitrariness, then the question naturally follows: does folklore meet these criteria for protection? The widespread unauthorized use and commercial exploitation of folklore provide a compelling affirmation.

The rapid advancements in technology and globalization have transformed societies from knowledge-centric to material-driven economies, exacerbating the problem of cultural misappropriation. For traditional and indigenous communities, folklore is not merely an artistic expression but an intrinsic part of their identity and existence. (von Lewinski, 2004) Yet, this cultural wealth is increasingly subjected to unregulated commercial exploitation. Instances of such appropriation are prevalent—folk songs are reimagined with digital beats to produce best-selling music, indigenous artwork and handicrafts are mass-produced and marketed as authentic heritage pieces, often without due credit or consent. These exploitative practices, fuelled by economic gain, persist largely unchecked. While globalization facilitates economic exchanges across borders, it simultaneously erodes indigenous traditions and cultural ethos. The continued commercial misuse of folklore threatens its survival, underscoring the urgency of legal protection. (Babu, 2012)

A critical challenge in advocating for the legal safeguarding of folklore is determining the rightful claimant of such protections. Conventionally, rights are vested in natural persons or legal entities; however, folklore resists such individualized ownership. As a form of traditional knowledge (TK), folklore is inherently collective, transmitted across generations, and deeply interwoven within the social fabric of a community. Rather than belonging to a singular creator, it represents a shared cultural legacy, embodying the traditions, beliefs, and historical continuity of an entire people. This distinctive nature necessitates legal framework tailored specifically for the protection of communal cultural activities to ensure adequate protection.

Traditional knowledge, by its very essence, is an evolving corpus transmitted orally over generations. Its “traditional” attribute does not stem from antiquity but from the continuity of its transmission and utilization. Both TK and folklore serve as pillars of a nation's cultural heritage, fostering self-expression, shaping social identity, and even contributing to environmental sustainability. In many developing regions, TK is not merely an emblem of cultural pride but a vital source of livelihood, providing income, food security, and healthcare, thereby enabling communities to sustain themselves independently. However, the increased commercialization of TK has rendered it particularly vulnerable to misappropriation.

Corporations, researchers, and various vested interests frequently capitalize on indigenous knowledge, patenting it for exclusive benefits while depriving the original custodians of any financial or legal recognition. This exploitative pattern is reinforced by the erroneous presumption that TK exists within the “public domain” and, therefore, is not subject to proprietary rights. The situation echoes historical colonial practices, where outsiders laid extravagant claims to indigenous resources, akin to the territorial acquisitions of the Age of Discovery. Despite growing international acknowledgment of indigenous rights, existing legal frameworks remain inadequate in preventing such exploitation. The expansive reach of globalization and the proliferation of digital technologies have only accelerated the unauthorized commodification of folklore, further exacerbating the vulnerabilities of traditional communities. (Babu, 2012)

At its core, the debate on rights underscores an inescapable truth—legal protection is not merely a technical necessity but a moral imperative. Folklore, as a repository of cultural identity and an embodiment of intergenerational heritage, meets every justification for legal safeguarding: it faces persistent unauthorized appropriation, holds profound economic and cultural significance, and its erosion would result in an irreversible loss to humanity. The legal recognition and preservation of folklore are not abstract academic concerns but pressing policy imperatives that demand immediate, concrete global intervention.

IV. INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF FOLKLORE

1. Intellectual Property Right Protection

- a. **The Berne Convention and the Initial Foray into Folklore Protection:** The international legal recognition of folklore protection first emerged substantively during the 1967 Stockholm Revision Conference of the Berne Convention for the Protection of Literary and Artistic Works. This period coincided with a transformative shift in international diplomacy, as newly decolonized states from the Global South began asserting their interests within multilateral fora. Although folklore preservation was not strictly a North-South binary—given the existence of Indigenous populations in developed countries such as Canada, Australia, the United States, and New Zealand—it was predominantly developing countries that spearheaded the demand for international legal safeguards for traditional cultural expressions (TCEs). (World Intellectual Property Organization, 1886)

