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STRENGTHENING THE LEGAL PROTECTION OF COMMUNAL INTELLECTUAL PROPERTY TO ANTICIPATE MISUSE BY FOREIGN PARTIES

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ABSTRACT

The adoption of Communal Intellectual Property (CIP) into laws and regulations (wettelijk regeling) in Indonesia began with the inclusion of Traditional Cultural Expressions (TCE) in Law Number 28 of 2014 concerning Copyright. Copyright Law does not define Communal Intellectual Property (CIP) or Traditional Cultural Expressions (TCE). However, the definition of CIP and TCE has received confirmation in Government Regulation Number 56 of 2022 concerning Communal Intellectual Property. The absence of regulation on CIP in a special law makes CIP's position weak conceptually and in terms of its protection, so the indigenous peoples' position still needs to be stronger as a subject of CIP. This research uses a normative juridical approach. This study aims to analyze CIP's position in Copyright Law and provide input so that CIP has legal force in Indonesia. To strengthen the legal position of Communal Intellectual Property, it is necessary to regulate norms in the form of sui generis laws which aim to guarantee legal certainty for Communal Intellectual Property in Indonesia.

Keywords: Intellectual Property, Communal Intellectual Property, Traditional Cultural Expressions, Copyright Law

A. Introduction

Cultural change can occur because it is based on the desires and needs of the people, as a form of planned change, for example through cultural development programs. Cultural changes that are planned, whether through the hands of stakeholders, the government, or other parties, such as cultural observers, activists and "creative engineers," can impact that culture’s existence. This behavior aims to enrich its values, and develop its people’s quality of life. Cultural change is influenced by two factors, namely endogenous and exogenous factors. Endogenous factors include population growth, social conflict, and new discoveries in the fields of science and technology. Meanwhile, exogenous factors include

the environment, war between countries, and other cultural influences.[1]

Unplanned cultural change it can occur through claims of ownership of a cultural asset by the community or other parties. Moreover, this is done by governments in other countries which can impact the existence of this culture.

From a cultural perspective, a claim to ownership of Communal Intellectual Property as a cultural asset is an act of uprooting a particular culture from its origin. This behavior can also be interpreted as reducing the values and intrinsic wealth attached to them. Claims of the cultural assets of a country's people by other parties and/or countries also raise problems, regarding issues of cultural authenticity, and political diplomacy, foreign relations and legal issues.

As reported by the mass media and electronic, these claims are made by foreign business actor and several foreign countries. The existence of these claims naturally led to disappointment for community groups and the Indonesian nation. This also raises questions about the government role in protecting the Communal Intellectual Property of its people and the government's response to claims by foreign parties/countries.

Several forms of Communal Intellectual Property of local communities in Indonesia that are claimed by the state (government) and foreign parties turn out to be quite a lot, batik, ancient manuscripts, culinary materials (cooking), songs, dances, musical instruments, designs and plant products, and the claim time has also been going on for a long time.[2] For example, in 2009 Malaysia felt that the Barongan Dance (in Indonesia it is called the Reog Ponorogo Dance) was already well known by the people in the archipelago before the founding of the Indonesian state, where this dance was brought by the Ponorogo people who migrated to Malaysia in 1722. Therefore, Malaysia feels that it is not in a position to claim the Reog Ponorogo Dance, but to preserve the dance of the Malaysian people, which is indeed similar to the Barongan Dance.[3] Likewise, in 2021, Miss World Malaysia, Lavanya Sivaji, claimed that Batik came from Malaysia. In fact, UNESCO has determined that batik is an Intangible Cultural Heritage belonging to Indonesia since October 2 2009.[4]

In addition, there are five forms of Communal Intellectual Property in Indonesia that have been claimed by foreign parties, namely the Sasando musical instrument originating from East Nusa Tenggara (NTT), which was claimed by Sri Lanka; Wayang kulit from

1 Talcott Parsons, "A Functional Theory of Change", in Eva Etzioni-Halevy and Amitai Etzioni, Social Changes: Sources, Patterns and Consequences, (New York: Basic Book, 1994), p. 76.

2 Agus Setiawan, Perlindungan Hukum Dalam Lingkup Pengetahuan Tradisional dan Ekspresi Budaya Tradisional atas Soto Sebagai Indikasi Geografis dan Makanan Khas Nusantara." Dharmasisya Jurnal Program Magister Hukum FHUI, 2 (1), 2022, p. 18.

3 Republika, Sejarah Reog Ponorogo yang Diklaim Malaysia di UNESCO, accessed from https://kurusetra.republika.co.id/posts/101324/sejarah-reog-ponorogo-yang-diklaim-malaysia-di-unesco, at the date of 2 June 2023.

4 Viva, Malaysia Kepincut 4 Budaya Khas Indonesia, dari Batik hingga Rendang Padang, accessed from https://www.viva.co.id/gaya-hidup/inspirasi-unik/1640991-malaysia-kepincut-4-budaya-khas-indonesia-dari-batik-hingga-rendang-padang, at the date of 17 November 2023.

