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**PARSING THE PROTECTIONS ACCORDED TO  
'TRADITIONAL CULTURAL EXPRESSIONS' OF SIKKIM  
IN THE CONTEXT OF COMMUNITY OWNERSHIP OF  
IPRS**

Dr Nidhi Saxena \*

Dr Veer Mayank \*\*

**Introduction**

Traditional cultural expressions (hereinafter TCEs) as the name suggests are the expressions through which the traditional cultural aspects of a community are expressed or made available for the world to perceive. Traditional cultural expressions provide a window into the culture of a people. TCEs being expressions of the culture of a community encompass within their sweep the traditional knowledge of a community along with other expressions of their culture. These TCEs form a demesne as the encompass of these expressions is not fixed and forms a part of the identity or heritage of the traditional community.<sup>1</sup> In this sense, where 'traditional cultural expressions', define the silhouette of the identity of a community, any abstraction or dilution of such expressions, which is unauthorised may at best be misappropriation and at the worst could be an attempt at the dissolution of the particular community by an assault on their separate identity. It is therefore necessary to provide protection to the 'traditional cultural expressions' of a community as that would protect the separate cultural identity of a community and thereby its existence as a people. The

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\* Assistant Professor of Law, Sikkim University.

\*\* Assistant Professor of Law, (Senior Scale), Sikkim University

<sup>1</sup> WIPO, Traditional Cultural Expressions, WIPO (n.d.)

[https://www.wipo.int/tk/en/folklore/#:~:text=Traditional%20cultural%20expressions%20\(TCEs\)%2C,other%20artistic%20or%20cultural%20expressions.](https://www.wipo.int/tk/en/folklore/#:~:text=Traditional%20cultural%20expressions%20(TCEs)%2C,other%20artistic%20or%20cultural%20expressions.)

protection of the cultural mores and values of a community is protected as a human right under the ‘Universal Declaration on Cultural Diversity’.<sup>2</sup> The question that arises in this context is what are the mechanisms and methods for providing protection to such ‘traditional cultural expressions’? Since ‘traditional cultural expressions’ are intangible, the only mechanism available for their protection under the current legal regime is ‘intellectual property rights’ protection. While attempts have been made to accord protection to the ‘expressions’, it suffers from the drawback that ‘traditional cultural knowledge’ conjures up protection that has to be provided to communal property instead of private property, which is beyond the scope of industrial property protection under the intellectual property rights regime as it is currently contoured. In view of the limitations in the current structure of intellectual property protection, attempts are being made to devise a *sui-generis* system of protection of ‘traditional cultural heritage’ in India particularly in the biodiversity rich regions of India and the state of Sikkim falls within this biodiversity zone of India. While attempts at the protection of ‘traditional knowledge’ through the *sui-generis* protection models have attained a semblance of success, the same cannot be stated about protection accorded to ‘traditional cultural expressions’. Since the apportioning of property rights with ownership over defined aspects of a particular object, is the key to the protection and development of the object, it becomes necessary to understand the contours of such a *sui-generis* regime for providing protection to the ‘traditional cultural expressions’ in Sikkim.

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<sup>2</sup> United Nations Educational Scientific and Cultural Organisation, Universal Declaration on Cultural Diversity, adopted by the 31st session of the General Conference of UNESCO, Paris, 2 November 2001, CLT.2002/WS/9

## Property and its Protection

A discussion on the property protection to be accorded to ‘traditional cultural heritage’ cannot be successful without a primary discussion of the concept of property. Harold Demsetz in his paper has provided an explanation of the concept of property. He opines “Property rights are an instrument of society and derive their significance from the fact that they would help a man form those expectations which he can reasonably hold in his dealings with others.” Property rights convey an expectation from the world in general that these rights accruing or granted to an individual would be protected from usurpation, within the confines of the legal system of the particular society. This expectation of security of property rights crystalized in the form of laws, customs and traditions.<sup>3</sup> Property rights are identified as right in rem which means that the right is available against the whole world. The concept of property finds its place in the theory of distributive justice and is instrumental in maintaining the social order in any society. The Supreme Court of the United States found that the right to exclusion is a fundamental element of property rights.<sup>4</sup> Similarly the Apex court of India held that the right to property is not just a constitutional or statutory right but a human right too.<sup>5</sup> Sir Willam Blackstone<sup>6</sup> states that right of property plays a significant role in human relations<sup>7</sup> and the justification of right to property is that everyone needs

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<sup>3</sup> Richard de Schweinitz & Walter E. Block, Property Rights in the Postcolonial World 9MEST JOURNAL 68, 71 (2021). (discussing how customary law over land in African societies came into existence).

<sup>4</sup> Kaiser Aetna v. the United States, 444 U.S. 164 (1979).

<sup>5</sup> State of Haryana v. Mukesh Kumar, (2011) 10 S.C.C 404 (India).

<sup>6</sup> William Blackstone, Commentaries on the Laws of England in Four Books, vol. 1, The Online Library of Liberty (2022), available at [https://oll.libertyfund.org/titles/2140#Blackstone\\_1387-01\\_1353](https://oll.libertyfund.org/titles/2140#Blackstone_1387-01_1353)

<sup>7</sup>There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. Id.

property or rather resources for their complete development. Right to property is justified only when it doesn't harm the interest of others.<sup>8</sup>

Demsetz has further distinguished between three kinds of rights in property - communal ownership, private ownership and state ownership.<sup>9</sup>

Communal ownership is differentiated from private ownership through the fact that in communal ownership, the object of the ownership is owned by the community collectively and everyone has equal right to utilise the object. In the case of private ownership, the society recognizes the right of the private owner to exclude others from the use of the object.<sup>10</sup> Intellectual property rights are private rights and provide a very important dimension of property wherein the property is qualified by the term intellectual and therefore indicates its origin from the intellect of a human being. The rights guaranteed under the intellectual property laws extend protection against everyone who is not a holder of right by virtue of creation, licence authorisation, transfer etc.<sup>11</sup>. On the other hand, 'traditional knowledge' and 'traditional cultural heritage' are communal rights where everyone has the right to use the communal property to the extent permitted by the rules of that community.

