

The Exploitation of Indigenous Communities by Commercial Actors: Traditional Knowledge and Traditional Cultural Expression

Desak Putu Dewi Kasih¹, Ni Ketut Supasti Dharmawan, Ida Bagus Wyasa Putra, Kadek Agus Sudiawan, and Ayu Suci Rakhima
Universitas Udayana, Indonesia

Abstract: The protection of traditional knowledge (TK) and traditional cultural expression (TCE) of underprivileged indigenous communities is threatened due to frequent exploitation attempts by commercial actors for economic benefits. The literature highlighting the legal gaps and necessities to support such legal reforms to protect those communities are scarce in the literature, which has been studied in the current research. The current study aims to provide insightful recommendations for policymakers to help protect the legal rights of underprivileged communities scattered in various parts of the world. Indonesian study setting provided a perfect case to achieve the study objectives. Using a qualitative doctrinal legal research design, the secondary data were collected, and content was analyzed using phenomenological and linguistic analysis. The results revealed that the protection of TK and TCE in Indonesia and several underprivileged communities in various countries need serious legal amendments in local legislation considering international laws. Contextually, the Indonesian Copyright Law is inadequate to accommodate the full protection for TCE. Meanwhile, Indonesian laws that regulate traditional knowledge are overlapping and immature to protect national cultural heritage comprehensively. A new regulation is recommended to ensure that all international legal instruments related to traditional knowledge should help the community of traditional knowledge copyrights in Indonesia with affirmative action towards indigenous communities. Policy recommendations and future research directions are suggested to protect Traditional Cultural Expression and Traditional Knowledge of underprivileged communities in general and Indonesia in focus.

Keywords: international copy right law, traditional cultural expression, Traditional Knowledge, underprivileged community.

Cultural heritage includes both intangible and tangible heritage, known as Traditional Cultural Expression (TCE). These intangible and tangible forms, cultures, and traditional knowledge are expressed, manifested, or communicated (Susanti et al., 2019). "Traditional knowledge (TK) refers to the innovation, knowledge, and practices of indigenous and local communities around the world which are developed from experience gained over the centuries and adapted to the local culture and environment" (Bangun, 2019). It is transmitted orally from generation to generation and tends to be collectively owned in the form of cultural values,

¹ Corresponding Author E-Mail: dewi_kasih@unud.ac.id

proverbs, rituals, beliefs, the local language, community laws, and agricultural practices, including the development of animal breeds and plant species (Nan et al., 2021). Besides, Traditional cultural expressions are a culture born from a community group and passed down from generation to generation, such as music, dances, songs, handicrafts, designs, folklore, and other art forms (Palar et al., 2018).

Moreover, TK and TCE are produced by the process of interaction between natural resources and human resources. When utilizing and preserving their natural resources, humans produce TK and TCE (Kastowo, 2020). TK and TCE protection as a part of “people's welfare is urgent due to its economic values, and its position” under guidelines of the Council for Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (Oriakhogba, 2020). Further, intellectual property rights (IPR) protection is characterized by individual protection and communal protection (Susanti et al., 2019). In its development, intellectual property protection started to consider the nature of communal protection, which includes TK and TCE protection (Susanti et al., 2019; Torsen, 2008). The individualistic protection paradigm asserts that intellectual property should be protected by either a person or a company (Susanti et al., 2019). This paradigm is based on the argument that failure to protect intellectual property will impede gaining financial benefits. Financial benefits are necessary for executing any business-related activities, such as innovations, investments, and technological enhancements (Mansoor, 2021; Dalle et al., 2020a; Dalle et al., 2020b; Rihab & Lofti, 2011).

Theoretically, the rationality of individual protection is based on Reward Theory which asserts that the issuance of a “creator's exclusive rights over its creation as a reward for its material effort and creativity to produce a creation” (Du Bois, 2018). However, this paradigm is no longer able to support the need for obtaining social benefits for communities. Under all communities' best practices, intellectual property was not the only means for affording financial benefits (Oriakhogba, 2020). This fact further leads to the establishment of a communal paradigm (Kuruk, 1999). The communal paradigm considers the social-oriented protection of intellectual property rights (Tamsah et al., 2020). This paradigm values communal rights so that the community would own intellectual property rights of knowledge and culture. As a result of the debate, there has been a gray area with no clear instruction about international agreement about traditional knowledge and traditional cultural expression protection by international law (Ranathunga et al., 2018). On the other hand, developing states, including Indonesia, which have much potential for rich traditional knowledge, feel disadvantaged about the frequent occurrence of misappropriation or use by foreigners who are ignoring the rights of local communities to the traditional knowledge and associated biological resources which belong to the community concerned (Dasrol & Bachtiar, 2020).