Central Java, which was once claimed by Malaysia, but was disputed in 2003 and UNESCO acknowledged that wayang kulit is a rich source of indigenous Indonesian cultural heritage; Batik from Central Java which was once claimed by Malaysia, which in 2009 was also declared as one of Indonesia's cultural heritages.[5] In addition, the musical instrument Angklung comes from West Java,[6] Rendang which is a typical Padang dish, Pendet Dance from Bali and the Plate Dance from West Sumatra, Kuda Lumping from Java, Pencak Silat, the song Rasa Sayange, Tor-Tor dance from North Sumatra, Lumpia from Semarang, the Gordang Sambilan musical instrument from Mandailing, North Sumatra, and the Adan Rice from Nunukan, East Kalimantan, were also claimed by Malaysia.[7]

Not only has Malaysia claimed Indonesia's cultural assets, but other countries have also done the same thing, such as the Netherlands, England, France, Japan, America, and others. Apart from foreign countries, multinational companies have also made claims on Indonesian cultural assets, such as Gayo coffee, originating from Central Aceh, Aceh Province, claimed by a Dutch multinational company, products made from spices and medicinal plants native to Indonesia by Shiseido Co. Ltd., Japan, Toraja coffee originating from South Sulawesi has also been claimed by a company from Japan, as well as tempeh which has been claimed by several foreign companies.[8]

The efforts of other parties to make claims on cultural and food products originating from Indonesia are due to the need for more legal systems that can guarantee protection for the position of indigenous peoples. Legal recognition of cultural and food products originating from indigenous peoples in Indonesia was introduced through Regulation of the Minister of Law and Human Rights Number 13 of 2017 concerning Communal Intellectual Property Data, although previously Law Number 28 of 2014 concerning Copyright has given recognition to Traditional Cultural Expressions (TCE). However, Regulation of the Minister of Law and Human Rights Number 13 of 2017 has at least provided a formulation included in the legal objects of Communal Intellectual Property, such as Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources, and potential Geographical Indications.

Regarding the government's steps in providing law protection for Communal Intellectual Property, in Regulation of the Minister of Law and Human Rights Number 13 of 2017 concerning Data on Communal Intellectual Property, it is stated that the inventory of CIP

5 Afrillyanna Purba, *Perlindungan Hukum Seni Batik Tradisional berdasarkan UU No. 19 Tahun 2002 tentang Hak Cipta*. (Bandung: Penerbit Alumni, 2023). See also Pudentia MPSS, Justifikasi Warisan Budaya Tak Benda, (Jakarta: Kemendikbud Ristek, 2021).

6 M. Maman Sumaludin, Angklung Tradisional sebagai Sumber Belajar Sejarah Lokal, Prabayaksa: Journal of History Education, Vol. 2, No. 1 (2022). https://doi.org/10.20527/pby.v2i1.5033

7 Liputan6, 8 Warisan Budaya Indonesia yang Pernah Diklaim Malaysia, accessed from https://www.liputan6.com/citizen6/read/2156339/8-warisan-budaya-indonesia-yang-pernah-diklaim-malaysia, at the date of 3 June 2023. See also Detikcom, Reog hingga Rendang, Ini 14 Warisan Budaya RI Mau Diakui Malaysia, accessed from https://news.detik.com/berita/d-6019917/reog-hingga-rendang-ini-14-warisan-budaya-ri-mau-diakui-malaysia?single=1, at the date of 3 June 2023.

8 Abdul Rachman Patji, Pengembangan dan Perlindungan Kekayaan Budaya Daerah: Respon Pemerintah Indonesia terhadap Adanya Klaim oleh Pihak Lain, Jurnal Masyarakat dan Budaya, LIPI, 2010: 170-171.

data is only a record for defensive protection. However, the definition, formulation, and legal steps as a form of "defensive protection", are not described in the Regulation of the Minister of Law and Human Rights.

Likewise with the phrase "defensive protection" contained in Article 27 paragraph (2) Government Regulation Number 56 of 2022 concerning Communal Intellectual Property and in its explanation, the government does not provide a clear description of this phrase. In the Elucidation section of Article 27 paragraph (2) of the Government Regulation, it only states that "What is meant by "defensive protection" is protection used to defend the existing rights of the Community of Origin from misuse, deception, fraud, or misrepresentation, and theft or piracy (misappropriation)."

In previous research conducted regarding Communal Intellectual Property by Dewi Sulistianingsih, Yuli Prasetyo Adhi, and Pujiono, in an article entitled "Digitalization of Communal Intellectual Property in Indonesia" (2021) emphasized the importance of the role of technology in providing protection for Intellectual Property Rights in the form of a database. is the concept of digitizing Communal Intellectual Property in Indonesia.[9]

Likewise, research conducted by Anak Agung Gede Agung Indra Prathama, Ketut Rai Marthania Onassis, and I Gusti Agung Made Dwi Komara, with an article entitled "Legal Protection of Communal Intellectual Property Rights in Balinese Society" (2023), emphasizes the importance of protection law regarding Communal Intellectual Property in the national legal system, even though the local Bali Provincial Government has taken the initiative to make a Governor's Regulation as a form of legal protection for the potential of Communal Intellectual Property in Bali.[10]

Apart from that, Ismail Koto in his article entitled "Development of Communal Intellectual Property Rights in Indonesia (2023), provides a description of the development of the regulation of Communal Intellectual Property and states that the state needs to provide concrete guarantees in the form of government action on Communal Intellectual Property as an effort to realize legal certainty.[11]

Of the three studies that have been conducted, they have not specifically explained the conceptualization of Communal Intellectual Property and its regulation in several laws and regulations as well as solutions to the legal position of Communal Intellectual Property in the national legal system. Therefore, this article is an attempt to explore the concept of Communal Intellectual Property and provide an explanation of the position of Communal

9 Dewi Sulistianingsih, Yuli Prasetyo Adhi, dan Pujiono, Digitalisasi Kekayaan Intelektual Komunal di Indonesia, Seminar Nasional Hukum Universitas Negeri Semarang 27 Juli 2021, 7 (2), 645-656. https://proceeding.unnes.ac.id/index.php/snh/article/view/723

10 Anak Agung Gede Agung Indra Prathama, Ketut Rai Marthania Onassis, dan I Gusti Agung Made Dwi Komara, Perlindungan Hukum atas Hak Kekayaan Intelektual Komunal dalam Masyarakat Bali, Jurnal Raad Kertha, Vol. 6, No. 1, Februari-Juli 2023: 21-33. https://doi.org/10.47532/jirk.v6i1.823

11 Ismail Koto, Perkembangan Hak Kekayaan Intelektual Komunal di Indonesia, Seminar Nasional Hukum, Sosial, dan Ekonomi (SANKSI 2023), Vol. 2, No. 1, 2023: 167-173. https://jurnal.umsu.ac.id/index.php/sanksi/article/view/14324

Intellectual Property in Indonesian laws and regulations which have not received special regulation in the form of law and provide a basis for consideration for law makers. in formulating and enacting special laws regulating Communal Intellectual Property.