### **Communal Property Rights and Traditional Knowledge**

When communities were formed, they learnt the various usages, employment and the importance of resources for survival through the instrument of trial and error which crystallised itself in the form of

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<sup>8</sup> Wendy J. Gordont, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 THE YALE LAW JOURNAL 1533, 1562 (1993).

<sup>9</sup> Harold Demsetz, Toward a Theory of Property Rights, 57 THE AMERICAN ECONOMIC REVIEW 347, 354 (1967).

<sup>10</sup> Id. at 354. The concept of 'State Ownership' is not being discussed since it is not directly relevant to the theme of the paper.

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]

traditional knowledge of a particular community and handed down from generation to generation. The development of practices in the community are based on learning, day to day struggle and ways to overcome it. The existence of the traditional expressions in the form of dances, folklore, cultural artefacts, dress codes etc, in a community creates a cultural bond between the members of the community and helps in the preservation and development of the community as a people. However, the existence of these traditional expressions which is the common property of the community is not to be interpreted as being useful to the community alone. The importance of traditional expressions has been realised in many areas - from ecological restoration<sup>12</sup> to the preservation of endangered species and plants; from techniques to protect the environment to the sustainable development<sup>13</sup>. These cultural expressions are a reflection of the 'traditional knowledge' present in the community and have been helpful in meaningful environmental decision making through the top-down<sup>14</sup> and bottom-up strategies<sup>15</sup>.

Communal ownership however, by its very nature is exploitative of the resource on which such ownership is exercised since it is in the interests of the various owners to maximise their returns from such a communally owned object. This leads to the increase in externalities associated with such use of resources. Private ownership internalises these externalities and leads to the preservation of resources. Extending the concept of private ownership to intellectual property instantly leads us to the conclusion that

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<sup>12</sup> Yadav Uprety, et al., Contribution of Traditional Knowledge to Ecological Restoration: Practices and Applications, 19 ECOSCIENCE 225, 226 (2012).

<sup>13</sup> William C. Clarke, Learning from the Past: Traditional Knowledge and Sustainable Development, THE CONTEMPORARY PACIFIC, 233, 235 (1990).

<sup>14</sup> Stephen C. Ellis, Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making, 58 ARCTIC 65, 68 (2005).

<sup>15</sup> Id. at, 69.



the externalities associated with the communal ownership of intellectual property is sought to be internalised so that the development of intellectual property is not hindered. However, it is also immediately evident that private rights boundaries cannot be created on the part of intellectual property which is classified as traditional knowledge and traditional cultural heritage. Traditional cultural heritage and traditional cultural expressions are by their nature representative of community and hence cannot be circumscribed by the defined boundaries of private property rights. Doing so would extinguish the character of traditional heritage and traditional cultural expression and with it the identity of a people expressed through these expressions. Due to the unique nature of communal property, which because of its nature, has to be protected as such, it is necessary to devise a novel legal mechanism for its protection.

### **Protection of TCEs at International Level**

Demand for protection of traditional knowledge gained momentum at the international level in the wake of technological changes that took place towards the end of the last century. Realisation of the importance of intellectual property made the international community think about uniformity and consistency in the protection of intellectual property at international level that resulted in international instruments - the Berne Convention<sup>16</sup> and the Paris Convention<sup>17</sup> followed by acceptance and signing of the TRIPs Agreement<sup>18</sup>. The TRIPs Agreement extended protection to all intellectual property but the “norms for identifying the expression of folklore and the method of exploitation, further

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<sup>16</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986)

<sup>17</sup> Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883, 21 U.S.T. 1583; 828 U.N.T.S. 305

<sup>18</sup> TRIPs: Agreement

development, maintenance, etc., were left to individual nations<sup>19</sup>. There was no mandate of documentation or protection of traditional cultural expressions, though the draft ‘UN Declaration on the Rights of Indigenous People’<sup>20</sup> expressed the requirement of protection of indigenous culture and their intellectual property through the vesting of ownership and control rights with the communities.<sup>21</sup>

During 1980s a campaign to protect cultural expression was jointly conducted by the United Nations Educational, Scientific and Cultural Organization (UNESCO)<sup>22</sup> and the World Intellectual Property Organization (WIPO) followed by another attempt at an international treaty, with general principles. The treaty was wide and ambiguous on issues and thus could not provide any guidance of national legal systems<sup>23</sup> on protection of traditional IP.

The indigenous and traditional societies are known for their deeply implanted connection with folklore<sup>24</sup> which impacts their intellectual creations and ideas.<sup>25</sup> Their everyday struggle for existence impacts their life which transform into folklore, this includes the food, the art and craft, the agricultural & medical practices they follow, the preservation

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<sup>19</sup> N.S. Gopalakrishnan, Protection of Traditional Knowledge The Need for a Sui Generis Law in India 5J. WORLD INTELL. PROP. 725(2002).

<sup>20</sup> G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007)

<sup>21</sup> Id. at Art. 26 (2) & 35

<sup>22</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 16 November 1945, available at: <https://www.refworld.org/docid/3ddb73094.html> [accessed 11 July 2021]

<sup>23</sup> Gopalakrishnan, J. WORLD INTELL. PROP., (2002).

<sup>24</sup> Veer Mayank, Protection of Traditional Cultural Expressions of Indigenous Communities in Sikkim: Contextualization within the Institutional Framework for Protection of Traditional Knowledge in India, in THE CULTURAL HERITAGE OF SIKKIM (Sarit K. Chaudhuri, et al. eds., 2020).

