BRANDING AND COMMCERCIALISATION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS:

Customary Law of North East vis-à-vis Contemporary Law

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Table of Contents

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Introduction

The North Eastern (NE) States of India, also popularly known as the Seven Sisters, are a hub of rich cultures, traditions, customs, usages, flora, and fauna. There are more than 150 tribes and subtribes with distinct customs, dialects, cultures, and traditions. The region has survived through generations, including times of adversity and tribulation, by the application of traditional knowledge (TK) in all occupations and facets of life. Such knowledge has been passed down orally from generation to generation. Thus, in the NE there is no written documentation of such TK. The region, located at the intersection of the Palearctic and Indo-Malayan biogeographic realms, is blessed with rich floral and faunal biodiversity.[1] About fifty percent of total flowering plants in India are found in the NE region, amounting to more than 7,500 species of flowering plants.[2] One-third of India's floral species is endemic to the NE region.[3] The utilization of both floral and faunal species has been in practice since time immemorial and has been a major resource for various purposes. The people of the region are dependent on such natural resources for survival and thus maintain ecological equilibrium to avoid the exploitation of these resources. Since ancient times, customary law alone has regulated the use and exploitation of the diverse and rich resources of the region. The domestic legislation of India appears inept to accommodate the customary laws of the region. Indeed, much of the local indigenous population is unaware of the contemporary formal laws. Besides, the lack of modern scientific and technical knowledge of the people has contributed more to the problem of being exploited by selfish and commercially minded companies, organisations, and individuals. This problem necessitates a pressing and urgent legal framework in collaboration with the Sixth Schedule to the Constitution of India, Articles 371A,[4] 371B,[5] 371C,[6] 371F,[7] 371G,[8] and 371H[9] of the Constitution of India, and customary laws. This Article investigates the legal history and the contemporary legal framework to scrutinize whether the existing domestic legislation would alleviate the need for protection of TK and

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1 Sudipto Chatterjee *et al*., *Background Paper No. 13, Biodiversity Significance of North East India* 1 (WWF-India, June 2006).

2 *Id.* at 27.

3 *Id.*

4 Special Provision with respect to the State of Nagaland. Constitution of India, 1950 art. 371A.

5 Special Provision with respect to the State of Assam. Constitution of India, 1950 art. 371B.

6 Special Provision with respect to the State of Manipur. Constitution of India, 1950 art. 371C.

7 Special Provision with respect to the State of Sikkim. Constitution of India, 1950 art. 371F.

8 Special Provision with respect to the State of Mizoram. Constitution of India, 1950 art. 371G.

9 Special Provision with respect to the State of Arunachal Pradesh. Constitution of India, 1950 art. 371H.

traditional cultural expressions (TCEs) of the NE region and, if so, how such legal protection should be enforced in accord with the customary laws. The Article attempts to conclude with some suggestions.

I. About the North Eastern States: Legal History

The NE States of India are connected to the mainland by a narrow strip of land called the "Chicken Neck."[10] The region covers an area of about 262,230 km² and consists of the states of Assam, Nagaland, Manipur, Mizoram, Meghalaya, Arunachal Pradesh, Tripura, and Sikkim.[11] About 5182 km of the region shares international borders with China, Myanmar, Bhutan, Nepal, and Bangladesh.[12] Before the colonial administration, the region consisted of numerous independent tribal and village territories ruled by chieftains and headmen. Though the Ahoms of Assam, the Meiteis of Manipur, and Twipra of Tripura were ruled by powerful kings, these kingdoms never interfered in the tribal territories but instead maintained peaceful relations of brotherhood. The arrival of the British in India and the grant of Dewany of Bengal to Sir Robert Clive in 1765 started a new legal era in the NE region, which eventually led to the 1822 enactment of Regulation X and laid the foundation of a different legal and administrative system known as the "Non-Regulated System."[13] This was followed by the Government of India Act of 1853, the Indian Councils Act of 1861, and the Garo Hills Act of 1869 which granted internal administrative and judicial autonomy to the NE region by adopting the Non-Interference Policy and removing the Civil Procedure Code and Criminal Procedure Code from the tribal territories. With the enactment of the Scheduled District Act of 1874, the Commissionership of Assam was formed, and administration was transferred from the Lt. Governor of Bengal (at Fort William) to the Commissioner of Assam. The 1874 Act recognised the current NE States as scheduled districts and "backward tracts" which required different treatment with regard to the enforcement of laws applied in other parts of British India.[14] In 1935, in

[10] The Chicken Neck is narrow strip of land about 22 km in width. The land falls under the State of West Bengal and the place is called Siliguri, hence, it is also called Siliguri Corridor. The corridor is squeezed between Nepal and Bangladesh.

