Indonesian Journal of International Law

Volume 19
Number 2 *Third World Approaches to International Law*

Article 6

1-31-2022

Communal Rights as the Hegemony in Third World Regime: An Indonesian Perspective

Yunita Maya Putri
University of Lampung, Indonesia

Ria Wierma Putri
University of Lampung, Indonesia

HS Tisnanta
University of Lampung, Indonesia

Recommended Citation

Putri, Yunita Maya; Putri, Ria Wierma; and Tisnanta, HS (2022) "Communal Rights as the Hegemony in Third World Regime: An Indonesian Perspective," *Indonesian Journal of International Law*: Vol. 19: No. 2, Article 6.
DOI: 10.17304/ijil.vol19.2.5
Available at: https://scholarhub.ui.ac.id/ijil/vol19/iss2/6

Indonesian Journal of International Law (2022), Vol. 19 No. 2, pp. 289-315
https://doi.org/10.17304/ijil.vol19.2.5

COMMUNAL RIGHTS AS HEGEMONY IN THE THIRD WORLD REGIME: INDONESIAN PERSPECTIVE

Yunita Maya Putri, Ria Wierma Putri & HS Tisnanta

University of Lampung, Indonesia
Correspondence: yunita.maya@fh.unila.ac.id

Abstract

The Trade-Related Aspects of Intellectual Property Rights (TRIPs) recognize communal rights as a part of intellectual property right (IPR) regimes at the international level. TRIPs focus on economic interests, technology development, and investment progress to elevate members' social-economic welfare. In accordance with other international law field, TRIPs is also dominated by developed countries' values and create disparity in the ability to master knowledge, technology, and information as intangible capital. On the other hand, developing countries struggle to fulfill TRIPs standards to accommodate their potential. However, the recent development of IPR is associated with communal rights that recognize intellectual creativities from culture and tradition. These potentials will provide numerous advantages to developing countries rich in culture, tradition, and nature. Indonesia must be able to take appropriate steps to promote and protect its communal rights in response to the hegemony of communal wealth controlled by developed countries to maintain national identity. Therefore, this research evaluates the advantages and challenges of protecting communal rights and its potential to generate economic benefits for the entire custodial community. The result indicated that the protection for communal rights is still vague due to the lack of written and systematic inventory of the traditional cultures produced by indigenes, as well as the registration model and benefit-sharing by the state to the custodian community in Indonesia. Government policies are needed to gradually provide adequate protection in the form of defensive protection and the sui generis law.

***Keywords** : communal rights, developing countries, hegemony, third world.*

Submitted : 30 January 2022 | Revised : 17 June 2022 | Accepted : 30 June 2022

I. INTRODUCTION

International law has almost four centuries of history, but its roots date back to ancient Greek and Roman times.[1] The birth of international law directly resulted from the emergence of civilized and independent countries in Europe in the XV and XVI centuries, known as the renaissance period. Lawyers in this century have started to consider the evolution of independent and sovereign states and to write an enormous variety of legal issues for these

[1] Mahendra Putra Kurnia, "Hukum Internasional (Kajian Ontologis) [International Law (Ontological Studies)]", *Risalah Hukum* 4, no. 2 (2008): 77.

nations. They realized the need to implement certain rules to regulate these countries' relationships. In the circumstances with no fixed customary rules, these jurists need to find and enact applicable principles based on reasonable analogy. These jurists adopted not only Roman law as the subject of European studies but also explained ancient historical precedents, canonical and semi-theological concepts. They also adopted natural law, a concept that has existed for centuries, significantly influenced by the development of international decree.[2]

After World War II, there was a period of vividness, which led to the emergence of a new stage associated with developing societal and international laws. These were the product of research funding that initially contributed to military investment but later promoted economic and innovative enhancement as an entirety. This was due to the several changes and new developments that differed from the previous period.[3] Following World War II, the economy appeared to be steadily increasing, as well as the generated income.[4] This situation does not reflect the entire globe because it is a generally known fact that from the beginning of the XVII century until the end of World War II, most nations, especially those in Asia and Africa, were colonized. Therefore, the polarization of the international community at that time was divided into two. The first is the smaller colonized group, and the second is the larger one.[5]

International law experts from colonized nations stated that it is strongly dominated by European and American values and does not in any way accommodate their local wisdom.[6] Based on the third-world countries' (former colonies) perspective, it is a discourse, regime, dominating, and subordinating accommodative policy, although not liberating.

The term "third world nations" emerged during the cold war between America and the Soviet Union. Both parties were familiar with the West and East Blocks or NATO and Warsaw Pact at that time. However, Warsaw Pact allies include countries such as the Soviet Union, Bulgary, Roman, and are

[2] Dyah R. A. Daties, "Memahami Third World Approaches to International Law (TWAIL) [Understanding Third World Approaches to International Law]," *Jurnal Sasi* 23, no.1 (2017): 1, https://doi.org/10.47268/sasi.v23i1.154

[3] Sandra E. Price, Donald S. Siegel, "Assessing the Role of the Federal Government in the Development of New Product, Industries, and Companies: Case Study Evidence since World War II," *Annals of Science and Technology Policy* 3, no. 4 (2019): 350, http://dx.doi.org/10.1561/110.00000016.

[4] Amy Kapcynzski, David Singh Grewal, Jedediah Britton-Purdy, "How Law Made Neoliberalism," *Boston Review*, 22 February 2021, accessed 30 January 2022, https://bostonreview.net/articles/jedediah-purdy-david-g-victor-amy-kapczynski-lpe/.

[5] Bagus Riadi, "Menggugat Hegemoni Demokrasi: Disciplinary Power Demokrasi di Negara Dunia Ketiga [Challenging Democratic Hegemony: Disciplinary Power of Democracy in Third World Countries]," *Politeia* 12, no. 2 (2020): 82, doi: 10.32734/politeia.v12i2.3695.

[6] Daties, "Memahami Third World Approaches to International Law (TWAIL) [Understanding Third World Approaches to International Law]," 18.

known as the second-world nations. Allies of NATO include America, Canada, and Japan, which are referred to as the first-world nations.[7] Countries that are not an ally of each party are called the "third world nations." At the same time, the Asian and African Regions were experiencing backwardness, poverty, and hunger due to war, colonialism, and slavery imposed on them by the Western and Eastern Bloc countries.

Along with the development of contemporary international law, the "claims" of ex-colonial third world countries against the dominance of European and American values led to the birth of TWAIL or Third World Approaches to International Law. TWAIL is a movement of scholars and practitioners of international law and policy concerned with issues related to the Global South, commonly known as third-world countries.[8] According to Antony Anghie,[9] "he principle of universality creates a difference that needs to be sanctioned. Moreover, it is designed to disempower the party to which it applies. Indeed, constructing the universal policy is not an innocent act, but it would seem as if the 'international' was formulated to ensure the Third World nations act as their subordinates."

This event caused Indonesia to organize the Asian-African (Bandung) Conference held in Bandung in 1955, which led to the *Dasa Sila Bandung*.[10] It brought together leaders from countries that accounted for almost two-thirds of the world's population. The attendees did not correctly fit into the First World versus Second World political matrix, nor was the Conference a clear predecessor to the Non-aligned Movement.[11] The Conference was symbolic because it was a decolonization movement that swept the world after World War II. In 1996, a group of Harvard law graduates initiated a series of meetings during spring. This event led to the emergence of TWAIL, which was understood to be a form of anti-colonialism against western countries, and

[7] Rio Akbar Pramanra, Roihanatul Maziyah, Dela Karisma, Putri Rahma Asri, Ayu Tiara Karel Bua, Dimas Bagas Priambodo, Bayu Mahendrea, "Kemitraan Strategis Non-Zero Sum Game: Hubungan ASEAN-Australia dalam Konteks Geopolitik [Non-Zero Sum Game's Strategic Partnership: ASEAN-Australia Relations in a Geopolitical Context]," *Indonesian Perspective* 3, no, 2(2019): 115, https://doi.org/10.14710/ip.v3i2.22347.

[8] Hilton T. Putra, Aan Asphianto, "Third World Approach to International Law (TWAIL) Sebuah Pendekatan Alternatif Terhadap Hukum Internasional [Third World Approach to International Law: An Alternative Approach to International Law]," in *International Law Lecturers Association Symposium Proceedings* (Andalas University, Indonesia, 7-8 September 2017), 116.

[9] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2004), 328.

[10] Taufan Herdansyah Akbar, Agus Subagyo, & Jusmalia Oktaviani, "Realisme Dalam Kepentingan Nasional Indonesia Melalui Forum Konferensi Asia Afrika (KAA) dan Gerakan Non Blok (GNB) [Realism in Indonesia's National Interests Through the Asian-African Conference Forum and the Non-Aligned Movement],"*Jurnal Dinamika Global* 5, no. 1 (2020): 124, https://doi.org/10.36859/jdg.v5i1.194.

