

**Protection of Traditional Knowledge in India by sui generis laws of
Geographic Indications and The Protection of Traditional
Knowledge Bill, 2022**

*Dr. Shambhu Prasad Chakrabarty¹
Abhisekh Rodricks²*

Abstract

This research paper explores the potential of protecting Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) under the modern Intellectual Property Law Regime with special reference to Geographical Indications (GI). It also highlights the process of registering GI under the Indian GI legislation with special regard to ancestral knowledge. The paper also highlights the limitations of GI protection concerning protecting TK/TCE as a whole. Protecting TK has always been a challenge under the modern legal system, and this limitation has irretrievably damaged this knowledge base. Efforts have been made to preserve and protect TK through IPR, but this approach achieved very limited success. The absence of TK protection as a whole by TRIPS has left a sui generis approach to protecting TK. The proposed Protection of TK Bill 2022 could be criticised at length, including the absence of synchronisation between Intellectual Property Rights (IPR) safeguards, including GI as a mode of protecting TK has also been noticed.

This research paper identifies some of the TK that has been protected under the GI Act in India encourages the indigenous and tribal peoples to explore the limited potential of GI protection to their ancestral knowledge. It also assists the legislature in reconsidering certain aspects of the Protection of the TK Bill, 2022.

Keywords: *Traditional Knowledge, Traditional Cultural Expressions, GI, TRIPS, TK Bill, 2022*

¹ Professor of Law, Department of Law, University of Engineering and Management, Kolkata

² LL.M, candidate at University of Wroclaw, Poland

I. INTRODUCTION

There has been an unprecedented loss of indigenous and traditional knowledge across the world in the last century. The discontinuation of ethical standards prevalent in traditional practices has exposed nature to catastrophic consequences. Only 10% of big ocean fishes remain, according to a report³ published in the Nature journal in 2003.⁴ How much more has been lost in the next 20 years is yet to be assessed.⁵ We have lost 60% of wildlife in less than 50 years. Freshwater species have also faced cruel consequences. 81% of freshwater species disappeared between 1970 to 2012⁶. 64% of world wetlands have vanished since 1900.⁷

Tribal and indigenous peoples have been the last repository of ancestral and traditional knowledge, which included ethics and ethos that helped nature to retain its goodness for life on earth. Modern science has evolved dramatically and brought us to a technologically superior era bereft of moral commitments for sustainable coexistence. The prior mentioned facts are testimony to this technologically superior era.

It is not that the voice raised to protect traditional standards has fallen on deaf ears in recent years. Still, this undermining can be noticed in the non-acceptance of the Havana Charter of 1948 and previously by ignoring the Forest Charter of 1217.⁸

The radical change in the climatic condition invoked an urgency in exploring avenues to counter this crisis leading to the Stockholm Conference and 'Our

³ Myers, Ransom & Worm, Boris. (2003). Rapid Worldwide Depletion of Predatory Fish Communities. Nature. 423. 280-3. 10.1038/nature01610.

⁴ SeaWeb. (May 15, 2003). *Cover Study of Nature Provides Startling New Evidence That Only 10% Of All Large Fish Are Left in Global Ocean*. SCIENCE DAILY. (Aug. 5, 2022) www.sciencedaily.com/releases/2003/05/030515075848.htm.

⁵ We've lost 60% of wildlife in less than 50 years, World Economic Forum, <https://www.weforum.org/agenda/2018/10/weve-lost-60-of-wildlife-in-less-than-50-years/>.

⁶ *Freshwater species populations fall by 81% between 1970 and 2012*, LIVING PLANET REPORT, 2016, <https://www.worldwildlife.org/pages/living-planet-report-2016>.

⁷ Global Wetland Report, <https://www.global-wetland-outlook.ramsar.org>.

⁸ Forest Charter of 1217, <https://www.bl.uk/collection-items/the-forest-charter-of-1225>.

Common Future'.⁹ Experts have highlighted the role of indigenous and local communities in resolving this complex crisis during the 1970-the 80s. Still, it has not been acted upon by the overwhelming commercialisation movement, including the growth of companies like Monsanto, which is considered to have singlehandedly been responsible for introducing monoculture and extinction of thousands of indigenous crop varieties. This has eradicated innumerable rare species of plants and crops and the ancestral knowledge inherent in them.