The formulation of the norm for "defensive protection" of Communal Intellectual Property, especially Traditional Cultural Expressions (TCE) is also not contained in Law Number 28 of 2014 concerning Copyright as a legal umbrella for Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal Intellectual Property Data and Government Regulation Number 56 of 2022 concerning Communal Intellectual Property. The lack of synchronization between the three legal products that regulate the legal position of Communal Intellectual Property can result in legal uncertainty in providing legal protection for forms of Communal Intellectual Property. Thus, the problem formulation of this research is: how is Communal Intellectual Property regulated in the legal system in Indonesia, especially in law? And what are the state's efforts to provide legal protection and certainty for Communal Intellectual Property? This problem is the basis for analysis as an effort to provide input in developing legal governance of Communal Intellectual Property in Indonesia.

B. Research Method

The method used in writing this scientific work is normative juridical legal research. The normative research method is a method that emphasizes that law is a building from a system of norms.[12] This method is carried out concerning the norms and principles of Intellectual Property Law, especially Communal Intellectual Property. The type of approach used in writing this scientific paper is the statute approach. This approach is carried out by examining laws and/or regulations related to the legal issues discussed in this paper. The result to be achieved from the use of normative juridical methods in this research is to determine the legal position and legal strength of Communal Intellectual Property which has been regulated in statutory regulations.

C. Discussions

One branch of Intellectual Property Rights (IPR) is Copyright. After the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement), changes to laws relating to copyright are directed at the need to create a better climate for the growth, development, and protection of intellectual works to smooth the flow of international trade. This latest change includes refinements and additions, one of them is an improvement to the protection of creations where there is no author, including traditional knowledge and traditional cultural expressions (otherwise known as *folklore*).

12 Mukti Fajar and Yulianto Achmad, Dualisme Penelitian Hukum Normatif & Empiris, 3rd Edition, (Yogyakarta: Pustaka Pelajar, 2015), p. 34.

From a legal perspective, folklore is classified as Traditional Knowledge which is included in the Intellectual Property Rights regime. The World Intellectual Property Organization (WIPO) defines Traditional Knowledge as:

> *"Tradition based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names, and symbols, undisclosed information, and, all other tradition based innovations and creations resulting from intellectual activity it the industrial, scientific, literary or artistic fields."*[13]

In the context of Law Number 28 of 2014 concerning Copyright (Copyright Law), folklore is included in the category of Traditional Cultural Expressions. In the Explanation of Article 38 paragraph (1) of the Copyright Law, Traditional Cultural Expressions includes one or a combination of forms of expression, including: verbal textual, both spoken and written, in the form of prose or poetry, in various themes and message content, which can be: literary works or informative narratives; music, including, among other things, vocal, instrumental, or a combination thereof; movement, including, among other things, dance; theater, including, among other things, puppet shows and folk plays; fine art, both in two-dimensional and three-dimensional form from various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or a combination thereof; and traditional ceremonies.

According to William R. Bascom in Danandjaja (2007), folklore is divided into three, namely:: myth, namely folk prose stories, which are considered to have really happened and are considered sacred by the person who owns the story; legend, namely folk prose which has characteristics similar to myth, namely that it is considered to have actually happened, but is not considered sacred; and fairy tales (folktales), namely collective short stories of oral literature, which are not considered to have actually happened.[14]

At the international level and in scientific works, "folklore" is still accepted as the most frequently used term. Markowski in Anna Friederike Busch (2015) states that the term "folklore" has been used for decades, even though it has discriminatory connotations.[15] The country delegates who are members of the WIPO working group, which consists of government authorities, reached a consensus by using the term "Traditional Cultural Expressions", arguing that the term "folklore" is seen as derogatory in terms of cultures, regions, and specific countries.[16] On the other hand, the term "expressions of folklore" has been used in previous international processes as well as in national laws. This term is also

13 Adrian Sutedi, Hak Atas Kekayaan Intelektual, (Jakarta: Sinar Grafika, 2009), p. 174.
14 James Danandjaja, Folkor Indonesia: Ilmu Gosip, Dongeng, dan Lain-lain. (Jakarta: Pustaka Utama Grafiti, 2007), p. 60.
15 Markowski in Anna Friederike Busch, Protection of Traditional Cultural Expressions in LatinAmerica: A Legal and Anthropological Study, (Berlin Heidelberg: Springer-Verlag, 2015), p. 28.
16 See Annex WIPO/GRTKF/IC/7/INF/4, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, 2004. https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_inf_4.pdf

synonymous with “Traditional Cultural Expressions” and is used interchangeably.

The term folklore itself has been separated from discussions on the concept of traditional knowledge by WIPO and UNESCO, namely:[17]

> *“Expression of folklore means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (a country) or by individuals reflecting the traditional artistic expectations of such a community, in particular: verbal expressions, such as folk tales, folk poetry, and riddles; musical expressions, such as folk songs, and instrumental music; expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to material form; and tangible expressions, such as: productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms.”*

The adoption of Communal Intellectual Property (CIP) into laws and regulations (wettelijk regeling) in Indonesia began with the inclusion of Traditional Cultural Expressions (TCE) in Law Number 28 of 2014 concerning Copyright (Copyright Law), to be precise in Article 38. However, the article only states that the Copyright on EBT is held by the state and the state is obliged to inventory, protect, and maintain it. Copyright Law does not define Communal Intellectual Property (CIP) or Traditional Cultural Expressions (TCE), but the definition of CIP and TCE has received confirmation in Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property.[18]

Article 1 point 1 Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property, states that:

> *"Communal Intellectual Property, after this abbreviated as KIK, is an intellectual property whose ownership is communal and has economic value while upholding the nation’s moral, social and cultural values."*

Furthermore, in number 2 of the Government Regulation define of TCE as follows:

> *"Traditional Cultural Expressions are all forms of expression of copyrighted works, either in the form of objects or intangibles, or a combination of both which shows the existence of a traditional culture which is held communally and across generations."*

Before the issuance of Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property, arrangements for forms of Communal Intellectual Property (CIP) were regulated in Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Data on Communal Intellectual Property, which consists of traditional knowledge, traditional cultural expressions, genetic resources, and potential geographical indications. This Permenkumham is the legal basis for the government to carry out an

17 Ibid., p. 175.
18 Peraturan Pemerintah (PP) Nomor 56 Tahun 2022 tentang Kekayaan Intelektual Komunal, Pasal 1 angka 1.

inventory of the sub-sections classified as Communal Intellectual Property for the purposes of protection, preservation, development and/or utilization.[19]

In addition to these two legal products, in terms of protection of cultural expressions, this is also accommodated in Law Number 5 of 2017 concerning the Advancement of Culture. However, grammatically, it does not mention Traditional Cultural Expressions as referred to in the Regulation of the Minister of Law and Human Rights Number 13 of 2017 concerning Data on Communal Intellectual Property and Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property. However, the limits on cultural expressions contained in Law Number 5 of 2017 concerning the Advancement of Culture with Traditional Cultural Expressions (TCE) are regulated in the Regulation of the Minister of Law and Human Rights Number 13 of 2017 concerning Data on Communal Intellectual Property and Government Regulations (PP) Number 56 of 2022 concerning Communal Intellectual Property, can be interpreted as having a substance that is not much different.

In the Explanation section of Article 5 letter g of Law Number 5 of 2017 concerning the Advancement of Culture it states that:

> *"What is meant by "art" is individual, collective, or communal artistic expression, which is based on cultural heritage or the creation of new creativity, manifested in various forms of activity and/or medium. Arts include performing arts, visual arts, literary arts, film, music arts, and media arts."*

This correlates with the components included in Traditional Cultural Expressions (TCE), namely visual arts, theater, and music, as stated in Article 7 paragraph (1) of Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property. Thus, it can be said that in terms of advancing culture, Traditional Cultural Expressions (TCE) have received guaranteed protection through Law Number 5 of 2017 concerning the Advancement of Culture. In terms of protection of creation, Traditional Cultural Expressions (TCE) also receive protection through Law Number 28 of 2014 concerning Copyright.

1. Definition and Legal Basis

Communal Intellectual Property is traditional cultural heritage that needs to be preserved, this is because culture is the identity of a group or society.[20] Several categories included in Communal Intellectual Property (CIP) in Article 4 of Government Regulation Number 56 of 2022 concerning Communal Intellectual Property consist of: Traditional Cultural Expressions, Traditional Knowledge, Genetic Resources, and Indications of Origin

19 Peraturan Menteri Hukum dan HAM (Permenkumham) Nomor 13 Tahun 2017 tentang Data Kekayaan Intelektual Komunal, bagian Menimbang dan Pasal 1 angka 1.

20 Kemenkumham NTT, Buku Panduan Inventarisasi Kekayaan Intelektual Komunal, accessed from https://ntt.kemenkumham.go.id/attachments/article/10546/Inovasi%20Unggulan_Manual%20Book%20KIK.pdf, at the date of 10 Juni 2023.

and Potential Geographical Indications (IG),[21] in which the diversity and potential of the Communal Intellectual Property (CIP) must receive protection from the state for recognition, theft or piracy of other countries.[22]

Traditional Cultural Expressions and Traditional Knowledge (TCETK) are state assets that have great potential for the nation's prosperity because they have high economic value. However, their ownership is widely recognized (claimed) by foreign parties without any sharing of benefit sharing, causing conflicts of interest between developed country and developing country. Weaknesses in developing a protection system for Communal Intellectual Property (CIP) are that there is no proper and adequate protection system and the limited data, documentation, and information related to this.[23]

The utilization of Communal Intellectual Property (CIP) without considering the economic aspects and moral aspects arising from such utilization of custodians, especially the TCETK category by foreign parties, is the impact of the inadequacy of the conventional Intellectual Property Rights (IPR) system in providing adequate protection. In addition, efforts to support international conventions in the field of TCETK are a factor why Indonesian culture must be protected.[24]

As a step to inventorying Communal Intellectual Property (CIP) data owned by Indonesia, the government built a data center named the National Data Center for Communal Intellectual Property, which is managed by the Directorate General of Intellectual Property (DJKI) Ministry of Law and Human Rights, which can be accessed through http://kikomunal-Indonesia.dgip.go.id/. This is a measure to protect Communal Intellectual Property (CIP) if there is a dispute over Indonesian culture with other countries. Apart from that, this step is also considered as a defensive protection of the Communal Intellectual Property (CIP), which is Indonesia's cultural heritage wealth and is aimed at mobilizing the active participation of local governments in updating data on cultural assets in their regions.

Indonesia has a wealth of traditional cultural expressions still lagging at the legislative level. In the past, Indonesia only had laws protecting Traditional Cultural Expressions (TCE) through Law Number 28 of 2014 concerning Copyright. Following the provisions of Article 38 paragraph (4) Copyright Law, that Traditional Cultural Expressions (TCE) as objects of copyright law held by the state are regulated by Government Regulations, then through Government Regulation Number 56 of 2022 concerning Communal Intellectual Property, Traditional Cultural Expressions (TCE) entered as one of the categories in the Communal Intellectual Property (CIP).