[11] Luis Eslava, Michael Fakhir, Vasuki Nesiah, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures*, (Cambridge University Press, 2017), 4, https://doi.org/10.1017/9781316414880.

played an essential role in forming International Law.[12] The role of TWAIL towards Third World Countries is that it was an expression of resistance to the hegemony of the Western world in the discipline, theory, and practice of international law.[13]

TWAIL's role in fighting Western Hegemony is in line with its goals, namely understanding, deconstructing, and dismantling the usefulness of international law as a medium for creating and preserving a hierarchy of norms and institutions that makes non-Europeans appear as subordinates to Europeans. It strived to establish and present alternative normative legal structures for international governance. This was realized through scholarships, policies, and politics to eradicate third-world nations' underdevelopment.[14] The majority of the developing countries have participated in various world forums to formulate various legal provisions as well as ensure it reflects the views and interests of the third world nations. They also used the United Nations Forum and multiple others held globally to end the era of colonialism and fight for their interests in the economic and social fields.[15] The New International Economic Order (NIEO) is one of the forums that helped these nations to face their issues by shifting pressure from developing to developed countries.[16] The NIEO principles essentially sought to alter the classical international order, which is heavily affected by the industrialized countries' political and economic policies.[17] Another form of fighting for justice adopted by the TWAIL has sparked demands from these countries to create justice and balance the social order in the world. The emergence of TWAIL greatly contributed to the realization of justice and the balance of social order. Bung Karno's thunderous speech at the opening of the Asian-African Conference held in Bandung on April 18, 1955, initiated the emergence of the Third World. From then on, one world was politically divided into three, namely first, second, and third world nations. However, whether or not it was realized, all countries that participated in the Conference automatically became members of the third world group.[18]

---

[12] Makau Mutua, "What is TWAIL?", *Proceedings of the ASIL Annual Meeting* 94, (2000):31, https://doi.org/10.1017/S0272503700054896

[13] *Ibid*, 36.

[14] *Ibid*, 37.

[15] Janedjri M. Gaffar, "Sikap Kritis Negara Berkembang terhadap Hukum Internasional [Critical Attitudes of Developing Countries to International Law]," *Jurnal Konstitusi* 10, no. 2 (2013): 209, https://doi.org/10.31078/jk%25x

[16] Ha-Joon Chang, "Building Pro-Development Multilateralism: towards a "New" New International Economic Order," *CEPAL Review*, no. 132 (2020): 73.

[17] M. Ya'kub Aiyub Kadir, "The Failure of New International Economic Order: a Lesson Learned," *Yuridika* 36, no.1 (2021): 142, doi: 10.20473/ydk.v36i1.13561.

[18] Tri Harso Karyono, *Arsitektur dan Kota Tropis Dunia Ketiga [Architecture and Tropical Cities of the Third World]*, (Harian Sinar Harapan, 2013), 1.

The initial characteristics of the classification of the political stream later provided other indications regarding differences in the level of economy, knowledge, technology, education, social welfare, law enforcement, civilization, etc.[19] Based on the earlier explanation, in circumstances where TWAIL is oriented toward the future, it is expected to significantly help Asian and African countries to be completely free from the intervention of the first world nations, who tend to manipulate aspects during the process of the international law. Indonesia is highly committed to realizing justice and striking a balance in the world. This is stated in the Preamble of the 1945 Constitution of the Republic of Indonesia (UUD 1945). It read, "Indeed independence is the right of all nations; therefore, colonialism needs to be abolished because it is categorized as inhumane and unfair and participates in executing world order based on freedom, eternal peace, and social justice."

TWAIL is a reformist methodology that addresses intellectual property counter-hegemony from the standpoint of third-world states. It was recently utilized as a critique to analyze the socio-legal creation of international intellectual property rights and its development through case studies. The reason it was used as a methodology is that it focuses on how the actors' identities and interests influence the function of Intellectual Property rights in third-world countries.[20] The Intellectual Property Rights regime born out of free trade is certainly not far from its principles which demand equality. All parties are regarded as "gladiators" who need to be able to survive in this fight. The principle of survival of the fittest simply implies that the strongest will surely survive. Poor and developing nations are bound to lose to developed countries with an established concept of Intellectual Property Rights. Indonesia is extremely rich in ethnic diversity, giving birth to a sense of art that manifests in various cultural products. The creative form of "Indonesians," colored by ethnic diversity, environment, topography, and religiosity, is a known fact, even abroad. Its product is also included in sustainable traditional knowledge, passed down from one generation to the next.[21]

Protection of Intellectual Property Rights, especially in developed countries, such as Western Europe, stems from the idea of natural law, particularly that of absolute ownership, inherited by the Roman legal system.[22]

[19] *Ibid.*

[20] Pratyush Nath Upreti, "A TWAIL Critique of Intellectual Property and Related Disputes in Investor-state Dispute Settlement," *The Journal of World Intellectual Property 25,* no. 1: (2022): 223, https://doi.org/10.1111/jwip.12217

[21] Muhammad Djumhana, *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual [Development of Doctrine and Theory of Protection for Intellectual Property Rights]* (Bandung: Citra Aditya Bakti, 2006), 13.

[22] Trisno Raharjo, *Kebijakan Legislatif dalam Pengaturan Hak Kekayaan Intelektual [Legislative Policies on the Regulation of Intellectual Property Rights]*, (Yogyakarta: Pensil Komunka, 2006), 17

Its development as part of human rights started in England precisely in the Magna Charta. Based on the provisions of Article 27 paragraph (2) of the Universal Declaration of Human Rights, "everyone has the right to protect their moral and material interests, including scientific, literary or artistic creations." [23] Presently, the protection of Intellectual Property Rights is in favor of developed countries, which emphasizes individual interests. This contradicts the people's "atmosphere of thought" in developing countries irrespective of their familiarity with this policy, which constantly strives not to reduce the community's interests.[24] The philosophy of protecting Intellectual Property Rights is to encourage progress and the emergence of new ideas as well as create a conducive climate for the benefits of spreading these initiatives. In addition, the creators and inventors are financially rewarded. At the same time, the public enjoys and benefits from the developed creations. This concept does not only protect the rights of the inventor or creator but also that of the users of Intellectual Property Rights.

The GATT agreement was the forerunner of the WTO (World Trade Organization) formation, emphasizing the importance of protecting intellectual property rights, especially after the meeting held in Marrakesh in April 1994. This framework was replaced with a global trading system known as the WTO, ratified by Indonesia, as stated in Law no. 7 of 1994. Its structure comprises the TRIPs Council (Trade-Related Aspects of Intellectual Property Rights), also known as Trade Aspects Including Intellectual Property Rights. The initial agreement was formed due to the anticipation of the United States and several European countries who regarded the WIPO. Meanwhile, under the auspices of the United Nations, TRIPs were unable to protect their intellectual property in the international markets, and it was argued that this inability resulted in the trade balance between the United States and other countries. Europe experienced negative progress, while the Uruguay Round of TRIPs negotiations was able to discern the fact that the proposed agreement would affect the interests of developing countries. Historically, the majority have not been able to provide a high level of protection for Intellectual Property Rights in their national legal systems. If, as a consequence of the TRIPs negotiations, these countries agree to provide such protection, then the recognition of intellectual property rights is bound to logically result in the transfer of wealth from a developing economy to an industrialized one, at least in the long term.

---

[23] Agus Triyanta, "Hak Milik Intelektual dalam Pandangan Hukum Islam *[Intellectual Property Rights from the Islamic Law Perspective]*", *Jumal Hukum Ius Quia Iustum* 8, No. 17 (2001): 33, https://journal.uii.ac.id/IUSTUM/article/view/6967.

[24] Trisno Raharjo, *Kebijakan Legislatif dalam Pengaturan Hak Kekayaan Intelektual [Legislative Policies on the Regulation of Intellectual Property Rights]*, 17

Initially, these developing countries opposed the TRIPs negotiations because they had already foreseen the unintended economic consequences. This led to various reasons during the Uruguay Round negotiations, and several developing countries involved in the process certainly had different motivations for accepting the agreement. Nonetheless, it was evident that the TRIPs Agreement was part of a bargaining package,[25] and climate change had the potential to aggravate all these crises. It fundamentally undermines the people's way of life, making it difficult to effectively grasp the potential impacts of current institutions and intellectual frameworks.[26]

The Purposeful Legal protection of the intellectual property is intended to ensure the lawful party has the right to exploit its wealth with a sense of security and comfort. This creates a conducive climate that allows them to produce different creations or inventions. On the other hand, the right owner is made to disclose the method and wealth benefits.[27] Intellectual Property Rights protection standards regulated in the TRIPs Agreement are loaded with the interests of developed countries. One can safely and comfortably disclose his work because the law provides protection. Although, the public is bound to enjoy or benefit from it on a license basis or even develop it at a more advanced level. The TRIPs Agreement has become a means for developed countries to create a world trading system at the expense of developing nations.[28] Countries deemed to have violated Intellectual Property Rights are subject to cross retaliation in the form of trade sanctions. Developed countries are more prepared than underdeveloped ones because, to a more significant extent, they have mastered the most recent science and technology.