The proposition to include folklore within the Berne framework appeared logical, as folklore occupies the literary and artistic domain contemplated by the Convention. However, the Convention's foundational reliance on the concept of individual authorship posed a theoretical and practical obstacle. The Indian delegation's initiative to incorporate "works of folklore" into Article 2(1) was ultimately thwarted, with delegations—most notably Australia—voicing concerns about the incompatibility of extending copyright-like protections to collective, authorless expressions. (World Intellectual Property Organization, 1971)

Instead, a compromise was reached in the form of Article 15(4), which authorizes national legislation to designate a competent authority to act on behalf of unidentified authors of unpublished works presumed to originate from a member state. Although the term "folklore" was deliberately excluded due to definitional complexities, the travaux préparatoires unambiguously indicate that this provision was drafted with folklore as its principal object. Nevertheless, because Article 15(4) continues to operate within the doctrinal architecture of individual authorship, it remained an ill-suited vehicle for protecting community-generated and intergenerational cultural expressions. (World Intellectual Property Organization, 1971)

- b. **The Tunis Model Law: Tailoring Protection for Developing Nations:** In response to the inefficacy of Article 15(4), evident in the near absence of notifications under Article 15(4)(b), UNESCO and WIPO collaborated on the development of the Tunis Model Law on Copyright for Developing Countries (1976). This instrument represented a significant normative evolution, offering a more folklore-sensitive

approach by including specific provisions that dispensed with the fixation requirement, acknowledged the non-finite duration of protection, and provided a working definition of folklore. (World Intellectual Property Organization, 1976)

Despite these advances, the Tunis Model Law faced criticism for its insufficient treatment of the communal and custodial nature of folklore. It did not articulate a robust framework for equitable benefit-sharing or enforcement mechanisms that could withstand transnational appropriation. These lacunae prompted further normative refinement, culminating in the 1982 adoption of the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* by a Committee of Governmental Experts. These Provisions were not legally binding but served as authoritative guidelines for national law-making aimed at curbing unauthorized commercial exploitation of traditional expressions and ensuring respect for the cultural rights of indigenous communities. (World Intellectual Property Organization, 1976)

- c. **Treaty Drafting Efforts and the Limits of Consensus:** An ambitious step forward was attempted in 1984, when UNESCO and WIPO jointly convened a Group of Experts to draft a treaty grounded in the 1982 Model Provisions. The draft treaty envisioned an international legal framework based on the principle of national treatment. While there was general agreement on the normative desirability of protecting folklore globally, several intractable issues impeded consensus. Key among these were difficulties in delineating which expressions of folklore qualified for protection across jurisdictions, the absence of an effective dispute resolution mechanism for overlapping or shared cultural claims, and general legal uncertainty regarding treaty obligations. (Babu, 2012) These operational uncertainties led to the widespread perception that any binding multilateral instrument was premature. The resulting recommendation was to intensify experimentation at the domestic level, using the Model Provisions as a referential base. Consequently, momentum toward a binding treaty stalled, and the international community pivoted toward soft law approaches and national-level regulatory strategies.
- d. **The Rome Convention and the Doctrine of Neighbouring Rights:** In a parallel trajectory, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) extended limited protection to traditional cultural expressions through the lens of neighbouring rights. Article 7(1)(a) safeguards performers' rights against unauthorized broadcasting and public communication, thereby affording indirect protection to folklore when performed in public. Although not designed specifically for folklore, the Convention's provisions have proven instrumental in recognizing performers of traditional music, dance, and oral narratives as legal rights-holders. (Rome Convention 1961). While the Rome Convention does not address the communal ownership or the moral dimensions intrinsic to folklore, its inclusion of performers' rights nonetheless constitutes a foundational legal mechanism through which cultural custodianship can be partially vindicated.

- e. **TRIPS and the Expansion of Global IP Obligations:** The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), established under the WTO in 1994, represents the most far-reaching multilateral treaty on intellectual property protection. Though TRIPS do not explicitly refer to folklore or traditional knowledge, Article 14(1) incorporates performers' rights akin to those found in the Rome Convention. Furthermore, TRIPS imposes minimum standards on member states for copyright and related rights, thereby tightening the domestic enforcement landscape. (World Trade Organization, 1994)

However, TRIPS remains anchored in conventional IP categories—authorship, originality, and fixation—which do not adequately reflect the evolving, anonymous, and collectively owned nature of traditional cultural expressions. As such, its utility for folklore protection remains marginal, unless supplemented by *sui generis* legislative innovations at the national level.