[11] After the inclusion of Sikkim in the North Eastern Council in 2002, the Seven Sisters, which was originally seven states, now consists of eight states. *See* North Eastern Council (Amendment) Act of 2002.

[12] J.K. Gogoi et al., *Project Report on Problems of Border Areas in North East India : Implications for the Thirteenth Finance Commission* 1 (Department of Economics, Dibrugarh University 2009).

[13] The Non-Regulated System was introduced to bring the administration within the reach of the tribal people through simple and personal procedure. Under this system, all powers of administration, legislation, judiciary and to conclude arrangements with the tribal Chiefs were intensely centralized in a single executive i.e. the Commissioner. (B.L. Hansaria, *Sixth Schedule to the Constitution of India*, Universal Law Publishing, New Delhi, 2011).

[14] The Act enabled the local government to declare what normal laws should be applied in the Scheduled Districts. Sections 5 and 5A of the Act laid down that any laws

line with the recommendations of the Simon Commission,[15] a separate section pertaining to the NE region was included in the Government of India Act of 1935 which replaced the terminology of "backward tracts" with "excluded area" and "partially excluded area." The 1935 Act declared that no act of the Federal Legislature or the Provincial Legislature shall apply to the excluded and partially excluded areas the Governor so directs by notification.[16]

After Indian independence, many members of the Constituent Assembly objected to the adoption of the Sixth Schedule to the Constitution of India.[17] They cited various reasons which may pose a threat to the security and integrity of India. Vehemently opposed to the wide autonomous powers given to the tribally managed Regional and District Council, Constituent Assembly members like Shri Brajeshwar Prasad[18] and Shri Kuladhar Chalia[19] argued such autonomy would lead to the establishment of another Pakistan and bring anarchy. However, Dr. B.R.

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passed by the British Parliament could not be enforced in the Scheduled Districts and the indigenous tribal people unless with the previous sanction of the Governor-General in Council.

[15] In November 1927, the British Government appointed seven English Members of Parliament to study and suggest reforms on the working of the Government of India Act of 1919. The Commission was officially named as "Indian Statutory Commission." It popularly came to be known as "Simon Commission" named after its Chairman Sir John Simon. The Commission arrived in India in 1928 and published its report in 1930. As a result of the recommendations of the Commission a separate chapter, i.e. Chapter-V was dedicated to the North Eastern Frontier of India in the Government of India Act of 1935. (*See* Indian Statutory Commission, *Report of the Indian Statutory Commission Volume II Recommendations*, Published by His Majesty's Stationery Office, London, 1930).

[16] Government of India Act of 1935, Sec. 92(1).

[17] The Sixth Schedule to the Constitution of India lays down the provisions for administration of tribal areas in the North Eastern States. The Schedule provides for constitution of Autonomous District and Regional Councils and its power in administration, legislation, revenue generation, imposition of taxes, establishment of schools, markets, road transport, water ways, extraction of minerals, management of forests, etc. The Schedule also empowers the Council to exercise judicial powers and in trials before the Council, the Code of Civil Procedure and the Criminal Procedure Code shall not apply but shall be according to the customary practice. (*See* the Sixth Schedule to the Constitution of India as first enacted and the C.A.D).

[18] The words of Shri Brajeshwar Prasad is quoted as follows: "I am opposed to the District Councils and Regional Councils because they will lead to the establishment of another Pakistan in this country . . . I will not jeopardise the interest of India at the alter of the tribals. The principle of self-determination has worked havoc in Europe . . . . It led to the vivisection of India, arson, loot. . . . " 9 C.A.D. Para 2.

[19] The words of Shri Kuladhar Chalia is quoted as follows: "The Nagas are very primitive and simple people and they have not forgotten their old ways of doing summary justice when they have a grievance against anyone. If you allow them to rule us or run the administration it will be a negation of justice or administration and it will be something like anarchy . . . . It is said that they are very democratic people, democratic in the way of taking revenge; democratic in the way that they first take the law into their own hands. And it is threatened by some that they are so democratic that they will chop off our heads." 9 C.A.D. (1949).

Ambedkar,[20] who had far-reaching visions for the nation and indigenous people, convinced the opposing members of the Assembly to support the Sixth Schedule by citing the United States and the American Indians in the following words:

> Now what did the United States do with the Red Indians? So far as I am aware, what they did was to create what are called Reservations or Boundaries within which the Red Indians lived. They are a Republic by themselves. No doubt, by the law of United States they are citizens of the United States. Factually, they are a separate, independent people. It was felt by the United States that their laws and modes of living, their habits and manners of life were so distinct that it would be dangerous to bring them at one shot, so to say, within the range of the laws made by the white people for the white persons and for the purpose of the white civilization.[21]

After three days of rigorous debate,[22] the Sixth Schedule to the Constitution of India was adopted with an aim of meeting the needs and goals of the indigenous tribal people and bringing them closer to the national mainstream. Thus, from the hereinabove-stated legal history of the colonial administration to the present status under the Indian Constitution, the NE States have been treated with special legislation to suit the indigenous people and their customs, traditions, and cultures.

