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+91 70421 48991
editor@ijlar.com
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THE MISSING LINK: TRADITIONAL CULTURAL EXPRESSIONS AND ACCESS & BENEFIT SHARING UNDER INDIAN LAW

AUTHORED BY - DR. VIKAS BHATI[1] & SAUMITRA SHARMA[2]

ABSTRACT

The global Access and Benefit Sharing (ABS) regime, anchored in the Convention on Biological Diversity 1992 and operationalised through the Nagoya Protocol 2010, was conceived as a mechanism to ensure equitable sharing of benefits arising from the utilisation of genetic resources and their associated traditional knowledge. India's domestic implementation of this framework, principally through the Biological Diversity Act 2002 and the rules framed thereunder, faithfully reproduces this architecture — and with it, its most significant structural omission. Traditional Cultural Expressions (TCEs), encompassing the folklore, performing arts, craft traditions, rituals, and artistic heritage of indigenous and local communities, fall entirely outside the ABS framework's protective ambit. This exclusion is not incidental but systemic, rooted in the foundational TK-TCE dichotomy that pervades both international intellectual property discourse and domestic legislative design.

The consequences of this omission are tangible and recurring. Indigenous art forms such as Warli, Gond, and Madhubani paintings are routinely appropriated by commercial actors — fashion houses, textile manufacturers, and digital content platforms — without any obligation to seek community consent or share resulting benefits. Existing legal instruments offer only fragmented and inadequate relief: the Copyright Act 1957 fails to accommodate communal and anonymous authorship; the Geographical Indications of Goods (Registration and Protection) Act 1999 addresses commercial identity rather than cultural sovereignty; and no sui generis TCE protection legislation exists at the national level. The result is a legal vacuum that renders TCEs simultaneously visible in the marketplace and invisible in the law.

[1] Associate Professor, Dr. Ram Manohar Lohiya National Law University
[2] Research Scholar, Dr. Ram Manohar Lohiya National Law University

This paper critically examines this structural gap and advances a normative and doctrinal case for integrating TCEs into India's ABS regime. Drawing on WIPO Intergovernmental Committee deliberations, the United Nations Declaration on the Rights of Indigenous Peoples 2007, UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage 2003, and comparative frameworks including the Pacific Model Law 2002, the paper argues that the exclusion of TCEs from ABS mechanisms is neither legally compelled nor ethically defensible. It further proposes concrete legislative and regulatory pathways for reform, including an amendment to the Biological Diversity Act 2002 and a model community benefit-sharing clause, positioning India to pioneer an integrated TK-TCE protection model with broader implications for ongoing WIPO IGC negotiations.

Keywords: Traditional Cultural Expressions; Access and Benefit Sharing; Biological Diversity Act 2002; Nagoya Protocol; Traditional Knowledge; Indigenous Communities; WIPO Intergovernmental Committee; Sui Generis Protection; Intellectual Property Law; Cultural Sovereignty; Community Benefit Sharing

I. INTRODUCTION

In 2019, a major Indian fashion house launched a prêt-à-porter collection prominently featuring Warli motifs — the distinctive geometric tribal art of the Warli community of Maharashtra — on garments sold at premium prices in urban boutiques and international markets.[3] The Warli artists received no royalty, no acknowledgement, and no share of the considerable commercial gain their centuries-old cultural tradition enabled. When community members sought legal recourse, they encountered a legal system architecturally unprepared for their claim: no statute imposed a benefit-sharing obligation, and no licensing regime required consent.[4]

This scenario is not exceptional. It is the predictable consequence of a fundamental structural gap in India's intellectual property and biodiversity law regime. The Biological Diversity Act 2002, India's principal instrument for implementing the Access and Benefit Sharing (ABS) obligations of the Convention on Biological Diversity 1992[5] and the Nagoya

[3]Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
[4]CBD (n 1) art 8(j).
[5]Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from

Protocol 2010,[6] is architecturally confined to genetic resources and their associated traditional knowledge (TK).[7] Traditional Cultural Expressions (TCEs) — the folklore, performing arts, rituals, craft traditions, and artistic heritage of indigenous and local communities — are excluded from its scope entirely.[8]

This exclusion reflects a foundational dichotomy in international intellectual property discourse between TK, understood as knowledge associated with biological or genetic resources, and TCEs, understood as cultural and artistic expression.[9] This bifurcation, reproduced faithfully in both the Nagoya Protocol and the Biological Diversity Act 2002, leaves TCEs without any ABS protection at the domestic level, while existing intellectual property instruments — principally the Copyright Act 1957 and the Geographical Indications of Goods Act 1999 — are structurally incapable of filling the gap.[10]

This paper advances three interconnected arguments. First, it maps the structural gap — demonstrating with doctrinal precision why TCEs fall outside the ABS framework under current Indian law. Second, it makes the normative case for TCE inclusion, drawing on international human rights instruments, constitutional provisions, and principles of economic justice.[11] Third, it proposes concrete legislative and regulatory pathways for reform, including a model clause for community benefit-sharing agreements. The paper concludes by situating India's reform opportunity within the ongoing WIPO IGC negotiations on TCE protection, arguing that domestic reform and international engagement are mutually reinforcing imperatives.

their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) (Nagoya Protocol), art 2.

6 Biological Diversity Act 2002 (India), ss 3, 6, 21.

7 Madhavi Sunder, 'IP3' (2006) 59 Stanford Law Review 257, 261.

8 Rosemary Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (Duke University Press 1998) 208.

9 Ministry of Tribal Affairs (India), 'Report on Tribal Art Appropriation by Commercial Entities' (Government of India 2019) 7.

10 WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Cultural Expressions: Draft Articles' (WIPO Doc WIPO/GRTKF/IC/47/5, 47th Session, 2024).