- f. **WPPT and the Further Recognition of Performers' Rights:** The WIPO Performances and Phonograms Treaty (1996) marks a significant development in extending protection to performers, including those embodying traditional cultural expressions. Article 2(a) of the Treaty defines “performers” to include individuals who interpret or perform expressions of folklore, thus bringing traditional artists—such as storytellers, singers, and dancers—within the protective ambit of neighbouring rights. (World Intellectual Property Organization, 1996)

Although WPPT constitutes an important normative instrument for safeguarding cultural expressions in performance contexts, its effectiveness is still constrained by its adherence to an individualistic rights model. It falls short in recognizing the collective custodianship, spiritual meanings, and customary governance systems underpinning folklore in indigenous and local communities. (von Lewinski, 2004)

- g. **The WIPO Intergovernmental Committee: Debates and Divergences:** Since 2001, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has become the principal institutional forum for debating the need for a *sui generis* international regime for folklore protection. Drawing on regional consultations and empirical studies, the IGC has recognized the necessity of a bespoke framework that accommodates the distinct legal character of traditional knowledge systems.

Despite broad conceptual support, significant divergences remain between developed and developing countries. While the Global South advocates for binding international obligations and the update of the 1982 Model Provisions, developed nations have called for incremental reforms, technical assistance, and further national-level piloting. The IGC's work has, therefore, centered on definitional debates, the compatibility between customary and formal legal systems, and the scope of benefit-sharing frameworks, but has yet to yield a universally accepted treaty text. (von Lewinski, 2004)

- h. Cultural Sovereignty through the ILO and UNDRIP:** Beyond the contours of intellectual property law, international human rights instruments have bolstered the legal recognition of traditional communities' cultural sovereignty. The ILO Convention No. 169 (1989) affirms the right of Indigenous and tribal peoples to define their own development priorities, including in cultural domains. (International Labour Organization, 1989)

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) This asserts the right of Indigenous peoples to maintain, control, and develop their traditional knowledge and expressions of culture, and to hold intellectual property over such manifestations.

These instruments reflect a paradigmatic shift from market-based protection to rights-based empowerment, emphasizing self-determination, heritage governance, and the moral entitlements of communities. They call upon nation-states to develop internal legal mechanisms that recognize the inalienable and collective dimensions of folklore.

2. Evolving Sui Generis Initiatives for the Protection of Folklore

The international community has long acknowledged the inadequacy of conventional intellectual property systems to protect traditional cultural expressions (TCEs), including folklore. As a response, several sui generis efforts have emerged over the past few decades, reflecting a growing consensus on the need for specialized legal frameworks that recognize the collective, intergenerational, and often anonymous character of folklore.

- a. The WIPO-UNESCO World Forum on the Protection of Folklore (1997):** A significant milestone in this process was the WIPO-UNESCO World Forum on the Protection of Folklore, held in 1997. This forum drafted a comprehensive Plan of Action which emphasized the necessity of developing tailored legal mechanisms for the protection of folklore expressions. The deliberations identified gaps in the prevailing copyright frameworks and underscored the urgency of advancing a sui generis system responsive to the unique nature of TCEs. (WIPO & UNESCO, 1999)
- b. Regional Consultations and Fact-Finding Missions (1998–1999):** Following the World Forum, a series of WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore were convened in 1999. These consultations, spanning multiple geographic regions, reaffirmed that the protection of folklore must be pursued through the intellectual property (IP) lens but should diverge from conventional models. The outcome suggested that folklore requires recognition as a distinct domain within the broader discourse of IP law.

Parallel to these consultations, WIPO conducted Fact-Finding Missions (1998–1999) across 28 countries. These missions aimed to gather empirical insights into the expectations and needs of traditional knowledge holders, including those safeguarding oral traditions, indigenous rituals, and customary cultural expressions. The reports demonstrated that communities seek both legal recognition and practical enforcement tools for protecting their cultural heritage from misappropriation and commodification.