Indigenous and tribal communities have played a significant role in preserving and continuing their traditional and ancestral practices. However, the era of colonisation coupled with neo-colonialism in recent times has created a political system of destroying traditional practices in general and ancestral knowledge in particular. The International Labour Organisation, in their Convention (ILO) 107, promoted the essence of assimilation of tribal and indigenous peoples with the mainstream and undermined their right to self-determination and a homogenous approach to life. Affirmative actions and the introduction of compulsory formal education amongst the tribal peoples have de-stabilised the much-needed homogenous existence of indigenous and tribal peoples. This dangerous move had a much-anticipated consequence, and as expected, ILO Convention 169 admitted the mistake made in ILO C-107. The damage has already been done in many jurisdictions. It continues in some countries which never adopted ILO C 169, like India, where traditional knowledge continues to deplete with every passing day.

With the World Trade Organisation and World Intellectual Property Organisation flourishing in their respective wings leading to the adoption of Trade-Related Aspects of Intellectual Property Rights, the commercial model of protection of private intellectual properties became predominant and enforceable in developing and least developed countries. However, the fatal flaw in this system was 'undermining traditional knowledge as a form of IPR.

⁹ Report of the World Commission on Environment and Development: Our Common Future, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

II. BIOPIRACY AND THE INTELLECTUAL PROPERTY RIGHTS BOOM

Rampant cases of biopiracy were detected amongst the European and Western companies where patents have been granted to many commonly known natural products and by-products. Inadequate legal protection in member countries or a centralised legal regime to combat this situation was severely felt. Movements to incorporate a general guideline like patent or trade mark to protect Traditional Knowledge was growing momentum. However, this never materialised, irrespective of the initial outburst of interest in the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). This prompted the activists and experts to explore alternative avenues to bring TK/TCE within the purview of legal protection in general and IPR in particular. Every intellectual property domain (for example, patent, copyright, designs) was explored to expand to include T.K. with very little success, with a few exceptions in the copyright and designs laws. Irrespective of this failure, the approach of finding ways to protect T.K. with the IPR regime led the focus towards Geographical Indication, which can play a promising role in protecting T.K. in India.

III. GEOGRAPHICAL INDICATIONS AS AN EVOLVING LAW TO PROTECT TRADITIONAL KNOWLEDGE (TK)

A Geographical Indication (G.I.) is a legal norm which originated in Europe. This norm was transplanted to countries worldwide through the WTO's TRIPS Agreement in 1995, including the countries of Asia. The norms laid down in the TRIPS were generally adopted, irrespective of inadequate consciousness about the G.I. norms prevailing in Europe. During this stage, India was mandated to implement the TRIPS Agreement without any similar domestic practices prevalent in the past. Consequently, efforts were made to understand the concept of G.I. and explore avenues to use it in our jurisdiction.

This effort led to identifying products similar to those protected by G.I. in European countries. Elite Indians by then have come across Champagne sparkling wine or Roquefort cheese. Darjeeling Tea looked identical to fit into the domain of G.I.

Consequently, the journey of G.I. started in India with the registration of Darjeeling Tea in 2004-05 after the enactment of Geographical Indications of Goods (Registration & Protection Act, 1999) in 2003. The journey since then has been quite fascinating. However, to know more about G.I., it is essential to understand what it is.

G.I. is an identifier which associates a product to a particular region. It is a designation indicating quality, reputation, or other characteristics essentially attributable to its geographic origin. This norm migrated to Asian countries in general and India in particular, with the specific adoption theory at its very best in Section 2 (e) of the G.I. Act.

*“Geographical Indication, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.”*¹⁰

A. The Paradigm Shift

Irrespective of the norms pertaining to G.I. being inherited from Europe, Asian countries soon realized the potential of this unique form of protection being extended to their indigenous domestic interests. An immediate economic interest could be seen in mushrooming indigenous geographical indications associated with such names. Tulaipanji rice or Joynagar Moya (consignments of Jaynagar Moa and Mihidana are exported regularly to the Kingdom of Bahrain) are examples of such exposition in recent years in the state of West Bengal.

Today the makers of Bengal Rosogolla have benefitted immensely in the larger Indian market and beyond. The increase in popularity of this sweetmeat has triggered an encouragement to popularise other similar products. Tulaipanji rice or Joynagar Moya (consignments of Jaynagar Moa and Mihidana are exported

¹⁰Section 2 (e) of the G.I. Act, 1999.

regularly to the Kingdom of Bahrain) are examples of such exposition in recent years in the state of West Bengal.

