

# A Comparative Study of the Existing Laws Governing Traditional Cultural Expressions

Parvathy Menon<sup>1</sup>, Valarmathi R<sup>2</sup>

<sup>1</sup>Student, LLM IPL, CHRIST (Deemed to be) University, Bengaluru

<sup>2</sup>Professor, School of Law, CHRIST (Deemed to be) University, Bengaluru

## ABSTRACT

The legal frameworks governing the protection of Traditional Cultural Expressions (TCEs) are as diverse as the cultural heritage they seek to preserve. Across the world, countries have adopted a wide array of legislative approaches to safeguard TCEs, each reflecting the unique socio-cultural, historical, and legal contexts of their societies. This diversity highlights the challenge in shaping legal mechanisms that are capable of addressing the respective needs of each region and community, while balancing the demands of globalization, modernization and cultural preservation. This multiplicity of laws arises from the highly varied cultural identities of nations and communities which also results in varied approaches. However, this diversity also brings with it significant challenges. The lack of a unified or harmonized framework for TCE protection at the international level has led to fragmented efforts, with national laws varying widely in their scope, enforcement mechanisms, and alignment with international norms. While some countries rely heavily on traditional intellectual property regimes, others have introduced sui generis systems or integrated customary law frameworks to address the limitations of conventional legal models. These differences highlight the difficulty of reconciling the communal, intergenerational nature of TCEs with the predominantly individualistic and time-bound principles of intellectual property law. This comparative analysis explores the varied legal frameworks that have emerged across different jurisdictions to protect TCEs, focusing on the interplay between cultural diversity and legislative diversity. It examines how the distinct cultural and legal traditions of nations influence their approaches to safeguarding TCEs and identifies commonalities and divergences that arise from this interplay. By highlighting the cultural underpinnings of existing laws, this study underscores the need for culturally sensitive and inclusive legal solutions that not only preserve the rich tapestry of global cultural heritage but also empower the communities that serve as its custodians.

**Keywords:** Traditional Cultural Expressions, Expressions of Folklore, Sui Generis Framework, Comparative Analysis, Cultural Heritage, Preservation

## 1. INTRODUCTION

Traditional Cultural Expressions or TCEs are integral to the cultural, social and communal identities of indigenous as well as local communities that are the practitioners and propagators of the same. While a proper, commonly agreed upon definition for TCEs is yet to be arrived at, it is generally understood to include any music, dance, art, designs, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, as well as many other artistic or cultural expressions.

Traditional Cultural Expressions bare the true essence of the cultural richness of the world nations and embody their collective history and values. Transmitted across generations, they hold immense significance, cultural, social and economic. However, they are left vulnerable to all kinds of exploitation, misappropriation and commercialisation, placing the source communities at a place of loss.

## 1.2 VARIOUS LEGAL APPROACHES TO TCE PROTECTION

While there have been various approaches from the different nations towards the protection of Traditional Cultural Expressions, it is not that all these are uniform or identical laws that are made on the same line. Each of these laws and enactments have varying powers, methods of approach as well as enforcement mechanisms. This is owing to the variance in the cultures and the practices in existence. There are various legal approaches through which the varied nations have attempted to tackle the question of TCE protection.

### 1.2.1 INTELLECTUAL PROPERTY REGIMES

A sizeable obstacle that is generally faced when it comes to TCE protection is that most Traditional Cultural Expressions are based on cultural expressions that have existed for periods longer than any existing Intellectual Property regime. This results in them failing in properly protecting the expressions. This is mainly due to the requirements that are put down for the protection by the existing IP regimes which do not align with the basic characteristics of Traditional Cultural Expressions. Taking the case of copyright protection, the very basic requirements that are made mandatory for the protection in copyright regimes across the world include creativity/originality, skill and knowledge, imprint of personality or individuality. It could be the case that the Traditional Cultural Expressions do not satisfy these requirements. Another factor is that most of the copyright regimes prescribe limited term of protection. However, the traditional cultural expressions are to be perpetually protected. Hence, the currently existing IP regimes that are based on the western idea laid down by TRIPS does not align with the protection that is required by the Traditional Cultural Expressions. Even considering Trademark law, Geographical Indications or Trade Secret protection, they fall short of the needs of the protection of Traditional Cultural Expressions.

### 1.2.2 SUI GENERIS SYSTEMS

Sui Generis Systems are one of the main approaches that are adopted for the protection of Traditional Cultural Expressions. They are new intellectual property categories that are created exclusively for the protection of Traditional Cultural Expressions.<sup>1</sup> They also simultaneously work with the existing Intellectual Property regimes or by progressively replace them. Several countries have created and implemented sui generis solutions for the protection of Traditional Cultural Expressions. However, some have also established them as independent intellectual property regimes. This include the Tunis Model Law on Copyright, Bangui Agreement of OAPI, Panama Law No. 20 and South Pacific Model Law for National Laws.

However, these sui generis systems also have their shortfalls. Though sui generis, they are based on existing IP regimes and hence suffer from several of the limitations that IP regimes have in the protection of TCEs.<sup>2</sup>

### 1.2.3 CUSTOMARY LAW INTEGRATION

Having established the above two systems for protection of Traditional Cultural Expressions, question as

---

<sup>1</sup> Meghana RaoRane, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L.& POL'y J. 827(September 2006)

<sup>2</sup> ibid

to what the need for another system is when they already exist. There are several arguments put forward by scholars that the use of existing IP regimes and sui generis solutions are sub-optimal and the indigenous customary laws of the communities that see protection are more effective and are to be implemented instead.<sup>3</sup> Indigenous customary laws here, are the set of rules, customs, traditions and values that have been accepted by the source communities since time immemorial and act as standards and procedures that are to be followed and upheld in connection with the practice of the traditional cultural expressions. This argument stems from the realisation that Traditional Cultural Expressions constitute the living cultural heritage of indigenous people. These laws have in place, instead of economic rights, rights corresponding to the relationships of the persons practicing them. The Traditional Cultural Expressions have been protected over the years by the indigenous people or the source community to which it belongs. It is only with the modernisation of the world and globalisation that protecting it has become a hurdle. It is but only common sense to understand that the customary law of the source community would be one that is tailored to fit the needs of the Traditional Cultural Expression and its protection. This method bridges the lacunae left by the implementation of sui generis systems or existing IP regimes, both of which are based on western ideals and concepts. Additionally, the utilisation of customary laws also boosts the right of the indigenous people practice and sustain their culture and traditions including protecting their history and simultaneously preserving it.