- c. **WIPO Intergovernmental Committee (IGC): Policy and Legal Framework Development:** Established in the early 2000s, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) became the primary global forum for shaping a coherent policy approach toward the protection of TCEs. Distinct from its work on genetic resources and traditional knowledge, the IGC's agenda includes the development of recommendations, principles, and legal frameworks specifically addressing folklore. (World Intellectual Property Organization, 2023)

This institutional focus on folklore as a separate domain marked a critical development, demonstrating the recognition that conventional IP categories (e.g., copyright, trademark) cannot adequately secure community-based rights that stem from customary law and shared heritage.

- d. **Human Rights and Cultural Participation: Universal Declaration of Human Rights (1948):** The human rights framework further complements these efforts. Article 27 of the Universal Declaration of Human Rights (UDHR), 1948, articulates every individual's right to participate in the cultural life of the community and to enjoy the benefits of scientific, literary, and artistic production. While not explicitly mentioning folklore, the provision establishes a normative foundation for the protection of cultural expressions and the moral and material interests of cultural contributors, thereby reinforcing the claim for safeguarding folklore within human rights discourse. (United Nations General Assembly, 1948)
- e. **The Convention on Biological Diversity (1992): An Indirect Framework:** Although the Convention on Biological Diversity (CBD), 1992 does not expressly address folklore, it acknowledges the significance of indigenous knowledge systems and promotes the protection of traditional knowledge, innovations, and practices relevant to biodiversity conservation. By implication, the CBD recognizes the cultural dimensions of such knowledge, thereby offering an indirect avenue for advocating the protection of expressions of folklore—especially where such expressions are intrinsically tied to traditional ecological knowledge and rituals.

Despite these initiatives, the international legal regime for folklore protection remains fragmented and non-binding, leaving indigenous and local communities vulnerable to cultural appropriation. While forums such as WIPO and UNESCO have produced valuable guidance and policy recommendations, the absence of a globally ratified sui generis treaty continues to hamper meaningful enforcement. (United Nations, 1992)

V. SCENARIO IN INDIA

1. Indian Constitution and Folklore

While the Indian Constitution does not explicitly enumerate *folklore* as a subject of protection, a substantive and culturally sensitive reading of its provisions reveals a rich constitutional tapestry conducive to safeguarding the intangible heritage of India's diverse communities. This interpretive potential is reinforced when examined through the lens of comparative legal-cultural scholarship, most notably by Alison Dundes Renteln, who argues

that legal systems must evolve to recognize and protect traditional cultural expressions—not merely as artistic artifacts, but as embodiments of community identity and moral worldviews (Renteln, 2004).

Article 29(1) of the Constitution of India, which guarantees the right of “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” to conserve the same, provides the most direct constitutional mooring for folklore protection. Renteln underscores that legal neglect of such cultural practices constitutes not just a legislative omission but a deeper epistemic marginalization of indigenous and traditional knowledge systems. This aligns with Indian constitutional jurisprudence which, in *Indira Gandhi v. Raj Narain*, emphasized that fundamental rights must be interpreted purposively in line with the Constitution’s moral and philosophical underpinnings. (*Indira Gandhi v. Raj Narain*, 1975)

Similarly, Article 51A(f), which enjoins citizens “to value and preserve the rich heritage of our composite culture,” while framed as a duty, establishes a normative baseline for state obligation and civic responsibility. Renteln argues that cultural expression is often inseparable from legal identity, and that any failure to preserve it—particularly in multicultural societies—threatens both diversity and justice. In *State of H.P. v. Umed Ram Sharma*, the Supreme Court reinforced this sentiment, reading environmental and cultural rights into the ambit of Article 21, thereby laying a precedent for the constitutional protection of folklore as an extension of life and dignity, especially for those communities for whom folklore is not recreational but existential. (*State of H.P. v. Umed Ram Sharma*, 1986)

The Directive Principles of State Policy further buttress this framework. Article 43 promotes the development of cottage industries in rural areas—many of which are grounded in folklore-based artisanal knowledge. (Constitution of India, 1950, Art. 43) Article 46 mandates the promotion of the educational and economic interests of Scheduled Castes and Scheduled Tribes, who are frequently the custodians of traditional cultural expressions. Renteln’s critique that indigenous traditions are often dismissed as “non-modern” and thus unworthy of legal protection finds a direct parallel in India’s legal vacuum surrounding folklore. Such neglect, in her view, amounts to a form of cultural disenfranchisement.

