

HUMAN RIGHTS AND INDONESIAN LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: A Comparative Study in Kenya and South Africa

Yenny Eta Widyanti

Faculty of Law Universitas Brawijaya, Indonesia

Email: yenni.eta@ub.ac.id

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Abstract

Legal protection of traditional cultural expressions in Indonesia is paramount to human rights. Indonesia is home to its richness of cultures and tribes, offering economic, social, and cultural values. However, this potential will remain insignificant without proper regulatory provisions in the domains of intellectual property or human rights. Departing from this issue, this research seeks to profoundly analyse the interface between traditional cultural expressions and human rights from the perspectives of either national law or international convention, and this analysis involves the comparison between Kenya and South Africa that appropriately govern legal protection of human rights in traditional cultural expressions. This research aims to elaborate on the interface between human rights and the protection of traditional cultural expressions within the purviews of national law and an international convention. With a legal research method and statutory, conceptual, and comparative approaches, this research finds

that there is a close correlation between traditional cultural expressions and human rights, as referred to in international laws in Indonesia, Kenya, and South Africa, and the international convention. This research is expected to serve as a reference for Indonesian national law, in which adopting the best practices in Kenya and South Africa can be taken into account.

Perlindungan hukum Ekspresi Budaya Tradisional Indonesia adalah penting untuk diwujudkan sebagai bagian dari hak asasi manusia. Fakta Indonesia sebagai negara yang kaya dengan keanekaragaman budaya dan suku bangsa menjadi potensi luar biasa nilai ekonomi, sosial dan budaya. Potensi luar biasa tersebut tidak dapat diwujudkan tanpa diikuti pengaturan hukum yang memadai baik di bidang hak kekayaan intelektual maupun hak asasi manusia. Atas dasar hal tersebut, menjadi penting untuk menganalisis keterkaitan ekspresi budaya tradisional dengan hak asasi manusia dalam hukum nasional, konvensi internasional, dan perbandingan di negara-negara Afrika, yaitu Kenya dan Afrika Selatan yang telah mengatur dengan baik perlindungan hukum atas hak asasi ekspresi budaya tradisional. Penelitian ini bertujuan untuk memaparkan interface hak asasi manusia dengan perlindungan ekspresi budaya tradisional baik dalam hukum nasional maupun konvensi internasional. Jenis penelitian hukum dengan pendekatan perundangan, konseptual, dan perbandingan maka ditemukan bahwa terdapat hubungan yang erat antara ekspresi budaya tradisional dengan hak asasi manusia sebagaimana terdapat dalam pengaturan di dalam hukum nasional Indonesia, Kenya, Afrika Selatan, dan konvensi internasional. Penelitian diharapkan dapat menjadi rujukan dalam hukum nasional Indonesia dengan mengadopsi praktik terbaik di Kenya dan Afrika Selatan.

Keywords: *human rights, interface, legal protection, traditional cultural expressions*

Introduction

Every state of law upholds human rights, and this respect is marked by the protection of intellectual property rights (henceforth referred to as IPRs). The most crucial issue in IPRs lies in the legal matter regarding the protection of traditional cultural expressions of traditional people. This is because the regulations concerning traditional cultural

expressions have not been realised to date in terms of the agreements set in the form of international legislation between developed and developing countries. In this case, Indonesia as a state of law holds an interest vital to the embodiment of the protection of the traditional cultural expressions as part of the protection of human rights. Indonesia is home to diverse cultures, and the majority of the areas have their own cultural identities sourced from the archaic cultures of ancestors representing the characteristics of the state. This cultural identity indicates that Indonesia stands unique where such diversity will not be found in other countries. Therefore, Culture is a valuable element to be protected by the government and its citizens. The word identity literally means characteristic, symbol, or personal identity inherent in a person, a community, or something, creating uniqueness that others do not have. Identity also represents the entirety showing the characteristics or particular circumstances of a person, such as their psychological, biological, and sociological factors serving as a basis of a person's attitude. Cultural identity represents a characteristic embedded in a culture, allowing for differentiating one culture to another. Cultural diversity in Indonesia is an excellence for this country. In this case, the traditional creations are categorised as the objects of protection of Intellectual Property Rights.¹

By and large, culture is generated from humans' thoughts of developing and maintaining life in their neighbourhood. In this context, traditional cultural expressions are part of the cultural life of the people, carrying economic, spiritual, and communality values, and all these values are respected by people because these expressions represent the identity of a community in a certain region.² ³At an international level, negotiations may take place and an international treaty may serve as the basis for protecting the expressions, which, in IPRs, are known as the New Emerging Issues on Intellectual Property Rights. Negotiation on a new matter has been held by the World Intellectual Property Organization (WIPO) since 2000,⁴ and it was responded to with the establishment of the Intergovernmental Committee on Intellectual

¹ Husamah, "Mengusung Kembali Khazanah Identitas Budaya Bangsa," *Jurnal Bestari* 42 (2009).