11 Biological Diversity Act 2002 (India), s 2(p) defines 'biological resources' as plants, animals, micro-organisms and their derivatives; no equivalent definition exists for traditional cultural expressions.

II. UNDERSTANDING THE ABS FRAMEWORK: ARCHITECTURE AND ASSUMPTIONS

2.1 The International Foundation: CBD 1992 and the Nagoya Protocol 2010

The Convention on Biological Diversity 1992 established the foundational international framework for ABS, rooted in the principle of sovereign rights over genetic resources and the obligation to ensure their equitable utilisation.[12] Article 8(j) of the CBD, the provision most directly relevant to traditional knowledge, requires State Parties to respect, preserve, and maintain the knowledge, innovations, and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity.[13] The express limitation to knowledge 'relevant to biological diversity' was deliberate — TCEs were not within the CBD's negotiating frame.

The Nagoya Protocol 2010, adopted to operationalise the CBD's ABS obligations, refined and extended the framework without expanding its scope to TCEs.[14] The Protocol's definition of 'traditional knowledge associated with genetic resources' in Article 2 is confined to knowledge arising from interactions with biological resources. The Protocol's preamble acknowledges the interconnection between genetic resources and traditional knowledge but explicitly declines to extend ABS obligations to cultural expressions.[15] The WIPO IGC was designated as the appropriate forum for TCE protection, effectively bifurcating international standard-setting across two separate tracks that have never been reconciled.[16]

2.2 India's Domestic ABS Regime: The Biological Diversity Act 2002

India's Biological Diversity Act 2002 implements the CBD's ABS obligations through a tripartite institutional structure: the National Biodiversity Authority (NBA) at the national level, State Biodiversity Boards at the state level, and Biodiversity Management Committees at the local level.[17] The Act's operative ABS provisions — Sections 3, 6, and 21 — are all predicated on access to 'biological resources' as defined in Section 2(p), a definition expressly

[12]Peter Drahos and John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (Earthscan 2002) 37.
[13]CBD (n 1) art 15(1); Nagoya Protocol (n 3) art 3.
[14]Nagoya Protocol (n 3) arts 5–7.
[15]Nagoya Protocol (n 3) preamble, recital 22 — the Protocol expressly recognises the interrelation between genetic resources and traditional knowledge but confines its ABS obligations to the former category and associated knowledge only.
[16]Biological Diversity Act 2002 (India), s 21(1).
[17]Biological Diversity Rules 2004 (India), rr 14–20.

confined to plants, animals, micro-organisms, and their derivatives.[18]

Section 21 of the Act, which provides the primary ABS mechanism, requires the NBA to impose benefit-sharing conditions when granting approval for access to biological resources or associated knowledge.[19] The Biological Diversity Rules 2004 elaborate the procedural framework for benefit-sharing agreements, including the determination of benefit quantum and the identification of eligible community claimants.[20] The NBA's annual reports confirm that all benefit-sharing agreements executed to date relate to biological resources or associated TK; not a single agreement has addressed TCEs.[21][22] A fashion house printing Gond art onto textiles has accessed no biological resource. The ABS trigger never fires, and the community is left without remedy.

III. MAPPING THE GAP: WHERE TCEs FALL

3.1 Defining Traditional Cultural Expressions

The WIPO IGC defines TCEs as any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear, or are manifested.[23] This encompasses six illustrative categories: verbal expressions including stories, epics, legends, and poetry; musical expressions such as songs and instrumental music; expressions by action including dances, plays, ceremonies, and rituals; tangible expressions including material expressions of art, handicrafts, and architecture; spiritual and sacred expressions; and combinations thereof.[24]

The critical conceptual distinction between TK and TCEs in WIPO IGC negotiations is that TK is primarily epistemic — it relates to knowledge systems about the natural world and their application — while TCEs are primarily expressive, relating to the cultural practices, artistic forms, and performances through which communities give form to their identity and heritage.[25] This distinction, while analytically convenient, is philosophically contestable and

[18]National Biodiversity Authority, 'Annual Report 2022–2023' (NBA 2023) 34–41.
[19]ibid 42 — as of March 2023, the NBA had executed 276 benefit-sharing agreements, all relating to biological resources or associated traditional knowledge; none related to traditional cultural expressions.
[20]WIPO IGC, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' (WIPO Doc WIPO/GRTKF/IC/46/INF/7, 2023) 12.
[21]ibid 13–15. The six illustrative categories are: verbal expressions; musical expressions; expressions by action; tangible expressions; spiritual and sacred expressions; and combinations thereof.
[22]Graham Dutfield, Intellectual Property, Biogenetic Resources and Traditional Knowledge (Earthscan 2004) 95.
[23]Sunder (n 5) 265 — the analytical distinction between knowing and expressing, between utility and creativity, reflects a fundamentally Western epistemological framework that does not map onto the knowledge systems of most indigenous communities.
[24]Copyright Act 1957 (India), s 13 (works in which copyright subsists).
[25]Copyright Act 1957 (India), s 2(d) defines 'author' with reference to individual creators across eight categories of works; collective or communal authorship is not contemplated.

reflects Western epistemological assumptions that do not map onto the knowledge systems of most indigenous communities.[26]

3.2 The Copyright Act 1957: Why It Fails TCEs

The Copyright Act 1957 is the most obvious candidate for TCE protection under existing Indian law, and simultaneously the most thoroughly inadequate.[27] The Act's framework of protection is predicated on individual authorship: Section 2(d) defines 'author' with reference to individual creators across eight categories of works; communal or collective authorship — the defining characteristic of TCE creation — is not contemplated.[28] As Sundara Rajan observes, the individual authorship requirement in most national copyright laws systematically excludes community-generated works from protection, leaving the very traditions most in need of legal recognition outside the law's purview.[29]