II. The Bengal Eastern Frontier Regulation of 1873

On November 1st, 1873, the Bengal Eastern Frontier Regulation of 1873 came into force.[23] At the date of its inception, the Regulation of 1873 was enforced *proprio vigore* in the *erst* in the districts of Cachar, Darrang, Kamrup, Khasi & Jaintia Hills, Lakhimpur, Naga Hills, Nowgong, and Sibsagar. After, the enactment of the Scheduled Districts Act of 1874 and the formation of the Commissionership of Assam, the Regulation of 1873 was extended to the districts of Mokokchung, Sadiya Frontier Tract, Balipara Frontier Tract, Lakhimpur Frontier Tract, and Lushai Hills District. Thus, the present day's entire NE region was covered by the Regulation of 1873. Section 7 of the Regulation dictated that "it shall not be lawful for any person, not being a native of the districts comprised in this Regulation to acquire any interest in land or the product of land beyond the said 'Inner Line' without the sanction of the Lieutenant Governor (State Government) or such officer as the Lieutenant Governor may appoint on this behalf."[24]

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[20] Dr. B.R. Ambedkar was the Chairman of the Indian Constitution Drafting Committee. He is the architect and the father of Indian Constitution.

[21] 9 C.A.D. Para 2.

[22] The three days of debate occurred on September 5th, 6th, and 7th of 1949. See 9 C.A.D. Para 2.

[23] Noti. 13, Bengal Eastern Frontier Regulation of 1875, Ministry of Home Affairs, published in the 1 GAZ. INDIA 529.

[24] [24] The Bengal Eastern Frontier Regulation of 1873, Sec. 7.

The general purpose of the Regulation was for Inner-Line permitting,[25] but it is also evident that it was also intended to protect the virgin land inhabited by indigenous tribes from commercial exploitation by outsiders. Section 7 thus uses the words *"to acquire any interest in land or the product of land beyond the said Inner Line."* Though, this regulation may not have direct reference to IP law, a pragmatic interpretation of the words *"any interest"* and *"product of land"* draws a connection to IP. Although there may be no universally accepted definition of TK, the World Intellectual Property Organisation (WIPO) defines 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."[26] The traditional and cultural knowledge, practices, skills, etc., of the NE States have been passed down from generation to generation and spawn from the relationships the tribes of this region have with the land. Hence, they are products of the land and confer legal interest to the land and its people. Thus, the words *'product of the land'* and *'any interest'* under Section 7 of the Bengal Eastern Frontier Regulation of 1873 satisfy the notions of "knowledge," "know-how," "skills," and "practices" in the WIPO definition of TK. Therefore, the Bengal Eastern Frontier Regulation of 1873 can be read harmoniously with the WIPO definition of TK.

India's central (the union) IP law, the Patent Act of 1970, does not define TK, but Section 3(p) affirms that any invention which is a result of TK or duplication of traditionally known properties or components is not an invention for the purpose of patent law.[27] Thus, the domestic legislation provides a degree of legal protection to other parts of the country for TK. However, in the case of the NE region, particularly in the states with special constitutional status, no central legislation or enactments shall apply unless adopted by the respective State Legislative Assembly via resolutions. Hence, in the NE region, in the absence of the state legislations or resolutions adopting the central laws and enactments, neither domestic nor international legislation has the force of law. In such circumstances, Section 7 of the Bengal Eastern Frontier Regulation of 1873 is the only active enactment that may come to the rescue of the state administrations and the courts of law.

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[25] In the tribal areas of the North Eastern states, even an Indian citizen is mandated to obtain Inner Line Permit to travel the tribal area. The Inner Line Permit is issued by the Home Ministry, Government of India and can be obtained from the respective Resident Commissioners of the State or the Deputy Commissioners of the district. (*See* the Bengal Eastern Frontier Regulation of 1873, Sec. 2, and also the Criminal Law Amendment Act, 1961, Sec. 3 subclause 1).

[26] WIPO, *Traditional Knowledge*, http://www.wipo.int/tk/en/tk (last visited March 21, 2020).

[27] Section 3(p) of the Patent Act of 1970 is reproduced as follows: "3. What are not inventions.—The following are not inventions within the meaning of this Act—(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components."