Furthermore, Article 371, in conjunction with the Sixth Schedule, provides for the establishment of Autonomous Councils in certain tribal areas, granting them the authority to self-govern according to their customs and traditions. These councils possess the power to enact laws aimed at preserving and protecting their unique cultural practices, including folklore.

Moreover, in the absence of specific domestic legislation, international instruments such as the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage become normatively significant. In *Vishaka v. State of Rajasthan* the Supreme Court established those international treaties can be read into domestic law to bridge legislative gaps, especially when such treaties align with constitutional values. Renteln’s work supports such judicial creativity, advocating for what she terms “legal pluralism”—a recognition that the formal legal system must accommodate non-codified, customary, and cultural norms.

Thus, the question is no longer whether folklore should be protected constitutionally, but why such protection remains precarious. In a rapidly globalizing and digitalized economy, folklore is routinely subjected to commodification, misappropriation, and epistemic exploitation—stripped from its cultural moorings and repackaged for profit. As Renteln articulates, such unregulated appropriation constitutes cultural harm and legal erasure, thereby demanding urgent juridical redress.

Indian constitutionalism—when read holistically and through an anthropological-legal lens—provides fertile ground for folklore protection. The Constitution's commitment to cultural pluralism, equality, and human dignity, coupled with interpretive tools from Indian case law and global cultural rights theory, can and must be marshaled to protect folklore as a living, collective, and dynamic tradition. Renteln's scholarship not only validates this approach but challenges us to rethink law's capacity to preserve the intangible and intergenerational soul of a community.

2. 161st Parliamentary Standing Committee Report

The Report, in its analysis of the misappropriation of traditional knowledge (TK), acknowledges the critical lacuna in the existing mechanisms for its documentation and preservation. It draws particular attention to the limitations of the Traditional Knowledge Digital Library (TKDL), which, despite being conceived as a defensive tool to prevent biopiracy and misappropriation, has not fully succeeded in serving as a comprehensive or effective repository of TK. While the Report recommends the strengthening of such databases, it refrains from elaborating on the specific shortcomings of the TKDL or proposing concrete strategies for addressing them. Prior academic and policy critiques—some of which have surfaced in scholarly blogs and public discourse—have already highlighted various limitations of the TKDL, including issues related to accessibility, classification, and community participation.

An especially notable, though controversial, recommendation is the proposal to designate the State as a joint owner of IP rights along with individual creators or communities. This suggestion is premised on the logic that such co-ownership could serve as a deterrent against misappropriation. However, it raises normative questions concerning autonomy, control, and the extent of state intervention in matters of community-held knowledge systems.

The Report further suggests that traditional knowledge closely tied to specific geographical locations could be registered as Geographical Indications (GIs), positing that such registration would assist in consolidating TK within the formal intellectual property regime. While this proposition has potential utility, it again presumes that TK can be readily mapped onto existing IPR frameworks without grappling with the inherent complexities and conceptual divergences between customary knowledge systems and formal IP law. (Murugesan, 2021)

A central concern with the Report's approach is its rather reductive and instrumentalist understanding of TK. It appears to treat the definition of TK as a settled issue, overlooking one of the most persistent challenges in this domain—namely, the lack of a universally accepted or context-sensitive definition of traditional knowledge. Without clear definitional contours, policy proposals advocating patentability of innovations derived from TK remain inadequate and potentially exclusionary. They fail to engage with the fundamental questions

of what is being protected, for whom, and by what mechanisms the purported beneficiaries—namely, the indigenous and local communities—are to be meaningfully included in and empowered by the process.