### 1.3 TCE SPECIFIC LAWS ACROSS THE GLOBE

#### 1.3.1 ASIA-PACIFIC

##### 1.3.1.1 INDONESIA

Indonesia is a country with very advanced laws and instruments in place for the protection of intellectual property, especially in case of Traditional Cultural Expressions. As per the system in place in Indonesia, this falls under the sub-category of Intellectual property known as ‘Communal Intellectual Property Rights’ which is nothing but intellectual property rights in cases where communal moral rights held by a source community is to be protected, especially in cases of economic benefit, perpetually. In short, communal intellectual property is intellectual property that is held by a community instead of an individual.<sup>4</sup>

The extensive legal protection of Traditional Cultural Expressions in Indonesia stem from the 1945 Constitution of the state. Articles 18 B(1), B(2) and 28C as well as 28I(3) state as follows.

“18B (1) The State recognises and respects units of regional authorities that are special and distinct, which shall be regulated by law.

(2) The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of Unitary State of the Republic of Indonesia and shall be regulated by law.”

“28C (1) Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race

(2) Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.”

---

<sup>3</sup> ibid

<sup>4</sup> Ayu Palar et al, *Inclusive Rights to protect communal intellectual property : Indonesian perspective on its new government regulation*. Cogent Social Sciences(2023), 9

“28I(3) The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations.”

A proper reading of these provisions makes it immensely clear that the Indonesian constitutional makers intended to properly demarcate the national pride they held in their traditional heritage, so much that they enshrined their protection in the constitution of the nation. They specifically provide for the proper protection of the traditional customary rights of traditional communities.

The various laws, regulations and drafts in place effectively define terms such as custodians and source communities. As per these, the source communities- the indigenous community and/or local community who produces, protects, maintains, and/or develops the Communal Intellectual property in intergenerational Context including supporting societies- hold the right to include other people who have commitments to co-maintain, co-safeguard and co-develop the objects together without written licensing agreements. They also have the right to be involved in a prior informed consent arrangement when their Traditional Cultural Expressions are going to be exploited by outsiders. Specific provisions are in place regarding this, that oral or silent consent is sufficient in case of general Traditional Cultural Expressions whereas written consent in the form of mutually agreed terms are necessary in case of Traditional cultural Expressions associated with Genetic Resources.

The Indonesian National Laws and Customary Laws together provide the following rights in case of Traditional Cultural Expressions:

1. Right of stewardship, safeguarding, conservation, protection, defence, development, maintenance, and co-stewardship
2. Right to control
3. Right to use, exchange, mortgage and rent
4. Right of reproduction, publication, communication to the public, make available to the public
5. Transformation right including digitization right
6. Right of benefit sharing, including monetary and non-monetary benefit sharing
7. Right to conduct indirect commercialization, in form of tourism programs
8. Individual right based on customary law authorisation of the custodians
9. Moral rights that can be measured by economic valuation.

Such a Defensive Protection mechanism is provided through a centralized Official Database. This database is interactive in that the content can be officially revised or renewed. An open database for Traditional Cultural Expressions as well as a restricted database for Traditional Cultural Expressions associated with Genetic Resources are maintained and the rights are re-declared through the Letter of Inscription from the Directorate General of Intellectual Property. The Traditional Cultural Expressions and questions as to their custodianship, stewardship in cases where they are held by conflicting source communities can be obtained through mediation which is facilitated by the Government.

The Indonesian Ministry of Justice and Human Rights conducts inventory programs of Communal Intellectual Property. The Ministry is instructed to work with other ministries, universities and research institutions, non-government organisations and local governments to conduct the inventory of Traditional Cultural Expressions.

The sui generis legal provisions regarding Communal Intellectual Property in Indonesia include:

1. Law 29 Year 2000 , Art 7
2. Law 28 Year 2014, Art 38
3. Law 13 Year 2016, Art 26

4. Law 20 Year 2016, Arts 1.6, 1.7, 21d, 53, 54, 56, 66, 101
5. MJHR 13 year 2017
6. UU 11 Year 2018 Art 25

Law No.28 of 2014 of the Republic of Indonesia was the first document to address the protection of TCEs. Chapter V of the Act specifically deals with 'Protected Traditional Cultural Expressions and Works' and Article 38 explicitly recognises the State as the rightful owner of the rights on Traditional Cultural Expressions. It makes the State dutybound to take inventory, preserve and maintain TCEs.

The Ministerial Regulation No/13 of 2017 on Communal Intellectual Property is another landmark enactment issued by the Indonesian Government aimed at the Preservation of Traditional Cultural Expressions. The Regulation defines the communities that maintain or develop the Traditional Cultural Expressions in communal or traditional ways as Custodians.