III. Domestic Legislation vis-à-vis Customary Law

Ever since the era of colonial administration, the NE region has enjoyed special constitutional autonomy in both internal administrative and judicial matters. Post-Indian independence, the Sixth Schedule to the Constitution of India endowed the NE States with customary autonomy in internal governance and administration of justice, and exempted the region from applying formal technical and procedural laws enforced in other parts of the country. Subsequently, with the reorganization of the region and attainment of statehood, special constitutional status has been conferred on the states of the region. In short, the very law of the region in administrative, policy, and judiciary matters is the customary law and customary authorities. Thus, in such circumstances, the contemporary formal technical laws, even if adopted by the state legislatures, may have negligible significance. This is so because, in this part of the country, the customary authorities are considered next to the state and the people respect customary authorities more than the formal authorities. Upholding and recognizing the importance of customary law, the Supreme Court of India in *State of Nagaland v. Ratan Singh*[28] held that:

> Laws of this kind are made with an eye to simplicity. People in backward tracts cannot be expected to make themselves aware of the technicalities of a complex Code. What is important is that they should be able to present their defence effectively unhampered by the technicalities of complex laws.

Customary law and authorities are indispensable in the case of the NE region for effective implementation of any law or policy. Any law or policy to be applied in the region has to be adopted in consultation with the indigenous customary authorities and the people. Failing to do so could render a law futile in its implementation and perhaps create chaos in the particular society. Thus, a question arises as to whether the existing domestic legislation would satisfy the need for protection of TK and cultural expressions in consonance with the customary laws of the NE region. It is thus imperative to study the domestic legislations and policies of India and test it with the customary laws of the NE region.

A. *The Biological Diversity Act of 2002*

As a party and signatory to the United Nations Conference on Biological Diversity of 1992, India enacted the Biological Diversity Act of 2002.[29] Besides environmental concerns, the Act focuses on fair and equitable sharing of the benefits of TK. The Act thus emphasizes approving the acquisition of biological resources and knowledge associated thereto, sharing of results of research and transfer of biological resources,[30] and sharing of benefits.[31] By virtue of the Act, State Biodiversity Boards were

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[28] *State of Nagaland v. Ratan Singh*, 1967 A.I.R. 212 (S.C.) at Para 34.
[29] The Biological Diversity Act of 2002, the Preamble.
[30] *Id.* at Sec. 3, 4 & 20.
[31] *Id.* at Sec. 21.

constituted in all the states of the region.[32] These state boards consist of experts in sustainable use of biological resources, biological diversity, and sharing of benefits, and government servants from relevant departments. As discussed hereinbefore, with the NE States being unique, the current composition of the state boards (as provided by the Act) may not cater to the practical solution of the problem without formally involving the indigenous customary authorities. Though, the current composition of the state boards may satisfy the technical and scientific objectives of the Act, the indigenous villagers of these states are often unaware of the existence of such boards and the policies and information disseminated by them. It is imperative to note that in the NE region, the village is the center of all social, political, and cultural activities. The village customary authorities thus play the primary role in social and legal transformation. Besides the village customary authorities, the district and regional customary authorities play significant roles in policy implementation and societal development. Thus, amendments should be made to the Act providing for the appointment of board members from the primarily grassroots customary authorities of the indigenous tribal people.

The region's international borders create added difficulties for the implementation of law and policy regarding the transfer of biological resources and the sharing of benefits received from those resources. The borders are open, so infiltration becomes a problem in the region. The topography of the region is such that it is not possible for the authorities to staff all the international borders. Thus, there is smuggling of endemic species out of the region. In such situations, the involvement of indigenous people is best suited for safeguarding such resources. The indigenous people sometimes fail to understand the vested interests of outsiders when they share their TK. Thus, they disclose to outsiders their knowledge and information, which is then commercially misused, without receiving the benefits. Such TK obtained by deception is misused by the outsider, and it may be impossible for the authorities to apprehend offenders. Oftentimes, offenders escape the country without facing consequences for exploiting the indigenous people of the NE region. Representation of customary authorities in state boards is indispensable for the practical protection of the TK of the region. Thus, in the case of the NE region, the Biological Diversity Act of 2002 has to be modified and amended according to the custom and practices of the area by involving the indigenous customary authorities before it is applied in toto.

B. *The Patent Act of 1970*

Patent law in India has a long history dating back as early as 1856 when the first Indian patent law was enacted. Since then, it has gone through numerous repeals and amendments. After Indian independence, the Indian Patents and Designs Act of 1911 was repealed and replaced by the Patent Act of 1970. The Act remained without amendment until 1994.

[32] *Id.* at Sec 22.

As a consequence of India signing the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Patents (Amendment) Act of 2002 was enacted. In conformity with the provisions of TRIPS, the definition of "invention" was widened by introducing the concept of "inventive step"[33] and "capable industrial application."[34] In addition, micro-organisms became patentable.[35] Section 3(p) of the 1970 Act provides protection for TK by laying down that any invention which is a result of TK or duplication of traditionally known properties or components is not an invention for the purpose of patent law.