Besides, Indonesia is the “world's latest archipelago and home to a multitude of diverse ethnic cultures, ancestral heritage, value systems, and customs” (Nurjani & Dwijendra, 2020). Like several other Asian nations, “Indonesia's cultural life has witnessed attempts by various business pursuits to exploit it, i.e., various old-age cultural expressions and practices of craft, music, and art were exploited by resourceful entrepreneurs for financial benefits that in turn affected the mindset of the indigenous people” (Susanti et al., 2019, p. 263). For the rights of their intellectual creations, several people of Indonesia have begun to consider legal protection (Dasrol & Bachtiar, 2020). The extensive but not exhaustive forms of TCE are narrated in the Elucidation of Article 38 Act of the Republic of Indonesia Number 28 of 2014 concerning Copyrights “Indonesia Copyrights Law” (Suparlan, 2014). It is defined as a cultural expression in the form of music, dances, songs, handicrafts, designs, folklore, and other forms of art (Susanti et al., 2019).

Indonesia protects TCE under the regime of Copyrights Law. It is governed under Article 38 Paragraph 2 of the Indonesia Copyrights Law, which stipulates that "the State is under obligation to establish an inventory, protects, and preserve TCE" (Article 38 of Indonesia Copyrights Law). Despite the legislation, the government has not taken any measures for conducting inventories of the existing and remaining TCE, which existed and have been passed from generation to generation within the community (Nurjani & Dwijendra, 2020). This non-performing obligation of the government ignores the rule and contrary to the great relevance of TCE in the living of community because the protection of communal rights takes up parts of intellectual property that are firmly inseparable from the global trade and inevitably include the conflict of interest, which may disproportionately bring loss to the community or even nation (Nawastuty S, 2015). *Adat* communities (a traditional community in Indonesia) who developed and preserved the TCE are the most potential victims of those who blindly exploit TCE primarily for gaining maximum financial benefits (Arizona et al., 2019).

Moreover, Indonesia's Copyrights Law provides limited protection towards the acknowledgment of TCE as a form of creation (Dasrol & Bachtiar, 2020). It is mostly represented by various disputes, such as the *fleur* silver pattern, which has seriously detrimental effects on Balinese silver designer and handicraft maker Ketut Deni Aryasa. The *Fleur* silver pattern is an original Balinese pattern found in almost all ornamental art creative products in Bali. However, a Canadian businessman, the owner of Karya Tangan Indah Ltd Co., held the fleur silver pattern's copyright (Jaszi, 2009). A similar case has affected the Balinese *Keplak* motif as a foreign businessman has claimed it as its creation and blatantly renamed it as a *dot motif* (Arsanti & Böhme, 2018; Tampubolon, 2008). The enactment of the Indonesia Copyrights Law of 2014 was expected to effectively settle TCE protection (Susanti et al., 2019). Such exploitations necessitate that legal scholar highlight and attract the attention of legal bodies nationally and internationally. This exploitation is not only in Indonesia but all over the world. Underprivileged traditional communities are potential victims of such commercially motivated attempts (Khushnud & Qingjie, 2020). This situation makes this research vital for legal and human behavior research related to traditional knowledge and traditional cultural expression.

Besides the importance and impact of such grey legal areas, Indonesia, to date, has not had any specific national regulation related to the protection of traditional knowledge (Bangun, 2019). Even though Indonesia has ratified Nagoya Protocol and regulates the distribution of results and access to utilization of traditional knowledge in Article 26 of Act No. 13 of 2016 on Patents, this is inadequate to protect Indonesian indigenous communities. It makes the interests of local communities in Indonesia relatively unprotected because their traditional knowledge can be exploited by others for commercial purposes under the pretext that there are no regulations against it (Putra et al., 2021). This makes Indonesia the best context to conduct research that can highlight the critical issue and gaps in the legal landscape. Consequently, there is a need to make a regulation that explicitly regulates traditional knowledge (Bangun, 2019). Indonesia's national regulation related to IPR, such as Act No. 28 of 2014 on Copyright; Act No. 13 of 2016 on Patent; Act No. 20 of 2016 on Marks; Act No. 30 of 2000 on Trade Secrets; Act No. 31 of 2000 on Industrial Design; and Act No. 32 of 2000 on Layout Design of Integrated Circuit has not accommodated protection against traditional knowledge (Lubis & Siahaan, 2016). Instead of providing benefits for Indonesia, the laws and regulations related to such IPR are considered more favorable to developed states' positions (Kurnilasari et al., 2018). In this regard, the need to establish national regulations on the protection of traditional knowledge is urgent.

This study aims to contribute suggestions regarding the existence of international law for the establishment of Indonesian national regulations on the protection of traditional cultural expression and traditional knowledge. Therefore, this article will discuss the protection of traditional knowledge in international legal instruments and the existence of international law in the formation of traditional knowledge arrangements in Indonesia. This article aims to identify the factors contributing to the lack of legal protection of TK and TCE in Indonesia. It also aims to determine the applicable legal and technical schemes or actual programs that Indonesia might adopt to increase the Indonesian law's capacity for providing legal protection for TK and TCE in Indonesia following Act Number 28 of 2014 on Copyrights. Based on the facts above, this article analyzes the following issues:

- What factors contribute to the lack of legal protection of TK and TCE in the developing country context of Indonesia?
- What proper steps need to be taken by the Indonesian legal system to improve the capacity of law, including the applicable legal schemes and existing programs, in protecting the Indonesian TK and TCE?
- How to form regulations that can provide benefits and welfare for the people of Indonesia, especially the underprivileged local communities and owners of traditional cultural expression and traditional knowledge?
- How the country context of Indonesia as a developing nation can bring key insights to preserve the legal intellectual property rights of developed and developing nations worldwide.