Indonesia must be cautious in adopting the TRIPs Agreement into its seven Intellectual Property Rights laws. In that case, the essence of the dominant legal politics is the desire to continuously adjust the formation of these regulations with the provisions of the WTO conventions, especially the TRIPs Agreement. At the same time, aspects of national interests considered during its deliberation are not perceived as the soul of the law. The attributes

---

[25] Hendra Tanu Atmadja, "Urgensi Perlindungan Hak Kekayaan Intelektual dalam Perdagangan Bebas, *[The Urgency of Protection of Intellectual Property Rights in Free Trade]*." *Jurnal Lex Jurnalica 12*, no. 3 (2015): 192.

[26] Jedediah Britton-Purdy, David Singh Grewal, Amy Kapcynski, K. Sabeel Rahman, "Building a Law and Political economy Framework: Beyond the Twentieth Century Synthesis," *The Yale Law Journal* 129*,* no. 6 (2020*):*1788.

[27] Rina Shahriyani Shahrullah, "Perlindungan terhadap Hasil Karya Cipta Pengrajin Hijab di Kota Batam *[Protection of the Copyrights for Hijab Craftsmen in Batam City]*", *Journal of Law and Policy Transformation 3*, no. 1(2018): 193.

[28] Agus Sardjono, *Pembangunan Hukum Kekayaan Intelektual Indonesia: Antara Kebutuhan dan Kenyataan [Development of Indonesian Intellectual Property: Between Necessity and Reality],* (Jakarta: UI Press, 2008), 34.

important for the interests of the national Intellectual Property Rights are not firmly regulated as complementary. For example, there is a need to consider the mandatory licenses, parallel imports, benefit-sharing, disclosure or origin, prior informed consent, licensing agreements that tend to harm the interests of the national economy, protection of traditional knowledge, factors, and products of people's culture. These attributes are regulated in non-operational articles because they depend on Government Regulations or Presidential Decrees, which were presently implemented.[29]

Developed and developing countries have different viewpoints on Intellectual Property Rights. The developed nations believe their investments and technologies need not be transferred to developing countries if there is no protection of Intellectual Property Rights. They also believe that if developing countries increase the protection of Intellectual Property Rights, they are bound to develop their domestic resources sustainably. Therefore, there is a need for local inventors and creators to continuously discharge their duties effectively, thereby enabling developing countries to become successful competitors, produce diverse technology, and reduce dependence on developed nations. Developing countries' points of view are: 1) developed nations only enjoy the benefits of increased protection of Intellectual Property Rights. The developing ones are only regarded as consumers, thereby causing them not to see the need to protect their Intellectual Property Rights. These are controlled by companies from developed countries and dominate the global market. The potential of Intellectual Property Rights in developing countries, such as arts, and traditional knowledge, find it challenging to meet the criteria of the system originating from the developed nations. 2) Intellectual Property Rights are perceived as an obstacle in the technology transfer process from developed countries to developing ones because they have to pay royalties and license fees, which are getting expensive, draining their foreign exchange. 3) Protecting Intellectual Property Rights is considered an effort to ensure developed countries dominate the developing ones. This is to the point of futile development of the Intellectual Property Rights law if the dominant foreign interests are put forward.[30] In the legal context, the formation of laws and regulations needs to refer to the Pancasila philosophy, which emphasizes the balance between individual and community (communal) rights, as contained in the 1945 Constitution and the social reality of the Indonesian nation.

[29] Tri Setiady, "Harmonisasi Prinsip-prinsip TRIPs Agreement dalam Hak Kekayaan Intelektual dengan Kepentingan Nasional *[Harmonization of the Principles of the TRIPs Agreement in Intellectual Property Rights with National Interests]*"." *Fiat Justisia Jurnal Ilmu Hukum* 8, No. 4 (2014): 595, https://doi.org/10.25041/fiatjustisia.v8no4.322.

[30] Budi Agus Riswandi, "Politik Hukum Hak Cipta: Meletakan Kepentingan Nasional untuk Tujuan Global *[Copyright Law Politics: Putting the National Interest for Global Goals]*" *Jurnal Hukum Ius Quia Iustun* 11, no. 25 (2004): 11, https://doi.org/10.20885/iustum.vol11.iss25.art6.

The issue currently being analyzed in the scope of this study is the legal protection of the indigenous people or traditional communities' intellectual property rights. This is one of the problems usually encountered in providing protection. Communal intellectual property owned by Indonesia becomes material when manifested in the form of products with a distinctive design. Specific differences are associated with the basic concepts and aspects of ownership. Interestingly, the basic concept of a capitalistic western society is centered on the communal intellectual property being owned individually.

Meanwhile, indigenous peoples see it as a heritage or cultural expression rather than an economic viewpoint. Communities as owners of communal intellectual property do not consider the economic benefits and have no intention of protecting their knowledge from outsiders. This is due to the assumption that it is a shared attribute. Although, this condition is vulnerable to acts of misappropriation, namely the use by other parties to ignore their rights.[31]

This led to important issues, such as the Public Domain Position that communal intellectual property is a civic asset that all residents need to enjoy. This is against businesses that intend to convert this wealth into their commodity. Therefore, they tend to disagree that the enactment of Intellectual Property Rights is mainly concerned with protecting individuals' rights to damage traditional institutions and communal structures. Second, the appropriation position supports the ownership of communal intellectual property and its utilization for commercial and other purposes. Similarly, it is presumed that communal intellectual property is a commodity and an important measure to determine its usage and users. Third, the moral right position states that the holders of communal intellectual property rights must be protected and given certain privileges in complete ownership. It also tends to prevent or challenge the claims of the beneficiaries or users and is commercialized only by those entitled.

Communal intellectual property rights are not necessarily discussed in the international and national spheres. Its protection has been considered since the recognition of human rights, especially in Article 6 of Law no. 39 of 1999 concerning Human Rights, which formally recognizes indigenous peoples' existence and traditional rights.[32] This is in line with Miriam Budiarjo's

---

[31] Muthia Septarina, "Perlindungan Hukum Pengetahuan Tradisional dalam Konsep Hak Kekayaan Intelektual *[Legal Protection for Traditional Knowledge in the Concept of Intellectual Property Rights]" Al-Adl: Jurnal Hukum* 8, no. 2 (2016): 11, http://dx.doi.org/10.31602/al-adl.v8i2.457.

[32] Miranda Risang Ayu, Harry Alexander, Wina Puspitasari, *Hukum Sumber Daya Genetik, Pengetahuan Tradisional, dan Ekspresi Budaya Tradisional di Indonesia [Law of Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions in Indonesia]* (Bandung: Alumni, 2014), 27.

definition of human rights that these privileges were obtained and brought about through birth. In this case, right is inherent in human existence without any form of distinction based on nation, race, religion, or gender, therefore it is universal. In accordance with this understanding, it is evident that this concept emphasizes its importance in society. It should also be noted that due collective human rights form, which is the core of the second and third generations, is recognized[33]

Collective rights reflect group interests based on a common fundamental perspective. Congruently, it has similar attributes to communal rights, namely that they are "commonly possessed" by collective subjects (local communities) to protect cultural practices. This is in line with the collective rights reported by Freeman that:[34]

> *"I propose to defend the conception of collective human rights. To prove that these are lire privileges, that have the exact nature and justification as well-established human rights. To this end, it was further argued that a particular conception of these rights, namely 'interest' - needs to be defended against some plausible criticisms. In addition, it can also be defended against communitarian and relativist objections. It was concluded by presenting the argument while identifying certain problems raised by attempting to reconcile individual and collective human rights."*

From Freeman's analysis, it is evident that the justification of collective rights is similar to that of fundamental human rights. These are consistent with individual rights in society which are irreducible and whose development is collective. It was concluded that Indonesia recognizes the community's rights, including protecting the intellectual property owned by the indigenous people as a form of culture that has been created, protected, and preserved collectively. Communal Intellectual Property Rights concerns properties, recognition, respect, and appreciation of the creators' contributions. Therefore, Intellectual Property Rights play a vital role in protecting the dignity of the communal holders. For example, when granting Intellectual Property Rights, the holders supervise its usage by other parties for commercial purposes. Presently, the regulation contained in TRIPS has not been able to accommodate the original property of the traditional community optimally. The provision of this protection becomes important when faced with its unique characteristics.

There are several reasons for communal intellectual property's protection development urgency. These include justice, conservation, preservation of

---

[33] Miriam Budiarjo, *Dasar-Dasar Ilmu Politik [Basics of Political Science]* (Jakarta: Gramedia Pustaka Utama, 120).