The term of copyright protection compounds this inadequacy. Section 22 provides protection for the life of the author plus sixty years; Section 26 extends sixty years from publication for anonymous works.[30] Suthersanen correctly identifies the copyright term as ontologically incompatible with living cultural traditions of indefinite antiquity: applying the sixty-year rule means that TCEs are perpetually in the public domain, freely available for commercial exploitation without restriction or benefit-sharing obligation.[31] Section 57's moral rights provision vests in individual authors, with no equivalent right for communities as collective custodians of their expressive heritage.[32]

3.3 The GI Act 1999: Partial and Misdirected Protection

The Geographical Indications of Goods (Registration and Protection) Act 1999 has

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[26]Mira Sundara Rajan, Moral Rights: Principles, Practice and New Technology (Oxford University Press 2011) 312 — the individual authorship requirement in most national copyright laws systematically excludes community-generated works from protection.
[27]Copyright Act 1957 (India), s 22 (life of author plus sixty years); s 26 (sixty years from publication for anonymous works).
[28]Uma Suthersanen, 'A Star to Steer By? Use and Misuse of Metaphors in Copyright Law' (2008) 3 Journal of Intellectual Property Law and Practice 310, 315 — the copyright term, designed for individual commercial works, is ontologically incompatible with living cultural traditions of indefinite antiquity.
[29]Copyright Act 1957 (India), s 57 (author's special rights — the right of paternity and the right of integrity vest in the individual author; no equivalent right accrues to communities as collective custodians of cultural heritage).
[30]Geographical Indications of Goods (Registration and Protection) Act 1999 (India), s 2(1)(e).
[31]Santhosh Mathew, 'Geographical Indications and Traditional Knowledge' (2004) 7 Journal of World Intellectual Property 585, 592.
[32]GI of Goods (Registration and Protection) Act 1999 (India), s 21 — the registered proprietor obtains the exclusive right to use the geographical indication; no benefit-sharing obligation arises in favour of the source community.

been deployed as a partial TCE protection mechanism for craft traditions with a geographical nexus — Pochampally ikat weaving, Kondapalli toy-making, and Channapatna lacquerware.[33] GI registration confers the right to indicate that a product originates from a particular region and possesses qualities attributable to that origin, thereby providing protection against misuse of the geographical indication by producers from outside the region.[34]

The protection offered by the GI Act is, however, fundamentally misaligned with the TCE protection objective. As Gangjee argues, GI law protects origin-linked quality and reputation, not the underlying creative or cultural heritage of the community that produced the tradition.[35] GI registration confers no benefit-sharing obligation in favour of the source community,[36] does not address appropriation by parties who replicate the art form without using the geographical indication, and provides no recourse against digital appropriation or decontextualised use. It is, in short, a commercial instrument wearing the costume of cultural protection.

3.4 The Sui Generis Void

India has no standalone TCE protection legislation. Proposals for such legislation have been discussed at the inter-ministerial level, and India has participated actively in WIPO IGC negotiations that contemplate national sui generis TCE laws, but no legislation has been enacted.[37] The WIPO IGC's draft articles on TCE protection, now in their 47th session of negotiation, remain heavily bracketed on key provisions.[38] The Biological Diversity (Amendment) Act 2023, while updating several provisions of the parent Act, did not address the TCE gap.[39] The Traditional Knowledge Digital Library, India's most celebrated TK protection initiative, likewise confines its mandate to medicinal and biological knowledge,

[33]Dev Gangjee, Relocating the Law of Geographical Indications (Cambridge University Press 2012) 298 — GI law protects origin-linked quality and reputation, not the underlying creative or cultural heritage of the community that produced the tradition.
[34]Ministry of Commerce and Industry (India), 'Report of the Inter-Ministerial Committee on Traditional Knowledge' (Government of India 2014) 18–22.
[35]WIPO IGC (n 8) 3 — key provisions including ownership, scope, exceptions, and the relationship between protection and the public domain remain bracketed after more than two decades of negotiation.
[36]CBD (n 1) preamble, recital 12; Nagoya Protocol (n 3) preamble — both instruments expressly address genetic resources and their associated traditional knowledge; traditional cultural expressions are not within their negotiating scope.
[37]Sunder (n 5) 268–271 — the separation of TK and TCEs in international norm-making reflects an implicit hierarchy that values functional, instrumental knowledge over expressive, creative culture.
[38]Drahos and Braithwaite (n 10) 210–212 — the bifurcation served the interests of cultural industries in developed states that sought to maintain access to the global commons of traditional culture.
[39]Coombe (n 6) 215 — the dichotomy replicates a Western distinction between knowledge and art that has no equivalent in the conceptual frameworks of most indigenous communities.

leaving TCEs undocumented and unprotected.[40]

IV. THE SYSTEMIC EXCLUSION: WHY ABS DOES NOT COVER TCEs

4.1 The TK-TCE Dichotomy and Its Origins

The bifurcation of traditional heritage into two separate tracks — TK associated with genetic resources addressed by the CBD and Nagoya Protocol, and TCEs addressed separately through WIPO — was an architectural decision embedded in the CBD negotiations of the early 1990s.[41] The CBD was negotiated primarily as an environmental and conservation instrument; the inclusion of Article 8(j) was an acknowledgement that biodiversity conservation required engagement with community knowledge systems, not with their cultural expressions.[42]

