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Sui Generis Models for Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs): A Comparative Study of India's Draft TK/TCE Bill with National Sui Generis Regimes in Indonesia and Panama

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ABSTRACT

The safeguarding of traditional knowledge (TK) and traditional cultural expressions (TCEs) has become one of the most contested and intellectually complex issues in the contemporary international legal landscape, particularly within the field of intellectual property. Indigenous and local communities across the world have developed, preserved and transmitted these systems of knowledge over generations, covering medicinal uses, agricultural techniques, folklore, spiritual practices, art forms and ecological wisdom. Much of that knowledge now faces an increased threat from commercial exploitation through cultural appropriation, biopiracy, and the unauthorised commodification of traditional knowledge by third parties, whether multinational corporations or researchers, operating in jurisdictions outside the control of the communities concerned. Scholars and practitioners have identified persistent gaps in conventional intellectual property frameworks, patents, copyright and trademarks, in protecting the communal, intergenerational and often non-commercial character of TK and TCEs. The result has been a global movement towards sui generis legislation designed to fit the needs and realities of indigenous and local communities. This paper compares India's Draft Traditional Knowledge and Traditional Cultural Expressions Bill with the national sui generis regimes of Indonesia and Panama, and assesses each against the criteria of definitional scope, ownership, prior informed consent, benefit-sharing, recognition of customary law, enforcement and community autonomy.

Keywords: *traditional knowledge, traditional cultural expressions, sui generis protection, biopiracy, benefit-sharing, prior informed consent, indigenous communities, wipo igc, indonesia, panama, india*

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I. STATEMENT OF PROBLEM

Traditional knowledge (TK) and traditional cultural expressions (TCEs) sit awkwardly within intellectual property law, and it is not difficult to see why. The intellectual property system was built around individual creators, fixed works and time-limited rights. TK and TCEs do not work that way: they belong to communities, they are passed down orally, and no one can point to a moment at which they were "created". The frameworks in place were simply not designed with them in mind. What makes this more than an academic problem is biopiracy. Companies and researchers have taken traditional medicinal knowledge, agricultural practices and cultural expressions and turned them into patents and products without asking permission or sharing any of the profits. The communities that developed and preserved this knowledge over centuries receive nothing. It is economic exploitation layered on top of cultural appropriation.

The international response has not helped a great deal either. The World Intellectual Property Organization has been working on this for years, drafting instruments and holding discussions, but there is still no binding agreement. States cannot agree on the basics, so communities are left without enforceable protections at the global level. India has made some notable efforts here.

The Traditional Knowledge Digital Library has blocked hundreds of wrongful patent applications by documenting traditional remedies and making that information available to patent offices worldwide. But it is purely defensive. It stops others from claiming ownership; it does not give communities any positive rights over their own knowledge. The Biological Diversity Act 2002 exists on paper, but implementation has been patchy. Awareness is low, enforcement is weaker, and the gaps show.

There is also a human side to this. Many indigenous communities do not know what rights they have, and even those who do often cannot access the legal systems that might protect them. Documentation is sparse. Legal resources are scarce. The exploitation continues because the people affected do not have the tools to fight back. The fundamental issue is therefore structural: the legal frameworks we have inherited do not fit what TK and TCEs actually are. Until that changes, until we build systems that recognise collective ownership, intergenerational transmission and community benefit-sharing, traditional knowledge holders will remain vulnerable to misappropriation.

II. LITERATURE REVIEW

The debate around protecting traditional knowledge (TK) and traditional cultural expressions (TCEs) has been a major topic across academic, policy and legal discussions. There is a broad

awareness that these forms of knowledge cannot readily be fitted into the conventional intellectual property frameworks on which we currently rely.

Reports and working papers of the World Intellectual Property Organization have been central in drawing attention to the issue. They underline how deeply the problem runs and consistently call for a *sui generis* system, something specifically built to fit the nature of traditional knowledge rather than an attempt to squeeze it into the intellectual property mould. These documents also reflect the slow and often difficult international negotiations that continue without a binding global agreement.

Scholars have been equally vocal. Madhavi Sunder challenges the way TK is commonly portrayed. She argues that it is not something frozen in time or merely "ancient": it is dynamic, adaptive and living knowledge. Her point is that it deserves legal recognition on its own evolving terms, not as a relic.

Graham Dutfield's research examines how existing intellectual property systems fall short, especially when it comes to equitable benefit-sharing. He argues for new models centred on community rights and fairness, systems that protect traditional knowledge without stifling innovation.

Anil K. Gupta's work adds a practical, human dimension to the discussion. Through his research on grassroots innovation, he shows how local communities continuously generate and refine knowledge that benefits society as a whole. He calls for these communities to be properly recognised and rewarded within more inclusive innovation systems.

When it comes to India, the scholarship on the Traditional Knowledge Digital Library and the Biological Diversity Act 2002 paints an instructive picture. These legal tools have helped prevent exploitation, but researchers note that they remain limited by weak enforcement, low community awareness and insufficient legal empowerment.

Taken together, the literature agrees on one thing: traditional knowledge and cultural expressions cannot be effectively protected through conventional intellectual property law. What is needed is a dedicated legal framework, one that genuinely reflects the collective, evolving and deeply cultural nature of TK and TCEs.

III. RESEARCH OBJECTIVES

This paper pursues the following objectives:

- To ascertain the nature, scope and extent of the legal protection available for traditional knowledge (TK) and traditional cultural expressions (TCEs).