[34] Michael Freeman, "Are There Collective Human Rights?," *Political Studies* 43, no. 1 (1995): 28, https://doi.org/10.1111/j.1467-9248.1995.tb01734.x.

cultural practices, prevention of confiscation by parties who are not entitled to the components of traditional knowledge, and the development of its interests. Legal protection does not only involve the avoidance of unfair competition rather, it is also beneficial for equity and the development of economic welfare. Access is given to other parties to benefit from the communal property rights as approved by the community, the owner of the traditional knowledge. This aids them in taking advantage of these rights as intangible capital in economic development. Based on these problems, this research explains the advantages, challenges, and benefits of protecting communal intellectual property in Indonesia.

II. THE BENEFITS OF COMMUNAL INTELLECTUAL PROPERTY

Communal Intellectual Property is divided into cultural expressions, traditional knowledge, genetic resources, and geographical indications.[35] This term was derived separately to accommodate the needs of modern society's understanding of the characteristics of each element. Traditional knowledge is similar to patents, and cultural expressions are closer to Copyright, Industrial Design Rights, and Trademark rights in modern intellectual property.[36] Elements of culture form a cultural and social system in society. This is then preserved and used as a way of life, in addition, culture becomes valuable because it functions as a form of identity and history.[37] John Locke proposed the concept of ownership concerning human rights that every individual is naturally privileged to own the outcome of his creation. If someone creates or invents something, then such an individual need not be harmed by others.[38]

The Universal Declaration of Human Rights fundamentally regulates intellectual property based on cultural rights. This protection reflects a global concern to ensure the fulfillment of fundamental rights and is treated according to internationally agreed minimum standards.[39] Article 27 of the Universal

---

[35] Robiatul Adawiyah, Rumawi, "Pengaturan Hak Kekayaan Intelektual dalam Masyarakat Komunal di Indonesia", *Repertorium 10 [Regulation of Intellectual Property Rights of Communal Society in Indonesia]*," *Repertorium:* 10, no. 1 (2021): 5, doi: 10.28946/rpt.v10i1.672.

[36] Direktorat Jenderal Kekayaan *Intektual Kementerian Hukum dan HAM RI, Modul Kekayaan Intelektual Bidang Kekayaan Intelektual Komunal* [*Intellectual Property Module for the Communal Intellectual Property Sector]*, (Direktorat Jenderal Kekayaan intelektual Kementerian Hukum dan HAM RI , 2019), https://www.dgip.go.id/unduhan/modul-ki?kategori=kekayaan-intelektual-komunal.

[37] Atvi Lutviansori, *Hak Cipta dan Perlindungan Folklore di Indonesia [Copyright and Folklore Protection in Indonesia]*, (Yogyakarta: Graha Ilmu, 2010), 97.

[38] *Ibid*, 100.

[39] Zainul Daulay, *Pengetahuan Tradisional, Konsep Dasar Hukum dan Praktiknya [Traditional Knowledge, Basic Legla Concepts and its Practices]* (Jakarta: Radja Grafindo Persada, 2011), 77.

Declaration of Human Rights stipulates that:

> *"Everyone has the right to freely participate in the cultural aspect of the community, enjoy the arts, and share in the advancement of science and the benefits thereof. (2) Everyone has the right to be protected from the moral and material interests of their scientific, literary or artistic production."*

Furthermore, ICESCR 1966 explains that everyone enjoys and is usually involved in their culture. According to Article 15, the parties involved recognize the right of everyone to participate in cultural celebration through the leisure of science and its implementation. It further describes that every party who is a creator has the right to receive protection as well as morally and materially benefit from their scientific, literature, and artistic creations.

Other protections within the framework of UNESCO are actions aimed at ensuring the preservation of intangible culture based on Article 1, Chapter 1 of the general provisions. It encourages each party to respect the intangible cultural inheritance from the community and related individuals. This preservation increases local, national, and international awareness regarding its significance, which is perceived as a form of paying respect. Additionally, this research also regulates parties to provide international cooperation and support in implementing this gesture.

WIPO recognizes traditional cultural expressions communally owned by a community group. The regulation of its legal protection at the national level is mandated in several policies, including the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyrights. Therefore, it was stipulated that legal instruments are still part of the copyright regime where the state is still in control of all traditional sources of wealth with the obligation to carry out an inventory and preserve existing potentials. Traditional cultural expressions regulated in Article 38 of the Copyright Law have affirmed that the state holds these. The reason is that the state needs to take inventory, maintain, and preserve traditional cultural expression. To benefit from this attribute, there is a need to adhere to the indigenous values of the community. The article also elaborates further provisions regarding copyrights held by the state on traditional cultural expressions regulated by Government Regulations.

Another regulation regarding communal culture is Law of the Republic of Indonesia Number 5 of 2017 concerning the Advancement of Culture. This policy aims to increase cultural resilience and its contributions to world civilization through the Protection, Development, Utilization and Fostering of Culture. The advancement is based on the principles of cultural promotion regulated in Article 3: tolerance, diversity, localization across regions,

participation, benefits, sustainability, freedom of expression, cohesiveness, equality, and cooperation.

In Article 4 of the Law for the Advancement of Culture, efforts to promote traditional beliefs are carried out to develop the noble values of the nations. These consist of culture, enriching diversity, strengthening national identity, unity, and integrity, educating the nation's life, improving its image, and creating a society. Furthermore, civil society improves the people's welfare, preserves the nation's cultural heritage, and influences the development of world civilization, thereby causing culture to be perceived as a directive of national development.

The object of cultural promotion is confirmed in Article 5 of the Law on the Promotion of Culture, which includes oral traditions, manuscripts, customs, sites, traditional knowledge, technology, arts, languages, folk games, and sports. Based on Article 44 of the Law for the Advancement of Culture, local governments play an essential role in promoting culture under their administrative areas in accordance with the following tasks: (1) guarantee freedom of expression, (2) ensure the protection of cultural expressions, (3) promotes culture, (4) maintain diversity, (5) manage related information, (6) provide cultural facilities and infrastructure, (7) serves as a source of funding for the promotion of culture, (8) establish a mechanism for community involvement, (9) encourage active roles and community initiatives in the Advancement of Culture, as well as (10) revive and maintain a sustainable cultural ecosystem.

III. THE ADVANTAGES OF COMMUNAL INTELLECTUAL PROPERTY

In principle, intellectual property is a set of legal rules enacted to protect a creator's or inventor's rights. It is also known as intellectual property rights,[40] and its concept is based on the idea of human-generated intellectual work that requires certain sacrifices such as energy, time, and money. These boost the economic value of the products due to the benefits enjoyed.[41] The protection of intangible property rights has existed since the 14th century. It was first practiced in Venice, Italy, to protect patents from scientific inventions by

[40] Afrilliyanna Purba, *Pemberdayaan Pelindungan Hukum Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Sebagai Sarana Pertumbuhan Ekonomi [Empowerment of Legal Protection for Tradition and Cultural Expression as a Means of Growth]*, (Bandung: Alumni, 2012), 45.

[41] Maria Alfons, "Implementasi Hak Kekayaan Intelektual Dalam Prespektif Negara Hukum *[Implementation of Intellectual Property Rights in the Perspective of the Rule of Law]*", *Jurnal Legislasi Indonesia* 14, no. 3 (2017): 304, https://doi.org/10.54629/jli.v14i3.111.

granting them monopoly rights. The legal system and arrangements at that time served as a reference, and several other countries also practiced this act. This includes the UK, which was technologically more advanced in terms of using Intellectual Property law to attract artisans and experts from other regions. To improve and expand the arrangement, some intellectual property rights were harmonized during the Paris Convention for the Protection of Industrial Property 1883 (patents and marks) and the Berne Convention for the Protection of Literary and Artistic Works 1886 (copyright). These two meetings were the first primary reference for regulating intellectual property rights in the world. However, in substance, they serve as a general legal umbrella and do not regulate the pattern of Intellectual Property regulation in detail.[42]

To implement and administer the Paris and Berne Conventions in 1967, the World Intellectual Property Organization (WIPO) was formed through the Stockholm Conference, which later became a specialized agency of the United Nations in December 1947 (Agreement on Tariffs and Trade). The main objective is to create economic growth and development to achieve human welfare. One of the historic negotiations that discussed the protection of Intellectual Property was the Paraguay Round in 1990. This was based on the fact that several developed countries experienced diverse losses related to Intellectual Property violations in international trade. Following up on these conditions, the TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights), the most comprehensive international agreement regarding intellectual property protection which is more complex, comprehensive, and extensive, emerged.[43]

Intellectual property is based on justice, economic, cultural, and social principles. TRIPs are considered part of the agreement in establishing the WTO (World Trade Organization). The arrangements of its mechanism are the minimum standard for managing property rights in each WTO member country in terms of providing protection and dispute resolution. This has certain implications for member countries' diverse national laws related to intellectual property rights management.[44]

---

[42] Chandra Nath Saha and Sanjib Bhattacharya, "Intellectual Property Right: An overview and Implications in Pharmaceutical Industry*". Journal of Advanced Pharmaceutical Technology & Research* 2, no. 2 (2011): 88.