B. The hope! Community Benefit Sharing!

Successful registration will entitle a product to a much-hyped G.I. tag which promises more hope of livelihood opportunity over mere legal protection against infringement. G.I. tag does attract a premium and quality-conscious customer base who consistently look for the authenticity of origin of a product and, with that, a global platform to showcase local delicacies and expertise.

The tag also assures strategic and more robust protection of the artisans, small-scale farmers and business owners in that bigger platform challenging counterfeit and fake products from deceiving prospective customers.

C. The Checklist

An applicant must be aware of specific indications which are non-registerable under the G.I. Act. An indication which would likely confuse, contrary to law, scandalous, obscene, likely to hurt any religious susceptibilities, or any other conditions laid down in Section 9 of the Act. An application for G.I. may also fail at the registration stage if the applicant fails to reply (counter statement) to an objection raised within two months of the said objection. The applicant should understand the provisions of the Act before applying for a G.I. tag.

D. Local Issues

With the evolution of extending G.I. protection to local products, two simultaneous challenges must be addressed. How to give domestic geographical indications the same protection given to non-domestic ones, and secondly, find ways to harmonize domestic business conflicts over uses of the same geographical indication.

Things got complicated with the G.I. registration of Rosogolla, a popular sweet delicacy of West Bengal and Orissa. The former was granted the G.I. thanks to the documentary and research support of Historian Haripada Bhowmik.

D. The G.I. Limitations

Traditional Knowledge has a very broad and inclusive interpretation. It contours within its domain far broader than the geographic location where it evolved or

practices. For instance, the benefits arising out of neem leaves have a clear geographical periphery beyond the domain of Darjeeling Tea for comparison.

Internationally, G.I. in a mechanism within the domain of IPR and TRIPS has clearly in Article 24.1, obliges members.

*“To enter into negotiations aimed at increasing the protection of individual geographic indications under Article 23”.*¹¹ And in Article 23.4 for protecting wines,

*“Negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”*¹²

TRIPS, however, ignores T.K. altogether. It is in the Doha Declaration of 2001 in Clause 19 that requires the TRIPS Council to *“examine the relationship between the TRIPS Agreement, and T.K. and folklore”*¹³ and to *“fully tak[ing] into account the development dimension”*.¹⁴

WIPO website quotes T.K. in the following words:

*“Many indigenous peoples, local communities and governments seek intellectual property (I.P.) protection for traditional knowledge (T.K.) and traditional cultural expressions (TCEs) as intangible assets. Such assets range from traditional medicine and environmental knowledge to art, symbols and music.”*¹⁵

To G.I.s, Article 24.1 of TRIPS obliged Members *“to enter into negotiations aimed at increasing the protection of individual geographic indications under Article 23”*.¹⁶ In order to facilitate the protection of G.I.s for wines, Article 23.4 provides that,

¹¹ TRIPS AGREEMENT,
https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art24_jur.pdf.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions,
<https://www.wipo.int/tk/en/>

¹⁶ *Ibid.*

*“Negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”*¹⁷

WIPO explains G.I. in the following words,

*“A geographical indication (G.I.) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a G.I., a sign must identify a product as originating in a given place.”*¹⁸

The role G.I. can play in protecting T.K. is made in a study by Panizzon and Cottier where they observed,

*“Traditional Knowledge (T.K.) and Geographical Indications (G.I.s) share a common element insofar as they both protect accumulated knowledge typical to a specific locality. While T.K. expresses the local traditions of knowledge, G.I.s stand for the specific geographical origin of a typical product or production method. G.I.s and T.K. relate a product (G.I.s), respectively a piece of information (T.K.), to a geographically confined people or a particular region or locality.”*¹⁹

Irrespective of the fact that G.I. has to some extent, effective in protecting T.K., it falls short of the desired level T.K. would require for effective and adequate protection. But where does G.I. falls short? To unravel this puzzle, it is important to explore the first objective of the IGC Secretariat of ‘Recognising Value’, which is defined as:

“recognise the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important

¹⁷ *Ibid.*

¹⁸ *Supra* note 13.

¹⁹ Cottier, T. and Panizzon, M. (2004), *Legal perspectives on traditional knowledge: the case for intellectual property protection*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW, p.371.