- To examine the inadequacy of existing intellectual property laws in protecting TK and TCEs.
- To analyse the international legal framework relating to TK and TCEs.
- To assess the protection of TK and TCEs against biopiracy.
- To suggest possible solutions for better protection of TK and TCEs in India.

IV. RESEARCH QUESTIONS

- What is the nature, scope and extent of the legal protection available for TK and TCEs?
- Why are existing intellectual property laws inadequate in protecting TK and TCEs?
- What are the key features of the international legal framework governing TK and TCEs?
- How does biopiracy affect the protection of TK and TCEs?
- What measures can improve the protection of TK and TCEs in India?

V. SCOPE OF THE STUDY

This study is mainly concerned with the legal and policy dimensions of the protection of traditional knowledge and traditional cultural expressions. It covers the international as well as the national plane, with a particular focus on India. It examines global approaches, including the initiatives of the World Intellectual Property Organization, and the approaches of various States to protecting TK and TCEs. It also explores Indian laws, policies and institutions for the protection of traditional knowledge. The study further draws on case studies and examples of misappropriation and protection in order to offer practical perspectives. It is, however, confined to legal and theoretical examination and does not address the technical and scientific elements of traditional knowledge.

VI. LIMITATIONS OF THE STUDY

This study is primarily based on secondary sources such as books, journal articles, reports and legal documents, which restricts the scope for empirical and field-based analysis. The lack of comprehensive and updated data on instances of misappropriation and on enforcement challenges limits the evaluation of the effectiveness of existing frameworks. Additionally, the international legal regime governing TK and TCEs is still evolving, and ongoing negotiations may lead to developments not reflected in this study. Limited access to indigenous communities further constrains understanding of practical challenges and ground-level realities. Moreover, variations in legal systems and cultural contexts across jurisdictions make it difficult to propose universally applicable solutions.

VII. INTRODUCTION

At the convergence of the rights of indigenous and local communities and intellectual property law lies one of the most challenging normative problems facing the international legal system in the twenty-first century, namely the legal treatment of the knowledge systems of those communities. These systems include medicinal plants and systems of healing; agricultural biodiversity; spiritual and artistic traditions; forms of architecture; music; dance; and oral traditions. Collectively they represent an immeasurable cultural, social, economic and scientific value as a collective intellectual heritage.¹

This heritage is being threatened rapidly and dramatically. Biopiracy, that is, the unauthorised use and commercialisation of biological resources and associated traditional knowledge without the free, prior and informed consent of the originating community and without equitable benefit-sharing,² has led to the grant of numerous patents for inventions derived from traditional knowledge, resulting in the loss of both recognition and economic reward for the intellectual contributions of indigenous communities. Well-known episodes such as the neem and turmeric patent disputes in the United States, the hoodia controversy in South Africa and the appropriation of ayahuasca in Peru have made painfully evident how ineffective the conventional intellectual property system has been in halting such misappropriation.³ Traditional cultural expressions (TCEs) raise similar but structurally different issues. The commercial exploitation of indigenous music, textiles, design, religious ceremonies and arts by outsiders, often without credit, compensation or consent, is not only an economic injustice but also an act of cultural violence, cutting communities off from the living, dynamic traditions that define their identity and sustain the social fabric and cohesion of their societies.

Conventional systems of intellectual property protection are inadequate to meet the challenges presented by traditional knowledge (TK) and TCEs because of both their structure and their underlying philosophy. Patent law requires that an invention be novel and that it be attributable to an identifiable inventor or inventors; copyright protection for creative works is generally limited in time and vests in an identifiable human author; and trademark law protects only signs used in trade.

¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: BACKGROUND BRIEF (WIPO 2020), https://www.wipo.int/export/sites/www/tk/en/docs/background_brief_on_tk.pdf (last visited 17 Apr. 2026).

² Convention on Biological Diversity art. 8(j), opened for signature 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 Dec. 1993).

³ Re-examination of U.S. Patent No. 5,401,504 (Turmeric), all claims cancelled following the re-examination request filed by the COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH (1997); European Patent No. EP 0436257 B1 (Neem), revoked by the EUROPEAN PATENT OFFICE Opposition Division on 10 May 2000, revocation upheld by the Technical Board of Appeal on 8 Mar. 2005.

VIII. CONCEPTUAL FRAMEWORK: TK, TCEs AND THE CASE FOR SUI GENERIS PROTECTION

A. Meaning and Scope of Traditional Knowledge

There is no internationally accepted legal definition of the term "traditional knowledge". Over two decades of negotiation the WIPO Intergovernmental Committee has worked with a description of TK as knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.⁴ Examples of TK include agricultural, scientific, technical, ecological, medicinal and biodiversity-related knowledge. The Convention on Biological Diversity does not define TK as such, but Article 8(j) provides that each contracting party shall, subject to its national legislation, "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".⁵ Several features distinguish TK from ordinary knowledge capable of protection under standard intellectual property laws. First, TK is held and created by communities acting as collectivities rather than by individuals who can be identified as inventors or authors. Second, TK is transmitted across generations through oral traditions, apprenticeship and collective or community practice.⁶

B. The Case for Legal Protection: Biopiracy, Misappropriation and Cultural Exploitation

The case for legal protection of traditional knowledge (TK) and traditional cultural expressions (TCEs) rests on several overlapping normative foundations. These fall into three main categories: justice-based arguments, consequentialist arguments and cultural preservation arguments.⁷

From a justice-based standpoint, the wrongful appropriation of TK and TCEs without community consent or fair sharing of benefits constitutes a distributive injustice and is viewed by many scholars as a form of structural theft. When a pharmaceutical company patents a product based on an indigenous plant whose healing properties were known through the traditional knowledge of an indigenous people, the company takes the accumulated intellectual

⁴ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *supra* note 1 (working description of traditional knowledge as "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity").

