



INITIATING THE CONCEPT OF SUI GENERIS OF THE LEGAL PROTECTION OF COMMUNAL INTELLECTUAL PROPERTY IN THE PHILOSOPHY OF SCIENCE PERSPECTIVE

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ABSTRACT

This study aims to answer how the protection of Communal Intellectual Property rights in Indonesia and how the concept of sui generis can be applied from the perspective of the philosophy of science. The research method used is a doctrinal legal research method with an approach to legislation, legal concepts, and theories through literature search. The results show that until now Indonesia has recorded and documented the Communal Intellectual Property, both by the Directorate General of Intellectual Property of the Ministry of Law and Human Rights and the Directorate General of Culture of the Ministry of Education and Culture. Including the recording and registration of Intangible Cultural Heritage to UNESCO. However, legal protection of Communal Intellectual Property cannot be carried out optimally considering that several laws and regulations governing Communal Intellectual Property, especially those related to Traditional Cultural Expressions, are not in harmony with one another, besides that no law specifically regulates this Communal Intellectual Property. On the other hand, considering the problems that are not easy to regulate, considering intellectual property protection which is individual protection while Intellectual Property Rights are communal. Therefore, Indonesia needs to immediately regulate the protection of Communal Intellectual Property in the form of law through the idea of the sui generis concept.

Keywords: Sui generis; communal intellectual property; science philosophy

INTRODUCTION

Intellectual Property Rights have become an important part developed countries, especially in the personal nature of material rights, both copyrights and industrial property rights, since the start of the World Trade Organization (WTO) era, one of which is Trade Related Intellectual Property Rights (TRIPS).

Protection of Intellectual Property Rights as part of the creative process and thought process of mankind cannot be separated from the moral rights and economic rights of the owner. Intellectual Property Rights that give birth to economic rights have a close relationship with economic activities, in other words, Intellectual Property Rights cannot be separated from economic problems, therefore Intellectual Property Rights are identical to the commercialization of intellectual works,¹ both

personal and communal Intellectual Property Rights.

However, in its development, when a communal Intellectual Property Rights appears which is commonly known as Communal Intellectual Property until now there has been no common view between developed countries and developing countries regarding the form of protection.

The discourse on the importance of protecting the rights of Communal Intellectual Property, as part of Copyright which does not only recognize individual ownership, has received international attention. Several research results have given serious attention to the parts of Communal Intellectual Property that need to be protected. Among the parts of Communal Intellectual Property that are getting a lot of attention today are Traditional Cultural Expressions. These forms of Traditional Cultural Expression are quite widely owned by developing countries.

¹ Henry Donald Lbn. Toruan, "Penyelesaian Sengketa Hak Kekayaan Intelektual Melalui Acara Cepat," (Intellectual Property Rights Dispute Resolution Through Fast Events,) *Jurnal Penelitian Hukum De*

Jure 17, no. 1 (2017): 74–91.

From the Giovanna Carugno research results,² it is seen that traditional folk music which has been played since ancient times in certain areas, as an expression of culture and identity can be considered a legacy of the local community as a whole, and comes from musical practices that are transmitted orally and repeated over a long period by a group of people. The owners of traditional folk music are not specific composers, but all members of the local community. However, this is in conflict with copyright efforts on traditional folk music expressions, because often the Copyright Law does not recognize the form of collective ownership of folklore and traditional knowledge.

In China, according to the research results by Liguozhang and Niklas Bruun,³ local social norms are inherently contradictory to the idea of Intellectual Property Rights. China's Intellectual Property Rights norms are formed by the convergence of political, economic, cultural, and legal factors. Therefore, in transplanting foreign Intellectual Property Rights law, China creates its own legal and social norms, which are different from western countries. Achieving convergence between Intellectual Property Rights law in general and Intellectual Property Rights norms in China will ultimately require improvements in Intellectual Property Rights governance and the establishment of rule of law norms in China. Traditional Cultural Expression, as part of Communal Intellectual Property, also has the same problem in its protection.

According to Luminița Olteanu,⁴ matters relating to the protection of Traditional Cultural Expression or the expression of folklore are sensitive and complex as a mixture of legal, economic, philosophical, and anthropological considerations that scramble to capture its core features. Traditional Cultural Expression, both tangible and intangible, is a world cultural heritage that contains philosophical and anthropological values for the community where "expression" has emerged and been preserved for generations.

² G. Carugno, "How to Protect Traditional Folk Music? Some Reflections upon Traditional Knowledge and Copyright Law," *Int J Semiot Law* 31 (2018): 361–274.

³ N. Zhang, L., Bruun, "Legal Transplantation of Intellectual Property Rights in China: Resistance, Adaptation and Reconciliation," *IIC* 48 (2017): 4–41.