<sup>25</sup> P.V. VALSALA G. KUTTY & WORLD INTELLECTUAL PROPERTY ORGANIZATION, NATIONAL EXPERIENCES WITH THE PROTECTION OF EXPRESSIONS OF FOLKLORE/TRADITIONAL CULTURAL EXPRESSIONS: INDIA, INDONESIA AND THE PHILIPPINES (World Intellectual Property Organization. 2004).

techniques they develop<sup>26</sup>. All these are their cultural expressions and not a means of commercial gain and therefore constitute an important commonality<sup>27</sup> which needs to be protected to best serve their needs.

Terri Janke<sup>28</sup> apprised how various Indian IPR laws are providing protection to TCEs and folklore. The paper did a comparative examination of the three international and three national instruments.<sup>29</sup> The detailed analysis of the paper raises the issues of limitations due to the weak design of protection by the international legal architecture.

The Intergovernmental Committee (IGC) of WIPO in its 'Gap Analysis' report<sup>30</sup> has identified at least ten issues relating to the protection of TCEs and folklore at the international level. The work also did a 'Consolidated Analysis' of suitability of *sui-generis* systems for protection TCEs<sup>31</sup>. In

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<sup>26</sup> Id. at, 25.

<sup>27</sup> Id. at, 20.

<sup>28</sup> Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (2003).

<sup>29</sup> These instruments are international - Tunis Model Law on Copyright (1976), UNESCO-WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO Lex No.UNESCO001 (1985), and African Intellectual Property Organization, Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property (Bangui (Central African Republic), March 2, 1977), National instruments, Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 STAT. 4662 (1990) and Indian Arts and Crafts Enforcement Act of 2000, Pub. L. No. 106-497, 114 STAT. 2219 (2000), Special System for the Collective Intellectual Property Rights of Indigenous Peoples (ACT 20 June 26, 2000, Published in Gaceta Oficial (Official Gazette) No. 24,083 of June 27, 2000) (Panama), Regulating Law No. 20 of June 26, 2000, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Enacting Other Provisions (MINISTRY OF TRADE AND INDUSTRIES EXECUTIVE DECREE NO. 12 of March 20, 2001) (Panama) and Secretariat of the Pacific Community, Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002).

<sup>30</sup> The World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO/GRTKF/IC/37/7 (2018)

<sup>31</sup> The World Intellectual Property Organization, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (2003).

2010, a study on ‘Intellectual Property & the Safeguard of Traditional Culture’ was published by WIPO which raised the legal questions pertaining to protection of TCEs and folklore and proposed the incorporation of principles of good practices.<sup>32</sup>

On the issue of effective IP management, a practical guide on ‘Intellectual Property and Folk, Arts and Cultural Festivals’ was published in 2013<sup>33</sup>. In the same year WIPO published ‘Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries in Transition’<sup>34</sup>. The document talks about the proper legal machinery of protection<sup>35</sup>. A guide<sup>36</sup> to provide information about how to use intellectual property for enhancing the power of Indigenous peoples and local communities was published in 2017<sup>37</sup>. To bring the focus on the protection of genetic resources and in certain cases the issue of benefit-sharing with an emphasis on the protection of TK & TCE a study was published by WIPO<sup>38</sup>. This is a comprehensive document which includes contributions of many stakeholders.

### **Cultural Heritage of Sikkim**

A country shows its wealth in its culture. Worshipping nature, air, fire, river, forests and trees is part of our tradition and around 14,000 sacred

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<sup>32</sup> MOLLY TORSÉN & JANE ANDERSON, INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES LEGAL ISSUES AND PRACTICAL OPTIONS FOR MUSEUMS, LIBRARIES AND ARCHIVES (World Intellectual Property Organization (WIPO). 2010).

<sup>33</sup> The World Intellectual Property Organization, Intellectual Property and Folk, Arts and Cultural Festivals: Practical Guide (2018).

<sup>34</sup> World Intellectual Property Organization, Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore A Guide for Countries in Transition (2016).

<sup>35</sup> Id. at. 34

<sup>36</sup> Protect and Promote Your Culture- A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities. (2017).

<sup>37</sup> Id. at.36

<sup>38</sup> The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. (2016).

groves<sup>39</sup>, with extremely rich flora and fauna are protected and worshipped as deity<sup>40</sup> or ancestral spirits all over India. These trees with unique and amazing biodiversity are the home for myriad birds, reptiles and other wild animals.

Blessed with the physiographic and ecoclimatic conditions, the north-eastern part of India is known for its rich biodiversity, endemic flora and fauna,<sup>41</sup> diversity of habitats, a wide altitudinal range and highest bird diversities with about 850 bird species<sup>42</sup>, forms the geographical gateway<sup>43</sup> to the vast natural resources of knowledge and stupendous traditional cultural expressions. Due to its significant biodiversity, the Eastern Himalayas region has been identified by the World Wildlife Fund as a priority 'Global 200 Ecoregion'<sup>44</sup>. The richness of wild relatives of crop plants of the region is underlined by the National Bureau of Plant Genetic Resources (NBPGR), India<sup>45</sup> and Indian Council of Agricultural Research (ICAR)<sup>46</sup> has designated the region as a centre of rice germplasm. Similarly, the organisation, 'Conservation International' has designated

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<sup>39</sup> Nanditha Krishna, The forests protected by deities THE INDIAN EXPRESS, April 4, 2019.  
<sup>40</sup> Id.

<sup>41</sup> Aniruddha Roy, et al., Biodiversity in North East India and their Conservation, 15 PROGRESSIVE AGRICULTURE (2015).

<sup>42</sup> Sudipto Chatterjee, et al., Biodiversity Significance of North East India, WWF-INDIA 1(2006).

<sup>43</sup> K S Singh, The People of India, Sikkim § XXXIX (Seagull Book of India 1993).