⁵ Convention on Biological Diversity, *supra* note 2, art. 8(j).

⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, PROTECTING TRADITIONAL KNOWLEDGE: A LEGAL AND POLICY OVERVIEW (WIPO 2019).

⁷ WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (WIPO 2017).

effort of generations without compensating the community in which that knowledge originated.⁸

The turmeric patent dispute illustrates the point. The University of Mississippi Medical Center obtained a United States patent (Patent No. 5,401,504) for the use of turmeric in wound healing.⁹ The patent was successfully challenged by India's Council of Scientific and Industrial Research on re-examination, on the ground that it lacked novelty in view of the prior use of turmeric for wound healing documented in ancient Sanskrit literature. The absence of appropriate legal protection for TK and TCEs also distorts incentives in a way that threatens the continued creation and maintenance of traditional knowledge systems. Where there is no legal recognition of, or economic reward for, the intellectual contributions of indigenous peoples, the incentive structure that sustains intergenerational transmission of knowledge is weakened.¹⁰

The unauthorised commodification of TCEs threatens the cultural tradition of a community and therefore its identity. The mass production of sacred designs as souvenirs, the use of ceremonial music without attribution on a commercial album, or the counterfeit production of traditional textiles by companies in distant countries all violate the cultural integrity of indigenous peoples, and may cause irreparable damage to social cohesion and cultural continuity.

C. Limitations of Conventional Intellectual Property Regimes

Conventional intellectual property mechanisms do not afford adequate protection to TK and TCEs, as both the scholarly literature and the history of attempts at sui generis law reform demonstrate.

i. Patent Law

The patent system is designed to encourage an individual inventor to disclose a new, non-obvious and useful invention. This focus on individual inventors is fundamentally incompatible with the way in which traditional knowledge is created and maintained, for three reasons. First, TK is a body of knowledge already known to the community that holds it, and is frequently recorded in written historical sources; it will therefore rarely satisfy the novelty criterion for patentability. Second, the requirement that a patent application identify an individual inventor or inventors is in direct conflict with the collective process through which a community develops its TK. Third, even where a third party obtains a patent for a TK-based compound, the

⁸ GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY, BIOGENETIC RESOURCES AND TRADITIONAL KNOWLEDGE* (Earthscan 2004).

⁹ U.S. Patent No. 5,401,504 (Use of Turmeric in Wound Healing) (issued 28 Mar. 1995 to the UNIVERSITY OF MISSISSIPPI MEDICAL CENTER); *see supra* note 3.

¹⁰ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *PROTECTING TRADITIONAL KNOWLEDGE: A LEGAL AND POLICY OVERVIEW*, *supra* note 6.

community that originated the knowledge will not necessarily derive any benefit from it. On the contrary, the third-party patent may create barriers to the community's own access to the compound derived from its knowledge.

ii. Copyright Law

Copyright law protects original works of authorship fixed in a tangible form. Its limitations with respect to TK and TCEs are equally structural.¹¹ The fixation requirement is incompatible with the oral, performative and living nature of many TCEs. The originality and identifiable-author requirements cannot be reconciled with the communal and anonymous character of folklore.¹² Copyright is also limited in time: once the term expires, the work falls into the public domain. As TCEs are by definition of ancient origin, most would under classical copyright rules have passed into the public domain long ago, leaving them available for unlimited commercial exploitation.¹³

iii. Trademark and Geographical Indication Law

Trademark law protects commercial signs that distinguish the goods or services of one undertaking from those of another. Geographical indications have shown some potential for the commercial protection of TCE-related products, as the Indian examples of Darjeeling tea and Kanchipuram silk illustrate.¹⁴ Geographical indications are nevertheless of limited use as comprehensive TK and TCE protection tools. They do not protect non-commercial expressions of culture, including sacred knowledge or ceremonial practices, and they do not vest ownership in the communities to which the underlying knowledge belongs.

D. The Emergence of Sui Generis Systems

The development of legal systems for TK and TCEs that are not tied to pre-existing intellectual property frameworks is a response to the structural limitations of conventional regimes. A sui generis regime, that is, a system specifically designed for the particularities of its subject matter, is not bound by those limitations. The recurring features of sui generis regimes for TK and TCEs include: (1) rights of ownership and control held by communities rather than by individual authors or inventors; (2) protection that is perpetual or indefinitely renewable; (3) collective enforcement; (4) benefit-sharing where a third party commercialises the subject matter; (5) prior

¹¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* (WIPO 2017).

¹² Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights*, 48 AM. U. L. REV. 769 (1999).

¹³ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *TRADITIONAL CULTURAL EXPRESSIONS: LEGAL AND POLICY ISSUES* (WIPO 2018).

¹⁴ Geographical Indications of Goods (Registration and Protection) Act, No. 48 of 1999 (India).

informed consent for access to and use of TK and TCEs; and (6) recognition of customary law as a complementary or parallel normative framework.