21 Peraturan Pemerintah No. 56 Tahun 2022 tentang Kekayaan Intelektual Komunal, Pasal 4.
22 Laporan Tahunan Direktorat Jenderal Kekayaan Intelektual, Kementerian Hukum dan HAM 2018. p. 39.
23 Ahmad Ubbe, Laporan Tim Pengkajian Hukum Tentang Perlindungan Hukum Kebudayaan Daerah, (Jakarta: BPHN Depkumham, 2009), p. 1.
24 Direktorat Jenderal Kekayaan Intelektual (DJKI), Kementerian Hukum dan HAM, Perkembangan Upaya Perlindungan Pengetahuan Tradisional dan Ekspresi Budaya Tradisional di Indonesia (Materi Forum Group Discussion), (Jakarta: DJKI Kemenkumham, 2011).

In 2017, the government, through the Ministry of Law and Human Rights issued Regulation of the Minister of Law and Human Rights (Permenkumham) Number 13 of 2017 concerning Communal Intellectual Property Data, as an effort to inventory data on sub-categories of Communal Intellectual Property, such as traditional knowledge, Traditional Cultural Expressions (TCE), Genetic Resources (GR), and potential Geographical Indications (GI), but the implementing provisions for Article 38 paragraph (4) UUHC, namely Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property, were issued after the Minister of Law and Human Rights concerning collection of Communal Intellectual Property (CIP).

There are at least 11 (eleven) legal provisions related to Communal Intellectual Property (CIP), namely:

1. Law of the Republic of Indonesia Number 11 of 2013 concerning Ratification of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization of the Convention on Biological Diversity;
2. Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright;
3. Law of the Republic of Indonesia Number 20 of 2016 concerning Marks and Geographical Indications;
4. Law of the Republic of Indonesia Number 13 of 2016 concerning Patents;
5. Law Number 5 of 2017 concerning the Advancement of Culture;
6. Law of the Republic of Indonesia Number 11 of 2019 concerning the National System of Science and Technology;
7. Government Regulation of the Republic of Indonesia Number 48 of 2011 concerning Animal Genetic Resources and Livestock Breeding;
8. Government Regulation of the Republic of Indonesia Number 56 of 2022 concerning Communal Intellectual Property;
9. Regulation of the Minister of Agriculture Number: 67/Permentan/OT.140/12/2006 concerning Preservation and Utilization of Plant Genetic Resources;
10. Regulation of the Minister of Law and Human Rights Number 13 of 2017 concerning Communal Intellectual Property Data; and
11. Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number P.2/Menlhk/Setjen/Kum.1/1/2018 concerning Access to Genetic Resources of Wild Species and Sharing of Benefits from Their Utilization.

2. Communal Intellectual Property Protection Issues

WIPO recognizes the existence of protection of communal intellectual property of an indigenous community in the form of Traditional Knowledge (PT) and Traditional Cultural Expressions (EBT). According to WIPO, PT and EBT documentation is a process where PT

and EBT are identified, collected, organized, registered or recorded.[25] At the international level, the 2019 WIPO General Assembly through WO/GA/51/12 continuously noted and accelerated its work to ensure balanced and effective arrangements for the protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions in order to complete work related to legal instruments internationally using all previously existing WIPO working documents, namely: WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18 and WIPO/GRTKF/IC/40/19.[26]

Furthermore, in IGC-mandate point (d) it is confirmed that the WIPO General Assembly approved the renewal of the Committee's mandate, without reducing the work carried out in other forums through the 2022-2023 agenda of continuously updating the protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions by uses all previous WIPO working documents and the Chair's Text on Draft International Legal Instruments and adds contributions from Member States, through collecting and identifying domestic laws, impact assessments, databases, then compiling and making available online information about national and regional sui generis regimes in for the protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions.[27]

At the WIPO international level, strengthening the protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions is continually being updated by improving previous documents and complementing them with contributions from member countries, as can be seen from IGC-mandate point (d) and the WIPO agenda for 2022 -2023.

At the national level, regulations regarding the definition of Communal Intellectual Property (KIK) can be found in Government Regulation Number 56 of 2022 concerning Communal Intellectual Property and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 13 of 2017 concerning Communal Intellectual Property Data, both of which are the same -sama specifically contains material regarding Communal Intellectual Property. However, there are differences in the definitions and types of KIK in the two regulations. In Article 1 number (1) KIK is not explicitly defined, but the regulations directly determine the types and scope of Communal Intellectual Property. According to this article, KIK is intellectual property in the form of Traditional Knowledge, Certain Cultural Expressions, Genetic Resources, and Potential Geographical Indications. Meanwhile, in

25 WIPO, Documentation of Traditional Knowledge and Traditional Cultural Expressions, accessed from https://www.wipo.int/tk/en/tk_and_tces.html, at the date of 7 November 2023.

26 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/44/4, accessed from http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_44/wipo_grtkf_ic_44_4.pdf, at the date of 8 November 2023.

27 WIPO, Assemblies of the Member States of WIPO Sixty-Second Series of Meetings, Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), accessed from https://www.wipo.int/export/sites/www/tk/en/docs/igc-mandate-2022-2023.pdf, at the date of 8 November 2023.

Government Regulation Number 56 of 2022 concerning Communal Intellectual Property, the definition of KIK emphasizes that IP is communal and has economic value, as regulated in Article 1 number 1 of Government Regulation Number 56 of 2022 concerning Communal Intellectual Property. Then in Article 4 PP 56/2022 KIK is described in Specific Cultural Expressions, Traditional Knowledge, Genetic Resources, Indications of Origin, and Potential Geographical Indications.

This is because TCE is passed down from one generation to another in ethnic communities. It is sometimes seen as the result of a slow but constant impersonal process of creative activity carried out through imitation and constant adaptation within the ethnic community. Ethnic communities consider TCE as an instrument to record their culture, history, and religion.

In addition, TCE has been transmitted and spread from generation to generation for centuries. It is not possible to know the name of the TCE creator. Thus, this characteristic of the identity of the unknown creator is inconsistent with the identity of the creator which must be known in copyright, because of the creator's moral rights, especially maternity rights.