This concept is apparent in *Dhanpat Seth & Ors. v. M/s Nilkamal Plastic Ltd.*,[36] in which the petitioner filed a suit for damages for infringing upon his patent "Device for Manually Hauling of Agricultural Produce," granted to him in July 2005. It was alleged by the petitioner that the defendant company M/s. Nilkamal Plastics Ltd. has infringed his patent by manufacturing and selling a product which was similar to his patent. The petitioner's contention was that when he was in Himachal Pradesh, he noticed the farmers using "Kilta" a basket made of bamboo for carrying agricultural produce, wood, and other items. He also noticed that the carrying of Kilta was very painful because it was secured to the forehead only by a thick rope. After researching and consulting with orthopaedic doctors, he finally developed a prototype long basket made of plastic and allied material to replace the Kilta, which would be healthier for the farmers to carry. The defendant argued that the petitioner's title of invention is ambiguous and misleading as the patented device is merely an application of an old device known as Kilta and does not constitute an invention. The High Court held that mere use of different raw material for manufacture of known device does not constitute an invention. Also, the patented device similitude and resemblance, vis-a-vis, the traditional Kilta. The Court further held that merely a discovery of a new form of a known substance, inasmuch, as traditional Kilta would not constitute an invention under the Indian Patent Act. Invoking Section 3(p) of the Act, the High Court revoked the patent of the petitioner on grounds of being based in traditional knowledge.

Thus, the legislation has some effect in protecting TK. However, complete documentation of TK and cultural expressions of the NE region is not available to the authorities, posing a problem in the identification of whether an invention is indeed a result of TK or duplication. Hence, the law has meagre significance in providing realistic solutions to the problem of appropriating TK and TCEs.

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[33] The Patent Act of 1970, Sec. 2(1) (ja), inserted vide the Patent Act (Amendment) Act of 2002.

[34] *Id.* at Sec. 2(1)(j), inserted vide the Patent Act (Amendment) Act of 2002.

[35] *Id.* at Sec. 3(j), inserted vide the Patent Act (Amendment) Act of 2002.

[36] High Court of Himachal Pradesh, Civil Suit No. 69 of 2005 along with Counter Claim No. 20 of 2006. Judgement delivered by Justice Sureshwar Thakur on 29th June 2018.

C. *The Copyright Act of 1957 and the Designs Act of 2000*

With regard to copyright, the Copyright Act of 1957 recognises copyright in dramatic works, original literature, visual art, music, sound recording, and cinematograph films,[37] and performer's rights.[38] The Act protects individual authors, artists, performers, and institutions or organisations from duplication or piracy of their works. However, in the case of TK and TCEs of the NE States, it is different. The knowledge and information are held by the society as a whole, and typically cannot be traced to an inventor or author. It may be verbally and easily accessible in the local limits and not in the custody of any individual or institution or locked in a secured system. Thus, if an individual or an institution (whether the author is a native or an outsider) writes a book about a tribe or clan's traditional knowledge in healings or medicines, the copyright belongs to the author and not the tribe or the clan. Thus, the protection given by other domestic and international laws for TK and TCEs becomes nugatory. A similar dynamic exists with traditional artistic works, cinematograph films, music, sound recordings, performances, etc. The Copyright Act thus miserably fails to protect the TK and TCEs of the indigenous people of not only the NE region but the whole of India.

The cultures, traditions, customs, and usages of tribal people of the NE region inform their identities and thus have indissoluble value to them. Any unwanted interference in their tradition is considered taboo and may attract heavy customary penalties. As an example, for the tribes, their traditional ornaments, shawls, and dresses are important assets, for they distinguish them from others.[39] It is common among the NE tribes, for clothes like shawls and mekhelas[40] to symbolize social status and honour. As these traditions have been passed down from generation to generation, no individual can claim ownership of them. They belong to the community in general. Recent changes in living standards and the adoption of modernization have impacted such sacred traditions. The redesigning or modification of such traditional attires like ornaments, shawls, and mekhelas by designers who then market them for high profits is a concern which needs to be addressed by legal and social measures.

According to the definition of TCEs by the WIPO, TCEs "include music, dance, names, signs, art, designs, symbols, ceremonies, performances, architectural forms, narratives and handicrafts, other artistic or

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[37] The Copyright Act of 1957, Sec. 13.

[38] *Id.* at Sec. 38.