E. International Normative Framework

i. The WIPO Intergovernmental Committee

The World Intellectual Property Organization established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2000; it held its first session in 2001 and has since served as the leading global forum for negotiations on possible binding instruments relating to TK, TCEs and genetic resources.¹⁵ The Committee has produced draft articles, which have not yet become legally binding international texts, covering three interrelated subjects: the draft articles on the protection of TK; the draft articles on the protection of TCEs; and the draft articles on intellectual property and genetic resources. These texts now provide the most reliable international reference points for TK and TCE protection and a basis for the design of national laws.¹⁶

IX. THE INDONESIAN MODEL: A LAYERED LEGISLATIVE FRAMEWORK FOR TK AND TCE PROTECTION

A. Constitutional and Contextual Background

Indonesia is one of the most striking examples of biological and cultural diversity on earth. With more than 17,000 islands and some 1,340 recognised ethnic groups (*suku bangsa*), the country holds immense traditional knowledge systems and cultural expressions.¹⁷ The protection of this heritage has long carried considerable social and political significance in Indonesia.

Article 32 of the 1945 Constitution of the Republic of Indonesia establishes the State's obligation to promote national culture, and Article 28I(3) provides that the cultural identities and rights of traditional communities shall be respected.¹⁸ The Indonesian State therefore has a dual role as both protector and promoter of the cultural heritage of its people. That dual role

¹⁵ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, <https://www.wipo.int/tk/en/igc/> (last visited 17 Apr. 2026); see also WORLD INTELLECTUAL PROPERTY ORGANIZATION GENERAL ASSEMBLY, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WO/GA/26/6 (2000).

¹⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION INTERGOVERNMENTAL COMMITTEE, *The Protection of Traditional Knowledge: Draft Articles*, WIPO/GRTKF/IC/40/4 (2019); WORLD INTELLECTUAL PROPERTY ORGANIZATION INTERGOVERNMENTAL COMMITTEE, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/38/4 (2018); see also WORLD INTELLECTUAL PROPERTY ORGANIZATION INTERGOVERNMENTAL COMMITTEE, *Draft Articles on Intellectual Property and Genetic Resources* (2022).

¹⁷ M. Hasan, *Cultural Diversity and Traditional Knowledge in Indonesia* (1995).

¹⁸ INDON. CONST. art. 32, art. 28I(3).

decisively influences the legislative approach to the protection of TK and TCEs, particularly the question whether the State or the traditional community is the principal rights holder.

The state-custodianship model has been widely criticised as inadequate on the ground that it displaces the autonomy of traditional communities in favour of state authority and creates opportunities for state-sanctioned commercial exploitation of TK and TCEs without community participation or benefit.¹⁹

B. Copyright Law: Law No. 28 of 2014

The principal instrument protecting TCEs in Indonesia is Law No. 28 of 2014 on Copyright. Articles 38 and 39 of that Law establish a distinct regime for traditional cultural expressions and for works whose author is unknown.²⁰ Under Article 38(1), copyright in traditional cultural expressions is held by the State. Article 38(2) obliges the State, as holder of that copyright, to take inventory of, preserve and maintain traditional cultural expressions. Article 38(3) requires that the use of traditional cultural expressions take account of the values of the communities in which they are practised, and Article 38(4) leaves further regulation to a government regulation. The scheme therefore creates a category of works that are publicly owned but State-managed. Its effects are twofold. It prohibits commercial use of TCEs by third parties without State authorisation; but it does not recognise any ownership right in the source communities, nor does it require the State to obtain the consent of those communities before licensing third-party use.

C. Law No. 5 of 2017 on Cultural Advancement

Law No. 5 of 2017 on the Advancement of Culture provides broader protection for, and better support for the promotion of, Indonesia's cultural heritage than earlier legislation.²¹ It puts in place a national system for identifying, protecting, developing, using and promoting objects of cultural advancement, defined to cover ten categories: oral traditions, manuscripts, customs (adat), rites and rituals, traditional knowledge, traditional technology, art, language, folk games and traditional sports.

The Law also mandates the preparation of a National Inventory of Objects of Cultural Advancement (Inventarisasi Objek Pemajuan Kebudayaan), comprising national, provincial and district inventories of considerable scale. The Indonesian National Inventory provides a more complete evidential basis for cultural heritage rights than India's Traditional Knowledge

¹⁹ INTERNATIONAL LABOUR ORGANIZATION, *Indigenous and Tribal Peoples Convention* (No. 169), 27 June 1989, 28 I.L.M. 1382 (entered into force 5 Sept. 1991).

²⁰ Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta [Law No. 28 of 2014 on Copyright] arts. 38-39 (Indon.).

²¹ Undang-Undang Nomor 5 Tahun 2017 tentang Pemajuan Kebudayaan [Law No. 5 of 2017 on the Advancement of Culture] (Indon.) (enacted 27 Apr. 2017).

Digital Library, in that it creates a formal record on which rights holders can rely in asserting their claims.

D. Traditional Knowledge Protection: The Geographical Indications Framework

Geographical indications in Indonesia are governed by Law No. 20 of 2016 on Marks and Geographical Indications, implemented through Government Regulation No. 22 of 2018, and serve as a supplementary mechanism for the protection of TK-associated products and handicrafts.²² Through the geographical indication system, communities and associations can register products that are distinctively tied to a geographical origin, thereby securing protection against unauthorised use of the indication by competitors and gaining recognition in the marketplace for traditional products.

Registered geographical indications in Indonesia include Kintamani Arabica Coffee (Bali), Ijen Robusta Coffee (Banyuwangi) and Muntok White Pepper (Bangka Belitung). Although registration confers valuable commercial protection, geographical indications operate only in the commercial sphere and do not extend to the broader category of TK and TCEs that have no direct commercial manifestation.