In addition to the issue of creator identity, from a Western model copyright perspective, TCE passed down from one generation to the next for centuries, will be positioned in the public domain. If these issues are ignored, the question will arise: Can ethnic communities claim their rights when faced with violations? This issue also concerns recognizing Customary Law used in ethnic communities and the relationship between Customary Law and national law.

The main obstacle in applying the provisions of Communal Intellectual Property in Indonesia is the issue of conceptual differences between IPR, which is individualistic, and the concept of Communal Intellectual Property, which is communalistic and puts forward the concept of community. For the Indonesian people, property rights have a social function that other communities may enjoy. The majority of Indonesian people, especially the holders of Communal Intellectual Property, do not see this as a serious violation if the Communal Intellectual Property is exploited or used by another person or group, even without the permission of the right holder.[28] Meanwhile, this concept is different from HKI which comes from the West where in the Western concept, every utilization of one’s property can be considered as a violation of IPR if it does not get permission from legal owner.

There are two forms of violations related to Communal Intellectual Property: misuse and misappropriation. According to Black's Law Dictionary, the concept of misuse is "the inappropriate use of patents by expanding the patent monopoly granted to non-patented objects or violating anti-trust laws". In general, Black's Law Dictionary states: "inappropriate use, accidentally or inconceivably." Some legal dictionaries usually define "misuse" as a

28 Adi Sulistiyono, Mekanisme Penyelesaian Sengketa HaKI (Hak atas Kekayaan Intelektual), (Solo: Sebelas Maret University Press, 2004), p. 34.

misuse, imprecision, or wrong application. Misuse can also refer to overuse or acting to change the original purpose or function of something.

In 2012, the term misuse was proposed to be added to the text "The Protection of Traditional Knowledge: Revised Objectives and Principles" (WIPO/GRTKF/IC/18/5) by several Delegations, such as Indonesia and Mexico. Meanwhile, misappropriation refers specifically to obtaining something without prior approval.[29]

Black's Law Dictionary defines “misappropriation” as “an unlawful act of using information that cannot be copyrighted, or using ideas collected and disseminated by an organization for profit to unfairly compete with that organization, or by duplicating a work for which the author does not exist or granted exclusive rights to the work. The elements included in the misappropriation are:

(1) the plaintiff must have invested time, money, and energy to obtain the information;
(2) the defendant must have obtained the information without the same investment; and
(3) the plaintiff must have suffer losses due to acts of misappropriation.

3. Differences in the Concept of Communal Intellectual Property with Copyright

Intellectual property rights with communal rights cannot be owned individually but by social groups or communities in certain areas which then in their implementation are empowered by a group of people to manage and safeguard or defend them. The concept of communal rights is known in Customary Law as ulayat rights. In communal rights, it is more appropriate to use the term control rather than ownership. The term ownership is used for individual rights. Meanwhile, the term tenure is used for communal rights.[30]

The division of intellectual property rights is now more realistic by referring to the nature of the rights granted, which can be divided into two types, namely:

i. Individual Intellectual Property Rights, consisting of: Copyright & Related Rights, Patent, Trademark, Industrial Design, Layout Design of Integrated Circuit, Trade Secret, and Plant Variety.
ii. Communal Intellectual Property Rights, which consist of: Indications of Source, Geographical Indications, Appellation of Origin, Traditional Knowledge, Folklore/ Traditional Cultural Expressions, and Genetic Resources.

29 WIPO/GRTKF/IC/20/INF/13, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twentieth Session, Geneva, February 14 To 22, 2012 Glossary of Key Terms Related To Intellectual Property And Genetic Resources, Traditional Knowledge And Traditional Cultural Expressions.

30 Wahyu Sasongko, Indikasi Geografis: Studi tentang Kesiapan Indonesia Memberikan Pelindungan Hukum terhadap Produk Nasional, (Bandar Lampung: Penerbit Universitas Lampung, 2012), p. 41.

Table 1.: Difference between individual and communal Intellectual Property Rights

Types of Intellectual Property Rights	Protection Focus
Copyright	Original creations or expressions of ideas in the fields of literature, art and science are automatically protected.
Related Rights	Performance Recordings, Sound Recordings, Television and radio broadcasts.
Industrial Design	Creation of the shape and composition of lines and colors in three-dimensional or two-dimensional form that gives an aesthetic impression and is used to produce products.
Trademark	Signs in the form of images, logos, names, words, letters, words, numbers, color arrangements in two-dimensional, three-dimensional form, sound, holograms or a combination of these elements which have distinguishing power and are used in trading activities.
Patent	Inventions in the field of technology that are novel, inventive, and industrially applicable.
Trade Secret	Information that is not known to the public in the fields of technology and business, has economic value and is kept confidential, including: production methods, sales methods, other information that has economic value and is not known to the public.
Layout Design of Integrated Circuit	Creation in the form of a three-dimensional layout design intended to prepare for the manufacture of integrated circuits.
Plant Variety	Plant varieties that are new, unique, uniform, stable and named.
Indication of Source	An indication that refers to a country (or to a place within that country) as the country or place of origin of a product.
Geographical Indications	Indication to identify an item originating from a particular region or region or place within that region that has the quality, reputation, or other characteristics of the item that are essentially related to geographic origin.
Appellation of Origin	A special form of geographical indication whose protection requirements are cumulative and more stringent, namely product quality or characteristics that must be exclusively or essentially connected to the geographical environment which includes natural and human factors.
Traditional Knowledge	Intellectual work in the field of knowledge and technology that contains elements of traditional heritage characteristics produced, developed and maintained by a particular community or society.
Traditional Cultural Expressions	All forms of expression of creative works, whether in the form of objects or intangibles, or a combination of both that demonstrate the existence of a traditional culture that is held communally and across generations.
Genetic Resources	Plants, animals, microorganisms or their parts that have real or potential value.