<sup>44</sup> WWF-India, About, WWF-India(ND),

[https://www.wwfindia.org/who\\_we\\_are/where\\_we\\_work/state\\_divisional\\_offices/assam\\_and\\_arunachal\\_pradesh/about/#:~:text=WWF%20has%20identified%20the%20entire.hills%20and%20Brahmaputra%20%26%20Barak%20plains.](https://www.wwfindia.org/who_we_are/where_we_work/state_divisional_offices/assam_and_arunachal_pradesh/about/#:~:text=WWF%20has%20identified%20the%20entire.hills%20and%20Brahmaputra%20%26%20Barak%20plains.)

<sup>45</sup> Jubilee Purkayastha E, Bioprospecting of indigenous bioresources of North-East India. (Springer 2016).

<sup>46</sup> BAHARUL ISLAM CHOUDHURY & MOHAMMED LATIF KHAN, HIMALAYAN SOAP POD (GYMNOCLADUS ASSAMICUS): AN ECOLOGICALLY AND ECONOMICALLY IMPORTANT TREE ON THE BRINK OF EXTINCTION (CAB International. 2019).

the North Eastern states<sup>47</sup> of India along with Bhutan, southern China and Myanmar<sup>48</sup> as the 'Eastern Himalaya Hotspot'<sup>49</sup>.

Covered in a total 262180 km geographical area<sup>50</sup> the north-eastern India has around 225 tribes out of 450 that are found in the rest of India<sup>51</sup>. The north-eastern region of India with delightful, appealing, and ravishing cultural heritage comprises Assam, Arunachal Pradesh, Meghalaya, Manipur, Mizoram, Nagaland, Tripura and Sikkim.

Sikkim, a north-eastern state of India was manifested as a separate Himalayan kingdom in 1642. Its position as a separate kingdom came through the treaty of "Lho-Mon-Tsong-Sum"<sup>52</sup>. As "The Greater Sikkim" the country acquired a distinct identity of its own and ruled by the Namgyal Dynasty till 1975<sup>53</sup> until merged with India. In 1975 Sikkim became 22nd Indian State vide Constitution (36th Amendment) Act 1975,<sup>54</sup> when Sikkimese voted 59,637 to 1,496 for Indian statehood<sup>55</sup>.

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<sup>47</sup> The Eight North eastern States are Sikkim, Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Tripura, Manipur and Tripura. See Ministry of Development of North Eastern Region, About North East, Ministry of Development of North Eastern Region (May 24, 2022), <https://mdoner.gov.in/about-north-east>.

<sup>48</sup> E. 2016.

<sup>49</sup> Id. At.45

<sup>50</sup> L.C. De & D.R. Singh, Natural Resources in North East Region of India, 7 INTERNATIONAL JOURNAL OF AGRICULTURAL SCIENCE AND RESEARCH 51(2017).

<sup>51</sup> Chatterjee, et al., WWF-INDIA, (2006).

<sup>52</sup> J R SUBBA, HISTORY, CULTURE AND CUSTOMS OF SIKKIM (Gyan Publishing House. 2008). House. 2008).

<sup>53</sup> Id. At.52

<sup>54</sup> Constitution (36th Amendment) Act 1975.

<sup>55</sup> Ministry of Electronics & Information Technology National Informatics Centre (NIC), The Constitution (Thirty-sixth Amendment) Act, 1975, National Informatics Centre (NIC), Ministry of Electronics & Information Technology,(2012), available at <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-thirty-sixth-amendment-act-1975>.

Sikkim is a small state of ‘four districts and 16 Sub-division’<sup>56</sup> with a population of ‘6,10,5778’<sup>57</sup> with ‘1.4% Literacy Rate’<sup>58</sup>. The state is spread over 7096 sq. kms. with 47.34% total forest cover. ‘Red Panda’ is the state animal, ‘Blood Pheasant’ is the state bird, ‘Dendrobium Nobile (Noble Orchid) is the state flower and Rhododendron Niveum’<sup>59</sup> is the state tree<sup>60</sup>.

Located in the lap of Eastern Himalayas, the State of Sikkim with its own unique, peculiar ethnicity, & distinctive culture is also known for its staggering biodiversity. Sikkim is rich in medicinal plants and endangered species<sup>61</sup> and that's why the state is called biodiversity ‘hotspot’<sup>62</sup>. The state is a land of sundry tribes with their unique and identifiable features, languages, festivals, dances, craft form etc.<sup>63</sup> As mentioned in his book “The People of India, Sikkim ” K S Singh founded 25 tribes and communities in Sikkim.<sup>64</sup>

The most enchanting Sikkim shares language and faith with neighbouring countries Nepal, Bhutan and Tibet<sup>65</sup>. Sikkim is a state of Buddhism with a great wealth of social, natural and cultural attractions that have economic

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<sup>56</sup> Tourism and Civil Aviation Department Government of Sikkim, About Sikkim, Tourism and Civil Aviation Department, Government of Sikkim (2020), <https://www.sikkimtourism.gov.in/Public/experiencesikkim/history>.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Mahendra Tamang, et al., Ethnobotanical Survey of threatened Medicinal Plants of West Sikkim, 2 INTERNATIONAL JOURNAL OF BOTANY STUDIES ETHNOBOTANICAL SURVEY OF THREATENED MEDICINAL PLANTS OF WEST SIKKIM 116(2017).

<sup>62</sup> Aparna Banerjee, et al., Urgent conservation needs in the Sikkim Himalaya biodiversity hotspot., 20 BIODIVERSITY 1(2019).

<sup>63</sup> Indian Mirror, Sikkim - Culture, Indian Mirror(n.d.), <https://www.indianmirror.com/culture/states-culture/sikkim.html>.

<sup>64</sup> Singh. 1993.

<sup>65</sup> Shikha Goyal, Which States of India Share Boundaries with Nepal?, JAGRAN JOSH, September 22, 2021. 2021.

values.<sup>66</sup> The economic prosperity of the state depends upon the protection provided to the cultural heritage of Sikkim.

This paper explores the legal protections provided to the traditional cultural expressions (TCEs) in the State of Sikkim in the context of their economic utilisation by the indigenous communities of Sikkim.