Methodology

Under the characteristics of doctrinal legal research, the secondary data used in this study was obtained from primary legal materials, secondary legal materials, and tertiary legal materials. In the first step, legal materials were collected, such as Indonesian regulations on Traditional Cultural Expression, in the form of "Copyright Law, the Bill of Government Regulation on Copyright of Traditional Cultural Expressions held by the State, and International Conventions dealing with Traditional Cultural Expressions and cultural heritage." In the second step, Hans-Georg Gadamer's legal hermeneutics approach was used in understanding the texts in the materials collected in the first step. This perspective is characterized by "dialogues." It is based on an inclusive analysis of the text in a circle in which the whole cannot be separated from the parts, and the parts cannot be separated from the whole, to derive a detailed understanding of the facts and figures, and is conducted via phenomenological and linguistic analysis (Susanti & Susrijani, 2017). One key aspect of the legal dimension of this topic is prejudice or preconception, which is indispensable for and relates to the whole issue of law. The dialog between the interpreter (researcher) and the text enables the text to be understood comprehensively through linguistic, philosophical, phenomenological, comparative, and historical analysis (Susanti & Susrijani, 2017).

The primary sources of this research were: "Article 26 of Act No. 13 of 2016 on Patents, Indonesian Law No. 28 of 2014 on Copyright, Presidential Regulation No. 28 of 2007 on the Ratification of the Convention for the Safeguarding of Intangible Cultural Heritage, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, the Convention on Biological Diversity, the WIPO Model Law for Folklore Protection 1982, the WIPO Draft Treaty

on Protection of Folklore, the WIPO Draft Treaty on Protection of Traditional Knowledge, the WIPO-IGC Draft of the Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, and the WIPO-IGC Draft of the Protection of Traditional Knowledge: Revised Objectives and Principles. The secondary sources were an encyclopedia, dictionaries, and writings in books and journals dealing with TK and TCE.

Linguistic analysis is used to find out the meaning from a linguistic perspective, as language is essentially the core of creating understanding (Stelmach & Brozek, 2006). Because the law is wrapped in language, this perspective is relevant and important. The philosophical approach is used to determine the essence of the state as the copyright holder of TCE. At the same time, the historical approach is used to trace back the legislators' considerations in formulating the regulation (Fedyk & Xu, 2018). In contrast, a comparative approach analyzes cultural heritage in national and international contexts (Kinata, 2016). The result of this research was drawn up under a descriptive nature to deliver an overall and systematic visualization of legal principles, legal norms, doctrines, and legal instruments related to the objective of this research (Putra, 2012). All research results obtained from legal materials were then discussed by drafting concepts, principles, and legal provisions. Next was looking for their relationship with each other using deduction and induction reasoning, which is commonly used in legal reasoning to produce propositions and concepts that are either in the form of definition, prescription, or classification as a result of research. Furthermore, the existing legal materials are analyzed qualitatively to draw conclusions that answer the problems discussed while giving prescriptions based on the arguments that have been presented into conclusions.

Results and Discussion

The Contributing Factor to the Lack of Legal Protection of TK and TCE in Indonesia

Indonesia is rich in traditional culture, whether in the form of TK or TCE. Until August 2020, the Directorate General of Intellectual Property recorded at least 794 TCEs and 135 TKs (Mahy, 2021). Indonesia is prone to the illegitimate exploitation of TK and TCE by irresponsible foreign and local actors, which often causing disproportionate loss to the *adat* society (Panca & Widodo, 2014). However, the government is yet to fully protect those TK and TCE due to the absence of a legal basis for the protection of TK and TCE. More specifically, two major obstacles are the lack of TK and TCE protection in Indonesia, the regulation, and practical factors.

Regulatory Factors

The protection of TCE in Indonesia falls within the scope of Copyrights Law and is governed under the Indonesia Copyrights Law. Notably, TCE is to be protected as the community's rights over its traditional resources as a collective result of their existing values and culture and held by the related *adat* community (Ismail et al., 2019). Meanwhile, copyright is qualified into a type of protection based upon the individualistic paradigm with an individual scheme of ownership over a certain work, serving as realizing the “creator's idea in art, literature, and science” (Schmidt & Anderman, 2011). As governed under Article 38 of Indonesia Copyrights Law, the state holds the rights over TCEs developed by the *adat* community. However, there is no clear regulation on which state actor has the authority to hold such rights

(Komaladewi et al., 2017). Therefore, the copyright protection of TCE is diminished by the vague regulation on which state actor is responsible for the rights (Foroutani, 2020).