Source: Rohaini, et. al., Pengantar Hukum Kekayaan Intelektual, (Bandar Lampung: Pustaka Media, 2021), p. 7-8.

Copyright Law has several essential weaknesses that hinder the regulation of the protection of works of traditional knowledge, including TCE. In order to be copyright protected, a work must be original and in a tangible form (fixation requirement). The limited term of protection in Copyright Law is also inappropriate for traditional works because most of these were created centuries ago.

One of the requirements of Copyright Law is that the work or work to be protected must be in a tangible form, a formal form or "fixation", meanwhile TCE is usually not in a certain form but is usually expressed orally and passed down from generation to generation in society. Concerned.[31] This means the idea is not protected; an idea must be an independently reproducible form or form. For example, a song only gets protection when it has been recorded or recorded; it's not enough to play the song on the guitar over and over again.

This requirement means that traditional works do not receive copyright protection. Many of these works are oral or can be seen and performed and passed on to the next generation from generation to generation (for example, wayang performances). Indeed, perhaps there are still many members of traditional society who are illiterate, who are unable to put their works into written form. This means that ideas, themes, styles, and techniques of traditional societies are not protected by Copyright Law, which means that this work is free to be used by other parties, including foreigners, without permission from the community that created the work.[32]

In addition to the problem of tangible form, there is a problem of authenticity related to Communal Intellectual Property. The Copyright Law requires that the works that are protected must be original. As we have seen, this means that a Creator must have created a work and must not be a work that imitates another work. The problem is that some traditional works have been inspired by existing customs and involve patterns that repeat other patterns over a long period of time. In indigenous peoples, the provision applies that a custom that is not the same as the previous custom is considered to violate customary regulations. Thus, even though it still involves expert skills and great effort in creating, these works can be called 'copy' by judges and thus may not meet the authenticity requirements..

4. The Regulation of TCE as CIP in the Copyright Law is Less Effective

As is well known, the regulation of TCE as a form of CIP in Indonesia is still under the auspices of the Copyright Law, particularly Article 38 concerning the possession of Copyright from TCE by the State for Works whose creators are unknown. Then also Article

31 Graham Dutfield, TRIPs-Related Aspects of Traditional Knowledge, Case W. Res. Journal of International Law, (Vol. 33, 2001), p. 250.

32 Society experiences two detrimental consequences with the enactment of Copyright. First, there is usually no protection provided by Copyright for works that are oral in nature belonging to the public. On the other hand, a foreigner who translates the work into a tangible form, for example a book, besides getting a profit from selling it, is also protected by copyright law. Second, if the work has cultural or spiritual value for an entire community, its commercial use could offend that community.

60 paragraph (1) implicitly mentions the period of TCE protection. The formulation is still very minimal to become a CIP protection concept.

Copyrights to TCE and cultural products of communal communities are joint property and their protection is valid indefinitely according to Article 60 paragraph (1) of the Copyright Law, which aims to protect traditional works. The question is, can rural communities file lawsuits against other parties for violating these articles?

Although Article 38 of the Copyright Law aims to protect indigenous culture, it will be difficult for traditional communities to use it to protect their works for several reasons. First, the application of Article 38 of the Copyright Law is not clear when it is related to the application of other articles in the Copyright Law. For example, what if a TCE that is protected under Article 40 paragraph (2) of the Copyright Law is not original? The law does not explain whether this kind of TCE gets copyright protection, even though it is a work classified as TCE whose authenticity is difficult to find or prove.

Second, this provision only regulates who is the right holder and what if a foreigner is to reproduce or use works whose rights are held by the state. The law containing this provision does not yet regulate: norms in the event of a violation committed by a foreigner, as well as procedural law or a dispute resolution mechanism for foreign parties outside the territory of the Republic of Indonesia deemed to have violated these provisions.

Third, ethnic groups or a traditional society only have the right to file a lawsuit against foreign parties who exploit traditional works without the permission of the creators of traditional works through the state or related agencies. Protection of TCE should not only protect TCE objects but also cover the protection of indigenous peoples. So far, the protection of TCE has only prioritized the protection of TCE objects, so it is not uncommon for indigenous peoples' position as a party to continuously preserve TCE to be neglected.

As an illustration, when foreign parties unlawfully exploit traditional creations, the people who suffer are the losers, not TCE. That is why public protection also needs a portion of legal protection.

Regulation of CIP will be more effective if the content of the protection of CIP is contained in a legal form with a hierarchy of laws. The content includes regulations regarding actions related to misuse of traditional works (Protection Against Misappropriation), the broad scope of protection of CIP (General Scope of Subject Matter), relevant and comprehensive legal forms in regulating CIP (Legal Form of Protection), relevant regulatory models in the form of laws, eligibility for protection, as well as in relation to benefit sharing arrangements, it is important to strictly regulate the benefits of protection, fair and equitable benefit sharing and recognition of knowledge holders.

In an effort to strengthen the position of Communal Intellectual Property in statutory regulations, there are 3 levels of legal instruments that can be used as a basis for establishing laws for the protection of Communal Intellectual Property, namely the international, national

and local levels. At the international level, the instruments used are sourced from the Convention on Biological Diversity (CBD) which is referred to by the WTO Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/370/Rev.1, IGC Mandate 2022/2023 (a follow-up to WIPO /GRTKF/IC/40/6), WIPO/GRTKF/IC/40/18 and WIPO/GRTKF/IC/40/19, and Chair's Text, WIPO/GRTKF/IC/42/11 in Geneva in 2022 (follow-up from WIPO/GRTKF/IC/40/17 of 2010 regarding The Protection of Traditional Knowledge: Revised Objectives and Principles, emphasizing the protection put forward in the Substantive Principles and Policy Objective). At the national level, as contained in Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal Intellectual Property Data, Government Regulation Number 56 of 2022 concerning Communal Intellectual Property, Law Number 28 of 2014 concerning Copyright, Law Number 13 of 2016 concerning Patents, Law Number 20 of 2016 concerning Marks and Geographical Indications, and Law Number 5 of 2017 concerning the Advancement of Culture. Apart from that, at the local level, such as Bali Governor's Regulation Number 1 of 2020 concerning Management of Balinese Fermented and/or Distilled Drinks.[33]

5. Laws Specially Governing CIP

In connection with legal problems related to implementing the IPR regime in terms of CIP protection, the government should consider making a law *sui generis*. Several countries have proposed a sui generis protection system as an alternative to protecting traditional knowledge.