The Report also signals a perceptible shift from a defensive to a positive model of protection for TK. Defensive protection, exemplified by tools such as the TKDL, primarily aims to prevent the acquisition of IP rights by third parties who do not belong to the knowledge-holding communities. Positive protection, in contrast, seeks to actively integrate TK into mainstream IP systems through mechanisms that can include both reforms within existing IP laws and the creation of *sui generis* legal regimes. Examples of the latter include Kenya's *Protection of Traditional Knowledge and Cultural Expressions Act, 2016* and Panama's *Special System for the Collective Intellectual Property Rights of Indigenous Peoples*. (Murugesan, 2021)

However, the Report's emphasis on the economic benefits of incorporating TK into the formal IPR regime reveals an underlying bias toward the propertization of knowledge. This singular focus on commercial potential fails to account for the multifaceted significance of traditional knowledge within its original cultural context. By privileging economic valuation over cultural meaning, such approaches risk instrumentalizing TK, reducing it to a commodity devoid of its spiritual, communal, and epistemic dimensions. Worse, it may result in the erasure or dilution of traditional practices when subjected to the homogenizing logic of market-oriented IP frameworks.

3. Indian Copyright Act and Protection of Folklore

a. The Justification for Protecting Folklore in Intellectual Property Regime: Folklore represents the intellectual, cultural, and artistic heritage of communities, deeply rooted in their traditions, environment, and language. It encompasses oral traditions, music, dance, paintings, storytelling, and rituals, making it an essential part of a society's cultural identity. Given its creative and artistic nature, folklore appears to align closely with the objectives of copyright law, which protects literary, dramatic and artistic expressions under Section 14 of the Indian Copyright Act, 1957. However, despite this apparent similarity, folklore faces several doctrinal and legal challenges under copyright law, raising concerns over its effective protection.

➤ **The Copyright Paradox: Individual vs. Collective Ownership:** Copyright law, both at the national and international levels, is founded on the principle of individual authorship, incentivizing personal creativity. This model is reflected in Sections 14, 17 and 19 of the Indian Copyright Act, which grant exclusive rights to the author or rights holder. However, folklore is typically collectively owned and transmitted across generations, making it difficult to attribute authorship to a single individual or a defined group of co-authors.

In *droit d'auteur* systems, such as those influenced by the Berne Convention, authorship is linked to natural rights, further complicating folklore protection. Even if a folklore-based work originates from an individual, it only becomes folklore through continuous adaptation by the community. Consequently, neither co-authorship nor collective work models—recognized under certain national laws, adequately resolve

this issue, as they still require an identifiable creator or an entity coordinating the work, which folklore lacks. Contemporary human rights theory increasingly acknowledges that many individual rights may inherently possess a collective dimension, even if they are not classified as collective rights per se. This perspective is particularly evident in interpretations of Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which safeguards the cultural rights of individuals specifically as members of indigenous communities. The Human Rights Committee, in interpreting this provision, has addressed the complex interplay between individual and collective rights in two significant ways: first, by urging States Parties to acknowledge both individual and collective forms of authorship; and second, by mandating that indigenous peoples be granted mechanisms for the collective administration and enjoyment of the benefits arising from their cultural and creative expressions. (United Nations, 1966)

- **The Challenges of Originality and Fixation:** Originality is a fundamental criterion for copyright protection. Under Section 13(1) of the Indian Copyright Act, a work must be original to qualify for protection. Since folklore evolves over time through communal adaptation, determining originality becomes problematic. The minor, incremental changes introduced through oral tradition may not meet the threshold of originality, particularly in jurisdictions following the “skill and judgment” test for copyrightability.

Additionally, the fixation requirement, which necessitates that a work be recorded in a tangible form, poses another barrier. Many forms of folklore exist only in oral tradition and are passed down without being written or recorded. Under Section 2(d)(ii) of the Indian Copyright Act, copyright applies to works that are expressed in a material form. This requirement excludes orally transmitted folklore unless it has been recorded or documented, potentially leaving vast amounts of traditional knowledge unprotected.