The Ministerial Regulation No. 13 of 2017 (MJHR 13/2017) further brought clarity to the definition of Communal IP and defined it as Intellectual Property in the form of Traditional Knowledge, Traditional Cultural Expressions, Geographic Resources, and a Geographical Indication's Potential (GIP). This move was a nod to the WIPO's usage of the specific names instead of referring to them as Communal IP. This regulation mandated maintenance of inventory activities on Communal IP objects. Not just this, the regulation also specifies the objective of such proper inventory measures. First among them is the protection of the rights of the indigenous communities to ensure that Communal IP is not used without their permission and that there is no unfair distribution of benefits. The Second is the necessity to obtain information as to the needs of the parties interested in utilising communal Intellectual property, whether such use be commercial or non-commercial. Thirdly, it aims to ensure that the data regarding Communal Intellectual Property so collected and inventoried cannot be accessed arbitrarily. The Fourth and Final objective is to advise the related indigenous communities and create awareness in them that if their Communal Intellectual Property is documented for inventory needs, Intellectual Property, whether conventional or modern will appear.<sup>5</sup>

It also recommends that the Indonesian Government should be able to substantiate whether the data collected in the inventory is sufficient to fulfil the moral and economic rights of the source community, A Third enactment is Law No. 5 of 2017 on Cultural Advancement. This one is aimed at safeguarding intangible cultural heritage by promoting the integration of the regional cultural expressions into the national development agenda of the country. It facilitates the inclusion of the Traditional Cultural Expressions in cultural policies and ensuring the legal and institutional measures to protect and promote them, whether domestically or internationally.

### 1.3.1.2 AUSTRALIA

The Australian approach to protecting Traditional Cultural Expressions is heavily rooted in indigenous protocols and sui generis systems. Unlike many other jurisdictions that rely heavily on adapting conventional intellectual property laws, Australia has developed a framework that uniquely caters to the cultural and legal needs of Aboriginal and Torres Strait Islander communities.

The Indigenous protocols in Australia play a crucial role in the management and protection of TCEs. They are culturally rooted guidelines developed by indigenous communities to regulate the use and dissemination of their cultural expressions. Protocols such as the Indigenous Art Code and the Indigenous Protocols for the Production of Indigenous Australian Music provide specific instructions on respecting

---

<sup>5</sup> Ibid

the cultural significance of TCEs and ensuring appropriate usage. They serve as a form of soft law, guiding artists, researchers, and businesses in engaging with indigenous cultural material. While not legally binding, their incorporation into contracts, licensing agreements, and industry standards help enforce community norms and values, promoting respect for indigenous culture and preventing exploitation.

Australia's sui generis systems for TCE protection are tailored to address the inadequacies of conventional IP laws, which often fail to recognise the collective and perpetual nature of indigenous cultural rights. The Aboriginal Heritage Act, 2006 and the Protection of Movable Cultural Heritage Act, 1986 are examples of legislation that acknowledge the unique status of TCEs and provide mechanisms for their safeguarding. The Aboriginal Heritage Act offers comprehensive protection for sacred sites and objects, ensuring that any use or alteration requires community consultation and approval. The law empowers indigenous communities to manage their cultural heritage actively, granting them a significant role in decision-making processes.

Additionally, the Indigenous Cultural and Intellectual Property framework developed by Terri Janke has been influential in shaping policy discussions and practices around TCEs. The ICIP framework advocates for recognition of indigenous rights over cultural expressions, emphasizing the need for legal reforms that align with indigenous customs and traditions.

The adoption of indigenous protocols and sui generis systems in Australia has fostered greater respect for TCEs and provided communities with tools to assert control over their cultural heritage. However, challenges remain in achieving comprehensive legal protection. The voluntary nature of protocols and the limited scope of sui generis laws can hinder their effectiveness, particularly in commercial contexts where enforcement relies on the goodwill of parties involved.

Furthermore, the fragmented nature of Australia's legislative framework, with different states and territories adopting varied approaches, can lead to inconsistencies and gaps in protection. There is a need for a unified national strategy that harmonizes these efforts and provides robust legal recognition of TCEs as distinct from conventional IP categories.

### **1.3.1.3 PACIFIC ISLAND NATIONS**

Customary laws play a central role in the protection and management of TCEs in Pacific Island Nations. Deeply embedded in the social and cultural fabric of indigenous communities, these laws govern the use, transmission and preservation of cultural heritage. Unlike statutory laws, customary laws are derived from traditional practices, norms and values passed down through generations.

In many Pacific Island Nations, customary laws are recognised alongside formal legal systems. Countries such as Samoa, Fiji, and Vanuatu have legal frameworks that acknowledge the authority of customary laws in matters related to cultural heritage. This dual legal system ensures that TCEs are protected in a manner that aligns with traditional governance structures and cultural contexts.

For instance, in Vanuatu, the Constitution explicitly acknowledges customary laws, providing them with a legal status that allows communities to enforce traditional practices concerning TCEs. Similarly, in Samoa, the Village Fono Act, 1990 empowers local village councils to regulate the use of cultural expressions within their jurisdictions.

These customary laws in Pacific Island Nations serve as a crucial mechanism for cultural preservation, safeguarding the integrity and authenticity of TCEs. They regulate the conditions under which cultural knowledge and expressions can be shared, ensuring that such practices are respected and not misappropriated.

These laws also reinforce community autonomy. Allowing indigenous groups to maintain control over

their cultural heritage. By relying on customary laws, communities can ensure that any use of their TCEs aligns with traditional values and contributes to the collective well-being.

However, despite their significance, customary laws face challenges in contemporary legal and economic contexts. The lack of formal codification and recognition in international IP systems often limits their enforceability outside the region. Additionally, the pressure of globalization and commercialization poses threats to the sustainability of these traditional legal systems.