[43] Agus Sardjono, *Hak Kekayaan Intelektual & Pengetahuan Tradisional [Intellectual Property Rights & Traditional Knowledge]*, (Bandung: Alumni, 2010), 149.

[44] Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia [Indonesian Economic Development Law]*, (Binacipta, 1988), 22.

In economic principles, intellectual rights are derived from creative activities that are beneficial and economically valuable to the copyright owner. The principle of justice refers to the legal protection of product owners, thereby ensuring they have the power to use intellectual property rights for their works. The principle of culture involves the development of science, literature, and art to improve the standard of living as well as ensure it is beneficial to the community, nation, and state. Lastly, social principles regulate human interests as citizens, thereby ensuring that their rights to work are a protected unit. This is based on the balance between the individuals' and community interests.[45]

Meanwhile, ownership of intellectual property rights is divided into personal (individuals) and communal (groups), where there are certain dissimilarities in their principles, as stated by Sudarmanto[46]. First, communal principles are passed on from one generation to the other. *Second*, it depicts the identity and culture of a particular community. *Third,* it is a part of the cultural heritage, and *fourth,* the creator or creators are not known. *Fifth*, communal rights are not for commercial purposes rather, these are perceived as cultural and religious means. *Sixth*, it develops and appears in the community, and *lastly*, ownership and preservation are communal.

In addition, protection and preservation are required indefinitely. The legal protection needs to be based on the recognition of each party. It is declarative and has tangible and intangible or material and moral owned by the state.

Based on the description above, the principles put forward, specifically personal intellectual property rights, emphasize the business aspect and have the potential to be developed. In contrast, communal intellectual rights emphasize religious and cultural facilities and are complicated to develop because they tend to have conflicting values.[47]

Intellectual Property Law in Indonesia is inseparable from the policy in the Netherlands. Furthermore, in Indonesia, laws, and regulations in the field of Intellectual Property Rights have existed since 1844. At that time, the Netherlands had issued the Trademark (1885) and Patent Laws (1910), as well as the Copyright Act (1912). At that time, Indonesia was still referred to as the Netherlands East-Indies. It was a member of the Paris and Berne

[45] Eman Suparman, "Perlindungan Hukum Kekayaan Intelektual Masyarakat Tradisional [Legal Protection for Intellectual Property of Traditional Society]," *Jurnal Pengabdian Kepada Masyarakat* 2, no. 7 (2018): 558.

[46] *Ibid.*

[47] Benny Andhika Sesa, "Upaya Perlindungan Hukum Terhadap Seni Ukir Suku Kamoro sebagai Ekspresi Budaya Tradisional di Kabupaten Mimika Provinsi Papua [Legal Protection Efforts For the Kamoro Tribe Carvings as an Expression of Traditional Culture in Mimika Regency, Papua]", (Master's thesis, Universitas Atma Jaya Yogyakarta, (2018): 20.

Conventions for the Protection of Industrial Property and Literary and Artistic Works since 1888 and 1914, respectively. During the Japanese occupation, all laws and regulations in the Intellectual Property Rights field are valid. In 1994, Indonesia became a member of the WTO by ratifying the GATT in the Republic of Indonesia Law Number 7 of 1994 concerning the Ratification of Establishing the World Trade Organization. This made Indonesia obliged to ratify and synchronize several international trade agreements, including the TRIPs arrangement.

Recognition of communal rights needs to be respected by everyone, including the state. This is stated in article 27 of the International Covenant on Civil and Political Rights, Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights, which the Government of Indonesia has ratified through Laws No. 11 and 12 of 2005 and the recognition of community rights in the Act. Number 39 of 1999 concerning Human Rights.[48] In addition, the constitutional basis for protecting traditional culture is stated in Article 18 B paragraph (2) of the second amendment to the 1945 Constitution. It states that "the state recognizes and respects customary law units and their traditional rights as long as they exist and follow community developments. This is also in accordance with the principles of the Unitary State of the Republic of Indonesia as regulated in the Law. Based on article 18 B paragraph (2), the constitution expressly mandates that within the framework of traditional rights, a statutory provision has to be made to accommodate these cultural privileges. Likewise, 28 I paragraph (3) of the second amendment of the 1945 Constitution states that cultural identity and the rights of traditional communities are respected in line with the developing times and civilization.[49] Article 32, paragraphs (1), and (2) of the fourth amendment of the 1945 Constitution serve as a basis for further strengthening its directives and guarantee the importance of protecting traditional culture.[50]

Communal Intellectual Property Rights are wholly owned by a group of people who permanently reside in a place, share similar characteristics with the indigenes, including common properties that can be divided, arranged,

---

[48] Purnama Hadi Kusuma, Kholis Roisah, "Perlindungan Ekspresi Budaya Tradisional dan Indikasi Geografis: Suatu Kekayaan Intelektual Dengan Kepemilikan Komunal [Protection of Traditional Cultural Expressions and Geographical Indications: An Intellectual Property with Communal Ownership]," *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022): 117, https://doi.org/10.14710/jphi.v4i1.107-120.

[49] Elizabeth Ayu Puspita Adi, I Gusti Ayu Ketut Rachmi Handayani, Susanto, "The Highest 1945 Constitution of the Republic of Indonesia: The Basis of the Highest Normative Arrangement of the Mass Organizations in Indonesia," *The 4th Proceeding: Legal Construction and Development in Comparative Study*, (2018): 99.

[50] Arif Hariyanto, Azis Budianto, "Protection of Indigenous People Law Based on the 1945 Constitution," *ICSSEE*, (2021): 6, http://dx.doi.org/10.4108/eai.6-3-2021.2306460

and maintained by tradition.[51] WIPO defines knowledge as part of communal intellectual property especially when it (1) is taught and implemented from one generation to the other, (2) the awareness of the environment and its relationship with surrounding attributes, (3) holistic, thereby making it inseparable from the community where it was developed, and (4) it is also a way of life jointly practiced by the community and is valuable to them. [52]

Currently, WIPO mandates member countries to discuss Genetic Resources, Traditional Knowledge, and Folklore (GRTKF) in international forums because it is perceived as part of communal intellectual property rights. Indonesia supports the establishment of an international agreement regarding the protection of Communal Intellectual Property. This was realized, among others, through the formation of the Bandung Declaration of the New Asian African Strategic Partnership (2007), in which the government, together with the countries that signed the statement, reported that efforts were urgently needed to accelerate the binding of international agreements to protect wealth.[53] In addition, the Berne Convention for the Protection of Literary and Artistic Works added to paragraph 4 to Article 15. It authorizes the parties involved to protect works whose owners are unknown, as long as it is ascertained that the individual concerned is a citizen. The said country may appoint a competent institution at the domestic level to provide protection and implement law enforcement. The granting of legal protection for copyrighted works is perceived as a justification for protecting Communal Intellectual Property, in which the creator or owner is generally not known. As a country with extraordinary cultural diversity, efforts to determine this tends to take a relatively long time. If necessary (due to the identification of entitled rights), the state can act as a representative on behalf of the Property Communal Intellectuals' owner.[54]

For example, Article 38 paragraph (1) of Law Number 28 of 2014 concerning copyright mandates that the state holds Copyrights for Traditional Cultural Expressions, and it can be translated into that context. This interpretation is

[51] "Sistem Perlindungan Hukum Kekayaan Intelektual oleh Kementerian Hukum dan HAM RI [Intellectual Property Legal Protection System by the Indonesian Ministry of Law and Human Rights]," Badan Perencanaan Pembangunan, Penelitian dan Pengembangan Daerah Kabupaten Bogor, accessed 7 September 2019, https://bappedalitbang.bogorkab.go.id/topik/sistem-perlindungan-hukum-kekayaan-intelektual-oleh-kementerian-hukum-dan-ham-ri/.

[52] Atvi Lutviansori, *Hak Cipta dan Perlindungan Folklore di Indonesia [Copyright and Folklore Protection in Indonesia]*, (Yogyakarta: Graha Ilmu, 2010), 96.

[53] J. Janeway Osei Tutu, "Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property," *Marquette Intellectual Property Law* Review 15, no. 1 (2011): 162.

[54] P. V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia, and the Philippines*, no. 912, (WIPO Publication, 1999), http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf.

based on Article 15, paragraph 4 of the Berne Convention. In addition, it is also in accordance with the government's obligations stated in the Preamble of the 1945 Constitution. It is a well-known fact that one of its obligations is to protect the entire Indonesian nation and homeland from promoting the general welfare. This simply indicates that the local government is expected to protect the indigenous peoples' economic and moral rights with respect to the Communal Intellectual Property, even in circumstances where they are ignorant.