*for indigenous and local communities and have equal scientific value as other knowledge systems.”*²⁰

The reference drawn to the ‘holistic nature of T.K. is to identify the non-economic ideals. G.I., on the other hand, “refer to the contribution which they can make to non-trade issues such as to the preservation of rural landscapes and rural lifestyles.”²¹

The evolving debate regarding the protection of T.K. within the IPR regime revolves around patent or industrial property-related matters. Protection of TCE, including folklore, is debated in and around the context of copyright. “*The inappropriateness of this bifurcation is illustrated in the debates concerning the extension of the additional protection of G.I.s to handicrafts.*”²²

“*Handicrafts may be characterised equally either as aspects of T.K. or as TCEs. A number of commentators have noted the obvious impact of the terrain upon the availability of which raw materials for the fabrication of handicrafts*”.²³ These handicrafts have evolved from ancestral knowledge limited to certain communities and, in some cases, to specific families.

Thus, G.I. can be an interesting way forward in legally protecting T.K. in various countries, including India. However, a more comprehensive protection for T.K. would be through the international adoption of a mandatory sui generis system which is illusive to date. According to many experts, TK can best be protected by sui generis legislations passed by respective countries with the sole objective of TK and TCE.

²⁰ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (Aug. 7, 2022), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf.

²¹ Blakeney, Michael. (2009), *Protection of Traditional Knowledge by Geographical Indications*, INT. J. OF INTELLECTUAL PROPERTY MANAGEMENT. 3. 357 - 374. 10.1504/IJIPM.2009.026912.

²² *Ibid.*

²³ Gangjee, D.S. (2002) *Geographical Indications Protection for Handicrafts under TRIPS*, MPhil Thesis, Faculty of Law, University of Oxford, Held at St Peter’s College, Oxford University, p.14.

IV. SUI GENERIS MODELS PROPOSED IN INDIA: PROTECTION OF TK BILL, 2022

Sui generis efforts to protect TK in India have faced criticism in the past with the introduction of the Protection of Traditional Knowledge Bill in 2016. Experts and activists critically acclaimed this Private Bill.

After around six years, the second TK Bill was re-introduced in 2022. A comprehensive study of the said provisions of the TK Bill 2022 may also raise some complicated issues.

- a. Traditional Knowledge has been defined in the proposed Bill in Section 2 (ix) as,

“S.2 (ix) ‘traditional knowledge’ means knowledge and expression of culture, which may subsist in codified or oral or other forms, whether publicly available or not, that is dynamic and evolving and is passed on from generation to generation, for at least three generations, whether consecutively or not, which is associated with group or groups who are maintaining, practising or developing it in the traditional cultural context and includes know-how, skills, innovations, practices, learning, medicinal preparations, method of treatment, literature, music, art forms, designs and marks but does not include any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, the management or unauthorized commercial exploitation.”²⁴

What seems arbitrary in the definition is the incorporation of “for at least three generations”. Some may argue the rationale of three and debate over it as not being at least four or ‘five’ or ‘six’ generations.

- b. Knowledge Society has been defined in Section 2 (iii) of the Bill as under:

“S.2 (iii) ‘knowledge society’ means a group of people or family, whether indigenous, tribal or otherwise, residing within the boundaries of the national territory, who may be identified as a separate group from other groups or other

²⁴ Protection of Traditional Knowledge Bill, 2022, https://shashitharoor.in/private_member_bills.

*members of the society by reason of their exclusive association with one or more forms of traditional knowledge.”*²⁵

The definition introduction of the concept of ‘exclusive association’ creates confusion. How would this concept be interpreted? Would we strictly interpret the word ‘exclusive’ or use the purposive rule of interpretation? What type of association (actual, constructive, symbolic or all of them) is referred to here is also, to some extent, puzzling.

V. IPR AND T.K. UNDER THE NEW TK BILL

A very interesting provision has been inserted to address biopiracy. However, the provision prohibits IPR protection of T.K. in the following words in Section 8.

“S.8. (1) No patents or any other form of intellectual property protection shall be granted or applied for by any person, within India or abroad, on any traditional knowledge or aggregation thereof, on any traditional knowledge obtained or derived from India, whether in the custody of the knowledge society or the public domain.