TCE is generally grown and developed inseparably with the way of living of the traditional community. Accordingly, the creator may not always be known (Roisah, 2014). “TCE's characteristic of having an unknown creator is the main obstacle in providing maximum legal protection to the traditional” community's TCE. Under Article 38 of Indonesia Copyrights Law, rights over creation in which its creator is unknown shall be held by the state (Nugroho & Utama, 2020). Communal intellectual property rights owned by the state are initially used to protect the interests of the anonymous creator. However, this protection scheme will only fulfill and protect the traditional community's moral rights who developed the TCE and may not cover their economic rights, becoming an inseparable part of intellectual property rights (Nugroho & Utama, 2020). Therefore, the protection scheme of the TCE stipulated under Indonesia Copyrights Law cannot fully safeguard the rights of the community over their TCE, which comprises economic and moral rights. This regulatory factor exposes a dilemma about whom is entitled to hold the copyrights of TK and TCE (Arizona et al., 2019). Authority, procedure, and substance that cover the "copyrights entitlement" have yet to be enacted. Hence, it has a big potential to harm the moral and economic rights of *adat* communities as TCE owners due to the unclear regulation of the latter (Arizona et al., 2019).

Aside from the Indonesia Copyrights Act, the legal basis on TCE protection can be found implicitly under Act No. 5 of 2017 on Cultural Enhancement "Cultural Enhancement Act" (Utami et al., 2017). Unlike Indonesia Copyrights Law, which clearly articulates the term TCE under its provisions, the Cultural Enhancement Act uses the term “Cultural Enhancement Object” under its provisions. Article 1(8) of the Cultural Enhancement Act defines Cultural Enhancement Object as cultures within the main target of Cultural Enhancement (Arizona et al., 2019). With its broad definition, Cultural Enhancement Object may also cover TCE. Hence, the Cultural Enhancement Act also suffices as a legal basis for protecting, archival, and enhancement of TCE. It is regulated under both Acts, Copyrights, and Cultural Enhancement; TCE protection is regulated further in an implementation regulation. However, up to this date, there has been no implementation regulation found enacted for both Acts, which provide a certain and clear mechanism to fulfill and protect the economic and moral rights of *adat* communities over their TCEs.

Practical Factors

The procedure for taking over the communal TCE's rights of entitlement by the state using an automatic entitlement has caused the *adat* community to be ignored by the process and consider consent by the community as the main reason for the overtaking. In the current practice, overtaking of rights of TCE can be performed directly by the state without any consultation step with the *adat* community (Pratiwi & Utama, 2019). Ideally, the protection of TK and TCE should safeguard the cultural creation and the rights of the communities. Ironically, those communities will be the primarily affected actors when the TCE is illegitimately exploited (Pratiwi & Utama, 2019). Accordingly, the current automatic overtaking scheme by the state resulted in the loss of acknowledgment of the *adat* community's existence and status of ownership.

The protection of economic rights of the community, which previously has become the regulatory obstacle, will potentially be harmed due to the unclear and uncertain protection mechanism. Indonesia Copyrights Act and Cultural Enhancement Act, as the legal basis of TCE protection, have yet to provide an implementation regulation that may clarify the protection

mechanism in question (Nugroho & Utama, 2020). Potential harm to the *adat* community arises whenever there is a utilization of TCE by foreign or national commercially motivated actors. As a copyright holder, the state has the right to obtain royalties for legitimate utilization and penalties for illegitimate ones (Dasrol & Bachtiar, 2020). However, as the TCE owners, the *adat* communities are not entitled to such rights and will certainly be left with nothing as the existing mechanism has put them outside the box (Palar et al., 2018). They would not have any certain position and rights regarding the benefit, economically or morally, which might be produced from such utilization for fulfilling their rights. Therefore, the economic rights of the traditional community are potentially harmed, not only by the existing regulation but also by the practice of the performance of such regulation (Minarchek, 2017).

As per this study literature search up to this date, an archival effort undertaken by the state through the Directorate General of Intellectual Property is through the creation of the Communal IP Law column on its website. This column has recorded at many as 794 TCEs and 135 TKs while providing general information consisting of name, TCE type, origin, and TCE subtype. However, this inventory gives no safeguard of intellectual property rights protection and does provide an opportunity to fulfill the economic rights of the traditional community as it does not provide information concerning the *adat* communities related to each TCEs. A database containing TCE inventories is needed to provide information regarding the existing TCE in Indonesia and open the opportunity for the community to gain benefits from the utilization of their TCEs. The absence of the TCE inventories would indirectly prevent the fulfillment of the community's economic rights.