² Dominikus Rato, *Pengantar Hukum Adat* (Surabaya: LaksBang Pressindo, 2009).

³ Hilman Hadikusuma, *Pengantar Hukum Adat* (Jakarta: Mandar Maju, 2010).

⁴ *Overview Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, World Intellectual Property Organization (WIPO), 2015, 10.

Property and Genetic Resources, Traditional Knowledge, and Folklore/Traditional Cultural Expressions (IGC-GRTKF). In recent years, indigenous peoples, local communities, and governments—mainly in developing countries—have demanded IP protection for traditional forms of creativity and innovation, which, under the conventional IP system, are generally regarded as being in the public domain, and thus free for anyone to use. Indigenous peoples, local communities and many countries reject a “public domain” status of TK and TCEs and argue that this opens them up to unwanted misappropriation and misuse.

To date, the law concerning IPRs has not touched multilateral agreements to protect traditional cultural expressions in international legislation notwithstanding the planning set among developing countries in Asia, Africa, and Latin America, dubbing themselves like-minded developing countries (LMDC) for further regulations under international legislation.⁵ Regulating these expressions under international legislation is deemed vital, considering that the intellectual property regimes currently in place contravene the culture of traditional communities responsible for traditional cultural expressions as set forth by WIPO “*This fact has in fact been acknowledged earlier on by WIPO (2002) that the intellectual property system is in direct conflict with traditional practices and lifestyles where the traditional knowledge holders are situated between their own customary regimes and the formal intellectual property system administered by governments and intergovernmental organisations such as WIPO*”.⁶ The delayed making of international legislation concerning traditional cultural expressions has been a hindrance to protecting traditional cultural expressions in Indonesia and other countries concerned. The shortcoming of this protection is in stark contrast to the condition of the Unitary State of the Republic of Indonesia with its diverse cultures and tribes and intellectual creation representing cultural heritage that needs to be protected and preserved. This matter is further specified in Article 32 of the 1945 Constitution of the Republic of Indonesia (henceforth referred to as the 1945 Constitution), the third amendment, stating “The state shall advance Indonesia’s national culture among the civilizations of the world by guaranteeing the cultural values.

⁵ Badan Penelitian dan Pengembangan HAM Kementerian Hukum dan HAM RI, *Perlindungan Kekayaan Intelektual Atas Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Masyarakat Adat* (Bandung: Alumni, 2013), 3.

⁶ Wan Izatul Asma Wan Talaat, “Protection of the Associated Traditional Knowledge on Genetic Resources: Beyond Theagoya Protocol,” *Procedia-Social and Behavioral Sciences*, no. 93 (2013). h. 675, www.sciencedirect.com, diakses 30 Maret 2022

These conditions of IPRs stimulate the emergence of strategic issues leading further to the interests of developing countries, including Indonesia. A study conducted by Purnama Hadi Kusuma and Kholish Roisah reveals that the system of the protection of traditional cultural expressions under the legal system of intellectual property belongs only to a small number of native people. With their economic values, their regions stand unique, and this uniqueness represents the distinguishing feature among other regions and sets the ground for respecting and protecting cultures.^{7 8} This notion is parallel to the study by Yenny Eta Widyanti, implying that traditional cultural expressions are vital simply because they represent the intellectual cultural heritage of the state that has to be regulated as something *sui generis*.⁹ Another study conducted by Cheryl Patriana Yuswar dkk, finds that the philosophical basis of the protection of traditional cultural expressions in the regime of copyright underlies the essence of properly regulating traditional cultural expressions to ensure that those owning and/or serving as the custodians of the expressions can optimally enjoy the economic right from the expressions.¹⁰ This elaboration leads further to profound analysis to discover the interface of human rights and legal protection of traditional cultural expressions within the national laws and an international convention involving the comparison between Indonesia and African countries constituting Kenya and South Africa that have accommodated the human rights in the protection of traditional cultural rights, recalling that the protection of these expressions is given as one of the practice of traditional intellectual property with its high ever-increasing cultural values and cultural heritage in modern society worldwide, rendering the expressions a source of creativity in intellectual property.

⁷ Purnama Hadi Kusuma dan Kholish Roisah, "Perlindungan Ekspresi Budaya Tradisional Dan Indikasi Geografis: Suatu Kekayaan Intelektual Dengan Kepemilikan Komunal," *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022). 107-120.

⁸ Purnama Hadi Kusuma dan Kholish Roisah, *Perlindungan Ekspresi Budaya Tradisional dan Indikasi Geografis: Suatu Kekayaan Intelektual dengan Kepemilikan Komunal*, Jurnal Pembangunan Hukum Indonesia, Volume 4, Nomor 1, Tahun 2022, 107-120.

⁹ Yenny Eta Widyanti, "Perlindungan Ekspresi Budaya Tradisional Indonesia Dalam Sistem Yang Sui Generis," *Arena Hukum* 13, no. 3 (2020). 388-415.