E. Community Ownership, State Role and the Critique of State Custodianship

Law No. 28 of 2014 designates the State, rather than communities, as the rights holder in traditional knowledge and traditional cultural expressions. The State holds copyright in traditional folklore on behalf of the nation, and it is therefore the State, not the community, that may license the use of folklore-based material.

This arrangement presents significant problems for the rights of indigenous and local communities. First, it encroaches on community autonomy, because it enables the State to license TK and TCEs to private business without regard to community views or consent. Second, there is no rule requiring the sharing of profits with the communities concerned. Third, questions arise about the compatibility of the licensing arrangement with the standards of ILO Convention No. 169 on Indigenous and Tribal Peoples, which Indonesia has not ratified but to which reference has been made in the development of constitutional argument.²³

The historic ruling of the Indonesian Constitutional Court in Decision No. 35/PUU-X/2012, recognising the constitutional rights of adat communities to their customary forests, has

²² Undang-Undang Nomor 20 Tahun 2016 tentang Merek dan Indikasi Geografis [Law No. 20 of 2016 on Marks and Geographical Indications] (Indon.); Government Regulation No. 22 of 2018 on the Registration and Management of Geographical Indications (Indon.).

²³ INTERNATIONAL LABOUR ORGANIZATION, Convention No. 169, *supra* note 19 (Indonesia is not a party).

established a line of authority on which challenges to government action inconsistent with the rights of indigenous communities in TK and TCEs may be built.²⁴

F. Enforcement Mechanisms and Implementation Challenges

Enforcement of TK and TCE protection in Indonesia raises logistical difficulties arising from the country's many islands, ethnic groups and administrative divisions. With more than 17,000 islands and over 300 ethnic groups, protection administered from a single centre is difficult to implement.

The Copyright Law provides both civil remedies, such as injunctions and monetary compensation, and criminal penalties for copyright infringement, extending under Article 113(3) to imprisonment of up to four years and a fine of up to one billion rupiah.²⁵ These remedies were, however, designed for conventional copyright protection, and none of them has been enforced in relation to the misappropriation of TCEs.

The Directorate General of Intellectual Property is the agency responsible for enforcing TK and TCE protection, but it has limited capacity to engage with communities at the level at which such enforcement must operate. Community-based organisations and customary law (*hukum adat*) play an important supplementary role. There is at present no formal legal framework that gives adequate support to either.

X. THE PANAMA MODEL: A COMMUNITY-CENTRED SUI GENERIS REGIME FOR TCE PROTECTION

A. Background and Legislative Genesis

Special Law No. 20 of 26 June 2000 on the special intellectual property regime governing the collective rights of indigenous peoples for the protection and defence of their cultural identity and traditional knowledge (the Special Law), together with its implementing regulations in Executive Decree No. 12 of 20 March 2001, is one of the world's earliest and most frequently cited pieces of *sui generis* legislation for the protection of the cultural expressions and traditional knowledge of indigenous peoples.²⁶ Its passage was the result of long-term work by the recognised indigenous peoples of Panama, among them the Ngabe, Bugle, Kuna, Embera, Wounaan, Bri Bri and Naso.

²⁴ Putusan Mahkamah Konstitusi No. 35/PUU-X/2012 [Constitutional Court Decision No. 35/PUU-X/2012] (16 May 2013) (Indon.) (holding that customary forests are no longer State forests).

²⁵ Law No. 28 of 2014 on Copyright, *supra* note 20, art. 113(3).

²⁶ Ley No. 20 de 26 de junio de 2000, Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas [Special Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples] (Pan.); Decreto Ejecutivo No. 12 de 20 de marzo de 2001 [Executive Decree No. 12 of 20 Mar. 2001] (Pan.) (implementing regulations).

The Law was enacted in response to a particular and urgent problem, namely the commercial appropriation of Kuna mola designs by the tourism sector and by commercial manufacturers, without the approval of, or benefit to, the originating people.²⁷ The Special Law is thus a direct legislative response to an identified case of misappropriation, and one of the few TK and TCE protection instruments in the world with a clearly identified triggering event raised by indigenous peoples themselves.

B. Scope of Protection and Definitions

The Special Law protects the collective rights of the indigenous peoples of Panama in their traditional knowledge, traditional dress, musical instruments, music, dances and performances, oral and written expressions, and traditional artistic and working tools and the techniques for their manufacture.²⁸ It covers both the immaterial aspects of cultural heritage, such as knowledge, ritual practice and oral tradition, and its material aspects, such as crafts, textiles, musical instruments and ceremonial objects.

Article 2 provides that the customs, traditions, beliefs, spirituality, religiosity, world view, folkloric expressions, artistic manifestations, traditional knowledge and any other form of traditional expression of the indigenous peoples form part of their cultural heritage and may not therefore be the subject of exclusive rights of any kind on the part of unauthorised third parties.²⁹ Framing the entitlement in collective terms is a significant departure from the individualistic premises of conventional intellectual property law, and aligns the Law with the community-oriented principles of international instruments on indigenous peoples' rights, in particular the United Nations Declaration on the Rights of Indigenous Peoples.³⁰ The perpetual character of the protection is secured by Article 7, under which the registration of collective rights neither lapses nor has a fixed duration, requires no lawyer and is exempt from all payment.³¹

C. The Registration System: The Department of Collective Rights and Expressions of Folklore

The operation of the Special Law depends on a dedicated registration system. Article 7 creates, within the Directorate General of the Industrial Property Registry (DIGERPI) of the Ministry

²⁷ A. Zuloaga, *Protecting Kuna Mola Textiles: The Experience with Special Law No. 20*, WIPO/GRTKF/IC/3/7 (2002).