[39] Amongst the Naga tribes in the State of Nagaland, traditional attires and ornaments represents the stature, identity and history of one's clan and tribe (the author hails from the State of Nagaland which lies in the North Eastern Part of India). *See also*, Bhadra Gogoi, "Row over showcasing of 'Naga' shawls at Surajkund by Ritu Beri." The Telegraph. February 21, 2020, https://www.telegraphindia.com/states/north-east/row-over-showcasing-of-naga-shawls-at-surajkund-by-ritu-beri/cid/1747034 (last visited March 23, 2020).

[40] Mekhelas are traditional garment worn by women of the North East. It is an outer garment fastened around the waist like a skirt hanging downwards around the leg.

cultural expressions."[41] The case of NE States falls within the definition given by the WIPO. However, the Design Act of 2002 fails to expressly lay down any provisions related to TCEs. It is imperative to note that IP laws like the Copyright Act and the Design Act remain as individual-centered legislation and lack provisions for the protection of TK and TCEs. The objective of such laws is to protect tribes from exploitative individuals and organisations. It may not be easy for the union central government to identify and mitigate every problem of the NE region. However, the special constitutional status given to the NE States and the Sixth Schedule to the Constitution of India should be used to combat such exploitation of traditional and cultural rights by the respective state governments.

D. *The Protection of Plant Varieties and Farmers' Rights Act of 2001*

To fulfill the obligations laid down by Article 27.3b[42] of the TRIPS Agreement, India enacted the Protection of Plant Varieties and Farmers' Rights Act of 2001 (PPVFA) via a *sui generis* system. However, owing to the social, educational, and economical background of the indigenous tribal people, the PPVFA has not made significant progress in achieving its object even in other parts of the country. The PPVFA created the Distinctness, Uniformity, and Stability (DUS) test for registration. Registration is granted only if a new plant variety conforms to the criteria of novelty, distinctiveness, uniformity, and stability.[43] Such testing is done by fulfilling legal procedural requirements and paying fees.[44] In a region where people live in poverty and are often unaware of mainstream scientific and technical knowledge, satisfying the criteria laid down by the PPVFA might be unimaginable. Besides, there is high probability of the traditional plant varieties not satisfying the criteria laid down by the PPVFA. In the NE region, laboratories for testing are located far away from where the indigenous people live. For DUS testing of plants like orchids, the only laboratories are located in the States of Sikkim and Arunachal Pradesh. For registration, the branch office is located in Guwahati, Assam. The roads and transportation systems in the region are not well connected to the villages where the indigenous farmers reside and cultivate. They have to walk for days along narrow footpaths and hilly terrain to reach motorable roads where they might wait hours to board a public transport. Thus, even if one desires to register, he may be discouraged by the legal, technical, and scientific criteria, as well as the physical stress he would have to endure on the journey to reach the DUS

[41] WIPO, *Traditional Cultural Expressions*, http://www.wipo.int/tk/en/folklore (last visited March 23, 2020).

[42] Article 27.3b of the TRIPS Agreement mandates upon every member nation to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.

[43] The Protection of Plant Varieties and Farmers' Rights Act of 2001, Sec. 15.

[44] *Id.* at Sec. 18 and 19.

testing centre and the registration branch. Thus, the onus of DUS testing and registration being on the farmer, the PPVFA appears to be impractical and more of a decorative document than a pragmatic approach to protecting indigenous plants in a region like the NE.

A more serious problem lies in identifying the owners and sharing the benefits of resources. Traditional varieties of plants have been collectively developed and used by whole communities for ages. Moreover, a community may not be limited to a single geographic location. For instance, the Naga tribe is found in Nagaland, Manipur, and Myanmar. Similarly, the Kachari tribe exists in both Assam and Nagaland. Thus, there may be situations where benefits may be claimed by a branch of the tribe living in one state or territory but not another. The Kani tribe[45] provides an example of such dilemma regarding benefit sharing and ownership rights of TK. In this case, the Tropical Botanic Garden and Research Institute (TBGRI) made an agreement with the Kanis from the Kuttichal Gram Panchayat area to develop a drug called *Jeevani* from the fruit of plant called *Trichopus zeylanicus*, which the Kani tribe has been traditionally using to combat fatigue. The agreement was to share to the tribe fifty percent of the license fee as well as the profit from the commercial returns of the drug. However, the Kani tribe from other Panchayats like the Vithura and Peringamala objected to the agreement by calling the benefit sharing a superficial excuse to pirate their TK. Though the PPVFA provides for benefit sharing, it is silent on indigenous tribal communities where the plant varieties are owned collectively or amongst branches of the tribe living in different territories.