### **Protection of Traditional Cultural Expression (TCE) in India**

There is a fundamental duty of every citizen of India under Article 51A (f) of the Indian Constitution to preserve, respect and safeguard the rich heritage of Indian culture. Fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India in its liberal interpretation can provide protection to the owners of traditional cultural expression (TCE). Whereas Article 29 (1) of the Indian Constitution grants the protection of cultural rights of minorities as guaranteed fundamental right. Nevertheless, this right is available only to the minorities which thereby excludes smaller communities that may not be identified as minorities resulting in exposing such communities to the threat of exploitation of their traditional cultural heritage.

The north-eastern states have been bestowed with constitutional autonomy in internal administrative and judicial matters since the pre-constitutional days. The Sixth schedule along with the Part XXI of the Constitution of India vouch more about the customary autonomy in internal governance and administration of justice of the north-eastern region. The Supreme Court of India admitted the importance and relevance of customary laws in the judgement of the State of Nagaland v. Ratan Singh<sup>67</sup>.

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<sup>66</sup> Iyatta Maharana Upreti. & Balam Pandey, Cultural attributes, economic valuation and community conservation in holy Khecheopalri Lake of Sikkim in the Eastern Himalaya, in CULTURAL LANDSCAPES: THE BASIS FOR LINKING BIODIVERSITY CONSERVATION WITH THE SUSTAINABLE DEVELOPMENT (P.S. Ramakrishnan, et al. eds., 2012).

<sup>67</sup> State of Nagaland v. Ratan Singh, 1967 A.I.R. 212 (India) at Para 34



Article 371F of the Part XXI of the Constitution of India is a special provision with respect to the State of Sikkim that provides immunity to pre-existing laws and mandates the requirement of the 'assent of the President' for the purpose of extending the application of national laws to Sikkim. Besides the basic land law of India there are several other laws that come into picture and need to be examined for unveiling the applicable provisions on various aspects of TCEs of communities of Sikkim. The most appropriate laws that need to be examined are various intellectual property laws. The IPR laws are applicable equally in Sikkim. The traditional cultural expressions in Sikkim are held by different communities present in this small state and are not the claim of an individual which keeps them out of the protection of 'The Copyright Act, 1957' and the Designs Act, 2000. The Copyright Act, 1957 protects the rights of an individual author, performer, artist, organisation or institutions etc, nor the rights of community. Thus, the Act amateurishly fails to protect the rights of indigenous community of Sikkim. In Sikkim the traditional dresses are the symbol of community and confer them with a distinct identity. They drape/wear aesthetically designed traditional dresses and ornaments sometimes regularly while sometimes on festivals and ceremonial occasions. Some of the popular and beholden dresses includes - *Bakhu* or *Kho*, the dress for the Bhutia Tribe; *Dumvum* or *Dumyam* for Lepcha women and *Thokro-Dum* for Lepcha man<sup>68</sup> with a hat, woven with fine bamboo strips<sup>69</sup>; *Shuruval* and *Daura* with *Askot*, a

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<sup>68</sup> Manisha Panda, Traditional Dresses of Sikkim - Bakhu and Other Sikkim Dresses, Holidify(nd), <https://www.holidify.com/pages/sikkim-dresses-202.html>.

<sup>69</sup> Id.

waistcoat and *Patuki* with a weapon called *Khukri*<sup>70</sup> for Nepali man while Nepali women wear *Pharia* with *Chaubandi Cholo* and *Hembari*<sup>71</sup>.

There are many elegantly splendid traditional ornaments wore by people of different tribes in Sikkim - *Namchok*<sup>72</sup>, *Lyak*<sup>73</sup> and *Gyar*<sup>74</sup> mostly made of gold and silver are some<sup>75</sup> popular ornaments of Lepcha tribe in Sikkim; *Yencho*<sup>76</sup>, *Khao*<sup>77</sup>, *Phiru*<sup>78</sup>, *Diu*<sup>79</sup>, *Khalli*<sup>80</sup> and *Joko*<sup>81</sup> are some common and popular ornaments of Bhutia tribe of Sikkim<sup>82</sup>; *Bandi* or *Tiara*, *Kantha*, *Naugeri*, *Charanihari*, *Tilhari*<sup>83</sup>, *Bulaki*, *Dungri*, *Gadwari*, etc. are ornaments of Nepalis in Sikkim<sup>84</sup>. These aesthetic and ravishing designs of traditional attires including their unique textile design along with the mesmerising ornament designs gives the tribes a social status and identity while constituting the traditional cultural expression of people of this smallest state. Since these are the part of traditional cultural expressions of people of Sikkim which passed from generation to generation, no one can claim them as their intellectual property therefore are open for easy duplication. It is pertinent to mention that the Copyright Act and Designs Act are individual-centric, thus are unable to protect the

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<sup>70</sup> Kukri is a weapon which Nepali men carry in a leather case which they call Daab.

<sup>71</sup> Panda. nd.

<sup>72</sup> Earring is called Namchok in the Lepcha Tribe.

<sup>73</sup> Necklace is called Lyak in the Lepcha Tribe.

<sup>74</sup> Bracelet is called Gyar in the Lepcha Tribe.

<sup>75</sup> There is a long list of jewellery of Lepcha community of Sikkim - Nyamrek, Thaktuk, Sumok Thaktuk, Papri Thaktuk, Anok Thaktuk, Seraboo Thaktuk, Soring Thaktuk, Baanmok, Baan-Payook etc. See Editorial Team, Traditional Jewellery of Sikkim from Head-to-Toe April 26, 2022 Our Himalayas. (2022), <https://www.ourhimalayas.com/traditional-jewelry-of-sikkim/>.

<sup>76</sup> Earring is called Yencho in the Bhutia Tribe

<sup>77</sup> Necklace is called Khao in the Bhutia Tribe

<sup>78</sup> A pearl ornament wore by Bhutia Tribe is called Phiru

<sup>79</sup> Gold bangle Bhutia Tribe call Diu

<sup>80</sup> Thick silver-coated anklets Bhutia Tribe call Khalli

<sup>81</sup> The ring is called Joko in Bhutia Tribe.