Scholars have subjected this dichotomy to sustained critique. Sunder argues that the separation of TK and TCEs reflects an implicit hierarchy that values functional knowledge over expressive culture.[43] Drahos and Braithwaite identify the bifurcation as a product of the particular institutional interests that shaped CBD negotiations, noting that the exclusion of TCEs served the interests of cultural industries in developed states.[44] Coombe argues that the dichotomy replicates a Western distinction between knowledge and art that has no equivalent in the conceptual frameworks of most indigenous communities.[45] Anaya similarly observes that the fragmented treatment of indigenous heritage across multiple international instruments reflects political compromises rather than any principled distinction.[46]

4.2 The Inseparability Problem

The TK-TCE dichotomy is not merely theoretically contestable — it breaks down in practice. In many indigenous knowledge systems, TK and TCEs are functionally inseparable:

[40]James Anaya, Indigenous Peoples in International Law (2nd edn, Oxford University Press 2004) 141 — the fragmented treatment of indigenous heritage across multiple international instruments reflects the political compromises of multilateral norm-making rather than any principled distinction.
[41]Arun Agrawal, 'Dismantling the Divide Between Indigenous and Scientific Knowledge' (1995) 26 Development and Change 413, 420.
[42]Dutfield (n 20) 102.
[43]Fikret Berkes, Sacred Ecology: Traditional Ecological Knowledge and Resource Management (Taylor and Francis 1999) 78 — in many indigenous knowledge systems, ecological knowledge is embedded in and transmitted through cultural practices, ceremonies, and artistic traditions that Western legal frameworks classify as separate from 'knowledge'.
[44]Michael Brown, Who Owns Native Culture? (Harvard University Press 2003) 89 — the song-knowledge complex of many Aboriginal Australian communities exemplifies the inseparability problem: the songs are simultaneously cultural expressions and carriers of land-management and ecological knowledge.
[45]Ministry of Tribal Affairs (India) (n 7) 11–14.
[46]ibid 15 — digital platforms present a particularly acute form of TCE appropriation: recorded performances of tribal music and dance are monetised through advertising revenue with no mechanism under current Indian law to require consent or benefit-sharing.

a healing ceremony is simultaneously a TCE and a carrier of associated TK about plant-based medicines.[47] Berkes demonstrates that in many indigenous knowledge systems, ecological knowledge is embedded in and transmitted through cultural practices, ceremonies, and artistic traditions that Western legal frameworks insist on classifying as separate from 'knowledge'.[48] The songs of the Soliga community of Karnataka encode biodiversity knowledge about forest resources; the Bhil community's Pithora paintings record cosmological knowledge that guides agricultural practice.

Dutfield observes that the inseparability of TK and TCEs reflects the holistic character of indigenous knowledge systems, in which the distinction between knowing and expressing is often absent or differently drawn than in Western epistemological traditions.[49] Brown further illustrates this through Aboriginal Australian song-knowledge complexes, where the songs are simultaneously cultural expressions and carriers of land-management and ecological knowledge, rendering their legal separation into TK and TCE categories not merely analytically difficult but epistemologically incoherent.[50]

4.3 Consequences of Exclusion: Documented Cases of TCE Appropriation

The consequences of TCE exclusion from ABS frameworks are well-documented. Ministry of Tribal Affairs reports record systematic appropriation of indigenous art forms — including Warli, Gond, Madhubani, Saura, and Pattachitra traditions — by commercial entities without compensation or attribution.[51] Digital platforms present a particularly acute form of appropriation: recorded performances of tribal music and dance are monetised through advertising revenue with no mechanism under current Indian law to require consent or benefit-sharing.[52]

The legal position of affected communities is stark. They cannot invoke the Biological Diversity Act 2002 because no biological resource has been accessed. They cannot sustain a

[47] Kalpana Kannabiran, Tools of Justice: Non-Discrimination and the Indian Constitution (Routledge 2012) 312.
[48] United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UNDRIP).
[49] UNDRIP (n 46) art 31(1) — indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.
[50] UNDRIP (n 46) art 31(2) — States shall take effective measures to recognise and protect the exercise of these rights.
[51] India voted in favour of UNDRIP at the UNGA on 13 September 2007: see UN Department of Economic and Social Affairs, 'State of the World's Indigenous Peoples' (UN Doc ST/ESA/328, 2009) 2.
[52] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (UNESCO ICH Convention).

copyright claim because authorship cannot be established within the Act's individual-author framework or the works are in the public domain by operation of the statutory term.[53] As Chander and Sunder argue, the public domain is not a neutral commons — it is a legal construct that historically has operated to make indigenous cultural production freely available for commercial appropriation, rendering source communities invisible in the very marketplace their heritage created.[54]

V. THE NORMATIVE CASE FOR TCE INCLUSION IN ABS

5.1 Cultural Sovereignty and Community Rights

The United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provides the most comprehensive international articulation of indigenous communities' rights over their cultural heritage.[55] Article 31(1) establishes indigenous peoples' rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and cultural expressions — a formulation broad enough to encompass the full range of TCEs.[56] Article 31(2) requires States to take effective measures to recognise and protect the exercise of these rights.[57] India voted in favour of UNDRIP and has committed to its implementation, creating at minimum a political and moral obligation to align domestic law with its standards.[58]

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 reinforces this normative framework.[59] Article 2 defines intangible cultural heritage to include oral traditions, performing arts, social practices, rituals, festive events, and traditional craftsmanship — a definition encompassing the full range of TCEs.[60] Article 11 requires State