Legal protection of the rights of indigenous peoples in a broad sense also includes the outcome of their intellectual creativity. Although Communal Intellectual Property does not fulfill the element of novelty, its existence emerges from the peoples' thought and its ability to survive for a long time. It has been proven that Communal Intellectual Property is also beneficial for human existence. Therefore, the works of the indigenous people need to be appreciated. This is "evidence" that the future has no meaning without the past. That is the reason why Communal Intellectual Property never goes extinct, irrespective of the fact that it has been in existence for a long time. Because it is part of the identity of the supporting community, it experiences development occasionally.[55]

Then from the existing timeframe aspect, TRIPs mandate member countries to complete the provisions of the Berne Convention. This includes considering the period of protection stated in Article 7 paragraph 3 that the stipulated period of protection for works whose owners are unknown is 50 years from when it was published. Meanwhile, in Indonesia, it refers to the copyright law that those held by the state based on article 10 paragraph 2 are valid indefinitely, and article 11 paragraph 3 is valid for 50 years from when it was published.

Several countries, especially developing ones such as Panama, have tried to protect traditional knowledge by establishing protective laws. Among others, every user needs to comply with the regulations issued by the indigenous groups who own or hold this traditional knowledge. Meanwhile, Peru also issued a policy mandating prospective users to obtain the community's consent and agree to their terms. This mechanism not only regulates licenses or arrangements regarding access to benefit-sharing it also preserves the communal intellectual property, which aids to realize and boost the welfare of the owners. To maximize the protection of communal intellectual property, especially traditional works, it is necessary to involve the owners because

[55] Kamal Puri, "Preservation and Conservation of Expressions of Folklore: The Experience of the Pacific Region," *UNESCO-WIPO World Forum on the Protection of Folklore*, UNESCO-WIPO/FOLK/PKT/97/4, (1997), https://unesdoc.unesco.org/ark:/48223/pf0000220168.

they play an active role. This aids in obtaining an appropriate mechanism in terms of regulating licensing and access to benefit-sharing by the utilization of foreign parties, thereby ensuring that the traditional communities prosper economically from the benefits offered.[56]

IV. THE CHALLENGES OF COMMUNAL INTELLECTUAL PROPERTY

Indonesian positive law explicitly classifies communal intellectual property in the Copyright Act, including traditional knowledge and cultural expressions. However, some of its concepts cannot be protected by this law. For example, in a situation where a group of known people owns copyright. On the other hand, much wealth is communally created by traditional communities, thereby leading to the need for juridical steps to ensure the certainty of protecting cultural expressions. Foreign parties use communal intellectual property, and in circumstances where it is economically valuable, the state becomes the first to manage these profits. Although, in practice, it is not clear how the benefits are intended to be distributed among the indigenous peoples.

Meanwhile, indigenous peoples are entities that preserve this culture from one generation to another, and the law does not regulate their participation. Their rights are unfulfilled, and this is not in accordance with the mandate of the 1945 Constitution of the Republic of Indonesia Article 28C paragraph 1. This stated that "everyone has the right to develop themselves by fulfilling their basic needs, through education, science, and technology, arts and culture to improve the standard of living and for the sake of human welfare."

One of the weaknesses in developing a communal intellectual protection system is limited data, documentation, and information about the property, which has existed for hundreds of years. Therefore, there is a need for provisions portraying the community as a communal intellectual property rights owner. When viewed from the aspect of its producer, it can be produced by individuals, or groups, such as indigenous people. Judging from how this knowledge is maintained, and accessed, it is grouped into personal, and community knowledge, as well as one that has become the public domain.[57]

---

[56] Simona Bustani, "Perlindungan Hak Komunal Masyarakat Adat dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan dan Harapan [Protection of Indigenous Peoples Communal Rights in the Perspective of Traditional Intellectual Property in the Era of Globalization: Realities and Expectations," *Jurnal Hukum Prioris* 6, no. 3 (2018): 304, https://doi.org/10.25105/prio.v6i3.3184.

[57] Zainul Daulay, *Pengetahuan Tradisional, Konsep Dasar Hukum dan Praktiknya [Traditional Knowledge, Basic Legla Concepts and its Practices]* (Jakarta: Radja Grafindo Persada, 2011), 77.

Two mechanisms are usually carried out in terms of protecting communal intellectual property, name binding and non-binding laws, including codes of conduct adopted by the international governments and non-governmental organizations, professional societies, and the private sector, such as discovery compilation, registration, and database.[58]

In protecting communal intellectual property rights, WIPO generally describes two models, namely defensive and positive protection.[59]

Defensive protection refers to efforts to prevent the granting of intellectual property rights by other parties without the knowledge and permission of the owner. It affects patent registration regarding the obligation to disclose the origin of genetic resources and traditional knowledge related to inventions.[60] Defensive protection is carried out by registering or inventorying cultural heritage to preserve it for future generations and protecting its objects as intellectual property assets.[61] Afterward, cultural protection and management tend to be integrated by conducting an inventory and documentation based on information technology. The documentation of various cultures in Sleman Regency is accessed through the website of the Sleman Regency Culture and Tourism Office, which is also used to promote culture-based tourism.[62]

Positive protection is carried out in the form of legal remedies, such as by effectively using laws related to communal intellectual property rights or by enacting specific special laws. Its form is reflected in the agreement of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression in the United Nations Education, Scientific and Cultural Organization forum (UNESCO) in the realm of conservation. Indonesia itself has signed and ratified these two UNESCO Conventions. The 2003 Convention for the Safeguarding of Intangible Cultural Heritage was ratified

---

[58] Budi Agus Riswandi, M. Syamsudin, *Hak Kekayaan Intelektual dan Budaya Hukum [Intellectual Property Rights and Legal Culture]*, (Jakarta: Rajagrafindo Persada, 2004).

[59] Yunita Maya Putri, "Perlindungan Bagi Hak Kekayaan Intelektual Komunal [Protection for Communal Intellectual Property Rights]," *Jurnal Hukum De'Rechsstaat* 7, no. 2 (2021): 183.

[60] Karlina Sofyarto, "Perlindungan Hukum Hak Kekayaan Intelektual atas Pengetahuan Tradisional terhadap Perolehan Manfaat Ekonomi [Legal Protection of Intellectual Property Rights on Traditional Knowledge for Economic Benefits]," *Kanun Jurnal Ilmu Hukum* 20, no. 1 (2018): 157, https://doi.org/10.24815/kanun.v20i1.9832.

[61] Nuzulia Kumala Sari, Dinda Agnis Mawaradah, "Sistem Pendataan Kebudayaan Terpadu Alternatif Perlindungan Hukum Ekspresi Budaya Tradisional [Integrated Cultural Data Collection System as an Alternative Legal Protection of Traditional Cultural Expressions]," *Jurnal Legislasi Indonesia* 18, no. 3 (2021): 409.

[62] Dyah Permata Budi Asri, "Implementasi Pasal 38 ayat (1) Undang-Undang Nomor 28 Tahun 2014 terhadap Ekspresi Budaya Tradisional di Kabupaten Sleman [Implementation of Article 38(1) of Law Number 28 of 2014 on Traditional Cultural Expressions in the Sleman Regency]", *Jurnal Hukum Ius Quia Iustum* 23, no. 4 (2016): 629.

in the Presidential Regulation of the Republic of Indonesia Number 78 of 2007 concerning Ratification of the Convention for the Safeguarding of Intangible Cultural Heritage (Convention for the Protection of Intangible Cultural Heritage). Similarly, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression was ratified by Presidential Regulation of the Republic of Indonesia Number 78 of 2011 concerning Ratification of the Convention on the Protection and Promotion of the Diversity of Cultural Expression.[63]

Therefore, the use of Intellectual Property Rights to protect communal intellectual property is realized by amending the current laws and regulations to provide a complete discussion of these policies regarding its acquisition. In addition, another alternative involving the use of a sui generis or independent system of legislation asides from the Intellectual Property Rights firmly acknowledges that indigenous communities are the "owners" of the traditional knowledge. Customary law is an alternative source or material for formulating the rights of these communities in the Sui generis Law. This is because several traditional cultures originated from certain regions with philosophical values highlighted through the emergence of these cultural expressions. These inevitably need to pay attention to the aspects in which these customs are developed.

The principles in customary law are accommodated in the sui generis.[64] The intended one does not ignore elements based on religious norms that are either magical, simple in nature, and based on a social system. In addition, taking inventory steps, namely by building a database related to communal intellectual property, which is then systematically documented, is regarded as defensive protection. This involves interested parties such as indigenous peoples, cultural experts, and professionals in the database.[65] Furthermore, there is a need to establish a particular agency to represent indigenous peoples in communal intellectual property. This is realized by considering that Indonesia has ratified the 1971 Bern Convention. Article 15 stated that the countries that attended this meeting needed to appoint an institution

---

[63] Annissa Nurjanah Tuarita, "Perlindungan Hak Kekayaan Intelektual Terhadap Kesenian Gendang Beleq Masyarakat Suku Sasak sebagai Pengetahuan Tradisional dan Ekspresi Budaya Tradisional [Protection of Intellectual Property Rights for the Sask Tribe's Gendang Beleq Art as Traditional Knowledge and Traditional Cultural Expressions]", (Bachelor thesis., Universitas Brawijaya, 2014): 15-16.