⁴ Ibid.

However, when outsiders exploit the intended "expression" with all its creativity for commercial purposes, then at that time the legal dimension takes on its role to provide recognition as well as protection for the community where the "expression" is born.

Cultural objects have a special status, protected, because of the intangible "legacy" value for people, as a symbol of identity.⁵ A recent case in the Netherlands regarding a Chinese Buddha statue which is the mummified remains of a monk can serve as an illustration. In 1995 a statue dating from the Song Dynasty (11th century) and revered as "Teacher Zhang Gong" by the Chinese community as a native, was stolen from a temple. The statue was acquired in Hong Kong by a Dutch collector, in 2014 he lent the statue to a Hungarian museum where it was recognized by Chinese villagers as their holy Master Zhang Gong. They filed a claim for damages before the Amsterdam District Court. The collector argued that he had purchased the statue in good faith and is the rightful owner under Dutch law.⁶

The complexity of the protection of Communal Intellectual Property which has legal, economic, and cultural dimensions needs serious attention from the Indonesian government. This is because Indonesia is a country that has wealth spreading from Sabang to Merauke, with various ethnicities and races to produce a diverse culture as well. The wealth owned by the Indonesian people is not only in the form of natural resource wealth, but the Indonesian people also have other wealth such as the richness of ethnic culture spread throughout the Indonesian archipelago. Humans and culture are one of bonds that cannot be separated in this life.⁷ A fragment of the lyrics of the Koes Plus song in 1971, entitled Nusantara

⁵ E. Campfens, "Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims," *Neth Int Law Rev* 67 (2020): 257–295.

⁶ Ibid.

⁷ Ahmad Syukri Saleh Mahdayeni, Muhammad Roihan Alhaddad, "Manusia Dan Kebudayaan (Manusia Dan Sejarah Kebudayaan, Manusia Dalam Keanekaragaman Budaya Dan Peradaban, Manusia Dan Sumber Penghidupan)," (Humans and Culture (Humans and Cultural History, Humans in Cultural Diversity and Civilizations, Humans and Sources of Livelihood)), *TADBIR: Jurnal Manajemen Pendidikan Islam* (2019).

V, has described how rich the archipelago is: *Ribuan pulau bergabung menjadi satu, sebagai ratna mutu manikam, nusantara oh nusantara, berlimpah-limpah kekayaan nusantara, tiada dua dimana jua, nusantara oh nusantara.* (Thousands of islands merged into one, as a pearl of manikam quality, archipelago oh archipelago, the abundant wealth of the archipelago, no two anywhere, archipelago oh archipelago).

Indonesia is a legal state (rechstaat) in the form of a Republic where sovereignty is in the hands of the people and implemented according to the Constitution, as referred to in Article 1 of the 1945 Constitution. The responsibility of the state of the law is to provide guarantees to its citizens in all aspects of life, including their culture. The responsibility of the rule of law is to provide guarantees to its citizens in all aspects of life, including their culture. This can be read in Article 32 paragraph (1) and paragraph (2) of the 1945 Constitution that the state shall promote Indonesia's national culture in the midst of world civilization by guaranteeing the freedom of the people to maintain and develop their cultural values, and the state respects and preserves local languages as national cultural treasures.

The meaning contained in Article 32 of the 1945 Constitution is that the state has a strategic role in advancing national culture amid a world civilization that guarantees the freedom of the people to maintain and develop their cultural values. Indonesia is a country with a large number of ethnic groups. This ethnic and cultural diversity gave birth to the Intangible Cultural Heritage as part of Traditional Cultural Expression which must be protected, preserved, and developed by the state as a Communal Intellectual Property right.

There have been several claims of Traditional Cultural Expression as part of Indonesia's Communal Intellectual Property by foreign parties. Among them are the claims of Indonesia Traditional Cultural Expression by Malaysia, where in an advertisement on the Discovery Channel in Enigmatic Malaysia, Pendet, Wayang, and Reog Ponorogo dances are shown in Malaysian tourism advertisements.⁸ Another case was the registration

⁸ Yenny Eta Widyanti, "Perlindungan Ekspresi Budaya Tradisional Indonesia Dalam Sistem Yang Sui Generis," (Protection of Indonesian Traditional

of the Balinese silver stone motif by John Hardy International, Ltd. The registration of the river stone motif causes the Balinese craftsman, Ketut Deni Aryasa, to not use a similar motif which he has long known as the crocodile skin motif.⁹ Lastly, what about Tortor and Gordang Sambilan which are claimed by the Malaysian state as their cultural heritage.