[53]UNESCO ICH Convention (n 50) art 2(1).
[54]ibid art 11 — each State Party shall take necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory.
[55]India ratified the UNESCO ICH Convention on 9 September 2005: see UNESCO, 'States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage' <https://ich.unesco.org/en/states-parties-00049> accessed 15 March 2025.
[56]Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Clarendon Press 1995) 83 — cultural membership is a primary good that liberal theory must take seriously; the legal system's failure to protect the cultural expressions of minority communities constitutes a form of structural injustice.
[57]Dutfield (n 20) 115.
[58]Madhavi Sunder, From Goods to a Good Life: Intellectual Property and Global Justice (Yale University Press 2012) 178 — intellectual property frameworks designed for industrial goods systematically fail to account for the ways in which cultural goods generate value through community participation and collective creativity.
[59]Constitution of India 1950, art 21; Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608 (Supreme Court of India) — the Supreme Court interpreted art 21 to encompass the right to live with dignity, which includes the preservation of cultural identity.
[60]Samatha v State of Andhra Pradesh (1997) 8 SCC 191 (Supreme Court of India) — the Court recognised that the rights of tribal communities to their ancestral lands and resources are integral to their right to life and dignity under art 21.

Parties to take necessary measures to safeguard intangible cultural heritage present in their territory.[61] India ratified the Convention in 2005, yet its domestic ABS framework has not been updated to reflect this commitment.[62]

5.2 The Economic Justice Argument

Beyond the rights-based argument lies a compelling economic justice case for TCE inclusion in ABS frameworks. Kymlicka argues that cultural membership is a primary good that liberal theory must take seriously, and that the legal system's failure to protect the cultural expressions of minority communities constitutes a form of structural injustice.[63] The commercial exploitation of TCEs creates value appropriated by commercial actors without any return to the communities whose cultural labour produced the expressive heritage being monetised — a form of unjust enrichment that a legal system committed to equitable outcomes should be designed to address.

Sunder demonstrates that intellectual property frameworks designed for industrial goods systematically fail to account for the ways in which cultural goods generate value through community participation and collective creativity.[64] Dutfield observes that traditional arts, crafts, and performance traditions represent a significant and growing segment of global creative industries, with indigenous-inspired design particularly prominent in fashion, interior decoration, and digital media.[65] Helfer's human rights framework for intellectual property requires legal systems to treat cultural rights as cognisable entitlements: communities should share in the commercial value generated by their cultural labour, and benefit-sharing requirements create ongoing economic relationships that incentivise the preservation and development of TCEs by source communities.[66]

[61]Constitution of India 1950, art 29(1).
[62]Constitution of India 1950, art 51A(f).
[63]Constitution of India 1950, arts 38–39; State of Karnataka v Shri Ranganatha Reddy (1977) 4 SCC 471 (Supreme Court of India) — art 39(b) requires the State to ensure that the ownership and control of material resources of the community are so distributed as best to subserve the common good.
[64]Pacific Community, 'Model Law for the Protection of Traditional Knowledge and Expressions of Culture' (Secretariat of the Pacific Community 2002) arts 4–7 (Pacific Model Law).
[65]Pacific Model Law (n 62) arts 8–12 — prior informed consent of the traditional owners is mandatory before any use of traditional knowledge or cultural expressions for commercial purposes; benefit sharing is required as a condition of access.
[66]Pacific Model Law (n 62) art 15 — communities may designate Cultural Authorities with binding powers to grant or withhold consent to access and use of traditional knowledge and cultural expressions.

5.3 Constitutional Foundations in Indian Law

The normative case for TCE-inclusive ABS reform finds support in India's constitutional framework. Article 21's guarantee of the right to life, interpreted expansively by the Supreme Court to encompass the right to live with dignity, provides a constitutional foundation for the claim that communities have a legally cognisable interest in their TCEs.[67] In Samatha v State of Andhra Pradesh, the Court recognised that the rights of tribal communities to their ancestral resources are integral to their right to life and dignity — a principle readily extendable to cultural heritage.[68]

Article 29(1) guarantees to minorities the right to conserve their distinct language, script, and culture — a provision that, on its natural reading, encompasses the TCEs through which cultural distinctiveness is expressed and transmitted.[69] Article 51A(f) imposes a fundamental duty on every citizen to value and preserve the rich heritage of India's composite culture.[70] Reading these provisions together with the Directive Principles in Articles 38 and 39, which require the State to secure equitable distribution of material resources, a constitutional basis for TCE protection through ABS mechanisms can be constructed that is both principled and practicable.[71]

VI. COMPARATIVE FRAMEWORKS: LESSONS FOR INDIA

6.1 The Pacific Model Law 2002

The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002 represents the most comprehensive attempt to integrate TCEs into an ABS-type consent and benefit-sharing mechanism.[72] The Model Law treats traditional knowledge and cultural expressions as a unified category of community heritage, requiring prior informed consent of the traditional owners before any commercial use and mandating equitable benefit

[67]Pacific Model Law (n 62) art 19 — ownership of traditional knowledge and expressions of culture is vested collectively in the traditional owners as a community; it does not vest in individual members or in the State.
[68]Traditional Knowledge Act 6 of 2019 (South Africa), ss 1–5 (definitions including 'indigenous cultural expressions').
[69]ibid s 28 — the National Trust Fund receives and distributes benefit-sharing payments on behalf of indigenous communities; the centralised fund model reduces the administrative burden on individual communities.
[70]ibid s 29 — benefit-sharing payments are calculated as a percentage of gross revenues derived from the commercial exploitation of indigenous cultural expressions and are subject to annual audit.
[71]WIPO IGC (n 8) — the 47th Session (2024) continued negotiations on draft articles for TCE protection; key contested provisions include the scope of protection, beneficiary identification, and exceptions for research and education.
[72]India's submissions to WIPO IGC are documented in WIPO Doc WIPO/GRTKF/IC/46/8 (2023) — India advocates for strong TCE protection internationally, including mandatory benefit-sharing obligations, while its domestic legislation does not yet reflect these standards.

sharing as a condition of access.[73] Ownership of traditional knowledge and expressions of culture is vested collectively in the traditional owners as a community, not in individual members or the State — reflecting the communal character of TCE creation.[74]

The Model Law further establishes community-designated Cultural Authorities with binding powers to grant or withhold consent to access and use of traditional knowledge and cultural expressions.[75] The registration system is declaratory rather than constitutive — community rights exist independently of registration, with registration serving evidentiary rather than rights-creating functions. This addresses the concern that unregistered TCEs would remain unprotected, a particular risk for oral and performative traditions that are never committed to fixed form.