[64] Agus Sardjono, *Pengetahuan tradisional: Studi mengenai Perlindungan Hak Kekayaan Intelektual atas obat-obatan [Traditional Knowledge: Studies on the Protection of Intellectual Property Rights for Drugs]*, (Jakarta: Pascasarjana Fakultas Hukum UI, 2004), 208.

[65] M. Zulfa Aulia, "Perlindungan Hukum Ekspresi Kreatif Manusia: Telaah terhadap Perlindungan Hak Kekayaan Intelektual dan Ekspresi Budaya Tradisional [Legal Protection of Human Creative Expressions: A Study of the Protection of Intellectual Property Rights and Traditional Cultural Expressions]," *Jurnal Hukum Ius Quia Iustum* 14, no. 3 (2007): 369.

representing indigenous peoples in terms of preserving culture, as well as protecting and enforcing copyright. These are null and void, if the laws are not implemented and enforced effectively. One element that triggers this is legal sanctions for violations of the rights concerned or even the application of criminal provisions.

V. CONCLUSION

Communal intellectual property is a traditional cultural heritage that needs to be preserved, considering that culture is the identity of a group or society. It is a form of recognition and preservation of the traditional culture of Indonesians in order to generate economic benefits for the entire custodial community. In addition, the state's absolute protection of communal intellectual property tends to boost the welfare of the indigenous peoples. Although, there are still some shortcomings associated with its protection because there are no written and systematic inventory of traditional cultures, as well as the registration model and benefit-sharing by the state to the custodian community. The government needs to enact policies to gradually provide effective and efficient protection. The first stage requires the application of a defensive approach. This is adopted by preparing a database showing that Communal Intellectual Property belongs to the indigenous peoples as well as the creation of a sui generis law.

BIBLIOGRAPHY

Journal articles

Adawiyah, Robiatul, Rumawi."Pengaturan Hak Kekayaan Intelektual dalam Masyarakat Komunal di Indonesia *[Regulation of Intellectual Property Rights of Communal Society in Indonesia]*". doi: 10.28946/rpt.v10i1.672.

Adi, Elizabeth Ayu Puspita, I Gusti Ayu Ketut Rachmi Handayani, Supanto. "The Highest 1945 Constitution of the Republic of Indonesia: The Basis of the Highest Normative Arrangement of the Mass Organizations in Indonesia". *The 4th Proceeding: Legal Construction and Development in Comparative Study*, (2018).

Akbar, Taufan Herdansyah, Agus Subagyo, & Jusmalia Oktaviani"Realisme Dalam Kepentingan Nasional Indonesia Melalui Forum Konferensi Asia Afrika (KAA) dan Gerakan Non Blok (GNB) *[Realism in Indonesia's National Interests Through the Asian-African Conference Forum and the Non-Aligned Movement]*". *Jurnal Dinamika Global* 5, no. 1 (2020). https://doi.org/10.36859/jdg.v5i1.194.

Alfons, Maria. "Implementasi Hak Kekayaan Intelektual Dalam Prespektif Negara Hukum *[Implementation of Intellectual Property Rights in the Perspective of the Rule of Law]*". *Jurnal Legislasi Indonesia* 14, no. 3 (2017). https://doi.org/10.54629/jli.v14i3.111.

Asri, Dyah Permata Budi. "Implementasi Pasal 38 ayat (1) Undang-Undang Nomor 28 Tahun 2014 terhadap Ekspresi Budaya Tradisional di Kabupaten Sleman *[Implementation of Article 38(1) of Law Number 28 of 2014 on Traditional Cultural Expressions in the Sleman Regency]*". *Jurnal Hukum Ius Quia Iustum* 23, no. 4 (2016).

Atmadja, Hendra Tanu. "Urgensi Perlindungan Hak Kekayaan Intelektual dalam Perdagangan Bebas *[The Urgency of Protection of Intellectual Property Rights in Free Trade]*". *Jumal Lex Jurnalica 12*, no. 3 (2015).

Aulia, M. Zulfa Aulia. "Perlindungan Hukum Ekspresi Kreatif Manusia: Telaah terhadap Perlindungan Hak Kekayaan Intelektual dan Ekspresi Budaya Tradisional *[Legal Protection of Human Creative Expressions: A Study of the Protection of Intellectual Property Rights and Traditional Cultural Expressions]*". *Jurnal Hukum Ius Quia Iustum* 14, no. 3 (2007).

Britton-Purdy, Jedediah, David Singh Grewal, Amy Kapcynski, K. Sabeel Rahman. "Building a Law and Political Economy Framework: Beyond the Twentieth Century Synthesis". *The Yale Law Journal* 129*,* no. 6 (2020*).*

Bustani, Simona Bustani. "Perlindungan Hak Komunal Masyarakat Adat dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan dan Harapan *[Protection of Indigenous Peoples Communal Rights in the Perspective of Traditional Intellectual Property in the Era of Globalization: Realities and Expectations* ". *Jurnal Hukum Prioris* 6, no. 3 (2018). https://doi.org/10.25105/prio.v6i3.3184.

Chang, Ha-Joon Chang. "Building Pro-Development Multilateralism: towards a "New" New International Economic Order". *CEPAL Review,* no. 132 (2020).

Daties, Dyah R. A. "Memahami Third World Approaches to International Law (TWAIL) [*Understanding Third World Approaches to International Law]*". *Jurnal Sasi* 23, no.1 (2017). https://doi.org/10.47268/sasi.v23i1.154

Freeman, Michael. "Are There Collective Human Rights?". *Political Studies* 43, no. 1 (1995). https://doi.org/10.1111/j.1467-9248.1995.tb01734.x.

Gaffar, Janedjri M.. "Sikap Kritis Negara Berkembang terhadap Hukum Internasional *[Critical Attitudes of Developing Countries to International Law]*". *Jurnal Konstitusi* 10, no. 2 (2013). https://doi.org/10.31078/jk%25x

Hariyanto, Arif, Azis Budianto."Protection of Indigenous People Law Based on the 1945 Constitution". *ICSSEE*, (2021). http://dx.doi.org/10.4108/eai.6-3-2021.2306460.

Kadir, M. Ya'kub Aiyub. "The Failure of New International Economic Order: a Lesson Learned". *Yuridika* 36, no 1(2021). doi: 10.20473/ydk.v36i1.13561

Kurnia, Mahendra Putra. "Hukum Internasional (Kajian Ontologis) *[International Law (Ontological Studies)]*". *Risalah Hukum* 4, no. 2 (2008).

Kusuma, Purnama Hadi, Kholis Roisah. "Perlindungan Ekspresi Budaya Tradisional dan Indikasi Geografis: Suatu Kekayaan Intelektual Dengan Kepemilikan Komunal *[Protection of Traditional Cultural Expressions and Geographical Indications: An Intellectual Property With Communal Ownership]*". *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022). https://doi.org/10.14710/jphi.v4i1.107-120.

Mutuf, Makau. "What is TWAIL?". *Proceedings of the ASIL Annual Meeting* 94, (2000). https://doi.org/10.1017/S0272503700054896

OseiTutu, J. Janewa. "Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property". *Marquette Intellectual Property Law* Review15, no. 1(2011).

Pramanra, Rio Akbar, Roihanatul Maziyah, Dela Karisma, Putri Rahma Asri, Ayu Tiara Karel Bua, Dimas Bagas Priambodo, Bayu Mahendrea. "Kemitraan Strategis Non-Zero Sum Game: Hubungan ASEAN-Australia dalam Konteks Geopolitik *[Non-Zero Sum Game's Strategic Partnership: ASEAN-Australia Relations in a Geopolitical Context]*". *Indonesian Perspective* 3, no. 2(2019). https://doi.org/10.14710/ip.v3i2.22347.

Price, Sandra E. Price, Donald S. Siegel. "Assessing the Role of the Federal Government in the Development of New Product, Industries, and Companies: Case Study Evidence since World War II". *Annals of Science and Technology Policy* 3*,* no. 4 (2019). http://dx.doi.org/10.1561/110.00000016.

Putra, Hilton T., Aan Asphianto. "Third World Approach to International Law (TWAIL) Sebuah Pendekatan Alternatif Terhadap Hukum Internasional *[Third World Approach to International Law: An Alternative Approach to International Law]*" in *Prosiding Call Paper Pada Simposium Nasional Asosiasi Pengajar Hukum Internasional (APHI) Hukum Internasional dalam Geopolitik Dunia Kontemporer: Perspektif dan Pengalaman Indonesia*, Fakultas Hukum-Universitas Andalas, Bukit http://carano.pustaka.unand.ac.id/index.php/car/catalog/download/37/34/114-1?inline=1

Putri, Yunita Maya. "Perlindungan Bagi Hak Kekayaan Intelektual Komunal *[Protection for Communal Intellectual Property Rights]*". *Jurnal Hukum De'Rechsstaat* 7, no. 2 (2021).