Protection of Traditional Knowledge and Traditional Cultural Expression in International Law Instruments

Admittedly or not, the current international system of Intellectual Property Rights (IPR) protection is a system whose formation is motivated by the emergence of industrialization in Western states and then developed according to the needs of technologically advanced societies (Susanti et al., 2019). To that end, in recent years, local communities and governments of developing states, in particular, have called for a protection system similar to that applied to IPR for Traditional Knowledge and Traditional Cultural Expressions (Nurjani & Dwijendra, 2020). In 2000 WIPO members formed the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in 2009 they agreed to develop an international legal instrument that could provide adequate protection for Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (Folklore) (Hakim, 2009; Hysa, 2020). An instrument recommended to WIPO members is a formal agreement that will bind the states that have ratified it (Purwana & Madhakomala, 2020). This instrument itself has not been agreed upon regarding the differences of views of developed and developing states on the concept of protection of traditional knowledge (Purwana & Madhakomala, 2020).

From the viewpoint of developed states, the problem of traditional knowledge has been accommodated in the geographical indication regime (Ahmadi, 2021; Palar et al., 2018). Additionally, they consider that the protection of traditional knowledge is not necessary because it has become public domain, and the modernization process of local and traditional societies is considered to be adequate compensation for the utilization of IPR (Palar et al., 2018). On the other hand, according to developing states, traditional knowledge and traditional cultural expression as part of IPR must be protected, without discrimination, as TRIP protects seven types

of IPR oriented to the interests of developed states (Kurnilasari et al., 2018). Developing states also see that, in practice, the traditional knowledge they have had so far has been exploited commercially by the developed states without being accompanied by proper remuneration for their side (Sadeghi et al., 2018).

Previously, local communities or indigenous people from various states have submitted several statements in some international declarations such as the Manila Declaration on the World Declaration for Cultural Development (1988), the Kari-Oca Declaration (1992), the Mataatua Declaration (1993), and the Beijing Declaration on Women of Indigenous People. Local communities or indigenous people's statements were also raised in the Amazon Valley Indigenous Peoples Coordinating Body (1994) and the South Pacific Regional Consultation on IPR of Indigenous Peoples (1995) (Hakim, 2009). The absence of an international treaty explicitly regulating the protection of traditional knowledge does not mean that there is no protection against it at all (Clark & Wylie, 2021). It is a fact that on the international level, the protection of general knowledge is getting more attention and support (Clark & Wylie, 2021). Such concern and support include respect for the cultural and spiritual values of traditional knowledge, biodiversity preservation, recognition of social and economic benefits, fairness, and equity in sharing economic benefits from the utilization of traditional knowledge (Palar et al., 2018).

That attention and support have led to the establishment of several international legal instruments that recognize and protect the rights of indigenous peoples or local Communities to enjoy their cultural heritage (including traditional knowledge) (Chou et al., 2017). Some examples are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). In Article 15 paragraph (3) of ICESCR, it states that: "The States Parties to the present Covenant recognize the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author" (Bangun, 2019). Explicit arrangements on the protection of traditional knowledge, especially those related to genetic resources, can be found in the 2010 Nagoya Protocol on Access to Biological Resources and Equitable and Equitable Benefits Distribution of Utilization. Article 3 of the Protocol stated that: "This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and the benefits arising from the utilization of such resources (Kurnilasari et al., 2018). This Protocol shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge" (Bangun, 2019).

The Convention on Biological Diversity (CBD), particularly in Article 8 letter j, states that participating states shall respect, preserve, and maintain traditional knowledge; in using it should seek approval from and engage its holders and seek a fair distribution of benefits from its use. Furthermore, in May 2002, the participating States of the CBD made the Bonn Guidelines on Access to Genetic Resources and Fair and Equalization of Arising Out of Their Utilization, fundamentally encouraging the disclosure of the state of origin of genetic resources and traditional knowledge in any patent application (Hawin, 2011). The Bonn Guidelines has its disadvantages because it merely encourages the protection of traditional knowledge. CBD itself is entirely entrusted to the participating states to determine how the implementation of such commitments. Therefore, without the support of an international IPR deal, the commitment is difficult to implement (Hawin, 2011).

International Law in the Establishment of Traditional Knowledge and Traditional Cultural Expression Regulations in Indonesia

In the context of international treaties are the most important source of international laws related to international relations. Almost all the results of international relations are in the form of international treaties that formulate the rights and obligations of the parties in the relationship. According to Purwanto et al. (2009),

during the ongoing relationships between states or international relations, during which it will also create international treaties. Through international treaties, the implementation of the rights and obligations of the as members of the international community will be more directed and guaranteed. (p. 399)

In the formation of a treaty, each has equal status. It is reinforced by the principle of *pacta sunt servanda*, which allows each to have equality in forming the agreement. The reality that is happening today, the will to build inter-cooperation, has been shown by the international community to fulfill their interests with the help of other states (Bangun, 2019). Therefore, it is natural that the inter-cooperation is directed to meeting the needs and interests of the international community in achieving its objectives (Palar et al., 2018).