### **1.3.2 AFRICA**

#### **1.3.2.1 SOUTH AFRICA**

South Africa's Intellectual Property Laws Amendment Act, 2013 represents a significant step toward integrating traditional cultural expressions (TCEs) into the country's intellectual property (IP) framework. The Act amends several key IP statutes, including the Copyright Act, the Performers' Protection Act, the Trademarks Act, and the Designs Act, to include provisions for the protection of indigenous knowledge systems (IKS), which encompass TCEs.

The Amendment Act establishes that indigenous communities are the rightful custodians of their TCEs, granting them moral and economic rights over these expressions. For instance, under the amended Copyright Act, indigenous communities are recognized as the authors of their TCEs, thereby ensuring that they receive royalties or compensation for the use of their cultural expressions.

Furthermore, the Act creates a mechanism for the registration of indigenous knowledge through the National Trust, allowing communities to document and register their TCEs formally. This registration aims to prevent unauthorized use and exploitation, fostering a system where communities can benefit financially and culturally from their heritage.

While the Intellectual Property Laws Amendment Act, 2013 represents a comprehensive approach to TCE protection, its implementation has faced challenges. Critics argue that the registration process can be cumbersome and that many communities lack the resources or legal knowledge to navigate it effectively. There are also concerns about the Act's reliance on a Western IP framework, which may not fully accommodate the communal and perpetual nature of TCEs.

The Swakopmund Protocol, adopted by the African Regional Intellectual Property Organization (ARIPO) in 2010, is a regional legal framework specifically designed to protect traditional knowledge (TK) and TCEs in African member states. The Protocol provides for the establishment of legal systems that recognize and protect the rights of communities over their TK and TCEs, ensuring that any commercial use is subject to prior informed consent and benefit-sharing agreements.

The Protocol defines TCEs broadly, encompassing verbal expressions, musical expressions, expressions by actions, and tangible expressions like traditional handicrafts. It aims to safeguard these expressions against misappropriation and misuse, particularly in the context of globalization and the commodification of culture.

A key feature of the Swakopmund Protocol is its emphasis on community ownership and the requirement for state parties to establish mechanisms that allow communities to manage and protect their TCEs. This includes the creation of registers and databases of TCEs, which serve both as a tool for documentation and as a legal reference to assert rights over these expressions.

However, the Protocol's implementation varies across member states, with differing levels of commitment and resources allocated to the protection of TCEs. In some countries, the integration of the Protocol into

national law has been slow, and enforcement mechanisms remain underdeveloped, limiting its effectiveness in safeguarding TCEs.

The effectiveness of TCE protection in Africa largely depends on the enforcement of both national laws, like South Africa's Intellectual Property Laws Amendment Act, and regional frameworks such as the Swakopmund Protocol. Enforcement challenges stem from limited institutional capacity, insufficient funding, and a lack of awareness about the rights conferred by these laws among indigenous communities. Community participation is crucial for the success of any legal framework aimed at protecting TCEs. In both South Africa and the broader ARIPO member states, involving communities in the legislative process, enforcement, and governance of their cultural heritage ensures that the protection mechanisms are culturally appropriate and effective. Initiatives that support community-led registration of TCEs and provide education on IP rights are essential in bridging the gap between legal frameworks and the actual protection of cultural heritage.

Despite these efforts, many African countries struggle with balancing the modern IP regime and the traditional, communal nature of TCEs. The dual requirement of legal and cultural understanding poses a challenge to both lawmakers and communities, necessitating a more integrated approach that respects traditional governance while providing the benefits of legal protection.

### 1.3.2.2 TUNISIA

Tunisia, a country situated in the extreme north of the African continent is one that is rich in cultural heritage. It is also one of the first countries in the world to have implemented and enacted an act for the protection of expressions of folklore. The nation enacted a copyright law that protects the expressions of folklore and other cultural expressions in the nation first in 1966 and then again in 1994. This active attempt at protecting the expressions stems from a concern to avoid their disappearance.<sup>6</sup> The origin of this concern is apparent from Article 7 of the Tunisian Copyright law of 1994 which begins by explicitly stating that “Folklore forms part of the national heritage.....”. There is also a general awareness that the folklore also forms the ground resource to boost creativity and that hence there needs to be a balance between the protection and encouraging creativity. Further, the 3<sup>rd</sup> paragraph of Article 7 provides a non-exhaustive definition of folklore as “any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation such as folk stories, writings, music and dance.” This definition, being very broad, provides ample room for interpretation.

A reading of the Tunisian Copyright Law leads to the inference that the words ‘cultural/popular heritage’ and ‘folklore’ are used interchangeably so as to indicate Traditional Cultural Expressions. The Tunisian statutory recognition of folklore describes folklore as that which possesses the following characteristics:

1. That which is passed on from generation to generation in an intangible form
2. That which is a community-oriented creation. That is, the expression of which is regulated by local traditions, standards and expectations
3. The expressions of which are not attributable to an individual author
4. Which is continually utilized, developed and innovated by its source communities.<sup>7</sup>

Article 1 of the Act classifies the works that are protected under the Act into three- works that customarily are held eligible for copyright protection, works that are linked to Tunisian Tradition and works that are

<sup>6</sup> Daphne Zografos, The Legal Protection of Traditional Cultural Expressions: The Tunisian Example, 7 J. WORLD INTELL. PROP. 229 (March 2004).

<sup>7</sup> WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on the Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, April 2001, 160



the result of the evolution of modern technology.<sup>8</sup> Expressions of folklore fall into the second category of the three.

The Tunisian Copyright law however puts forward a unique idea as to the status of these works of folklore. Since there are no indigenous communities in Tunisia, the works of folklore are part of the ‘public domain of the state’. This public domain of the state is markedly different from the public domain as such. It is common knowledge that works that are part of the public domain are open to be appropriated by anyone anywhere. However, works that form part of the Public Domain of the State are recognised to belong to the collective memory of the citizens of Tunisia, thus placing it at such a status that it cannot be appropriated by individuals and the protection remains in force for an unlimited period of time.