²⁸ Special Law No. 20, *supra* note 26, arts. 1-5.

²⁹ *Id.* art. 2.

³⁰ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 19, 31 (13 Sept. 2007).

³¹ Special Law No. 20, *supra* note 26, art. 7 (registration of collective rights "shall neither lapse nor have a fixed duration").

of Commerce and Industries, a Department of Collective Rights and Expressions of Folklore, through which the collective rights of indigenous peoples are registered, and Article 15 requires that use and marketing of protected subject matter be governed by each people's rules of use, approved and registered with DIGERPI. Executive Decree No. 12 of 2001 sets out the application procedure, requires the rules of use to be filed with the application, gives the Registry 30 days to verify that an application is complete, and permits DIGERPI to send officials into indigenous communities to gather the information needed for registration.³²

D. Collective Rights and Community Control

The rights structure created under the Special Law is purely collective. No individual member of an indigenous people may assert ownership of any portion of the collective cultural heritage; the entitlement vests in the people as a unit.

Article 20 prohibits the industrial reproduction, in whole or in part, of traditional dress and other protected collective rights without the authorisation of the Ministry of Commerce and Industries, which under Article 17 of Executive Decree No. 12 of 2001 may be granted only with the express prior consent of the general congresses, traditional authorities and councils of the people concerned.³³ This consent requirement is among the strongest protections found in any national TK or TCE law and gives concrete content to the idea of cultural sovereignty.

The Law also gives effect to the customary law (*derecho consuetudinario*) of each indigenous people. Article 15 requires that use and marketing of protected subject matter be governed by the rules of use of the people concerned, which are drawn from its own customary norms and registered with DIGERPI.³⁴ Customary law is thus not merely acknowledged in the abstract: it supplies the operative standard by which lawful use is judged, and the formal legal system is required to support rather than displace indigenous self-governance.

E. Benefit-Sharing and Prior Informed Consent

Benefit-sharing is regulated principally through the licence contract. Article 18(c) of Executive Decree No. 12 of 2001 requires that a licence contract specify the royalties that the indigenous people will receive for the use of the collective rights, and that those royalties include an initial payment or some other form of immediate, direct compensation together with a percentage of the value of sales.³⁵ The Decree does not, however, fix minimum ratios or formulas for calculating royalties, leaving the terms entirely to negotiation.

³² Special Law No. 20, *supra* note 26, arts. 7, 15; Executive Decree No. 12 of 2001, *supra* note 26, arts. 6-9, 13.

³³ Special Law No. 20, *supra* note 26, art. 20; Executive Decree No. 12 of 2001, *supra* note 26, art. 17.

³⁴ Special Law No. 20, *supra* note 26, art. 15.

³⁵ Executive Decree No. 12 of 2001, *supra* note 26, art. 18(c).

The prior informed consent requirement is equally specific. Authorisation for the industrial reproduction or commercial use of protected subject matter requires the express prior consent of the general congresses, traditional authorities and councils of the people concerned.³⁶ The consent requirement admits of few exceptions, and it has been criticised for the breadth of the subject matter it captures; supporters answer that only a requirement in these terms allows a community to retain control over the use of its TK and TCEs.

F. Enforcement Mechanisms and Penalties

Enforcement rests on a graduated scheme of prohibitions and sanctions. Civil remedies, including injunctions and monetary compensation, are available. Article 21 imposes fines ranging from 1,000 to 5,000 balboas, doubled in the case of repeat offences, with half of the sum collected paid to the National Treasury and half to the indigenous congresses or reserves concerned; the Law provides for no term of imprisonment. Article 22 confers enforcement authority on the chief of the region or the governor of the province, acting with the general assembly of the corresponding indigenous region.³⁷

Enforcement responsibility is therefore shared between the Ministry of Commerce and Industries, acting through DIGERPI, and the traditional authorities of the indigenous peoples themselves. Indigenous peoples accordingly have direct access to the enforcement of their rights and are not obliged to act only through a government agency.

XI. COMPARATIVE ANALYSIS: A STRUCTURED ASSESSMENT

Table 1: Definitions of TK and TCEs

Dimension	India (Draft TKTCE Bill)	Indonesia (Copyright Law 2014 & Law 5/2017)	Panama (Special Law No. 20 of 2000)
Definition of Traditional Knowledge	Broad: includes agricultural, scientific, technical, ecological, medicinal, and biodiversity-related knowledge; generated, preserved and transmitted in intergenerational context	Implicit: covered under Cultural Advancement Law (Law 5/2017) as "traditional knowledge" among cultural objects; not specifically defined in Copyright Law	Broad: encompasses traditional medicines, musical knowledge, dances, handicrafts, visual arts; emphasises collective community identity
Definition of TCEs	Broad: verbal, musical, action-based, and tangible expressions; broadly mirrors WIPO IGC Draft Articles	Article 38 covers ekspresi budaya tradisional broadly; includes folklore, traditional arts, folk songs; perpetual	Comprehensive: covers cultural heritage in its entirety; focus on collective material and immaterial cultural

³⁶ Executive Decree No. 12 of 2001, *supra* note 26, art. 17; Special Law No. 20, *supra* note 26, art. 20.

³⁷ Special Law No. 20, *supra* note 26, arts. 21-22.