IV. A Sui Generis System vis-à-vis Customary Law

As stated hereinbefore, the establishment of a *sui generis* system in the NE region is a debatable issue. On one hand, it may protect endangered species from extinction and culturally offensive use by outsiders. However, on the other hand, it will result in the evolution of a new IP regime. India has enacted legislation in accord with the TRIPS Agreement and, consequently, governmental authorities have been established in the NE region. However, books, documentaries, and films on various TK and TCEs are available both offline and online. The authorities may not have formally documented a complete list of TK and TCEs, but the availability of offline and online information shows that the TK and TCEs are commercially utilised and their appropriators, alone, enjoy the benefits derived from them. It is thus a violation not only of IP laws but also of fundamental rights of the tribal indigenous people.

The causes of exploitation of the biological resources and TK of the tribal indigenous people of the NE region are numerous, but it is imperative to mention the legal and administrative aspects here. Firstly, state administrations have failed to strictly implement the Inner Line Permit

[45] *See* R.V. Anuradha, *Sharing with the Kanis: A Case Study from Kerala, India*, http://www.cbd.int/doc/case-studies/abs/cs-abs-kanis.pdf (last visited March 24, 2020).

system created by the colonial administration under the Bengal Eastern Frontier Regulation of 1873. The colonial administration enacted this legislation for the NE region not to make the region backward and inaccessible to the outside world, but to protect the traditions, cultures, identities, and rich biological resources of the region. However, the state administrations have failed to realize the positive aspect of the Regulation and remained negligent to consequences that may follow. Secondly, the exclusion of the sates of Nagaland, Manipur, and Mizoram from the Foreigners (Protected Areas) Order of 1958[46] popularly known as "Restricted Area Permit" is another reason for such exploitation. It may thus appear that, in the guise of revenue generation, promotion of tourism, and industrial development, the age-old cultures, traditions, and biological resources of the NE region are being used and exploited unethically with no substantial safeguards for protecting and conserving biological diversity and indigenous cultures.

The problems with a *sui generis* system have been experienced by many countries, including Costa Rica, Kenya, Peru, and Zambia. The problems include identifying and establishing owner rights, diversity of the subject, technical procedures for the acquisition and maintenance of conferred rights, difficulty in time limits on utilising conferred rights, agreements on benefit sharing structures, etc.[47] Looking at the experience of other countries, a *sui generis* system may not be advisable for the NE region. Besides, the union central government has already enacted legislation in conformity with the TRIPS Agreement. The problem is therefore not the application of a *sui generis* system but the strengthening of existing statutory laws by modifying them to incorporate customary laws so as to foster wider and more-effective implementation of both domestic and international laws. The special status enshrined by the Constitution of India Articles 371A, 371B, 371C, 371F, 371G, 371H, and the Sixth Schedule to the Constitution of India for the NE States should be kept in mind when enacting any legislation by the central government. In the case of IP law, too, the state government should, like with other central enactments, modify and amend the central enactments before enforcing them in the state to maintain equilibrium with the customary law to achieve desired outcomes.

V. Documentation and Digitization of TK and TCEs

It has been the initiative of the Indian government as well as the WIPO to document TK and TCEs, an effort that has been successful to a great extent. Many scholars and experts are of the view that TK and TCEs should be documented at the earliest opportunity. According to them, documentation would prevent unethical patenting, biopiracy, and

[46] Noti. dated Ministry of Home Affairs 30th December 2010.

[47] *See* International Intellectual Property Institute, *Is a Sui Generis System Necessary?—Benefit Sharing Agreements*, New York City (2004) http://iipi.org/wp-content/uploads/2010/07/NewYork011404.pdf (last visited March 24, 2020).

misuse of TK and TCEs.[48] The NE region is a land inhibited by diverse tribal populations and, since time immemorial, knowledge of traditions, culture, custom, usages, folklore, healing, and medicine etc., have been passed down orally from generation to generation. The colonial administration as well as the Indian Constitution recognised such orally passed down cultures, traditions, customs, and usages. The reason behind such recognition is to preserve the unique and rich cultural and material resources of the land. In both the colonial and post-independence periods, it has been the fervent policy of the government to develop the region while preserving its uniqueness. Thus, in both periods, we see plural legislation which is constitutionally conferred and recognised. The reason for such plural legislation is that the customary law is best suited for the administration of the region. Custom cannot be codified, and in the NE region the TK and TCEs are all based on customary practices. Hence, they are deeply rooted together and cannot be practically isolated from each other. However, for academic purposes, they can be studied as different subjects. Our concern in contemporary times is not academic study but finding practical solutions for the problem of protecting and conserving the TK and TCEs in their originality from commercial exploitations. Documentation of TK and TCEs means codifying the traditions, cultures, customs, and usages and making them available worldwide. Thus, the choice is whether we are in search of a way to protect and conserve such culture and traditions or if we want them to be commercialised and made known to the outside world to attract multinational corporations and individuals with monetary interests in the TK or TCEs. Documentation and digitization places TK in the public domain, and current IP laws may not respond appropriately to protect the interests of indigenous communities. TK may also lose its commercial value and be used by people without due permission and approval. Again, there are risks of leaking such knowledge and making it freely available for the public. Secret TK like medicines, healings, trade, arts, defense and war tactics, etc., become vulnerable to misappropriation.