The function of international law in the context of legal knowledge is often understood only as a rule or rule applicable to the subject. Still, it is only one of the various functions of international law (Ismail et al., 2019). Other functions that are paid less attention to legal knowledge include a political instrument used by the government of a state to achieve its national goals (Susanti et al., 2019). According to Juwana (2011),

The existence of international law that serves as a political instrument is based on the reality of relations between states that cannot be separated from the interests of each other. Moreover, in the global era where physical boundaries seem to be absent (borderless). The problems faced by a state will be tangent to other states' sovereignty, such as the problem of international trade, the fight against terrorism, environmental issues, and human rights issues. (p. 436)

As a member of the WTO, Indonesia is bound by WTO provisions in its national legislation. Indonesia has done it by enacting several laws relating to IPR, such as the Law on Copyrights, Patents, Trademarks, Trade Secrets, Industrial Designs, and Layout Designs of Integrated Circuits.

Recommendations for Indonesia

Proposed Legal Protection Models for TK Protection in Indonesia

Based on the fact that in Indonesia, the law has not yet accommodated the protection of traditional knowledge. Hawin (2009) proposed two steps to address the need for Indonesian national regulations that protect traditional knowledge. The first was improving legislation in the

field of IPR by affirming the protection of local knowledge. For example, the Law on Patents should be required to mention that traditional knowledge used in the invention petitioned for patent and ask permission from the holder of traditional knowledge and relevant indigenous community (Ismail et al., 2019). Additionally, the Law on Patents must affirm that traditional knowledge is prior art that can dispel a patent application, may even be used as a reason to cancel the patent. The second step is that Indonesia can create a separate law (*sui generis*) on traditional knowledge to be used as an umbrella rule (Susanti et al., 2019). This law should provide a firm understanding of traditional knowledge, its legal protection, including the way of its registration, the body that will handle traditional knowledge, and others. It is also necessary to regulate the procedures and requirements of transferring traditional knowledge (Bangun, 2019).

In line with that, matters relating to foreigners' access to traditional Indonesian knowledge, the sharing of benefits to local indigenous and underprivileged communities over access, and the use of traditional knowledge are also essential to regulate in the law (Rosidawati, 2013). For achieving this point, the government needs to do an inventory and documentation to create a database of work or knowledge that will be categorized as traditional knowledge. This step is vital to clarify what will be protected, preserve traditional knowledge, prevent it from extinction and simultaneously show the government's seriousness to protect traditional knowledge (Oriakhogba, 2020). Defensive protection minimizes the occurrence of abuse against the law against the traditional culture of a society. Steps are carried out by various countries and the community to positively use this protection by building databases related to traditional culture in the country concerned (Xie & Peng, 2018). The protection through defensive mechanism will assure unlimited use of traditional knowledge for its indigenous people group as its owner. This protection method could be manifested by registering and documenting the existing traditional knowledge.

A particular defensive protection form has been a part of the Intellectual Property system for a long time (Kurnilasari et al., 2018). Related to the development of the *sui generis* system in the protection of traditional knowledge in Indonesia, Rosidawati (2013, p. 168) stated that "Indonesia can consider the *sui generis* system considering the characteristics of Indonesian society that are very different from Western society. Thus, creating a law based on a different value system will only cause problems in its implementation". Improvement of legislation in IPR and the establishment of laws that specifically regulate local knowledge protection will not effectively work if not supported by international agreements (Kastowo, 2020). It is related to the open possibility that the traditional knowledge of Indonesia can still be taken by other countries that do not recognize the traditional knowledge of other states (Hawin, 2009). Hence, strengthening regional cooperation in terms of the protection of traditional knowledge is a very effective strategy to achieve a state's goal.

Proposed Legal Protection Models for TCE Protection in Indonesia

Indonesia has developed a plan of legislation drafting on the Protection of TK and TCE to preserve traditional communities' moral and economic rights. However, it has yet to be achieved. The only protection of TCE provided recently is under the regime of copyright law, which is ineffective and insufficient, as mentioned in previous sections of this study. Therefore, strategic efforts must be taken to provide a proper and suitable legal scheme for protecting the community's rights to their TCE, both the moral and economic values. The best practices of several states on the protection of TCE as well as WIPO Draft Articles on the Protection of TCE 2019 (WIPO Draft Articles on the Protection of Traditional Cultural Expressions

(WIPO/GRTKF/IC/40/19), have drawn up a constructive legal scheme for developing a proper legal model in Indonesia.

Two legal models that might be extracted from such practices include 1) the legislative model (LM); and 2) the actual action model (AAM). However, due to the global legal culture, the actual action model would also be necessary for Indonesia, considering that the Indonesian community's TCE threats are mostly foreign business actors. The AAM can be conducted through the establishment of inventories and a large-scale publication on TCE information. These efforts serve as a defensive protection scheme to protect TCE and prevent any utilization, which may disproportionately cause loss to the traditional community. Defensive protection can be performed by establishing a database or databank that contains general or technical information about TCE. This database should be accessible for the general public and further provide relevant information concerning the traditional community, the owner of TCE. This database should firmly support traditional community TCE ownership with a strong legal basis and justification. This will simultaneously function as a core of defensive legal protection to prevent any illegal utilization of the community's TCE or TCE ownership by foreign actors.