Riadi, Bagus. "Menggugat Hegemoni Demokrasi: Disciplinary Power Demokrasi di Negara Dunia Ketiga *[Challenging Democratic Hegemony: Disciplinary Power of Democracy in Third World Countries]*". *Politeia: Jurnal Ilmu Politik* 12*,* no. 2 (2020). https://doi.org/10.32734/politeia.v12i2.3695.

Riswandi, Budi Agus. "Politik Hukum Hak Cipta: Meletakan Kepentingan Nasional

untuk Tujuan Global *[Copyright Law Politics: Putting the National Interest for Global Goals]", Jurnal Hukum Ius Quia Iustun* 11, no. 25 (2004). https://doi.org/10.20885/iustum.vol11.iss25.art6.

Saha, Chandra Nath, Sanjib Bhattacharya "Intellectual Property Right: An overview and Implications in Pharmaceutical Industry*". Journal of Advanced Pharmaceutical Technology & Research* 2, no. 2 (2011).

Sari, Nuzulia Kumala, Dinda Agnis Mawaradah."Sistem Pendataan Kebudayaan Terpadu Alternatif Perlindungan Hukum Ekspresi Budaya Tradisonal *[Integrated Cultural Data Collection System as an Alternative Legal Protection of Traditional Cultural Expressions]*". *Jurnal Legislasi Indonesia* 18, no. 3 (2021).

Septarian, Muthia. "*Perlindungan Hukum Pengetahuan Tradisional dalam Konsep Hak Kekayaan Intelektual [Legal Protection for Traditional Knowledge in the Concept of Intellectual Property Rights]". Al-Adl: Jurnal Hukum* 8, no. 2 (2016). http://dx.doi.org/10.31602/al-adl.v8i2.457.

Setiady, Tri Setiady. "Harmonisasi Prinsip-prinsip TRIPs Agreement dalam Hak Kekayaan Intelektual dengan Kepentingan Nasional *[Harmonization of the Principles of the TRIPs Agreement in Intellectual Property Rights with National Interests]*". *Fiat Justisia Jurnal Ilmu Hukum* 8, no. 4 (2014). https://doi.org/10.25041/fiatjustisia.v8no4.322.

Shahrullah, Rina Shahriyani. "Perlindungan terhadap Hasil Karya Cipta Pengrajin Hijab di Kota Batam *[Protection of the Copyrights for Hijab Craftsmen in Batam City]*". *Journal of Law and Policy Transformation 3*, no. 1(2018).

Sofyarto, Karlina. "Perlindungan Hukum Hak Kekayaan Intelektual atas Pengetahuan Tradisional terhadap Perolehan Manfaat Ekonomi *[Legal Protection of Intellectual Property Rights on Traditional Knowledge for Economic Benefits]*". *Kanun Jurnal Ilmu Hukum* 20, no. 1 (2018). https://doi.org/10.24815/kanun.v20i1.9832.

Suparman, Eman. "Perlindungan Hukum Kekayaan Intelektual Masyarakat Tradisional *[Legal Protection for Intellectual Property of Traditional Society]*". *Jurnal Pengabdian Kepada Masyarakat* 2, no. 7(2018).

Triyanta, Agus. "Hak Milik Intelektual dalam Pandangan Hukum Islam *[Intellectual Property Rights from the Islamic Law Perspective]*". *Jumal Hukum Ius Quia Iustum* 8, No. 17 (2001).

Upreti, Pratyush Nath. "A TWAIL Critique of Intellectual Property and Related Disputes in Investor-state Dispute Settlement". *The Journal of World Intellectual Property 25,* no. 1: (2022). https://doi.org/10.1111/jwip.12217

Books and book chapters

Afrilliyanna Purba. *Pemberdayaan Pelindungan Hukum Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Sebagai Sarana Pertumbuhan Ekonomi [Empowerment of Legal Protection for Tradition and Cultural Expression as a Means of Growth]*, Bandung: Alumni, 2012.

Agus Sardjono. *Hak Kekayaan Intelektual & Pengetahuan Tradisional [Intellectual Property Rights & Traditional Knowledge]*. Bandung: Alumni, 2010.

Agus Sardjono. *Pembangunan Hukum Kekayaan Intelektual Indonesia: Antara Kebutuhan dan Kenyataan [Development of Indonesian Intellectual Property Law: Between Necessity and Reality],* Jakarta: Pascasarjana Fakultas Hukum UI, 2004.

Anghie, Anton, *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press, 2004.

Direktorat Jenderal Kekayaan Intektual Kementerian Hukum dan HAM RI. *Modul Kekayaan Intelektual Bidang Kekayaan Intelektual Komunal [Intellectual Property Module for the Communal Intellectual Property Sector],* Direktorat Jenderal Kekayaan intelektual Kementerian Hukum dan HAM RI, 2019. https://www.dgip.go.id/unduhan/modul-ki?kategori=kekayaan-intelektual-komunal.

Kutty, P. V. Valsala G.. *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia, and the Philippines*, WIPO Publication, 1999.

Lutviansori, Atvi. *Hak Cipta dan Perlindungan Folklore di Indonesia [Copyright and Folklore Protection in Indonesia]*, Yogyakarta: Graha Ilmu, 2010.

Miranda Risang Ayu, Harry Alexander, Wina Puspitasari. *Hukum Sumber Daya Genetik, Pengetahuan Tradisional, dan Ekspresi Budaya Tradisional di Indonesia [Law of Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions in Indonesia]*, Bandung: Alumni, 2014.

Miriam Budiarjo. *Dasar-Dasar Ilmu Politik [Basics of Political Science]*, Jakarta: Gramedia Pustaka Utama.

Muhammad Djumhana. *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual [Development of Doctrine and Theory of Protection for Intellectual Property Rights]*, Bandung: Citra Aditya Bakti, 2006.

Riswandi, Budi Agus, M. Syamsudin. *Hak Kekayaan Intelektual dan Budaya Hukum [Intellectual Property Rights and Legal Culture]*, Jakarta: Rajagrafindo Persada, 2004.

Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia [Indonesian Economic Development Law]*, Bandung: Binacipta, 1988.

Tri Harso Karyono. *Arsitektur dan Kota Tropis Dunia Ketiga [Architecture and Tropical City of the Third World]*, Harian Sinar Harapan, 2013.

Trisno Raharjo. *Kebijakan Legislatif dalam Pengaturan Hak Kekayaan Intelektual [Legislative Polices on the Regulation of Intellectual Property Rights]*, Yogyakarta: Pensil Komunka, 2006.

Zainal Daulay. *Pengetahuan Tradisonal, Konsep Dasar Hukum dan Praktiknya [Traditional Knowledge, Basic Legal Concepts and its Practices],* Jakarta, Radja Grafindo Persada, 2011.

Web sources

Badan Perencanaan Pembangunan, Penelitian dan Pengembangan Daerah Kabupaten Bogor. "Sistem Perlindungan Hukum Kekayaan Intelektual oleh Kementerian Hukum dan HAM RI *[Intellectual Property Legal Protection System by the Indonesian Ministry of Law and Human Rights]*". Accessed 7 September 2019, https://bappedalitbang.bogorkab.go.id/topik/sistem-perlindungan-hukum-kekayaan-intelektual-oleh-kementerian-hukum-dan-ham-ri/.

Kapcynzski, Amy, David Singh Grewal, Jedediah Britton-Purdy. "How Law Made Neoliberalism". *Boston Review*, (2021). https://bostonreview.net/articles/jedediah-purdy-david-g-victor-amy-kapczynski-lpe/.

Others

Sesa, Benny Andhika, "Upaya Perlindungan Hukum Terhadap Seni Ukir Suku Kamoro sebagai Ekspresi Budaya Tradisional di Kabupaten Mimika Provinsi Papua *[Legal Protection Efforts For the Kamoro Tribe Carvings as an Expression of Traditional Culture in Mimika Regency, Papua]*". Master's thesis, Universitas Atma Jaya Yogyakarta, 2018.

Tuarit, Annissa Nurjana. "Perlindungan Hak Kekayaan Intelektual Terhadap Kesenian Gendang Beleq Masyarakat Suku Sasak sebagai Pengetahuan Tradisional dan Ekspresi Budaya Tradisional *[Protection of Intellectual Property Rights for the Sask Tribe's Gendang Beleq Art as Traditional Knowledge and Traditional Cultural Expressions]"*. Bachelor's thesis, Universitas Brawijaya, 2014.

Puri, Kamal. "Preservation and Conservation of Expressions of Folklore: The Experience of the Pacific Region". *UNESCO-WIPO World Forum on the Protection of Folklore*. UNESCO-WIPO/FOLK/PKT/97/4, (1997).