¹⁰ Dedi Harianto Runtung Sitepu, Cheryl Patriana Yuswar, "Kajian Filosofi Terkait Perlindungan Ekspresi Budaya Tradisional Oleh Rezim Hak Cipta," *University of Bengkulu Law Jurnal* 7, no. 2 (2022).

Research Methods

This study is categorised as legal research. Quoted from the words of Peter Mahmud Marzuki,¹¹ legal research is a know-how practice within the domain of legal science to unravel legal issues faced. Legal research requires the skill to identify legal problems, perform legal reasoning, analyse the issues faced and provide solutions to the problems. This is in line with the words of Morris L. Cohen, implying that legal research activities constitute a process to discover applicable law in the community.

Unlike empirical research that relies on a descriptive technique to discover the truth of correspondence, legal research is intended to obtain the truth of coherence. This stems from morality as a standard. The norms that regulate attitude must comply with the legal principle that further adheres to morality. The rules of law must be coherent with legal norms, and these legal norms must be coherent with legal principles.¹² This legal research is for academic purposes, which is different from legal research for legal practices. Legal research for academic purposes is used to compose academic work in which the researcher is in a neutral position.¹³ The essence of legal research in this context is to give a prescription of what should be, and due to this reason, the research is conducted. Adhering to the characteristic of legal study as an applied science, the prescription given must be applicable. That is, the prescription concerned is not something that has already been applied or existed. Therefore, legal research produces, if not a new legal tenet or legal theory, a new argument to which a prescription could be given. In other words, the prescription is not imaginary.¹⁴

To provide an answer to legal research as developed in this research, this research also employed a statutory approach exploring all laws and regulations regarding the legal issue dealt with. Thus, the *ratio legis* of human rights and the protection of traditional cultural expressions can be obtained. A conceptual approach was also used. This approach is related to the concept of expressions and human rights, followed by a comparative approach that compares Kenya and South Africa which regulate human rights in the protection of traditional cultural expressions. All the regulations concerning human rights and traditional cultural expressions within national laws and an international convention were explored and analysed. To unravel the problems, this research employed primary and secondary legal

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media, 2016), 6.

¹² Peter Mahmud Marzuki, 64-65.

¹³ Peter Mahmud Marzuki, 225-226.

¹⁴ Peter Mahmud Marzuki, 251.

materials. The primary data are authoritative, consisting of statutes, official records, minutes of law-making, and judicial decisions.¹⁵ The relevant laws studied included Law Number 5 of 2017 concerning Cultural Development, Law Number 28 of 2014 concerning Copyright, Law Number 11 of 2010 concerning Cultural Heritage, Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights (Stipulated by the United Nations General Assembly 2200 A(XXI) on 16 December 1966), *The Rome Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961*, *South African Constitution* and *Kenyan Constitution*. The secondary data involved sources from textbooks, containing the basic tenets of legal science and classical views of highly qualified students, all related to human rights and traditional cultural expressions. Both primary and secondary data were garnered by conducting library research. These data were further inventoried according to related laws, law literature, law journals and articles to be further classified based on research problems and objectives.¹⁶

The analysis required the collected data, and the analysis results will lead to a conclusion of arguments to help solve the issues studied. All the legal materials were normatively analysed to contribute prescriptions of new arguments established in the concluding part, and these prescriptions provide recommendations. This approach is congruous with the notion of Terry Hutchinson believing that *'theoretical research'* needs to involve the following: *"stating the theory with its main tenets, listing the common arguments against these aspects, putting forward counter-arguments, illustrating the consequences of particular points being accepted or denied"*.¹⁷ With this approach, new arguments can be garnered and represent a unity of a new research finding.

Discussion

The Interface between Human Rights and Legal Protection of Traditional Cultural Expressions in the National Law

The customary ownership of traditional cultural expressions, traditions, and cultures is principally inextricable from the fundamental values of the state—Pancasila—as the concept of law (*rechtidee*). The protection of these expressions constitutes the elements of intellectual property and cultural heritage of the country governed under the 1945 Constitution, the Fourth Amendment in the following Articles: 1) Article 18

¹⁵ Peter Mahmud Marzuki, 181.

¹⁶ Peter Mahmud Marzuki, 182.

¹⁷ Terry Hutchinson, *Researching and Writing in Law* (NSW: Law Book Co, 2001), 53.