(2) Subject to subsection (1), an invention, according to clause (j) of sub-section (1) of section 2 of the Patents Act, 1970, which is the output of advanced research on traditional knowledge, may be patented:

*Provided that prior to submitting an application to the patent office for acquiring a patent for such invention based on the traditional knowledge, the applicant shall acquire permission from the NATK.”*²⁶

The proposed TK Bill with this provision creates an embargo on protecting T.K. through IPR. The limited way of protecting T.K. through G.I. may be disturbed with the passing of this Bill to an Act unless altered otherwise.

A. Access and Benefit Sharing (ABS) Provisions

²⁵ *Ibid.*

²⁶ *Ibid.*

Surprisingly, the new Bill fails to synchronise the ABS objectives laid down in the Convention of Biological Diversity ²⁷ and the Biological Diversity Act ²⁸ of India. A reading of the proposed Section 10 makes the point clear.

“S.10. Where traditional knowledge has been misappropriated, the appropriate Government shall, subject to sub-section (8) of section 3, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

Where TK gets misappropriated, it should not be the Government who shall be entitled to damages, but should act as a custodian of the money received for the communities which shall be the ultimate beneficiary.” ²⁹

VI. TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

“With biopiracy being rampant and the cost of fighting litigation to combat such white-collar pirates running into millions of dollars, a strategy was developed by the Government of India (GOI), which took around eight years to materialize and be effective. Traditional Knowledge Digital Library or TKDL was established with the objective of incorporating a list of codified TK practices of India.” ³⁰

The proposed law can make the good work done by TKDL complicated by vesting the proposed ‘knowledge society’ on whose prior consent TKDL can identify, classify, codify and catalogue their traditional knowledge. In numerous cases, TKDL acted as a repository of “prior art”, leading to the rejection of many patent rights applications.³¹

“S. 37. (1) The Traditional Knowledge Digital Library unit under the Council of Scientific and Industrial Research (CSIR) shall maintain, protect and develop

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Protection of Traditional Knowledge Bill, 2022, https://shashitharoor.in/private_member_bills; <https://ipjagruti.com/2022/04/07/according-to-bill-traditional-knowledge-is-outside-the-scope-of-patent-and-ipr-regimes/>.

³⁰ Chakrabarty, S.P., Kaur, R. A Primer to Traditional Knowledge Protection in India: The Road Ahead. *Liverpool Law Rev* **42**, 401–427 (2021). <https://doi.org/10.1007/s10991-021-09281-4>.

³¹ Chakrabarty, S. P., Tanoue, M., & Penteadó, A. (2022). The Trouble Is, You Think You Have Time: Traditional Knowledge of Indigenous Peoples in Japan and India, the Reality of Biodiversity Exploitation. *Environmental Management*, 1-13.

India's Traditional Knowledge Digital Library (TKDL) for the purposes of identifying, classifying, codifying and cataloguing the traditional knowledge that is obtained or derived from India.

(2) The TKDL unit shall attempt to identify, classify, codify and catalogue India's traditional knowledge, which is in the custody of the appropriate Government.

(3) The TKDL unit shall attempt to identify, classify, codify and catalogue the traditional knowledge in the custody of any knowledge society if the knowledge society provides consent to the TKDL unit prior to its use.”³²

VII. Conclusion

“While natural resources are shared quite unevenly among nations, every country has at least one undeniable resource: its geography.”³³ The sovereign nations, inter alia, have specific geographical areas. Each government would understandably be interested in protecting GI, especially for the developing countries, which are rich in biodiversity and cultural diversity. “Because many traditional goods with a specific geographical origin come from developing countries, the protection of geographical indications has normative heft in countries that are ‘TK-rich’.”³⁴

This potential approach will ultimately assist countries in promoting using GI protection for various TKs, which GI may protect in their respective territorial jurisdictions. The Government of India has also taken affirmative steps, including framing appropriate guidelines.³⁵

Unprecedented efforts are required to protect TK in every possible way to protect our biodiversity, and cultural heritage and GI can come in handy in this effort. It

³² *Supra* note 23.

³³ Gervais, D. (2009). *Traditional knowledge: are we closer to the answer(s) the potential role of geographical indications*. ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, 15(2), 551-568.

³⁴ *Ibid.*

³⁵ Govt issues guidelines to promote use of GI logo, tagline, https://economictimes.indiatimes.com/news/economy/policy/govt-issues-guidelines-to-promote-use-of-gi-logo-tagline/articleshow/69944193.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

is expected that the recent actions of the government, coupled with the right intent of the legislators, shall help not only the indigenous and tribal peoples but also address the climate crisis the world is going through.