The statute also necessitates, by the second paragraph of Article 7, an authorization from the Ministry of Culture of the nation for the production of ‘works inspired by folklore’ and for full or partial assignment of copyright in such a work or even for an exclusive licence with respect to such a work. This provision flows naturally from the fact that the works of folklore form part of the Public Domain of the State and hence it cannot be permitted to be exploited with gainful intent without prior authorization of the State or its representative, here the Ministry of Culture.

Article 51 of the Act also provides penal provisions for infringers of the recognized copyrights and states that such an infringement may be proved if the alleged infringer is “unable to furnish authorization that is referred to in Article 2 of the Law.” The Ministry in cases of infringement contacts the infringing party and informs them of the infringement giving a chance for them to regularise their act. Since a majority of the infringements occur unintentionally owing to unawareness of the infringing party that they need to ask for an authorization to begin with, usually co-operate and regularise the situation easily.

The provisions mentioned till now represent the legal protection of folklore. The flip side of the coin is material protection of folklore, that is, the effective documentation of the folklore. This documentation has a dual function, that is, to protect from unauthorised exploitation and to safeguard the rich and diverse cultural identity of the nation and the preservation of its history.<sup>9</sup> Such documentation is implemented through various institutions and organisations governed by the Ministry of Culture, Youth and Leisure with the main task being the collection of relevant data and study and research on Tunisian Cultural heritage.

However, the absence of an international agreement to regulate the use of folklore at the international level means that all these provisions fall short when it comes to the protection of folklore. While there have been instances where the provisions of the legislation have been respected by the nationals of another country as was in the case of Microsoft Ltd where Microsoft London requested authorization from the Ministry to use a fragment of Noubu Dhill, a category of music that belongs to Tunisia’s musical cultural heritage.

### 1.3.3 EUROPE

In Europe, the protection of Traditional Cultural Expressions (TCEs) is predominantly addressed through existing intellectual property (IP) frameworks rather than through specific laws dedicated to TCEs. This reliance on IP law, particularly copyright, trademarks, and geographical indications (GIs), has shaped the region's approach to safeguarding cultural heritage.

---

<sup>8</sup> Supra 6

<sup>9</sup> Supra 7

Unlike some other regions, Europe lacks a comprehensive, sui generis system specifically designed to protect TCEs. Instead, the protection of TCEs often falls under broader cultural heritage laws or is embedded within general IP laws. This absence of dedicated TCE legislation means that cultural expressions must fit within the existing categories of IP, which can be problematic given the unique characteristics of TCEs, such as their communal ownership and transmission over generations.

One notable exception in the European approach is the use of geographical indications (GIs) to protect cultural heritage. GIs are used to identify products that have a specific geographical origin and possess qualities or a reputation due to that origin. The European Union (EU) has a robust GI system, which has been extended to cover traditional foods, beverages, and other cultural products.

Examples of cultural products protected by GIs include Parmigiano-Reggiano cheese from Italy and Champagne from France. While these products are often seen as culinary items, they are also integral to the cultural identity of their regions, thereby indirectly protecting the associated TCEs.<sup>10</sup>

The EU has initiated several efforts to address the gaps in protecting folklore and traditional knowledge. The European Commission has supported projects like the Europeana platform, which digitizes cultural heritage materials and makes them accessible to the public. These initiatives aim to preserve and promote European folklore but do not provide legal protection against misappropriation.

Moreover, the EU participates in international discussions on the protection of traditional knowledge and folklore through its involvement in the World Intellectual Property Organization (WIPO) and other global forums. However, the development of specific legal frameworks within the EU remains limited, and much of the responsibility for protecting TCEs lies with individual member states, leading to a fragmented approach.<sup>11</sup>

### 1.3.4 NORTH AND SOUTH AMERICA

#### 1.3.4.1 PERU

Peru is a leading example in Latin America with its Law No. 27811 of 2002, which protects indigenous knowledge associated with biodiversity. This sui generis law recognizes the collective rights of indigenous peoples over their traditional knowledge and provides mechanisms for benefit-sharing. Under this law, indigenous communities can register their knowledge in a National Register of Collective Knowledge, which aims to prevent unauthorized use and ensure that any commercial benefits are shared with the knowledge holders.<sup>12</sup>

The law has been instrumental in safeguarding the rich biodiversity-related knowledge of Peruvian indigenous communities, which is deeply intertwined with their cultural expressions. It also sets a precedent for integrating the protection of traditional knowledge with biodiversity conservation efforts, aligning with international frameworks such as the Convention on Biological Diversity (CBD).

#### 1.3.4.2 MEXICO

Mexico protects traditional cultural expressions under the Federal Law on Copyright. This law is structured in such a way that it clearly protects both the performer's rights as well any derivative works.

<sup>10</sup> Dev S. Gangjee, *Relocating the Law of Geographical Indications*, 110 (Cambridge Univ. Press 2012).

<sup>11</sup> Rosemary J. Coombe & Maria Aylwin, *Virtual Publics and the Privatization of Cultural Heritage in Digital Archives*, 18 Int'l J. Cultural Prop. 249, 270 (2011)

<sup>12</sup> Manuel Ruiz, *The Protection of Traditional Knowledge in Peru: A Comparative Perspective*, 13 Int'l J. Cultural Prop. 123, 128 (2006).

“116. Performer means the actor, narrator, speaker, singer, musician, dancer or any other person who performs a literary or artistic work or an expression of folklore or who engages in a similar activity, even though he may have no pre-existing text to guide his performance.

157. This law shall protect literary and artistic works, works of popular art or craft works and also all original manifestation in local languages, and the practices, customs and traditions of the multi-cultural society constituting the Mexican State that do not have an identifiable author.