B paragraph (2); 2) Article 28 C paragraph (1) and (2); 3) Article 28 I paragraph (3); 4) Article 32 paragraph (1). Article 18 B paragraph (2) of the Constitution states “The State shall recognise and respect the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia as regulated by law”. The word “recognition” by the State carries the meaning of “*declaratoior*”—stating something existing.¹⁸ The traditional rights of the peoples of customary law are translated as part of the customary law not only embedded in the *ulayat* land but all the natural and cultural richness restored, maintained, and developed within the traditional context of the *ulayat* land.¹⁹

According to the principle of social justice of Pancasila, the protection of the ownership of traditional cultural expressions can be applied by giving equal opportunities to traditional peoples in social, economic and political domains. To empower peoples of traditional communities as an unfortunate group, the peoples of this group are entitled to freedom and personal rights in both social and economic domains, as well as collective rights for a proportional setting in human life between their status as independent individuals and as social individuals in the utilisation of traditional cultural expressions as an asset. Traditional cultural expressions as the products of arts and literature in both tangible and intangible forms are sourced from customary traditions as the ownership objects in the expressions based on collective property because these expressions have been contributed and growing amidst the traditional communities under the principle of joint ownership involving a group of individuals. Article 18B paragraph (2) of the 1945 Constitution, regulated further in Law Number 5 of 1960 concerning Basic Agrarian Law (Law Number 5/1960), 1) Article 2 paragraph (4) states “the right to control from the state, in terms of its implementation, can be held by areas under regional governments and the communities of customary law as long as it is needed and does not contravene the national interests, and according to the government’s regulatory provisions”; 2) Article 3 “considering the provisions set forth in Article 1 and 2, the implementation of *ulayat* rights and similar rights should be carried out accordingly as long as these rights live to ensure that this implementation

¹⁸ Maria S.W. Sumardjono, *Agenda Yang Belum Selesai Refleksi Atas Berbagai Kebijakan Pertanahan* (Yogyakarta: Penerbit Fakultas Hukum Universitas Gadjah Mada, 2020), 5.

¹⁹ Wina Puspitasari Miranda Risang Ayu, Herry Alexander, *Hukum Sumber Daya Genetik, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional*, (Bandung: Alumni, 2014), 50.

complies with the national interests and according to the unity of the state. This practice must not contravene other higher laws or regulations.”

Elaborated criteria of *adat* peoples are specified in Article 97 paragraph (1) of Law Number 6 of 2014 concerning Village (Law Number 6/2014). The elements of customary villages are *adat* peoples who fulfil the following requirements:²⁰ 1) the unity of the peoples of customary law along with their traditional rights still live, either territorial, genealogical, or functional rights; 2) the unity of the *adat* peoples and their traditional rights is deemed in line with the current development of the society; and 3) the unity of the peoples of customary law along with their traditional rights complies with the principles of the Unitary State of the Republic of Indonesia.

Furthermore, Article 97 paragraph (2) of Law Number 6/2014 implies that the unity of the peoples of customary law along with their living traditional rights, as referred to in paragraph (1) letter a, should own an area or at least cover one element or a group of elements: a. the peoples who have the feeling of togetherness in a community; b. *adat* governance; c. assets and/or *adat* objects; and/or d. the instruments of *adat* legal norms. (underline added).”This rule underlies the regulations concerning *ulayat* rights, under Article 3 of Law Number 5/1960 stating “the practice of *ulayat* and similar rights comes from *adat* peoples as long as those rights live, and these rights should be practised according to the national interests under the principle of the unity of the state to ensure that this practice does not contravene other higher laws and regulations”

The unity of *adat* community involves²¹ a group of people sharing similar cultural identity, and have been living through generations in a particular geographical area bound to the origin of their ancestors and/or the same residential locations. People of the *adat* community also share the ownership of assets and/or *adat* objects, as well as values that set *adat* rules and norms as long as they live according to the current development of the society and the principles of the Unitary State of the Republic of Indonesia. The similar rights of the unity of the peoples of customary law refer to “the communal rights of the community to control, manage, and/or utilise, as

²⁰ Maria S.W. Sumardjono, *Agenda Yang Belum Selesai Refleksi Atas Berbagai Kebijakan Pertanahan*, 26.

²¹ Article 1, Number 1: Minister of Agrarian Affairs and Spatial Planning Regulation No. 18/2019, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Regarding the Procedures for the Administration of Customary Land of the Unity of Indigenous Legal Communities.

well as preserve their areas according to their customary laws.”²² The protection of *ulayat* rights can be applied to the ownership of traditional cultural expressions as an asset; in which it represents joint ownership of *adat* peoples in their areas” according to the current *adat* norms and laws, as referred to in Article 1 point 2 of the Regulation of the Minister of Home Affairs Number 52 of 2014, asserting that “*adat* areas, including adat land, water, or a body of water and its natural resources above it, with certain boundaries, shall be used, owned, and preserved throughout generations and sustainably to fulfil the needs of the people, and the sources can be obtained from cultural legacies left by ancestors or claims over the ownership of *ulayat* rights or *adat* forests.” According to this provision, the ownership of the traditional cultural expressions by a traditional community is relevant in *adat* areas marked by certain boundaries used, utilised, and preserved throughout generations and sustainably to fulfil the needs of the traditional people, and the sources can be obtained from cultural heritage.