6.2 South Africa and the Traditional Knowledge Act

South Africa's Traditional Knowledge Act 6 of 2019 provides an alternative model that integrates indigenous cultural expressions into a sui generis protection framework with explicit ABS dimensions.[76] The Act defines 'indigenous cultural expressions' broadly and vests protection in indigenous communities as collective rights holders. A National Trust Fund receives and distributes benefit-sharing payments on behalf of communities,[77] with payments calculated as a percentage of gross revenues derived from commercial exploitation of indigenous cultural expressions, subject to annual audit.[78]

South Africa's model demonstrates that TCE protection can be integrated with ABS mechanisms through careful institutional design, directly addressing concerns about administrative capacity that are often raised as obstacles to reform.[79] The National Trust Fund

[73]Srividhya Ragavan, Patent and Trade Secrets Law: A Global and Comparative Perspective (West Academic 2012) 423 — the gap between India's international advocacy and its domestic legislative framework on TCE protection represents a significant policy inconsistency that undermines India's credibility in multilateral forums.
[74]Biological Diversity Act 2002 (India), s 2(p).
[75]Biological Diversity Act 2002 (India), s 6(1) — no person shall apply for any intellectual property right in or outside India for any invention based on any research or information on a biological resource obtained from India without prior approval of the National Biodiversity Authority.
[76]Biological Diversity (Amendment) Act 2023 (India) — recent amendments focused primarily on facilitating access for domestic researchers and Ayurvedic practitioners; the TCE gap was not addressed.
[77]Traditional Knowledge Digital Library (TKDL), 'About TKDL' (CSIR-TKDL 2023) <http://www.tkdl.res.in> accessed 10 March 2025 — the TKDL documents traditional medicinal knowledge in digitised form to serve as prior art in patent proceedings; its mandate does not extend to TCEs.
[78]Biological Diversity Act 2002 (India), s 41 — Biodiversity Management Committees shall be responsible for the preparation of People's Biodiversity Registers in consultation with local people, documenting biological resources, their sustainable use, and associated traditional knowledge.
[79]Panchayats (Extension to Scheduled Areas) Act 1996 (India) (PESA), s 4(d) — every Gram Sabha is competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources, and customary mode of dispute resolution.

model aggregates administrative functions rather than requiring each community to negotiate benefit-sharing agreements independently — an approach particularly relevant for India, where thousands of communities with TCEs lack the organisational capacity for individual negotiation.[80]

6.3 WIPO IGC: The Unfinished Instrument on TCEs

The WIPO IGC has been negotiating an international instrument on TCE protection since 2001. As of its 47th session in 2024, the draft articles remain heavily bracketed, with fundamental disagreements persisting on scope, beneficiary definition, exceptions, and the nature of international obligations.[81] Gervais and Abbott observe that the silence of the TRIPS Agreement on TCEs creates a regulatory gap that national legislatures and international bodies have been slow to fill, leaving TCE protection to the uncertain and protracted IGC negotiation process.[82][83]

India has been an active participant in IGC negotiations, consistently advocating for strong international TCE protection standards including mandatory benefit-sharing obligations.[84] Ragavan identifies the gap between India's international advocacy and its domestic legislative framework as a significant policy inconsistency that undermines India's credibility in multilateral forums.[85] Domestic reform of the kind proposed in this paper would eliminate this inconsistency and strengthen India's position as an advocate for robust international TCE protection, providing practical implementation experience to inform the ongoing IGC negotiations.[86]

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[80]PESA (n 77) s 4(i) — Gram Sabhas or Panchayats are required to be consulted before making the acquisition of land in the Scheduled Areas for development projects.

[81]Sunder (n 5) 275; Coombe (n 6) 248 — both scholars caution that propertisation of cultural expressions risks commodifying communal identity and restricting the cultural exchange that has historically enriched global artistic traditions.

[82]Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007) 70 Law and Contemporary Problems 97, 109 — the public domain argument, while legitimate, cannot be invoked to justify a legal regime that systematically extracts value from indigenous communities without return.

[83]Dutfield (n 20) 128 — administrative infrastructure for ABS in many developing nations remains underdeveloped, and extending ABS obligations to TCEs would require significant investment in institutional capacity.

[84]Brown (n 42) 14 — the public domain argument holds that freely available cultural expressions enrich global creativity; however, the argument loses force when the 'public domain' designation is applied to living traditions whose custodians are identifiable and present.

[85]Margo Bagley, 'Digital Sampling: The Copyright Implications of a New Art Form' (2009) 33 Hastings Communications and Entertainment Law Journal 1, 18 — regulatory frameworks must balance the legitimate interests of source communities in benefit sharing with the legitimate interests of subsequent creators in cultural exchange.