Conclusion and Suggestions

Traditions and customs predate modern laws. They are older than the contemporary laws and courts. They have been used by generations and stood the test of time. They are fundamental to the identity of each community. For the NE region, their cultures, traditions, customs, and usages have regulated society for thousands of years. However, there is

[48] *See generally* Neelotpal Deka, *Traditional Knowledge in North-East India: Scope for A Sui Generis Protection*, 3(1) The Clarion 92–97 (2004); Pradeep Dua, *Intellectual Property Rights: Need for a Sui Generis Regime for Non-codified Traditional Medicine in India*, 2(1) AJPCT (2014); Moses Maguipuinamei, Traditional Knowledge, *Traditional Cultural Expressions and Intellectual Property Rights of Tribes in North-Eastern Region of India*, 6(2) International Research: Journal of Library & Information Science 226–236 (2016).

no available record of any unethical use or misappropriation of TK and TCEs during those periods. The issue started with the evolution of IP regimes and enactments of IP laws at the international and domestic levels. The customary system of protection and conservation TK and TCEs in the NE region is based on collective ownership by the community and customary practices, but individuals hold the knowledge and have the right to use it with the consent of the community. On the other hand, contemporary IP law is based on individual innovation and creation, such as an author in copyright law or an inventor in patent law. However, TK is passed down from generations thousands of years back and may involve a dynamic interplay between collective and individual creativity. Thus, the notion of authorship or inventorship in contemporary IP law may not apply to TK and TCEs. Hence, existing IP law may prove too narrow for the NE region because of its complicated and customary collective-ownership system. Similarly, the PPVFA emphasises technical and scientific aspects such as DUS test for registration (onus of such test lies upon the farmer), lack of laboratories and transport facilities, and other complex legal procedures, which might be suitable only in developed regions, failing to address the challenges faced by the indigenous peoples of the NE. Thus, it requires a pragmatic study of the current IP laws and the customary laws of all the tribes, subtribes, and clans to make necessary amendments that may maintain equilibrium and satisfy the conflicting interests and challenges of the region.

The object of law, whether customary or formal, is to regulate, protect, and deliver justice. The debate is not about which form of law should be applied. Deficiencies and loopholes may be apparent in both formal and customary legal structures. The concern is to apply such laws that would satisfy the conflicting interests between the modern IP laws and the customary laws. Thus, a good law is one that satisfies the conflicting interests of the society. Both the pre- and post-constitutional governments have faced this issue of conflict and created a plural legal system which recognises customary autonomy as the best for the administration of the NE region. The application of fundamental laws like the Penal Code, Criminal Procedure Code, and Civil Procedure Code in the hills of the tribal NE has long been experimented with by governments. Finding such technical and complicated laws ill-suited for effective administration and peaceful settlement of disputes, the government removed the application of such laws in the hills of the NE in favor of customary law.[49] This system of administration and governance is nearly two hundred years old and society has progressed tremendously in those years.

India's NE is a land with rich and diverse traditions, cultures, customs, and usages deeply rooted in the people and their societies. Isolating their customary laws from central IP laws would result in nothing but chaos and conflict because the social fabric in the NE is different

[49] Vide the Assam Frontier Tracts Regulation of 1880, and Assam Frontier Tracts Regulation of 1884.

from the mainstream societies and therefore the central laws would not entirely cater to the needs of region. Further, even if a *sui generis* system is developed for the NE, it would not be adequate as it will not be applicable outside the region. It is therefore imperative to consult customary authorities and accordingly modify and amend the technical Intellectual Property Rights law before enforcing it. The customary authorities at the village, district, and regional levels should be incorporated into the state board and various other statutory committees constituted under the Biological Diversity Act of 2002. In the Copyright Act of 1957, and the Designs Act of 2000, provisions regarding TK and TCEs should be inserted after carefully studying the customary law of the region. Under the PPVFA, the concept of benefit sharing should widen to incorporate the challenges faced by indigenous tribal peoples living in different territorial limits with concepts of ownership of knowledge different from mainstream society. Further, the scientific and technical aspects involved in registration of plant varieties should be amended to alleviate the practical and economic obstacles faced by the people of the NE region in gaining protection under this system of registration. Instead of *sui generis* legislation and documentation of TK and TCEs, the existing legal framework should be amended to accommodate customary law to protect the interests of tribal communities in their TK and TCEs.