Article 28 C paragraphs (1) and (2) of the 1945 Constitution states (1) “Every person has the right to self-realisation through the fulfilment of his basic needs, the right to education and to partake in the benefits of science and technology, art, and culture, so as to improve the quality of his life and the well-being of mankind; (2) Each person has the right to self-improvement by way of a collective struggle, for his rights with a view to developing society, the nation, and the country. This Article stands as part of human rights within the purview of IPRs, either the individual or collective ones. Miranda Risang Ayu confirms that “IPRs, as implied in Article 28 C paragraph (1) can be fought for collectively within the framework of national development.”²³ This Article represents the recognition of human rights, particularly personal rights or collective rights to the ownership of traditional cultural expressions to meet the basic needs of every person and to grant every person access to the benefits of arts and cultures in order to ensure the betterment of the quality of life and the well-being of the people as a whole.

Article 28 I paragraph (3) states: “The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilisation.” This article ensures respect for the rights held by the

²² Article 1, Number 2: Minister of Agrarian Affairs and Spatial Planning Regulation No. 18/2019, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Regarding the Procedures for the Administration of Customary Land of the Unity of Indigenous Legal Communities.

²³ Miranda Risang Ayu, Herry Alexander, *Hukum Sumber Daya Genetik, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional*, 51.

traditional community as the collective rights. This Article even highlights the recognition of the right to cultural identity as one of the communal rights held by the peoples of traditional communities.²⁴ The ownership of traditional cultural expressions is shown as part of cultural identity, portraying the nexus between the expressions and the traditional residents who keep, preserve, and develop these expressions.

Article 32 paragraph (1) of the 1945 Constitution states: “The state shall advance Indonesia’s national culture among the civilizations of the world by guaranteeing the freedom of people to maintain and develop cultural values.” Collective rights of the peoples of traditional communities are parallel to Article 32 of the 1945 Constitution which requires the state to comprehensively advance the culture by guaranteeing the freedom of the people, maintain, and develop their traditional values. Miranda Risang Ayu argues that “Article 32 paragraph (1) is vital in the formulation of the definition of communality of the owner of genetic resources, traditional knowledge, and traditional cultural expressions—Indonesia.”²⁵ This indicates that the protection of collective rights to traditional cultural expressions is strictly specified in the 1945 Constitution which serves as the primary principle of all legal sources (*grundnorm*).

The ownership of traditional cultural expressions according to Pancasila serving as the basis for Indonesia is formulated in five principles and outlined in the 1945 Constitution, underlying law-making.²⁶ Pancasila encompasses legal aspects responsible for controlling attitudes and fostering social order, safety, and justice in society.²⁷ To realise justice, the law is directed to what should be the rights of those concerned.²⁸ Indonesia as a civil law state adhering to the philosophy of Pancasila must ensure that the rights to traditional cultural expressions function socially and their distribution complies with the social justice as in Pancasila:²⁹ 1) fostering noble attitude reflecting good behaviour and the quality of kinship and mutual work; 2) being just; 3) maintaining a balance between rights and obligations; 4) respecting other people’s right; 5) helping others; 6) not

²⁴ Miranda Risang Ayu, Herry Alexander, 52.

²⁵ Miranda Risang Ayu, Herry Alexander, 52.

²⁶ B. Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum, Sebuah Penelitian Tentang Fundasi Kejihsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia* (Bandung: Mandar Maju, 2010), 49.

²⁷ B. Arief Sidharta, 110.

²⁸ B. Arief Sidharta, 110.

²⁹ “Principles of Understanding and Practice of Pancasila, the Fifth Principle: Social Justice for the Entire People of Indonesia.” n.d.

blackmailing others; 7) being frugal; 8) avoiding extravagant life; 9) avoiding tendency that harms public interests; 10) working hard; 11) appreciating others' creations; 12) jointly fostering fair development for social justice. In terms of drafting laws to guarantee social justice in Pancasila, traditional cultural expressions as collective property are established on the basis of the relation that supports the fulfilment of community rights.

The Interface between Human Rights and The Protection of Traditional Cultural Rights in an International Convention

Traditional Cultural Expressions emerged from the innate rights since the birth of human beings, and these rights are part of human rights protected by law as specified in Article 27 of the Universal Declaration of Human Rights 1948 (UDHR 1948): 1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; 2) Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary and artistic production of which he is the author. According to Article 27 paragraphs (1) and (2) of UDHR 1948, Everyone has the right to freely participate in the cultural life of the community, to enjoy arts and to share in scientific advancement and its benefits; and everyone has the right to the protection of moral and material interests resulting from scientific, literary, or artistic production of which he is the author.³⁰ The human rights as enacted in UDHR 1948 also applies to traditional cultural expressions that carry collective rights. This matter is strictly specified under Paragraph 2 Point 4 *Draft IGC-WIPO* bahwa; “*This provision of the Declaration is grounded in a range of universal human rights, including rights of culture, religion, property, and self-determination, as understood in light of the fundamental norm of non-discrimination and the specific characteristics of indigenous peoples. The rights to culture and religion*”. *Draft IGC-WIPO on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Technical Review of Key Intellectual Property-Related Issues of The WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions By Professor James Anaya, Thirty Third Session, Geneva, February 27 to March 3, 2017*. That is, the provision specified in *Draft IGC-GRTKF* is based on varied Universal Declarations on Human Rights, including the right to culture, religion, property, and right to self-determination, as

³⁰ WIPO IGC-GRTKF, *Glossary of Key Term Related to Intellectual Property and Genetic Resources Traditional Knowledge and Traditional Cultural Expression, WIPO/GRTKF/IC/40/INF/7, Forty-First Session, 2021*.

understood in terms of their association with the fundamental principle of non-discrimination and unique characteristics of *adat* peoples.