185. Literary or artistic works, works of popular art or craft works that have evolved and are perpetuated in a community or ethnic group with its origins or roots in the Mexican republic shall be protected by this Law against distortion intended to discredit that said works of prejudice the reputation or image of the community or ethnic group to which they belong.

160. In any fixation, representation, publication, communication or use in any way of a literary or artistic work, work of popular art or craft work protected under this Chapter, the community or ethnic group or, where appropriate, the region of the Mexican Republic to which it is specific shall be mentioned.”

Thus. Article 116 of the Law protects the performers rights of anyone who performs an expression of folklore whereas Article 157 protects derivative works which are a manifestation of the original work that form part of the Mexican culture and heritage, including orphan works. Art 158 and 160 of the law clearly put forward the protection of such expressions that have formed an integral, inalienable part of Mexican culture and heritage.

The Mexican Government in January 2022 enacted the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (LFPPCPCIA). Entering into effect from January 18<sup>th</sup>, 2022, the main purpose of the law was “to recognise and guarantee the protection and safeguard of the development of the Cultural Heritage and Collectible Intellectual Property of the Indigenous and Afro-Mexican Peoples and Communities”. The various purposes of the Law include the proper definition of the ones that preserve, protect and control the cultural heritage, the use and enjoyment or exploitation of it by third parties and mainly the establishment of a protection system to strike down on any misappropriation or exploitation of the Cultural Heritage or Knowledge and Cultural Expressions Traditional (KCET).

This law recognises, with clarity, the collective rights of two or more communities over the Cultural Heritages. The law is dynamic in that it does not give a one-dimensional view of the protection of Cultural Elements and instead goes to the extent of stating that any act, contract or agreement entered into which may result in the misappropriation, exploitation or commercialisation of the cultural elements will be null and void.

#### **1.3.4.3 PANAMA**

Panama implemented Law No. 20 of 2000, on the Special System for the Collective Intellectual Property Rights of Indigenous Peoples. Article 1 of the Law comprehensively states the purpose of the law. It states as follows:

“...to protect the collective intellectual property rights and traditional knowledge of indigenous peoples in their creations, such as inventions, models, drawings and designs, innovations contained in the images, figures, symbols, graphics, stone carvings and other details; as well as the cultural elements of their history, music, art and traditional forms of artistic expression suitable for commercial use, via a special system to register, promote and market their rights, in order to highlight the social and cultural values of indigenous cultures and guarantee social justice for them.”

This read with Article 2 which first recognises that customs, traditions, expressions of folklore etc form part of the cultural heritage of the indigenous people and hence exclusive rights of any kind on them shall not be granted to third parties, explicitly evidences the aim of the legislators and the comprehensive nature and intent of the statute.

The Act recognises the ‘collective rights’ of the indigenous peoples in their traditional culture and its expressions, explicitly taking a stand against the individual ownership concept propagated by the Western concept of Intellectual property.

The Act also specifically confers the right to use and market the art, crafts and other cultural expressions based on the traditional heritage of indigenous peoples and the same is to be approved and registered with the Government.

A unique feature of this statute can be seen in Article 24 of the Act wherein it has been provided that ‘non-indigenous Panamanian craftspeople’ who are engaged in the transactions relating to replicas of ‘traditional indigenous crafts’ can carry on their activities with the consent of the traditional indigenous authorities as long as there is a sign affixed stating that the work is a replica. It also extends the privileges and benefits enjoyed by the indigenous arts and crafts to those from other countries, provided that the same treatment is meted out by the other country as well.

#### 1.3.4.4 UNITED STATES

In the United States, the protection of TCEs is largely facilitated through trademarks and cultural protocols. The trademark system allows indigenous groups to register trademarks, including certification and collective marks, to protect symbols, names, and designs that are integral to their cultural heritage. An example is the Navajo Nation’s use of trademarks to protect its brand and ensure that the term "Navajo" is not misused in commerce.<sup>13</sup>

Additionally, cultural protocols, which are community-driven guidelines, play a significant role in safeguarding TCEs. These protocols outline the acceptable use and representation of indigenous cultural expressions and are often enforced through contractual agreements and community monitoring.

Despite these measures, challenges remain, particularly in addressing the non-commercial aspects of TCEs and ensuring that traditional knowledge holders are adequately compensated and involved in decision-making processes.

Canada has taken steps to incorporate indigenous perspectives into its legal frameworks, with initiatives like the Indigenous Knowledge Institute and various provincial laws that recognize the rights of indigenous peoples to manage their cultural heritage. While Canada does not have a sui generis TCE law, efforts to integrate customary laws and indigenous governance systems into national frameworks are ongoing.<sup>14</sup>

#### 1.4 COMMONALITIES AND DIVERGENCES

The legal protection of Traditional Cultural Expressions (TCEs) across various jurisdictions highlights both commonalities in principles and significant divergences influenced by regional contexts and socio-cultural frameworks. This section compares and contrasts the approaches of Panama, Tunisia, Australia, Africa, Indonesia, and Mexico, focusing on community ownership, benefit-sharing, enforcement mechanisms, and the challenges inherent in protecting TCEs.

<sup>13</sup> Angela Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *Cardozo Arts & Ent. L.J.* 175, 199 (2005).

<sup>14</sup> John Borrows, *Canada's Indigenous Constitution* 59 (Univ. of Toronto Press 2010).

#### 1.4.1 COMMONALITIES

A universal principle across the discussed jurisdictions is the recognition of community ownership over TCEs and the importance of benefit-sharing mechanisms. These principles aim to ensure that communities retain control over their cultural expressions and derive economic benefits from their commercial use.