- **Limited Duration of Protection:** A significant limitation of copyright law is its finite duration of protection. Under Section 22 of the Indian Copyright Act, copyright protection extends for 60 years following the author’s death. In the case of anonymous works, Section 23 provides that protection lasts 60 years from publication. Since folklore is typically anonymous and centuries old, it would not qualify for continued protection, making it vulnerable to misappropriation after it came to public domain. The purpose of protecting the folklore will then go in vein after the finite point of time.
- **Attempts to Extend Protection through Existing Legal Frameworks:** Several legal doctrines have been explored to overcome the gaps in copyright protection for folklore, but with limited success:
 - **Anonymous Works:** While Section 23 grants copyright to anonymous works, folklore does not originate from a single unknown author but rather from a collective.
 - **Performers’ Rights:** The Indian Copyright Act (Section 38) grants performers rights over their expressions. The concept of neighbouring rights—also referred to

as related rights—emerged within copyright jurisprudence to protect the interests of persons and entities who contribute to the dissemination of intellectual and cultural works but are not their original creators. These include performers, producers of sound recordings, and broadcasting organizations. Under the Indian Copyright Act, 1957, Sections 37 to 39A lay down the statutory framework for neighbouring rights, affording rights to performers and producers of phonograms, including exclusive rights of communication to the public, reproduction, and protection against unauthorized use.

When considered in the context of folklore and traditional cultural expressions (TCEs), neighbouring rights may offer a limited yet significant form of protection, particularly to performers of folklore, such as traditional dancers, musicians, oral storytellers, and ritual artists, who embody and transmit cultural knowledge through performance. Although these performers are not the “authors” of the folklore in the copyright sense, their artistic interpretations and public performances can fall within the ambit of neighbouring rights. (hankam, 2020).

This is supported by Section 38 of the Indian Copyright Act, which grants performers exclusive rights in respect of their live performances or performances fixed in any medium. Importantly, it also includes moral rights of performers under Section 38B, allowing them to claim attribution and object to any distortion, mutilation, or modification of their performance that would prejudice their reputation.

However, this recognition still largely rests on the individualistic model of rights, which proves inadequate when addressing the communal, intergenerational, and dynamic nature of folklore. Folklore does not originate from a single identifiable performer or creator, but is the collective product of a community's heritage. Performances of folklore are often fluid and evolving, passed down orally, and vary across time, region, and context. (**Radonjanin, A.** 2020). Thus, while performers can gain rights over their specific renditions, the community's role as the original custodian of the tradition often remains unacknowledged and unprotected.

In this light, the application of neighbouring rights to folklore should be reconsidered through the lens of cultural self-determination, a principle enshrined in international human rights instruments such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) and ILO Convention No. 169. These instruments emphasize the right of indigenous peoples and traditional communities to control, maintain, and protect their cultural expressions, including intangible heritage and folklore.

The link between neighbouring rights and self-determination in the context of folklore, therefore, demands a more community-based legal framework, one that transcends individual performance and recognizes the collective rights of communities as bearers and transmitters of folklore. This may necessitate the development of *sui generis* systems or the adaptation of neighbouring rights

regimes to include community custodianship, collective moral rights, and culturally appropriate mechanisms for benefit-sharing.

- **Moral Rights:** The intersection of moral rights under copyright law and the principle of self-determination holds particular significance when applied to folklore and traditional cultural expressions. Under Section 57 of the Indian Copyright Act, 1957, authors are conferred with moral rights, which include the right to claim authorship and the right to object to any distortion, mutilation, or modification of their work that would harm their honor or reputation. (Radonjanin, 2020) These rights, unlike economic rights, are personal and often inalienable, continuing even after the assignment of copyright. However, when applied to expressions of folklore—which are typically communally created, collectively maintained, and anonymously transmitted—this individual-centric framework becomes inadequate. Since folklore is not attributable to a single author or a defined group of co-authors, the moral rights regime struggles to protect the dignity and cultural integrity of the communities that have preserved and perpetuated such traditions over generations. In this context, the collective moral rights of indigenous and traditional communities can be conceptually aligned with the broader right to cultural self-determination, as recognized under international human rights law, such as Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Cultural self-determination encompasses the right of communities to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and expressions of folklore. Therefore, a reconceptualization of moral rights in the context of folklore is necessary—one that shifts from the individualistic model of authorship to a community-oriented model. Such a framework would not only protect the integrity and authenticity of traditional cultural expressions but also recognize the intrinsic link between cultural heritage and the collective identity of communities. (Murugesan, 2021) In essence, ensuring community-based moral rights over folklore is a legal and ethical imperative to uphold their right to self-determination and cultural sovereignty.