Moreover, Article 7 of UDHR 1948 regulates the equality-before-the-law principle, “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*”. Traditional cultural expressions as subjective collective rights indicate that all people are entitled to human rights, as Freeman said “*collective human rights are rights the bearers of which are collectives, which are not reducible to, but consistent with individual human rights, and the basic justification of which is the same as the basic justification of individual human rights*.”³¹ Subjective collective rights refer to collective ownership that cannot be reduced but is consistent with the human rights of individuals and as the primary justification equal to the basic justification of individual human rights. Samford in Miranda Risang Ayu affirms that the recognition of collective rights as human rights can benefit people in a community. Collective rights also accommodate the rights of every individual to access culture and take part in cultural programs according to personal affinity³² as members of a certain community. This affinity allows individuals to have the right to determine the social life and social status representing those collective individuals living in a community.³³ Collective rights of the people to get affiliated with the culture and practices in a local community are often identified as communal rights.³⁴ Collective rights from the local community relating to the interaction between physical, social, and cultural environments are known as human rights.

Regarding cultural rights as collective rights of the people, Miranda Risang Ayu identifies the nature of cultural rights as follows:³⁵ 1) cultural rights focusing on the existence of minority people; 2) cultural rights related to all cultural aspects in a customary law of a certain group of people, including the rights to use their own or local language and the rights to profess their own belief or religion; 3) cultural rights involving both immaterial and material aspects, including spiritual aspects of the cultural system); 4) cultural rights commonly assumed as a collective right; 5) cultural rights that always have a historic nature; a cultural aspect upon which the

³¹ Miranda Risang Ayu, Herry Alexander, *Hukum Sumber Daya Genetik, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional*, 31.

³² Miranda Risang Ayu, Herry Alexander.

³³ Miranda Risang Ayu, Herry Alexander, 33.

³⁴ Miranda Risang Ayu, Herry Alexander, 33.

³⁵ Miranda Risang Ayu, *Geographical Indication Protection in Indonesia Based on Cultural Rights Approach* (Jakarta: nagara, 2009), 209.

right is attached usually has been passed on from generation to generation, so it is difficult to determine some elements or individual authorial originality.

The nature of cultural rights resembles the nature of traditional cultural expressions, involving: (1) the fulfilment of the rights of traditional peoples as a minority, (2) traditional cultural expressions represent a custom and tradition of traditional peoples binding and followed as a law in a traditional community, (3) historical connection between culture and nature and a traditional community leaving the rights to traditional cultural expressions as a legacy passed throughout generations, and this legacy is collectively owned. These traditional cultural expressions are owned collectively by traditional peoples as cultural rights that are universally protected as part of human rights protection.

International human rights law gives a strong basis for the protection of traditional cultural expressions in the International Covenant of Economic, Social, and Cultural Rights 1966 (ICESCR 1966). This protection is considered paramount in fulfilling the rights of traditional peoples in economic, social, and cultural domains, as specified under Article 3 ICESCR 1996, stating “*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant*”. This provision confirms that both males and females are equal, and this view represents the non-discrimination principle for all to enjoy economic, social, and cultural elements to ensure the protection, preservation, safeguarding, and promotion of traditional cultural expressions. Therefore, both men and women receive equal rights to utilise and preserve traditional cultural expressions as lasting cultural heritage.

This matter is reconfirmed in Article 15 letter (a), (b), and (c) of ICESCR 1966, stating that signatories of the Covenant recognise every right of every person to 1) *take part in cultural life*; 2) *enjoy the benefits of scientific progress and its applications*; 3) *benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*. Every state signing the Covenant must fulfil the right to partake in cultural life, enjoy the benefits gained from scientific advancement and its implementation, and gain benefits from moral protection or advantages or from materials and products, literary works, or arts created by the creators. This covenant recognises the protection of traditional cultural expressions as cultural and intellectual property rights simply because they are basic rights. The protection of cultural and intellectual property rights is part of human

rights underlying the protection of the ownership of traditional cultural expressions.