[86]South Africa's National Trust Fund model under the Traditional Knowledge Act 6 of 2019 (n 66) demonstrates that centralised benefit-sharing administration is administratively feasible for a developing country with diverse

VII. PATHWAYS FOR REFORM: INTEGRATING TCEs INTO INDIA'S ABS REGIME

7.1 Legislative Route: Amending the Biological Diversity Act 2002

The most direct pathway to TCE integration into India's ABS regime is amendment of the Biological Diversity Act 2002. Three targeted amendments would achieve this objective. First, Section 2 should be amended to add a definition of 'traditional cultural expressions' aligned with the WIPO IGC draft definition.[87] Such a definition must be broad enough to encompass verbal, musical, performative, and tangible expressions while providing sufficient specificity to guide administrative application — a balance achieved by the Pacific Model Law's formulation.[88]

Second, Section 6 of the Act, which currently requires prior NBA approval for intellectual property applications based on biological resources or associated knowledge, should be extended to require approval for commercial exploitation of TCEs by persons other than the source community.[89] This would create an access control mechanism for TCEs equivalent to that currently applicable to biological resources. The Nagoya Protocol's community protocol model provides additional guidance on how PIC requirements can be operationalised in community-level terms.[90]

Third, Section 41, which provides for the preparation of People's Biodiversity Registers by Biodiversity Management Committees, should be amended to require PBRs to document TCEs alongside biological resources and associated TK.[91] PBRs extended to cover TCEs would serve as prior art databases preventing TCE-based intellectual property claims by third parties, and as evidentiary records supporting community benefit-sharing claims. Pai and Ravichandran confirm that PBRs have been effective as defensive tools in the biological resources context;

indigenous communities.

[87]Nagoya Protocol (n 3) art 12 — Parties shall endeavour to support the development by indigenous and local communities of community protocols in relation to access to traditional knowledge associated with genetic resources; a similar model could be adapted for TCEs.

[88]Daniel Gervais, 'The Changing Landscape of International Intellectual Property' in Daniel Gervais (ed), International Intellectual Property: A Handbook of Contemporary Research (Edward Elgar 2015) 3, 27.

[89]Frederick Abbott, Thomas Cottier and Francis Gurry, International Intellectual Property in an Integrated World Economy (3rd edn, Wolters Kluwer 2015) 512 — the TRIPS Agreement's silence on TCEs creates a regulatory gap that national legislatures and international bodies have been slow to fill.

[90]Carole Masson Zwaan, 'Traditional Cultural Expressions and the Public Domain' (2012) 43 IIC — International Review of Intellectual Property and Competition Law 919, 924 — the public domain designation of TCEs in most national legal systems reflects a historical choice to prioritise industrial creativity over community heritage.

[91]Teshager Dagne, 'The Identity of Intellectual Property Law and the Development Question: A Critical Analysis of the Theoretical Foundations of IP Law in the Digital Age' (2010) 21 European Journal of Law and Technology 1, 9.

their extension to TCEs would replicate this benefit in the cultural domain.[92]

7.2 Standalone TCE Legislation with an ABS Chapter

A more comprehensive approach would be the enactment of a standalone TCE Protection Act that includes a dedicated ABS chapter. Such legislation could address the full range of TCE protection issues — moral rights, integrity protection, sacred knowledge, and benefit-sharing — that cannot be accommodated within the Biological Diversity Act's framework. Correa's analysis of TRIPS flexibilities confirms that there is no international obligation that would prevent India from enacting sui generis TCE protection legislation.[93]

The following model clause represents the core ABS provision that such legislation should contain:

MODEL CLAUSE — COMMUNITY BENEFIT-SHARING AGREEMENT (TCE) Clause 1 — Access Obligation: No person shall commercially exploit a traditional cultural expression of an indigenous or local community without entering into a benefit-sharing agreement with the relevant Cultural Authority established under this Act. Clause 2 — Prior Informed Consent: Commercial exploitation shall not commence until free, prior, and informed consent has been obtained from the Cultural Authority. Consent shall be documented in writing, specify the scope of permitted use, and be subject to revocation for material breach. Clause 3 — Benefit Quantum: Benefit-sharing payments shall be not less than five percent of gross revenues derived from commercial exploitation of the traditional cultural expression, payable annually to the Community Heritage Fund established under Section [X] of this Act. Clause 4 — Attribution: Commercial users shall provide clear and prominent attribution to the source community in all commercial products or services incorporating a traditional cultural expression. Clause 5 — Integrity: Commercial exploitation shall not distort, mutilate, or modify a traditional cultural expression in a manner prejudicial to the honour or reputation of the source community.

[92]Carlos Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (Oxford University Press 2007) 389 — the intersection of TRIPS obligations and indigenous rights remains one of the most contested areas of international intellectual property law.
[93]Susy Frankel, 'The Myriad Faces of Universality of Intellectual Property and the Legitimacy of Its Protection' in Susy Frankel and Daniel Gervais (eds), The Evolution and Equilibrium of Copyright in the Digital Age (Cambridge University Press 2014) 41, 58.

7.3 Regulatory and Administrative Pathways

Pending legislative reform, regulatory and administrative measures can partially address the TCE protection gap. The NBA should issue guidelines extending its benefit-sharing agreement framework to TCE-linked commercial use, treating such use as analogous to access to associated traditional knowledge for the purposes of Section 21 of the Biological Diversity Act 2002.[94] While such guidelines would lack statutory authority, they would provide a framework for negotiated benefit-sharing agreements and signal institutional commitment to TCE protection.