In Panama, Law No. 20 of 2000 protects the collective rights of indigenous peoples to their cultural creations and establishes mechanisms for the commercial use of these expressions with a requirement for benefit-sharing. Similarly, Tunisia's legal framework incorporates the protection of folklore and traditional knowledge within its IP laws, mandating that benefits from the use of such knowledge be shared with the communities. This is reflected in the provisions of the Tunisian Copyright Law, which safeguards traditional cultural expressions and requires equitable remuneration for their use. Australia addresses community ownership through a blend of IP laws and specific indigenous protocols, although it lacks a dedicated sui generis system for TCEs. The establishment of benefit-sharing agreements is promoted through voluntary codes of conduct and cultural protocols. In Africa, instruments like the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore underscore community ownership and benefit-sharing. This protocol, adopted by the African Regional Intellectual Property Organization (ARIPO), obligates member states to ensure that communities benefit from the commercial exploitation of their TCEs. In Indonesia, Law No. 28 of 2014 on Copyright recognizes the communal nature of traditional cultural expressions and enshrines benefit-sharing principles, ensuring that local communities receive financial benefits from the use of their cultural heritage. Mexico's Federal Law on Copyright includes provisions for the protection of indigenous and traditional cultural expressions, requiring that any benefits from the exploitation of these expressions be shared with the originating communities.

Each jurisdiction has made efforts to align with international frameworks such as the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO) treaties, emphasizing the global importance of safeguarding TCEs

#### 1.4.2 REGIONAL DIVERGENCES IN THE MECHANISMS

##### 1.4.2.1 VARIATIONS IN ENFORCEMENT MECHANISMS

The enforcement of TCE laws varies significantly among the jurisdictions, influenced by the capacity of legal institutions and the socio-economic environment.

In Panama, enforcement mechanisms are relatively robust, with the establishment of the National Directorate of Copyright to oversee compliance and address violations. Tunisia faces challenges in enforcement due to limited resources and institutional capacity, which hampers the effective implementation of TCE protection laws. In Australia, enforcement is often left to community groups and cultural organizations, with limited direct government intervention. The reliance on soft law measures such as cultural protocols can lead to inconsistent enforcement. The Swakopmund Protocol encourages member states in Africa to develop robust enforcement mechanisms, but the level of implementation varies across countries, with some states more effectively incorporating the protocol into national law than others. Indonesia has a mixed enforcement record, with efforts to integrate TCE protection within broader copyright enforcement strategies. Mexico has faced enforcement challenges due to the vast and diverse range of TCEs within the country, alongside issues of bureaucratic inefficiency and limited community engagement in the enforcement process.

#### 1.4.2.2 INFLUENCE OF SOCIO-CULTURAL CONTEXT

The socio-cultural context profoundly shapes the legal structures for TCE protection in each jurisdiction. In Panama, the strong presence of indigenous groups and their political influence have led to relatively comprehensive legislation. Tunisia, with its rich cultural history and influence from both African and Mediterranean traditions, incorporates TCE protection within a broader cultural heritage framework. Australia's approach reflects its colonial history and the ongoing struggle of indigenous communities to reclaim and protect their cultural heritage within a predominantly Western legal system. In Africa, the diversity of cultural expressions across the continent and the varying degrees of post-colonial influence have led to a regional approach through ARIPO's initiatives, which aim to create a cohesive framework while respecting national diversities. Indonesia's vast archipelago and diverse ethnic groups require a legal framework that is flexible yet comprehensive enough to address the unique needs of each community. Mexico's approach is shaped by its indigenous heritage and the need to protect a wide array of cultural expressions, from Mayan and Aztec traditions to modern indigenous practices.

#### 1.4.3 CHALLENGES ACROSS JURISDICTIONS

The lack of a universally accepted definition of TCEs complicates legal protection across jurisdictions. Definitions vary, affecting the scope and applicability of laws. This inconsistency poses a challenge for international cooperation and the development of cohesive legal standards.

Enforcement barriers are common, often due to insufficient funding, limited resources, and a lack of awareness among communities and law enforcement agencies. These issues hinder the effective protection of TCEs and necessitate greater investment in capacity building and legal education.

### 1.5 BEST PRACTICES

Effective protection of Traditional Cultural Expressions (TCEs) requires adopting best practices that respect the unique cultural heritage of indigenous communities while ensuring their participation and benefit. This section outlines best practices in the legal frameworks of Panama, Indonesia, Mexico, Australia, Africa, and Tunisia, emphasizing tailored sui generis systems, inclusion of indigenous communities in decision-making, and benefit-sharing mechanisms.

#### 1.5.1 TAILORED SUI GENERIS SYSTEMS

Tailored sui generis systems are essential for accommodating the unique characteristics of TCEs, which often do not fit within conventional intellectual property frameworks. These systems provide specific protections that recognize the communal and intergenerational nature of TCEs.

Panama's Law No. 20 of 2000 establishes a sui generis system for the protection of the collective intellectual property rights of indigenous peoples over their cultural creations. This law specifically addresses the needs of indigenous communities, offering a legal framework tailored to their cultural expressions. In Indonesia, Law No. 28 of 2014 on Copyright includes provisions for the protection of traditional cultural expressions under a sui generis system. This law acknowledges the communal ownership of TCEs and provides specific legal mechanisms to safeguard them. Mexico also adopts a sui generis approach under its Federal Law on Copyright, which includes protections for indigenous and traditional cultural expressions, recognizing their unique cultural and social significance. Australia has taken steps to integrate indigenous perspectives into its legal framework, although it lacks a comprehensive sui generis system. Efforts such as the Indigenous Knowledge Initiative aim to develop tailored protections for indigenous cultural heritage. In Africa, the Swakopmund Protocol on the

Protection of Traditional Knowledge and Expressions of Folklore provides a sui generis framework that member states can adopt to protect TCEs, reflecting the continent's diverse cultural heritage. Tunisia incorporates TCE protection within its copyright law but could benefit from a more tailored sui generis system to address the specific needs of its traditional cultural expressions.