To maximize the benefit of both LM and AAM, Indonesia first needs to amend its legislation by inserting the rules of protection of TK and TCE as the existing protection rules under the Indonesia Copyrights Law are insufficient to safeguard the moral and economic rights of the traditional community. The act would need a stronger core focus on intellectual property protection. The newly drafted legislation needs to accommodate the content to safeguards the communal TCE ownership. Such legislation must uphold the communal protection principle and consider the absorption provisions under the *adat* law and customs of the traditional community. Such legislation must also be equipped with provisions relying on the free, prior, and informed consent principle as a form of protection towards the moral rights of traditional communities. It should also be strongly supported by providing a benefit-sharing concept to safeguard and fulfill the traditional community's economic rights.

Under the spirit of long-term protection over TK and TCE, Indonesia needs to consistently preserve, develop, and promote the TCE. It can be fulfilled by issuing an official acknowledgment and appreciation of artists, culturists, especially the traditional communities taking part in the development and preservation of TCE. The promotion of TCE through mainstream media would also be useful for supporting the effort of safeguarding the existence of TCE and the protection scheme by the state. A sustainable scheme can be done by providing selective access to TK and TCE to prevent claims by foreign actors. Under the AAM of a largescale publication of TCE, the strategic and basic information of TCE should certainly be kept secret to prevent illegitimate utilization of the TCE. It should be ensured that the largescale publication of TCE does not contain the strategic and basic information of the TCE. The legislation should also strongly announce this issue to the traditional community, researchers, research centers, and any other related parties for publication activities.

Indonesia also needs to refer disputes concerning TK and TCE ownership to the courts. It would give a deterrent effect to preventing the further illegitimate utilization of the TCE and its maximum protecting effort. This measure would be valid following the enactment of the TCE Protection Act in Indonesia. In resolving the TCE ownership dispute in courts, traditional laws and customs of the communities should be considered. Under the best practice of the Philippines, the positive law may only be applied when traditional law is unable to accommodate and provide a legal basis to resolve the dispute. However, if the dispute is beyond the measure, Indonesia could make traditional law and customs prevail in resolving the TCE ownership dispute in

Courts. Accordingly, the proposed measures *supra* show that the proper TCE protection may only be afforded under an LM and AAM proper scheme. Based on such schemes, the safeguarding of TCE intellectual property rights owner of the traditional community, both from moral rights and the economic rights, would suitably perform.

Recommendations for Developing and Developed Countries

This study used the Indonesian context to pitch the core idea of TK and TCE protection of indigenous and underprivileged communities because Indonesia lacks much in providing such legal protection to its communities. However, it is an international issue of importance that commercially motivated attempts to exploit traditional knowledge expression and traditional culture are common worldwide. The key contribution of this research is to provide some general recommendations for all nations based on learnings adopted from the Indonesian case. It will help to highlight and protect several indigenous communities in developed and especially developing countries.

1. Each country should establish an official database or directory to list all traditional cultural expressions and traditional knowledge and furnish international bodies such as world cultural heritage organizations and International Property rights organizations, and other international bodies dealing with such matters.
2. The established databases or directories must contain the information of rights ownership of each local indigenous community and underprivileged group so their exploitation by national and international actors may be discouraged.
3. All stakeholders, including developed and developing countries, should raise the issue at international forums for amendments in international law to make it fair and affirmative action towards underprivileged groups of society across the globe.
4. Each country should review and improve its current legal provisions in light of existing international provisions and should try to maximize and protect the legal rights of their local indigenous communities. These local amendments must consider local value systems and cultural desirability to make these laws easy to implement in a given society or country.
5. Each country should establish a court mechanism to deal with and support the underprivileged group of communities in case of any dispute of exploitation is raised between commercially motivated groups and genuinely holder communities of traditional knowledge and traditional cultural expressions.
6. The emergence of a global village has necessitated increased regional and global cooperation between the countries. So, all countries should establish legal committees responsible for protecting traditional knowledge and traditional cultural expressions. These committees should also strive to create international liaisons to bring harmony among global actors to discourage the exploitation of local communities' ownership and economic interests anywhere in the world.

Conclusion

Indonesian Copyright Law is inadequate to accommodate the complete protection for TCE. Meanwhile, Indonesian laws that regulate traditional knowledge overlap and comprehensively cover national cultural heritage. A new regulation is subsequently needed to

implement the protection. WIPO recommends that each country design its law on traditional knowledge protection (*sui generis*), and this path seems to be the best route for Indonesia to protect its cultural heritage. To design such a *sui generis* law, Indonesian lawmakers may follow the guidelines provided by WIPO in the form of predesigned questions and several model laws such as Tunis Model Law and Panama Law. The *sui generis* law should grant rights for protection to indigenous communities and accommodate their interests and views. To establish special arrangements regarding traditional knowledge that can provide benefits and welfare to the community, especially local communities or indigenous people as owners of traditional knowledge. Indonesia must be observant of adopting many international legal instruments related to this issue. Also, ensure that the binding of these international legal instruments following Indonesia's national interests.