Some other examples of how Indonesia Communal Intellectual Property has been imitated into carpets, T-shirts and greeting cards, traditional music combined with rhythmic dance house music to produce best-selling "world musicians" albums, hand-knitted carpets and handicrafts are imitated and sold as if "authentic" from the owner, the process of making traditional instruments is patented. All of this has prompted indigenous and traditional communities to demand stronger protection of their intellectual property.¹⁰

The interest and admiration of the international community for the cultural and ethnic diversity of the Indonesian people is a common thing because every country is obliged to respect and preserve the world's cultural heritage regardless of which country the culture originates from.

However, when the cultural heritage of a nation is claimed, taken in part, or modified in such a way for economic purposes, the problem will certainly be different. The illegal use of Indonesia's Communal Intellectual Property assets in the international arena has disappointed traditional communities. This condition raises questions about the government's actions to

Cultural Expressions in the Sui Generis System), *Arena Hukum* 13, no. 3 (2020): 388–415.

⁹ Laina Rafianti and Qoliqina Zolla Sabrina, "Perlindungan Bagi Kustodian Ekspresi Budaya Tradisional Nadran Menurut Hukum Internasional dan Implementasinya dalam Hukum Hak Kekayaan Intelektual Di Indonesia," (Protection for Custodians of Nadran's Traditional Cultural Expressions According to International Law and Its Implementation in Intellectual Property Law in Indonesia), *Padjajaran Jurnal Ilmu Hukum* 1, no. 3 (2019).

¹⁰ R. Diah Imaningrum, *Ekspresi Budaya Tradisional Dalam Undang-Undang Hak Cipta Indonesia: Kajian Maksud Pembuat Undang-Undang dan Kajian Perbandingan Hukum (Traditional Cultural Expressions in Indonesian Copyright Law: A Study of Legislators' Intentions and a Comparative Study of Law)* (Malang, 2016).

protect the community's communal assets.¹¹ How massive this illegal use is, can be seen in the table below:

Table 1. Indonesian Communal Intellectual Property Objects Used by Other Countries

No.	Communal Intellectual Property Objects Used	User Country
1.	Batik Pesisir	China
2.	Rendang	Netherlands
3.	Sambal Bajak	Netherlands
4.	Sambal Petai	Netherlands
5.	Sambal Nanas	Netherlands
6.	Jepara Graving	France
7.	Tempe	Thailand
8.	Jepara-Distinctive Ornamental Frame	England
9.	Bali-Silver Handicraft	America

Source: Ayu Citra Santyaningtyas, "Strategi Perlindungan Ekspresi Budaya Tradisional di Indonesia," (Strategy for the Protection of Traditional Cultural Expressions in Indonesia), *Jurnal Heritage*, 8 1 (2020): 107-113.

The data above shows that several developed countries have used Indonesia's Communal Intellectual Property. Communal Intellectual Property as property rights, rights for work creations, or rights for culture, is a national resource. This is also a basic capital that can be engineered to improve welfare and quality of life and is also meant to produce a better life.¹²

Taking into account and considering Copyright as part of Intellectual Property Rights which philosophically is a right born of individual creativity while Communal Intellectual Property is communal property, this article will try to discuss it from a different side through the offer of a stand-alone normative legal concept (*sui generis*).

The chapter in this article will be presented with an Introduction which contains an introduction to the importance of protecting Indonesia's Communal Intellectual Property by presenting relevant previous research results to support the aforementioned assumptions. The discussion contains answers and analysis of the formulation of the problem, namely how to protect Communal Intellectual Property in Indonesia and the idea of the *sui generis* concept for Communal

¹¹ Ayu Citra Santyaningtyas, "Strategi Perlindungan Ekspresi Budaya Tradisional di Indonesia," (Strategy for the Protection of Traditional Cultural Expressions in Indonesia), *Jurnal Heritage* 8, no. 1 (2020): 107-113.

¹² *Ibid.*

Intellectual Property protection in the perspective of the philosophy of science. Finally, in the closing section, conclusions and steps that need to be followed up by the Government of Indonesia will be presented.

RESEARCH METHODS

The research method used in writing this article is a doctrinal legal research method through a qualitative approach by utilizing secondary data as the main data based on literature searches. Sources of research data are laws and regulations, theories, and relevant legal concepts. The data were analyzed using qualitative juridical methods which were narrated in the form of explanations using legal interpretations and drawing inductive logic of thinking by presenting data related to the protection of Communal Intellectual Property and how the concept of *sui generis* can be applied in the perspective of the philosophy of science.