<sup>82</sup> Panda. nd.

<sup>83</sup> Tihari is worn by married women only.

<sup>84</sup> Panda. nd.

traditional cultural expressions which belong to none but the whole community.

The biodiversity, flora and fauna along with the opulent medicinal biodiversity of the state is another station of violations of rights of indigenous community of Sikkim. Nonetheless, the first law that looks into the rights of indigenous community of Sikkim is “The Biological Diversity Act of 2002”. The Act provided for the fair and equitable sharing of the benefits of Traditional Knowledge and constitution of the state board from experts in sustainable use of biological resources, biological diversity etc., thus creating a communication gap between unaware villagers and experts. The state has international borders which are open and cannot be guarded thus complexing the situation. The unaware of consequences, villagers disclose their precious information with foreigners/outside, that got commercially misused without providing any benefits to the owner of such knowledge<sup>85</sup>. This makes the Biological Diversity Act of 2002 the most incompatible law with the custom and practice of Sikkim.

The medicinal plants of Sikkim are highly valuable and if some researcher processes them with scientific methods, can easily get a patent over such medicinal products, the history speaks a lot about the loss caused to our country<sup>86</sup>. There are around 420 plants<sup>87</sup> known to Sikkimese people and are used to treat various diseases<sup>88</sup>. The reports says that there are

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<sup>85</sup>Moatoshi Ao, Branding and Commercialisation of Traditional Knowledge and Traditional Cultural Expressions: Customary Law of North East vis-à-vis Contemporary Law, 6 THE INDIGENOUS PEOPLES’ JOURNAL OF LAW, CULTURE & RESISTANCE 75, 82 (2020).

<sup>86</sup>Patent on Use of turmeric in wound healing. See, U.S. Patent No. US5401504A (issued Mar. 3, 1995).

<sup>87</sup> Forest and Environment Department Sikkim ENVIS Hub, Government of Sikkim, List of Medicinal and Aromatic Plants Grown and Found in Sikkim, State of Environment 2007 – Sikkim (2007), available at <http://www.sikkimforest.gov.in/soer/Annexure%20II.pdf>.

<sup>88</sup>Ashok Kumar Panda, Medicinal Plants of Sikkim in Ayurvedic Practice, ENVIS Hub: Sikkim (1987), <http://sikenvis.nic.in/writereaddata/sd79.pdf>.

numerous incidents of illegal collection of these medicinal plants<sup>89</sup> with various objectives amongst other one is poor scientific approach towards using such resources<sup>90</sup> by the government. The State is also good in traditional cane and bamboo craft which is an integral part of life of people of Sikkim. The tribal communities of Sikkim also made jewellerys of bamboo that are a great attraction for tourists who purchase them when visiting Sikkim. These are traditional art and constitute traditional cultural expression for the Tribe of Sikkim. The possibility of copying these designs and methods is quite high.

The Patent Act, 1970 of India under section 3 of the Act details what is not patentable wherein it has ousted traditional knowledge or duplication of any traditionally known product from the patentability criteria. The court in *M/S Nilkamal Plastic Ltd*<sup>91</sup> pointed out that mere use of different material/s for producing a product similar to traditionally made basket (Kilta) does not constitute an invention.<sup>92</sup> The court could protect the interest of local people of 'Himachal Pradesh' in this case and clinched that if it is possible to prove that claimed article constitute traditional knowledge it is guarded, but the non-documentation of the knowledge or information of traditional medicines/articles poses challenges to prove their prolonged existence in the community in the absence of any documentary evidence.

The Protection of Plant Varieties and Farmers' Rights Act of 2001 (PPVFA) via a *sui generis* system also looks at the interest of the

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<sup>89</sup> L.K. Rai, et al., Conservation threats to Some Important Medicinal Plants of the Sikkim Himalaya, 93 *BIOLOGICAL CONSERVATION* 27(2000).

<sup>90</sup> Mahendra Tamang, et al., *INTERNATIONAL JOURNAL OF BOTANY STUDIES* ETHNOBOTANICAL SURVEY OF THREATENED MEDICINAL PLANTS OF WEST SIKKIM 116 (2017).

<sup>91</sup> *Dhanpat Seth and Ors. v. Nil Kamal Plastic Crates Lt*, (2008) AIR HP 23 (India)

<sup>92</sup> *Id.*

community in the plant variety if it qualifies the test of novelty, distinctiveness, uniformity and stability. Traditional knowledge fails to qualify this test of novelty as their elongated practice in the community makes them the traditional knowledge of the community while keeping it outside the novelty. In many cases finding the true group or community for benefit sharing is a challenging task. The “Kani Tribal”<sup>93</sup> case is an axiomatic example of issues associated with the benefit sharing in matters of traditional knowledge. Further people are unaware about the test laid down by the laws and the technological and scientific development, thus the Act fails to extend protection to the community of Sikkim. Besides, the level of awareness, technical challenges, transportation issues etc. also contribute.

While a *sui-generis* regime is often the most popular of the recommendations advanced for providing protection to the ‘traditional cultural expressions’ or ‘expressions of folklore’, however integrating such a *sui-generis* regime into the mainstream legal architecture of the country always remains a challenge. The *sui-generis* system aims to protect endangered species from extinction and further exploitation by strangers, but in absence of complete documentation the objective of the *sui-generis* system fails to be achieved.

A *sui-generis* regime cannot act or operate as stand-alone or in a water-tight compartment devoid of any interface with the laws affecting the subject matter and thus out of necessity it has to present itself as an exception to established rights and duties. Thus, there is a need to analyse and elucidate the protections provided to the ‘traditional cultural heritage’

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<sup>93</sup> R.V. Anuradha, Sharing with the Kanis. A Case Study from Kerala, India, THE SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY 1(1998).

or ‘expression of folklore’ within the rubric of current framework of laws and regulations in India.