The absence of an international legal instrument specifically regulating the protection of traditional knowledge should not cause Indonesia to delay forming a national regulation related to it. The establishment of the national regulation can be used as the momentum of Indonesia to encourage the achievement of international agreements on the protection of traditional knowledge that has a positive impact on Indonesia. Regional cooperation forums, mainly ASEAN, can also be an effective means for Indonesia to fight for its importance in protecting traditional knowledge. Indonesia should encourage existing agreements within the ASEAN regional level to be implemented by ASEAN member states. Furthermore, the contributing factors to the weak protection of TCE in Indonesia can be divided into regulatory and practical factors. Regulatory factors contributed by the insufficiency of Indonesia Copyrights Law to protect TCE due to its protective nature. Accordingly, the protection of TCE, which is supposed to be communal protection, cannot be based upon the applicable copyright laws. The practical factor is the absence of an official recording system and inventories to provide information on TCEs, which the state has protected. Such absence leads to implementing an automatic overtaking system by the state with no consent of the traditional community. Various states, i.e., India, Philippines, Australia, have performed LM and AAM in different ways and shared the benefit of such LM and AAM in a certain level of achievement, which strongly supported the need of Indonesia.

Finally, Indonesia is still in the drafting phase of legislation on TCE protection. Indonesia can enact legislation and the TCE protection system if Indonesia could identify the contributing factor to the lack of TCE protection. It would be beneficial if Indonesia absorbed both the LM and AAM properly to maximize the benefit of the model for protecting Indonesia's TCE. Indonesia should enact legislation as a legal basis of TK and TCE protection in Indonesia based upon the principle of free, prior, and informed consent, benefit-sharing, and communal rights protection. Furthermore, Indonesia should establish a recording system to create a TK and TCE inventories database, which will further be developed as defensive protection of TK and TCE in Indonesia. In the long-term protection, Indonesia should preserve, develop, and promote TK and TCE. Lastly, Indonesia should refer disputes over TCE ownership to the courts while considering the applicability of traditional law and custom as the basis of dispute resolution. Indonesian legal policy experts can benefit from this study by incorporating all recommendations of this research into their legal amendments in IPR law. All countries facing such issues may gain policy insights from the recommendations of this research. Future studies may take a comparative look at the countries where local indigenous communities have been exploited, and legal protection is weak. Such a future research attempt would further help to strengthen the idea to highlight the issue at a global level to protect the rights of local underprivileged communities across the globe by commercial actors.

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Notes on Contributors

Desak Putu Dewi Kasih, is a Doctor in Indonesian Business Law in the Faculty of Law, Udayana University (Bali, Indonesia). She is currently sitting as the Vice Dean of Academic Affairs in the Faculty of Law, Udayana University. Her recent collaborative work, Implementing The Regulation of Tourism Services Trade Business Certification Through Stakeholders Synergy Model (Journal of Legal, Ethical and Regulatory Issues, 2021)

Ni Ketut Supasti Dharmawan is a Professor in Intellectual Property Rights in the Faculty of Law, Udayana University (Bali, Indonesia). She was named as the main author in her recent collaborative work, Trademark Protection for Small-Medium Enterprises in Bali: Strengthening Community-Based Tourism in the Era of Fourth Industrial Revolution (Journal of Legal, Ethical and Regulatory Issues, 2020).

Ida Bagus Wyasa Putra is a Professor in International Economic Law in the Faculty of Law, Udayana University. He had just finished his term as a Vice Rector on Cooperation and Planning in Udayana University. One of his prominent works, Harmonizing Ideological Tension in the Development of the ASEAN Law (Journal of East Asia and International Law, 2012), analyzed the performance of cooperation within ASEAN.

Kadek Agus Sudiarawan is a lecturer in the Faculty of Law, Udayana University, and currently sitting as the Editor in Chief for several law journals under the Faculty, as well as the Secretary for the Publication Unit of Udayana University. His latest work highlighted his field of focus, it was titled Position of Fictitious Positive Administrative Decisions as Dispute Object of State Administrative Court: Indonesia Omnibus Law Perspective (Journal of Legal, Ethical and Regulatory Issues, 2021).

Ayu Suci Rakhima is a final year Bachelor Candidate in the Faculty of Law, Udayana University. She was appointed as the Most Outstanding Student under the Faculty and is on track to graduate with summa cum laude. Her academic publication, Gross Violations of Human Rights Veiled within Xinjiang Political Reeducation Camps (Kertha Patrika, 2019), provides legal analysis towards the current situation in Xinjiang.