Dimension	India (Draft TKTCE Bill)	Indonesia (Copyright Law 2014 & Law 5/2017)	Panama (Special Law No. 20 of 2000)
		state-held copyright	expressions of indigenous peoples
Scope of Subjects Covered	All traditional communities including scheduled tribes, pastoralists, and local communities	All Indonesian traditional/ethnic communities: state holds rights on behalf of community	Specifically the seven recognised indigenous peoples (pueblos indigenas) of Panama
Approach to Dynamic/Living TK	Acknowledges dynamic and evolving nature; protection for ongoing traditions	Unclear; Copyright Law better suited to fixed expressions; Law 5/2017 more dynamic	Explicitly recognises living traditions; protection attaches regardless of fixation

Table 2: Ownership Models

Dimension	India (Draft TKTCE Bill)	Indonesia	Panama
Primary Rights-Holder	Communities (collective ownership)	State (on behalf of nation)	Indigenous peoples collectively, through their general congresses and traditional authorities
Role of State	Administrative/facilitative through TKTCEA; state is not rights-holder	State is primary rightsholder under Copyright Law 2014	State registers and recognises rights; does not hold rights
Community Autonomy	High: communities control access and consent	Low: state makes licensing decisions	Very high: general congresses and traditional authorities control all decisions
Recognition of Customary Law	Partial: customary decision-making recognised in PIC process	Limited: hukum adat recognised informally	Strong: general congresses and traditional authorities act under customary norms
Individual vs Collective	Collective only; no individual rights in TK/TCEs	Collective but state-mediated; individuals not rights-holders	Explicitly collective; individual claims expressly excluded

Table 3: Benefit-Sharing and Prior Informed Consent Mechanisms

Dimension	India (Draft TKTCE Bill)	Indonesia	Panama (Special Law No. 20)
PIC Requirement	Yes: free, prior and informed consent from community; modelled on Nagoya Protocol	No explicit PIC requirement; state grants licence without community consent required	Yes: absolute PIC requirement; no exceptions; consent through the general congresses and traditional authorities
Benefit-Sharing Framework	Yes: mandatory; monetary and non-monetary benefits;	No mandatory benefit-sharing mechanism; state licence fees not	Yes: royalties or equitable compensation; terms negotiated; benefits

Dimension	India (Draft TKTCE Bill)	Indonesia	Panama (Special Law No. 20)
	administered by TKTCEA; specific ratios not specified	necessarily flow to communities	negotiated by the general congresses and traditional authorities for the community
Mutually Agreed Terms (MAT)	Yes: envisaged but not fully operationalised	No: absent from framework	Yes: explicitly required; fair and equitable standard
Non-Monetary Benefits	Yes: includes technology transfer, capacity building, training	Not specified	Yes: development-oriented benefits recognised
Intra-Community Distribution	Not specified: significant gap	Not applicable (state holds rights)	Managed by the general congresses and traditional authorities under customary norms

Table 4: Overall Comparative Summary

Parameter	India	Indonesia	Panama
Rights-Holder	Community (collective)	State	Indigenous peoples (collective)
PIC Required	Yes	No	Yes (absolute)
Benefit-Sharing Mandatory	Yes (incomplete)	No	Yes
Minimum Benefit Ratio	Not specified	N/A	Not specified (fair & equitable)
Duration of Protection	Indefinite	Perpetual (state-held)	Perpetual (communityheld)
Registration Required	Declaratory (unclear)	No (state-held automatically)	Not mandatory; evidentiary
Community Enforcement Standing	Indirect (via TKTCEA)	None	Direct (general congresses and traditional authorities)
Parameter	India	Indonesia	Panama
Customary Law Recognition	Partial	Informal	Strong and mandatory
Cross-Border Protection	Not addressed	Not addressed	Not addressed
Digital Misappropriation	Not addressed	Not addressed	Not addressed
UNDRIP Compatibility	High	Moderate: Low	Very High

A. Synthesis: Comparative Strengths and Weaknesses

Assessed against these criteria, the three frameworks display both shared strengths and distinct weaknesses. Panama's Special Law No. 20 offers the most community-centred and operationally concrete means of implementing prior informed consent, of building a collective

rights framework, and of providing for enforcement at community level. Its principal shortcomings concern the protection of communities across international borders, the uneven capacity of the bodies through which registration and consent are administered, and the absence of minimum benefit-sharing ratios.

The Draft Traditional Knowledge and Traditional Cultural Expressions Bill in India is the broadest of the three in terms of coverage, extending to both TK and TCEs, and has the most developed institutional design, including a requirement for defined and enforceable benefit-sharing agreements.³⁸ Its main weaknesses are the inadequate operationalisation of the benefit-sharing provisions, the absence of any cross-border enforcement mechanism, the lack of rules governing how benefits are to be distributed within a community, and the ambiguous relationship between registration and title.

Indonesia's framework covers the widest range of cultural expression, but is the least favourable to the recognition of community rights. Because it is built on state custodianship, it gives precedence to the authority of the State over the autonomy of the community, and places no legal obligation on the State either to obtain prior informed consent or to share benefits.

B. Community Rights: Collective Ownership, Customary Law and Autonomy

The three frameworks differ significantly in their approach to community rights. At the heart of these differences lies a central question: who holds the rights in TK and TCEs, and what is the nature and scope of those rights? The answer informs every other aspect of the protective regime, including who may authorise access, who benefits from benefit-sharing, and who may enforce against infringement.

i. India: Collective Community Rights with Institutional Mediation

The Draft Bill in India incorporates collective community rights into its protective framework. Local communities, broadly defined for the purposes of the Bill, are to be vested with rights; they include tribal communities, villages, pastoralists and other groups whose members share traditional knowledge and traditional cultural expressions. The Bill provides that no member of a local community may claim individual ownership of TK or TCEs as against any other member, so that the rights are genuinely collective.