To strengthen the traditional rights of the peoples to the expressions as the collective rights of traditional property, this matter is further regulated in the Universal Declaration of the Rights of Indigenous Peoples 2007 (UNDRIP 2007). This declaration sets forth the rights of traditional peoples comprehensively, including the protection of traditional cultural expressions. This is presented in the preamble and the body, where international communities recognise the urgent need to respect and improve the rights vested in the peoples of traditional communities. The traditional rights are far-reaching, including those built from social, economic, and political aspects, and some are sourced from philosophical and historical aspects and spiritual and cultural traditions, especially the rights to land, areas, and other resources. This regulation serves as the basis for the protection of traditional peoples mentioned in the preamble of UNDRIP 2007, paragraph 7 which reads “*recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources*”.

Moreover, the principle of equality is also open to traditional practices and cultures having contributed to sustainable and equitable development and proper management of the environment.³⁶ Article 31 (1) UNDRIP 2007 recognises and protects traditional cultural expressions: *Indigenous people are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their science, technologies and cultural manifestations, including human of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts* (underline added). This Article indicates that traditional peoples are entitled to the rights to the recognition of full ‘ownership’, control, and protection of culture and intellectual property. Furthermore, Article 31 (1) UNDRIP 2007 also highlights four rights to traditional cultural expressions, namely: 1) to maintain; 2) to control; 3) to protect; and 4) to develop.

UNDRIP 2007 strictly states that traditional peoples hold the right to special measures to safeguard, control, protect, and develop the realisation of technological and cultural science, including human resources and other genetic resources from seeds, medicine, the knowledge of the ownership of flora and fauna, oral traditions, literary works, designs, and other forms of performing arts and fine arts. Article 31 of UNDRIP states “*They also have the*

³⁶The Preamble of UNDRIP 2007 paragraph 11.

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” The protection of collective rights to traditional cultural expressions and IPRs is justified in UNDRIP 2007, implying that traditional peoples have the right to develop their intellectual property of traditional cultural expressions as cultural heritage and traditional knowledge to fulfil the rights of traditional peoples according to the principle of equality in human rights.

Interface between Human Rights and the Protection of Traditional Cultural Expressions: A Comparative Study in Kenya and South Africa

The regulations of human rights in Kenya and South Africa show relevance to the protection of traditional cultural expressions, where collective human rights are recognised; therefore, it may protect the expressions, which is obvious in the Kenyan Constitution or South African Constitution governing property rights. Property is protected under Article 11 and Article 40 (5) Kenyan Constitution. Article 11 of the Kenyan Constitution states: (1) *This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.* (2) *The State shall — (a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) recognise the role of science and indigenous technologies in the development of the nation; and (c) promote the intellectual property rights of the people of Kenya.* (3) *Parliament shall enact legislation to — (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.* These provisions indicate that the Kenyan Constitution recognises the culture as the fundamental of the state and cumulative civilisation of the people and Kenya as a country. That is, this country has the responsibility for advancing all forms of national expressions and recognising the role of science and technology in the development of the state through the development of IPRs of Kenyan people to ensure that they receive compensations or royalty for utilising cultures and cultural heritage of Kenyan citizens.

Furthermore, Article 40(5) of the Kenyan Constitution states “*It is therefore feasible that the right to property presents a credible framework for the protection of expressions of folklore in Kenya*”. This statement implies that the state must support, advance, and safeguard the intellectual property rights of the people of Kenya. This part encompasses three important components; (1) support,

(2) promote, and (3) protect, the three of which hold the responsibility fulfilled according to Intellectual Property Law and reliable administrative measures to support, advance, and protect traditional cultural expressions as part of the protection of IPRs. In other words, the protection of property rights is closely related to the protection of traditional cultural expressions in Kenya, as in line with Nawche's statement "*it is therefore feasible that the right to property presents a credible framework for the protection of expression of folklore in Kenya.*"³⁷

Not far different from Kenya, in South Africa, property rights are governed under Article 25 of the South African Constitution, clearly declaring that the expressions of folklore, as other kinds of intellectual property, are part of the clause concerning constitutional property: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application—(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court; (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section—(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (6) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis....". Therefore, people can take part in protecting traditional cultural expressions as governed in *Act Number 28 of 2013: Intellectual Property Laws Amendment Act, 2013*

AS governed under Article 28 B, traditional creations are entitled to copyright: 1) according to the provisions of this law, traditional creations are entitled to copyright; 2) a traditional creation is not entitled to copyright unless this creation has been written recorded, presented through data or digital signal, or reduced into a material or is capable of proving it from the collective memory of a relevant traditional

³⁷ Enyinna Sodiénye Nwauche, "The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa" (North-West University, 2016), 307.

community; 3) copyright can be granted for a traditional creation if; a) the traditional creation is an original derivative work created on the date or after the stipulation of the Amendment Law concerning Intellectual Property rights 2013, and part of the traditional communities representing fifteen areas from which creation originates, or the majority has been part of traditional communities when the creation is created; or (b) the traditional work is the native creation; 4) there are no rights of original derivative creations governed under the Amendment Act concerning Intellectual property 2013 that meet the requirements of registration unless (a) the agreement formerly informed was obtained from related authority of indigenous peoples., (b) the expressions or the knowledge of native cultures have been informed to the Commission, and (c) an agreement of the distribution of benefits between an applicant and related authority has been agreed upon. 5) if indigenous peoples have set social protocol, this protocol is effective in the community of indigenous peoples.