### **1.5.2 INCLUDING INDIGENOUS COMMUNITY IN POLICY MAKING**

The inclusion of indigenous communities in decision-making processes is crucial for ensuring that the protection of TCEs aligns with the communities' values and needs. Participatory governance models foster greater community involvement and respect for traditional knowledge.

Panama's legal framework emphasizes the participation of indigenous communities in the management and enforcement of their intellectual property rights, ensuring their voices are heard in decision-making processes. In Indonesia, community involvement is a key component of the legal framework for TCE protection. Local communities play a significant role in registering and managing their traditional cultural expressions. Mexico promotes community participation through legal provisions that recognize the rights of indigenous peoples to manage their cultural heritage. This approach ensures that decisions about the use and protection of TCEs are made in consultation with the communities themselves. Australia has developed various guidelines and protocols to ensure that indigenous communities are involved in decisions affecting their cultural heritage. The Indigenous Cultural and Intellectual Property (ICIP) Protocols are an example of such inclusive practices. In Africa, the Swakopmund Protocol underscores the importance of involving indigenous communities in the protection and management of their TCEs, promoting a participatory approach. Tunisia's legal framework could be enhanced by formalizing mechanisms for indigenous community participation in the decision-making processes related to TCE protection.

### **1.5.3 BENEFIT SHARING MECHANISMS**

Effective benefit-sharing mechanisms ensure that indigenous communities receive fair compensation for the use of their TCEs, fostering economic development and cultural sustainability.

Panama's Law No. 20 of 2000 includes provisions for benefit-sharing, ensuring that any commercial use of TCEs directly benefits the communities that own them. This law mandates that a portion of the proceeds from such use be returned to the community. Indonesia's copyright law also incorporates benefit-sharing principles, providing legal avenues for communities to receive economic benefits from the commercialization of their TCEs. Mexico enforces benefit-sharing through legal requirements that ensure indigenous communities are compensated for the use of their cultural expressions. This approach not only protects the communities' rights but also supports their economic well-being. Australia encourages benefit-sharing through voluntary agreements and protocols, where organizations and businesses enter into partnerships with indigenous communities to share the benefits derived from the use of TCEs. In Africa, the Swakopmund Protocol outlines benefit-sharing as a fundamental principle, promoting equitable distribution of benefits arising from the use of TCEs to the communities of origin. Tunisia could strengthen its benefit-sharing mechanisms by developing specific provisions within its copyright law to ensure that the economic benefits of TCEs are shared with the communities that create and preserve them.

## **1.6 CONCLUSION**

The protection of Traditional Cultural Expressions (TCEs) presents a complex challenge that necessitates tailored legal frameworks, community involvement, and effective benefit-sharing mechanisms. The

comparative analysis of the legal approaches in Panama, Indonesia, Mexico, Australia, Africa, and Tunisia reveals both commonalities and divergences shaped by cultural, legal, and socio-economic contexts.

Across these jurisdictions, there is a shared recognition of the communal nature of TCEs, which contrasts sharply with the individual-centric model of conventional intellectual property (IP) laws. This understanding is evident in the implementation of sui generis systems tailored to the unique needs of TCEs. Laws like Panama's Law No. 20 of 2000 and Indonesia's Law No. 28 of 2014 on Copyright offer frameworks that prioritize the collective rights of indigenous communities, ensuring that cultural heritage is preserved and managed in ways that align with traditional practices.

The role of indigenous communities in the decision-making process is another crucial theme. Effective governance of TCEs requires the active participation of the source communities, as seen in Indonesia and Mexico, where legal frameworks mandate community involvement in managing and safeguarding their cultural expressions. In Australia, the adoption of indigenous protocols has fostered a more inclusive approach, though further integration into national legal systems is needed to enhance protection.

Benefit-sharing mechanisms are universally emphasized as a means to ensure that communities benefit economically from the commercialization of their TCEs. This is crucial not only for the economic sustainability of these communities but also for maintaining the cultural integrity of the expressions. Countries like Panama and Mexico have established legal provisions to ensure that revenues generated from the use of TCEs are equitably distributed to the source communities.

Despite these commonalities, significant divergences remain in the implementation and enforcement of TCE protection. Variations in the robustness of legal systems, resource allocation, and the socio-cultural context of each country influence the effectiveness of TCE laws. For instance, while Panama has relatively strong enforcement mechanisms, countries like Tunisia face challenges due to limited resources and institutional capacity, which hinder the full realization of TCE protection laws.

In Australia and some African countries, the enforcement of TCE protection often relies on community-led initiatives rather than robust state intervention, leading to inconsistent outcomes. The reliance on voluntary agreements and cultural protocols, though beneficial, may not provide the same level of protection as legally binding frameworks.

The influence of socio-cultural contexts is also pronounced. In Africa, the diversity of cultural expressions and the legacy of colonialism necessitate a regional approach through instruments like the Swakopmund Protocol, which attempts to harmonize the protection of TCEs across member states. Similarly, Indonesia's vast and diverse archipelago requires a flexible legal framework that accommodates the varied cultural practices of its many ethnic groups.

In conclusion, while significant progress has been made in protecting TCEs across different jurisdictions, ongoing efforts are required to refine legal frameworks, ensure community involvement, and establish equitable benefit-sharing mechanisms. By learning from the successes and challenges of countries like Panama, Indonesia, Mexico, Australia, Africa, and Tunisia, policymakers can develop more effective strategies to safeguard the rich cultural heritage embedded in Traditional Cultural Expressions.