According to Rebecca Clements, cultural property should be protected by the country of origin of the cultural wealth. In International Law it has been recognized.[34] Indonesia can consider a *sui generis* system considering the characteristics of Indonesian society, which are very different from Western society. The characteristics of Indonesian society are still strongly characterized by collective or communal and religious systems, so that people's behavior is still permeated and guided by these value systems.[35] Thus, creating laws based on different value systems will only cause problems in implementation.

The most important substance of the law *sui generis* in question is an exsplicit acknowledgment that the local community owns the TCE. It is hoped that Customary Law or customary law can become an alternative source or material for formulating the rights of local communities in the law *sui generis*.[36]

33 Ni Ketut Supasti Dharmawan, et. al., Model Penguatan Perlindungan Kekayaan Intelektual Komunal: Transplantasi Muatan Kebijakan Termasuk Benefit-Sharing Berbasis Undang-Undang, Jurnal Ilmiah Kebijakan Hukum, Vol. 17, No. 2, Juli 2023: 235-252, p. 240.

34 Rebecca Clements, "Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law", Toronto Faculty of Law Review, (Vol. 49 No. 1, 1991), p. 2.

35 Satjipto Rahardjo, Sisi-sisi Lain dari Hukum di Indonesia, (Jakarta: Penerbit Buku Kompas, 2003), p. 96.

36 Milpurrurru vs. Indofurn (Pty) Ltd., in Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?", Connecticut Law Review, (Fall, 1997), p. 4-7. In this case the determination of who is the owner of the disputed design is based on customary law.

The principles of customary law that can be accommodated in a *sui generis* law include: First, the provisions in the sui generis law are simple. This means that what is regulated in the law is easily understood and understood by the public at large, and its implementation does not require complicated procedures as is the case with IPR legislation. This characteristic is in line with the mindset of the people who are also simple. This simple mindset, among others, is reflected in the Customary Law system, which is clear and cash in nature. Customary Law does not recognize abstract legal institutions or "intellectual property" legal institutions.

Second, the *sui generis* law should not ignore elements based on religious norms. This is in line with the Customary Law system, which is religious magic. This element is the main factor that causes society not to be overly materialistic. The size of the award is not only material in the form of economic rewards, as rewards in the IPR regime. Appreciation also includes respect for the belief system or belief that traditional knowledge (including cultural expressions/TCE) is a gift from God that must be grateful for and practiced for the welfare of humankind.

Third, the *sui generis* law should still be based on a social system that highly values togetherness. This is in line with the customary law system which is not individualistic. In other words, a sui generis law should not be based on individualistic principles or ideas like the IPR regime. Adopting an individualistic system will only mean repeating the mistakes of the IPR regime, which have proven to be less successful in implementation.

Fourth, the *sui generis* law must guarantee or at least provide a great possibility that the use of traditional knowledge (including cultural expressions/TCE) and the practices associated with it can provide welfare for society in general. In this case, the law concerned must be able to assure that the people who become custodians of the TCE concerned will genuinely benefit from traditional cultural expressions.

The sui generis law specifically governing CIP is expected to contain a comprehensive set of communal intellectual property rules, to regulate the ownership and use of knowledge resources related to cultural heritage. In this understanding, a system of *sui generis* protection for traditional arts will:

a. Defines the types of cultural content that can be protected, including old stories, motifs, musical themes, and others as well as contemporary interpretations of the inherited traditions;
b. Determine the minimum terms/conditions for the protection and the duration of the protection;
c. Establish “ownership” rules for this protected content, including principles regarding control over the use of generally accepted traditions;
d. Grants owners a comprehensive range of exclusive use rights, including the right to reproduce, adapt, perform, and broadcast protected material in whole or in part;

e. Give owners access to courts or other administrative bodies for proceedings against parties using the protected material without permission, as well as penalties for such unauthorized use; and
f. Identify a series of limitations and exceptions (for personal use or educational purposes), which may confer exclusive rights other than those conferred on owners.

D. Closing

Intellectual Property Law, which initially only provided legal protection for the work of individuals, in its development also recognizes the existence of Communal Intellectual Property originating from communal communities which are works of cultural expression and traditional knowledge which is a transformation from ancestors, from generation to next generation. Based on the nature of the rights granted, Communal Intellectual Property Rights, which consist of Indications of Source, Geographical Indications, Appellation of Origin, Traditional Knowledge, Folklore/Traditional Cultural Expressions, and Genetic Resources. Various problems of misuse by foreign parties of Communal Intellectual Property originating from Indonesia require a national policy as an effort to protect Communal Intellectual Property.

Regulations regarding Communal Intellectual Property in Indonesia are currently spread across various regulations, but have not been explicitly stated in the form of a law. Even though the existence of Communal Intellectual Property is spread across various provisions, such as Law Number 28 of 2014 concerning Copyright, Law Number 13 of 2016 concerning Patents, and Law Number 20 of 2016 concerning Marks and Geographical Indications, the policy regarding Communal Intellectual Property is specifically still being adopted in Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal Intellectual Property Data and Government Regulation Number 56 of 2022 concerning Communal Intellectual Property. Therefore, in order to provide legal certainty and protection for Communal Intellectual Property from misuse, a sui generis law is needed that specifically regulates Communal Intellectual Property with the aim of strengthening the legal position of communal communities, both in local, national and international contexts.

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