### **Issues in the Protection of Traditional Cultural Heritage**

As observed in previous section traditional cultural expressions (TCE) or the expressions of folklore (EoF) are difficult to protect under the current regime of intellectual property protection<sup>94</sup>. There are two theories related to protection of TCE where one theory argues that these expressions are *sui-generis* protected so they are outside the purview of intellectual property protection<sup>95</sup> while the other theory believes that the existing intellectual property laws provides economic benefits to the owner if they claim it properly<sup>96</sup>.

The first issue with the protection of TCEs is the lack of proper definition of the term. Traditional cultural expressions (TCE) are not defined precisely anywhere. Traditional cultural expressions (TCEs), are also known as "expressions of folklore<sup>97</sup>, can be categories<sup>98</sup> as verbal, non-verbal, expressions by action<sup>99</sup>. They include artistic and cultural expression such as traditional music, handicraft, folk dances, unique art style and designs, signs and symbols, performances, ceremonies, architectural forms, etc.<sup>100</sup> Data says traditional knowledge, traditional

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<sup>94</sup> Mayank. 2020.

<sup>95</sup> D. A. Agyei, Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries, 28 TEXAS INTELLECTUAL PROPERTY LAW JOURNAL 393(2019).

<sup>96</sup> Erin Mackay, Indigenous Traditional Knowledge, Copyright and Art – Shortcomings In Protection and an Alternative Approach, 32 INDIGENOUS TRADITIONAL KNOWLEDGE, COPYRIGHT AND ART 1(2009).

<sup>97</sup> World Intellectual Property Organisation, Traditional Cultural Expressions, World Intellectual Property

Organization(n.d.),[https://www.wipo.int/tk/en/folklore/#:~:text=Traditional%20cultural%20expressions%20\(TCEs\)%2C,other%20artistic%20or%20cultural%20expressions.](https://www.wipo.int/tk/en/folklore/#:~:text=Traditional%20cultural%20expressions%20(TCEs)%2C,other%20artistic%20or%20cultural%20expressions.)

<sup>98</sup> KUTTY & WORLD INTELLECTUAL PROPERTY ORGANIZATION. 2004.

<sup>99</sup> Such as folk tales, folk poetry and riddles

<sup>100</sup> WIPO. n.d.

cultural expressions (TCEs) and genetic resources are not treated separately but form an integrated whole which in their wholeness are the heritage of the community and cannot be dealt separately<sup>101</sup>. Several attempts to define TCEs were made by WIPO through many international instruments but inactive nations reluctantly failed to give any definitive structure and shape to the term.<sup>102</sup>

The indigenous communities and their relation with community knowledge (TK and TCEs) have an evolving status in international instruments<sup>103</sup>. The first trace of the attempt can be found in an international instrument, the UNESCO-WIPO Model Rules<sup>104</sup> that uses the terms “traditional cultural expressions” and “folklore” synonymously. In the model document,<sup>105</sup> a list of traditional cultural expressions has been given, wherein, the definition of ‘expression of folklore’ covers merely verbal expression, musical expression, expression by action and tangible expressions. It didn’t include folk, medicine, agriculture, techniques of manufacture, designs, etc. into the definition that form part of the folklore of the community. An example from the folk /performance of Sikkim can be cited in support of the argument. Sikkim contains a range of folk performances which includes folk dance, folk music and folk songs<sup>106</sup> like Deusi, Bhaili and Maruni are famous Nepali dances while Chyabrung is a

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<sup>101</sup> WIPO. n.d.

<sup>102</sup> Elizabeth M. Lenjo, *Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* 139(2017).

<sup>103</sup> Francesco Mauro & Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, 10 *ECOLOGICAL APPLICATIONS* 1263, 1267 (2000).

<sup>104</sup> UNESCO-WIPO. 1985

<sup>105</sup> UNESCO-WIPO. 1985

<sup>106</sup> Kripal Singh, *Folk Songs and Dances of Sikkim Apollo* - University of Cambridge Repository (1995), [https://www.repository.cam.ac.uk/bitstream/handle/1810/242614/bot\\_1995\\_01\\_23.pdf?sequence=1](https://www.repository.cam.ac.uk/bitstream/handle/1810/242614/bot_1995_01_23.pdf?sequence=1).

Limbu dance.<sup>107</sup> Juwari song is a traditional cultural song of Nepali people in Sikkim<sup>108</sup> etc. There is a long list of folk performances for each and every occasion in various tribes of Sikkim.<sup>109</sup> These dances are an open attraction for people visiting Sikkim specially the ‘Yak Dance’ of Bhutia tribe of Sikkim.<sup>110</sup>

Similarly, the traditional medicines of Sikkim are great wealth for Ayurveda and researchers found that due to lack of care many medicinal plants are threatened<sup>111</sup>. Unfortunately, all these are outside the purview of ‘expression of folklore. As identified, these are untouched areas with immense economic importance for nations, which may provide economic support to not only the community, provinces but nations as a whole. The existing identified areas have made nations less serious as these traditional cultural expressions were initially identified with the non-economic importance or less economic importance for nations.

The second issue relates to the oral tradition of folklore. The traditional societies are either illiterate or if literate they have their own language and scripts, knowledge of which is limited to their small community. This means the traditions are passed from one generation to the other through oral communications and this channel of oral transmission of cultural heritage has been responsible for the creation of traditions and cultural mores relating to marriages, birth, death ceremonies etc. These oral traditions are confined to families or small communities and are not easy to prove in absence of the evidence of tradition due to non-documentation.

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<sup>107</sup> Lokesh Chettri & Bishnu K Sharma, Some Traditional Folk Songs and Dances of Sikkim Himalayas VIII ASIAN MIRROR 30, 32 (2021).

<sup>108</sup> Id.