In terms of strengthening the interface between human rights and the protection of traditional cultural expressions, the protection of dignity is embedded in the members of the community. According to Article 28 of the Kenyan Constitution, the dignity of a community can be protected under decent protection: "Every person has inherent dignity and the right to have that dignity respected and protected". This is in line with Article 1 of the South African Constitution, implying that human dignity is a basic value and protected as in this statement: "*The Republic of South Africa is one, sovereign, democratic state founded the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...*". Human dignity, therefore, is part of human rights for a community. The protection of traditional cultural expressions is important in existence, identity, and dignity. The importance of dignity in every individual indicates that the dignity of a community where an individual grows should also have comparable values. As explained, African countries like Kenya and South Africa strictly regulate the interface between human rights and the protection of traditional cultural expressions in the Constitution and IPR regulations to embody the protection of individual and community rights.

Conclusion

The interface between human rights and legal protection of traditional cultural expressions is governed under the 1945 Constitution, Article 18 B

paragraph (2), Article 28 C paragraph (1) and (2), Article 28 I paragraph (3), and Article 32 paragraph (1), and further under Article 97 paragraph (1) of Law Number 6 of 2014 concerning Village and Article 1 point 2 of the Regulation of the Minister of Home Affairs Number 52 of 2014 concerning the Guidelines of Recognition and Protection of the Peoples of Adat Communities (Permendagri 52/2014), strictly declaring that *adat* peoples are a community with the same cultural identities, living throughout generations in particular geographical locations and bound to their ancestors where they originate, or having similar residential areas, having traditional assets and/or objects and values that set traditional norms and laws as long as they live according to the development of communities and the principle of the Unitary State of the Republic of Indonesia. This interface is governed under Article 27 paragraphs (1) and (2) of UDHR 1948, explaining that every person is entitled to the right to participate freely in cultural life, enjoy artworks, and share the benefits gained from science. Legal protection of traditional cultural expressions is also outlined in Article 31 paragraph (1) of UNDRIP 2007, mentioning comprehensive protection of the rights of traditional people, including the protection of traditional cultural expressions. African countries like Kenya and South Africa strictly regulate the interface between human rights and the protection of traditional cultural expressions in the constitutions of both countries as part of the protection of individual rights or community rights where traditional cultural expressions prevail.

References

B. Arief Sidharta. *Refleksi Tentang Struktur Ilmu Hukum, Sebuah Penelitian Tentang Fundasi Kefilsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*. Bandung: Mandar Maju, 2010.

“Principles of Understanding and Practice of Pancasila, the Fifth Principle: Social Justice for the Entire People of Indonesia,” n.d.

Dominikus Rato. *Pengantar Hukum Adat*. Surabaya: LaksBang Pressindo, 2009.

Enyinna Sodiénye Nwauche. “The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa.” North-West University, 2016.

- Hilman Hadikusuma. *Pengantar Hukum Adat*. Jakarta: Mandar Maju, 2010.
- Husamah. "Mengusung Kembali Khazanah Identitas Budaya Bangsa." *Jurnal Bestari* 42 (2009).
- Maria S.W. Sumardjono. *Agenda Yang Belum Selesai Refleksi Atas Berbagai Kebijakan Pertanahan*. Yogyakarta: Penerbit Fakultas Hukum Universitas Gadjah Mada, 2020.
- Miranda Risang Ayu, Herry Alexander, Wina Puspitasari. *Hukum Sumber Daya Genetik, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional*. Bandung: Alumni, 2014.
- Miranda Risang Ayu. *Geographical Indication Protection in Indonesia Based on Cultural Rights Approach*. Jakarta: nagara, 2009.
- Minister of Agrarian Affairs and Spatial Planning Regulation No. 18/2019, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Regarding the Procedures for the Administration of Customary Land of the Unity of Indigenous Legal Communities. (n.d.).
- Peter Mahmud Marzuki. *Penelitian Hukum*. Jakarta: Prenada Media, 2016.
- Purnama Hadi Kusuma dan Kholish Roisah. "Perlindungan Ekspresi Budaya Tradisional Dan Indikasi Geografis: Suatu Kekayaan Intelektual Dengan Kepemilikan Komunal." *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022).
- RI, Badan Penelitian dan Pengembangan HAM Kementerian Hukum dan HAM. *Perlindungan Kekayaan Intelektual Atas Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Masyarakat Adat*. Bandung: Alumni, 2013.
- Runtung Sitepu, Cheryl Patriana Yuswar, Dedi Harianto. "Kajian Filosofi Terkait Perlindungan Ekspresi Budaya Tradisional Oleh Rezim Hak Cipta." *University of Bengkulu Law Jurnal* 7, no. 2 (2022).