VI. CONCLUDING REFLECTIONS: JURISPRUDENCE OF MEMORY— REFLECTIONS AND FUTURE IMPERATIVES

The tapestry of Indian folklore, woven through oral traditions, music, dance, rituals, and crafts—embodies not merely artistic creativity, but the lived philosophies, spiritual moorings, and cultural continuity of its indigenous and rural communities. It is a living archive of civilizational memory, a collective inheritance passed across generations, often anonymously, yet with profound emotional and socio-cultural resonance. However, in the face of rampant commodification, cultural appropriation, and epistemic marginalization, these intangible expressions stand vulnerable to legal erasure and economic exploitation. This crisis is not merely juridical, but civilizational, demanding a legal imagination capacious enough to honour the communal soul of folklore while shielding it from the extractive imperatives of modern economies.

The existing Indian copyright regime, grounded in individualistic and proprietary notions of authorship, proves structurally incompatible with the collective, evolving, and orally transmitted nature of folklore. Its foundational pillars, fixation, originality, limited duration, and identifiable authorship stand in dissonance with the lived realities of traditional cultural expressions. Attempts to retrofit folklore into copyright's doctrinal framework, through categories such as anonymous works, neighbouring rights, or moral rights—remain partial, often neglecting the community as the rightful bearer of cultural authorship. Even when performers of folklore gain limited rights, the deeper communal ontology of such traditions is left unacknowledged.

Nonetheless, a rich reservoir of normative potential exists within both constitutional and international legal frameworks. The Indian Constitution, while not explicitly naming folklore, offers a culturally responsive architecture that recognizes community rights through Article 29(1), protects cultural dignity under Article 21, and mandates heritage preservation through Article 51A(f) and various directive principles. These provisions, when read alongside global human rights instruments—such as UNDRIP, ICCPR, and the UNESCO 2003 Convention—affirm a growing jurisprudence of cultural self-determination. Alison Renteln's call for legal pluralism reinforces the need for jurisprudential frameworks that embrace customary law, non-Western epistemologies, and community-centric rights.

To address this complex intersection of cultural rights, legal recognition, and economic justice, there is an undeniable need to develop a *sui generis* legal system for folklore protection. A robust *sui generis* framework would not only enable the documentation, preservation, and promotion of folklore, it must facilitate a functional royalty mechanism that ensures traditional communities benefit financially from the commercialization of their cultural expressions. However, royalty alone is not enough. What is more vital than monetary compensation is the acknowledgment of identity, dignity, and legacy. Therefore, the *sui generis* system must embed explicit provisions aimed at ensuring respect and due recognition of the communities as the rightful custodians of their cultural expressions. The system must also incorporate explicit provisions that ensure respect, visibility, and due recognition to the source communities, affirming that cultural dignity is as critical as economic remuneration.

This dual mandate—of royalty and recognition—is crucial not only to preserve the authenticity and continuity of folklore but also to empower the communities that sustain it. Recognition, in this context, is not a symbolic gesture but a fundamental right, rooted in the principle of cultural self-determination under international human rights law. Without this, any system of protection would be incomplete, falling short of its ethical and constitutional promise.

In this context, the formulation and implementation of a *sui generis* regime should be prioritized not only as a tool for legal protection but as a strategic policy commitment to cultural democracy, inclusivity, and social justice. This requires active participation from governments, legal bodies, cultural institutions, and community representatives. It also calls for cross-sectoral collaboration—between ministries of culture, law, tribal affairs, and education—to create policy mechanisms that are sensitive to customary laws, grounded in participatory governance, and reflective of the lived experiences of communities.

Ultimately, protecting folklore is not just about law—it is about justice, memory, and the moral architecture of a nation that claims to be rooted in its traditions. As Renteln argues, when legal systems fail to recognize the moral universes of indigenous communities, they become agents of epistemic injustice. The time has come to reimagine law not merely as a tool of regulation but as a vehicle of cultural remembrance and restitution. A *sui generis* regime for folklore protection, grounded in respect, recognition, and redistribution, must therefore move from a conceptual ideal to a constitutional and legislative imperative.

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