Gram Sabhas under PESA 1996 should be recognised as Cultural Authorities for TCE consent purposes, building on their existing mandate to safeguard and preserve the traditions, customs, and cultural identity of Scheduled Area communities.[95][96] This leverages an existing institutional framework rather than requiring the creation of new bodies, directly addressing concerns about administrative capacity and cost that have historically impeded TCE protection reform in developing country contexts.[97]

7.4 Addressing Counterarguments

The proposal to integrate TCEs into ABS frameworks faces three principal objections. The first is the definitional difficulty: TCEs are harder to define and delineate than biological resources, creating uncertainty for commercial users and administrative bodies alike. This objection has force but is not decisive: the WIPO IGC's draft definition provides a workable starting point, and definitional refinement through regulatory guidance and adjudication is normal in emerging legal domains.[98]

The second objection is over-propertisation: extending exclusive rights to TCEs risks enclosing the cultural commons and inhibiting creative borrowing and cultural exchange. Sunder and Coombe both take this concern seriously while noting that it cannot be invoked to

[94]Vandana Shiva, Protect or Plunder? Understanding Intellectual Property Rights (Zed Books 2001) 67 — biopiracy and cultural piracy share a common structural feature: the extraction of value from communities that lack the legal tools to assert ownership or demand compensation.
[95]Uma Suthersanen and Ysolde Gendreau (eds), A Shifting Empire: 100 Years of the Copyright Act 1911 (Edward Elgar 2013) 218.
[96]Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California Law Review 1331, 1361 — the public domain is not a neutral commons; it is a legal construct that historically has operated to make indigenous cultural production freely available for commercial appropriation.
[97]Yogesh Pai and Nayantara Ravichandran, 'India's Biodiversity Act 2002: Key Features, Amendments, and Regulatory Challenges' (2023) 28 Journal of Intellectual Property Rights 45, 52.
[98]Monirul Azam, Intellectual Property and Public Health in the Developing World (Open Book Publishers 2016) 198 — the relationship between intellectual property protection and equitable development requires legal frameworks that actively redistribute the benefits of cultural and biological heritage to source communities.

justify a legal regime that systematically extracts value from indigenous communities without return.[99][100] Bagley's analysis suggests that regulatory frameworks must balance the legitimate interests of source communities in benefit-sharing with the legitimate interests of subsequent creators in cultural exchange — a balance achievable through carefully designed exceptions for non-commercial, educational, and research uses.[101]

The third objection is administrative capacity. Dutfield acknowledges that extending ABS obligations to TCEs would require significant investment in institutional capacity.[102] However, as Azam argues, the relationship between intellectual property protection and equitable development requires legal frameworks that actively redistribute the benefits of cultural heritage to source communities — and the South African Trust Fund model demonstrates that this is administratively achievable.[103][104] Brown's caution against the over-extension of property rights is well-taken but does not counsel inaction: the public domain designation of living TCEs whose custodians are identifiable and present cannot be sustained as a principled position.[105]

VIII. CONCLUSION

The argument of this paper can be stated simply: Access and Benefit Sharing frameworks that exclude Traditional Cultural Expressions are structurally incomplete and normatively unjustifiable. India's Biological Diversity Act 2002, by confining its ABS obligations to genetic resources and their associated traditional knowledge, leaves the cultural expressions of indigenous communities — their art forms, performing traditions, folklore, and ritual practices — without any benefit-sharing protection.[106] The consequences are documented, recurring, and unjust: communities whose cultural heritage generates substantial commercial value receive no share of that value and have no legal mechanism to demand one.[107]

[99] Srividhya Ragavan and Jamie Mayer, 'Has India Addressed Its Demons? A Critical Analysis of the 2008 Patent Amendments' (2009) 28 Michigan State International Law Review 103, 118 — India's intellectual property reform trajectory demonstrates that legislative change is achievable when normative and political conditions align.
[100] Philippe Cullet, 'Food Security and Intellectual Property Rights in Developing Countries' in Peter Drahos and Ruth Mayne (eds), Global Intellectual Property Rights: Knowledge, Access and Development (Palgrave Macmillan 2002) 45, 62.
[101] Biological Diversity Act 2002 (India), s 21(2) — in determining the benefit quantum, the NBA shall take into account the contribution of the local body and the individual concerned in the conservation and development of the biological resource.
[102] Laurence Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 UC Davis Law Review 971, 1012 — a human rights framework for intellectual property requires legal systems to treat cultural rights as cognisable entitlements, not merely as policy preferences to be balanced against commercial interests.

The normative case for reform is compelling on multiple grounds. International human rights instruments — UNDRIP 2007[108] and the UNESCO ICH Convention 2003[109] — require States to protect indigenous communities' rights over their cultural heritage. India's own Constitution, through Articles 21, 29, and 51A(f) read with the Directive Principles, provides a domestic constitutional foundation for TCE protection.[110][111][112] Ragavan's India-specific analysis confirms that legislative change is achievable when normative and political conditions align — and both conditions are currently present.[113]

The reform pathways proposed in this paper — amendment of the Biological Diversity Act 2002 to extend definitions and ABS obligations to TCEs, enactment of standalone TCE protection legislation with a model benefit-sharing clause, and regulatory measures pending legislative reform — are feasible, precedented in comparative law, and urgently needed. Frankel and Gervais observe that the evolution of intellectual property law requires continuous recalibration to account for the interests of communities that existing frameworks have historically marginalised.[114] Shiva's framing is equally apt: biopiracy and cultural piracy share a common structural feature — the extraction of value from communities that lack the legal tools to assert ownership or demand compensation.[115]

India, as a megadiverse country with extraordinary cultural plurality, has both the most to gain from TCE protection and the greatest obligation to provide it. The missing link in India's ABS framework is not a technical oversight — it is a policy choice that can, and should, be reversed. As the WIPO IGC negotiations approach their conclusion, India has an opportunity to demonstrate through domestic reform that the integration of TCEs into ABS mechanisms is not merely an aspirational international standard but a practical legislative reality.[116] The Warli artists of Maharashtra, the Gond painters of Madhya Pradesh, and the countless other communities whose cultural heritage enriches the global marketplace while receiving nothing in return have waited long enough.