<sup>109</sup> AAKRITI SINHA, LET'S KNOW DANCES OF INDIA (Star Publications. 2006).

<sup>110</sup> Government of Sikkim. Tourism and Civil Aviation Department, Music and Dance, Tourism and Civil Aviation Department, Government of Sikkim (2020), <https://www.sikkimtourism.gov.in/Public/ExperienceSikkim/musicanddance>.

<sup>111</sup> Rai, et al., BIOLOGICAL CONSERVATION, 28 (2000).



Further, there is an absence of provision or mechanism of documentation of traditions of folklore.

The third major issue is what exactly should be included in the definition of folklore? Can it be said that all elements that have been transmitted through oral communication are a part of the cultural heritage of a community? The answer would obviously be negative. Considering the passing of all orally as folklore is unreasonable and unproductive. An inclusion of the creative aspect in the definition could be productive, however the term creative is more complicative at some places. The channel of oral transmission of information is not the scale upon which it can be determined whether the attribute of cultural heritage can be assigned to an element which has been orally transmitted for it is understandable that there are other elements that are transmitted through the oral channel other than heritage of folklore alone. It is thus required that a stricter circle is drawn on a different criterion other than oral transmission which determines what should be incorporated in the definition of folklore.

The role played by the communities in developing and maintaining this mammoth knowledge base is admirable and needs protection. Thus, promoting further development, maintenance of existing knowledge base and dissemination of these expressions by protecting them from commercial abuse and loss of economic interest is the major challenge.

The challenge that is evident with the issue of protection of TCEs or folklore is that the concept of folklore is not completely developed and as yet needs to incorporate aspects of human creativity. Absence of a complete definition makes it less friendly towards the term folklore. Natural right theory asserts that folklore should belong to the community and those whose labour could discover the usage while putting an

obligation upon the state to find out the ways of protection. Thus, natural right theory advocates the interests of the public who are going to enjoy the fruits of creation of the creator and the creator himself. Folklore includes many things that give an identity to a community that can be even their folk songs or folk story. A story that describes a community cannot be explained by those who never were a part of that community. Thus, folklore belongs to the community only.

The utilitarian principle manifests itself as the reward theory and protects the interest of the creator as an incentive for the work he has created for the society, and thus appears more promising and in support of protection of folklore whether it is involved in traditional basket making or any other work that a community learned by himself and is an art of that community. The traditional cultural heritage can either be protected as an intellectual property right but by mere creating rights in traditional cultural expression will not economically empower the community and their knowledge should be treated as 'industrial knowledge to pay the community more.

### **Conclusion**

India is endowed with a rich cultural heritage which emerges from various parts of the country, but the biodiversity rich north-eastern India stands out for the unique cultural diversity and its vivid culture that it has fostered. Sikkim, a part of the north-eastern states has beautiful flora and fauna which attract not just the tourists but the people with scientific temperament too. Due to the value of biodiversity here, it has become a hotspot for biodiversity theft and piracy of traditional knowledge. The state is also an attraction due to affluent cultural expressions, smashes bamboo articles & jewellery, opulent traditional dresses, melodious folk songs, dances and folk stories etc.

Traditional cultural expressions are intimately connected with the traditional knowledge of the communities since these expressions form the physical representation of the beliefs and knowledge present in the community. The dance forms, music systems and instruments, dress code, ceremonies etc. which are traditional cultural expressions form an intrinsic whole with the larger traditional knowledge which is then a part of the biodiversity of the region. Additionally, traditional cultural expressions (TCEs), since having emerged over a period of time and representing the belief systems of the communities, generate economic value which rightfully belongs to the community and that originated the belief system. Intellectual property rights regime serves to provide property rights to the creator who has invested labour (which can be called mental or intellectual) in the creation of intellectual property. These rights can be assigned by the creator to another person. However, such property rights have to be assigned to another identifiable individual or a group and this group cannot be amorphous in nature. Thus, juristic persons can be holders or assignees of intellectual property but an amorphous group of individuals cannot be. This conception of property rights goes counter to the nature of property rights that have been existing in the past where either the entire property was owned by the king or was owned by a community. Private ownership of property formed a very small part of the ancient property rights jurisprudence. The present-day concept of intellectual property rights which vests the rights in an identified individual or an identified and delimited group of individuals runs counter to the conception of property rights that was in existence in ancient times and is even in existence in traditional communities today.

Since the protection that is demanded for traditional cultural heritage is beyond the scope of the present intellectual property systems as they do

not deal with communitarian or group rights, a *sui-generis* system was required to provide protection to the property rights of the traditional communities. The existing legal protection that is secured with the *sui-generis* system is based on the uniqueness of some flora and fauna, but this legal regime is ineffective in the case of cultural heritage. The definition of folklore provided by WIPO is too restricted to cover the variety of information and cultural expression present with the indigenous communities of Sikkim. It is necessary that protection has to be granted to the traditional communities and societies to preserve their unique cultural heritage from misappropriation. The existing law lacks any system of authorisation, consent or licensing in folklore before its exploitation as is the case of other intellectual property and also there is no provision of the ownership right of folklore with the community.

Nonetheless, the issues of protection of traditional cultural expression and traditional knowledge are vexatious and morally pressing in national and international legal society governing intellectual property. The change in modern trend has increased the interest of people in traditional cultural heritage and traditional knowledge, as they are commercially exploitable and thus open to misappropriation. To answer the question why one should think about protecting the traditional knowledge lies in three main aspects. The first is that the traditional cultural expressions have potential to be exploited commercially. Second very recently many people and bodies gained interest in TK & TCEs and lastly, they are the property of a community which is closely associated with their identity and therefore no one should be allowed to take them away.

Many observations were made about the challenges associated with the protection of folklore but not adequate research has been done. The dearth of study covering India and each and every state forces to analyse the

folklore for seeking the protection of traditional cultural expression and traditional knowledge. This may help in making a nationwide policy while keeping in mind the unique needs of each and every state of India.