The Bill treats collective rights as standing in a close relationship with customary law, recognising decision-making under customary law as a means of granting or withholding consent. It therefore gives legal recognition to indigenous governance structures rather than

³⁸ GOVERNMENT OF INDIA, *Draft Traditional Knowledge and Traditional Cultural Expressions Bill* (circulated for public consultation; not enacted).

imposing an external definition of the consent process. That approach is consistent with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which requires States to consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting legislative or administrative measures that may affect them.³⁹

The mediated relationship between collective community rights and the proposed Traditional Knowledge and Traditional Cultural Expressions Authority leaves a structural ambiguity. The Authority is a government body whose officials are appointed through a central government process, and it may not adequately represent the varied interests of the hundreds of distinct traditional communities in India.⁴⁰

ii. Indonesia: State-Held Rights and Community Exclusion

Under Law No. 28 of 2014, copyright in traditional cultural expressions is held by the State rather than by the originating communities. This framework is the opposite of a community-rights model: the communities become passive subjects of state management, with the State acting as owner, manager and licensor of their cultural heritage, without community consent.

The implications for community autonomy are profound. If an Indonesian corporation wishes to commercialise a traditional Balinese dance or a traditional Javanese batik design, it must obtain a State licence; it is under no obligation to obtain the consent of the community concerned, although Article 38(3) requires that use of a traditional cultural expression take account of the values of the community in which it is practised.⁴¹ The community has no veto, no right to negotiate benefit-sharing arrangements and no direct standing to act in respect of the commercial exploitation of its own cultural heritage.⁴²

The Constitutional Court's decision in No. 35/PUU-X/2012, recognising the rights of customary law communities in their customary forests, opens the possibility of a judicial challenge to the concept of state custodianship over such resources.⁴³ If customary communities enjoy constitutional rights over their customary lands, an argument can be made that they should enjoy constitutional rights over their traditional knowledge and traditional cultural expressions as well; but no Constitutional Court case has yet addressed the point.

³⁹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 30, art. 19.

⁴⁰ *Draft Traditional Knowledge and Traditional Cultural Expressions Bill*, *supra* note 38; WORLD INTELLECTUAL PROPERTY ORGANIZATION, PROTECTING TRADITIONAL KNOWLEDGE: A LEGAL AND POLICY OVERVIEW, *supra* note 6.

⁴¹ Law No. 28 of 2014 on Copyright, *supra* note 20, art. 38(3).

⁴² WORLD INTELLECTUAL PROPERTY ORGANIZATION, TRADITIONAL CULTURAL EXPRESSIONS: LEGAL AND POLICY ISSUES, *supra* note 13.

⁴³ Constitutional Court Decision No. 35/PUU-X/2012, *supra* note 24.

Indonesian law does allow hukum adat, or customary law, to operate alongside the formal legal system, and a number of institutions apply customary law as a practical means of managing TK and TCEs at community level. That recognition remains informal, however, and is not part of the formal copyright regime. There are accordingly no enforceable community rights in TK or TCEs under Indonesian law.

iii. Panama: Direct Community Rights with Full Autonomy

Panama's Special Law No. 20 provides the highest level of community empowerment of the three systems. Rights belong directly to the indigenous peoples as collective entities, and the decisive act of consent lies with their own general congresses, traditional authorities and councils. The State's role is confined to registration and to the administrative authorisation that cannot be given without that prior consent.

The Law's treatment of customary law is equally notable. Use and marketing of protected subject matter must conform to the rules of use of the people concerned, which are drawn from its own customary norms and registered with DIGERPI, and authorisation for industrial reproduction requires the express prior consent of the traditional authorities.⁴⁴ Customary law is thus not merely recognised as a theoretical matter: it supplies the legal standard against which lawful use is measured. Coupled with the perpetual and non-lapsing character of registered collective rights, this makes the Panamanian scheme a robust protection against the legal mechanisms, whether waiver by contract, adverse possession or prescription, by which a community's rights might otherwise be eroded.

XII. CONCLUSION

The three sui generis approaches examined here all represent an effort to protect TK and TCEs. Their structural differences nevertheless yield very different implications for community autonomy, benefit-sharing, the efficiency of enforcement and compatibility with international human rights standards.

Of the three frameworks, Panama's goes furthest in translating an abstract idea of community rights into practice. It combines a strong prior informed consent requirement with collective ownership and a benefit-sharing mechanism negotiated by the community's own authorities. The perpetual and non-lapsing character of the registered collective right completes a legally robust and philosophically coherent structure for the communities it serves.

⁴⁴ Special Law No. 20, *supra* note 26, art. 15; Executive Decree No. 12 of 2001, *supra* note 26, art. 17.

Indonesia offers broad protection for TCEs but is the least supportive of community rights, because the rights are vested in the State without any requirement of community prior informed consent and without a community benefit-sharing scheme.

The Draft Bill proposed in India is the most ambitious of the three legal frameworks, both in the scope of its application and in the manner in which it is to be implemented. Its comprehensive definitional framework, its community ownership model, its use of prior informed consent and benefit-sharing, and its multi-tiered institutional architecture reflect a sophisticated engagement with both the international normative framework and India's national context. Even so, the Bill will need substantial improvement in a number of respects: the operationalisation of benefit-sharing; the specification of criteria for the distribution of benefits within a community; protection against cross-jurisdictional misappropriation; an adequate response to digital threats; and clarification of the relationship between registration and ownership.