DISCUSSION AND ANALYSIS

A. Protection of Communal Intellectual Property Rights in Indonesia

1. Communal Intellectual Property Protection in Copyright Act

Intellectual Property Rights are creativity that results from human thought in order to meet the needs and welfare of human life. Human creativity that appears as a person's intellectual asset has long had a significant influence on human civilization, among others through inventions and results in the field of literary work and art.¹³

In Article 1 of Law Number 28 of 2014 concerning the Copyright Act, it is stated that work is every literary work in the fields of science, art, and literature produced on inspiration, ability, thought, imagination, dexterity, skill, or expertise expressed in real terms.¹⁴

¹³ Taufik H. Simatupang, "Sistem Hukum Perlindungan Kekayaan Intelektual dalam Rangka Meningkatkan Kesejahteraan Masyarakat," (Intellectual Property Protection Legal System in Order to Improve Community Welfare), *Jurnal Penelitian Hukum De Jure* 2, no. 6 (2017): 195-208.

¹⁴ Antonio Rajoli Ginting, "Tinjauan Hukum Sistem Pemberian Royalti Bagi Pemain Film," (Legal Review of Royalty Award System for Film Players) *Jurnal Ilmah Kebijakan Hukum* 15, no. 1 (2021): 81-94.

Communal Intellectual Property as cultural heritage can offer tangible and intangible traces of the past. The past forms cultural identity.¹⁵ Cultural heritage, both tangible and intangible, is a priceless treasure for mankind.¹⁶ Cultural objects have a special status, protected, because of the intangible value of “inheritance” for humans, as a symbol of identity.¹⁷ The introduction of the concept of “cultural heritage” is a relatively recent achievement of international law. Over the years, the spirit of protecting cultural treasures has enriched the term with new nuances of meaning, while retaining the old. At the same time, “cultural heritage” is just one of the terms used in international treaties and other normative instruments.¹⁸ The effects of globalization have seen cross-cultural exchanges, cultural forms, and cultural diversity. This demands the search for the most effective, comprehensive, and appropriate mechanisms to safeguard and protect traditional knowledge.¹⁹ Recommendation of The Historic Urban Landscape (HUL) (UNESCO 2011) suggests that heritage management should be holistic, integrated, community-centered, and focused on sustainable development goals. Both tangible and intangible inheritance should be taken into account, allowing for appropriate changes over time. A variety of stakeholders should be involved in the planning process, including all levels of government, NGOs, and communities.²⁰

¹⁵ De Clippele, “Does the Law Determine What Heritage to Remember?,” *Int J Semiot Law* 34 (2021): 623–656.

¹⁶ Y Cheng, L. & Yuan, “Intellectual Property Tools in Safeguarding Intangible Cultural Heritage: A Chinese Perspective,” *Int J Semiot Law* 34 (2021): 893–906.

¹⁷ Campfens, “Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims.”

¹⁸ S Ferrazzi, “The Notion of Cultural Heritage in the International Field: Behind Origin and Evolution of a Concept,” *International Journal for the Semiotics of Law-Revue internationale de Semiotique juridique* 34 (2021): 743–768.

¹⁹ P Covarrubia, “Geographical Indications of Traditional Handicrafts: A Cultural Element in a Predominantly Economic Activity,” *IIC- International Review of Intellectual Property an Competition Law* 50 (2019): 441–466.

²⁰ H.J Deacon, “Conceptualising Intangible Heritage in Urban Environments: Challenges for Implementing the HUL Recommendation,” *Built Heritage* 2 (2018): 72–81.

One part of Communal Intellectual Property is Traditional Cultural Expression. Traditional Cultural Expression itself is a term regulated in the Copyright Act (Law Number 28 of 2014), which according to the terms of the previous law is called folklore. Communal Intellectual Property as part of Copyright has experienced significant developments, especially in the concept of ownership, which was originally private ownership rights towards collective ownership, both in the scope of science, art, and literature, some of which are related to Traditional Knowledge and Traditional Cultural Expressions.

In general, Communal Intellectual Property consists of 4 (four) types, namely:²¹

a. Traditional Knowledge

Traditional knowledge is the result of science and technology that contains elements of the characteristics of the traditional heritage of a traditional society that is produced, developed, and maintained by custodians, for example, traditional medicines or herbal medicine. Traditional Knowledge includes:

- a. Technical skills, concepts, learning, innovations, and other customary practices that make up the lifestyle of traditional communities include technical knowledge, ecological knowledge, agricultural knowledge, medical knowledge related to medicines and healing procedures as well as knowledge related to genetic resources;
- b. Knowledge of rituals (magic) and traditional celebrations, traditional economic systems, and social organization systems of a traditional community or indigenous peoples;
- c. Knowledge of traditional medicine and habits of behavior about nature and the universe;
- d. Knowledge and ability to produce traditional handicrafts, traditional food and beverages, and traditional modes of transportation.

²¹ Ria Wierma Putri and Rehulina Yunita Maya Putri, “Perlindungan Bagi Hak Kekayaan Intelektual Komunal,” (Protection for Communal Intellectual Property Rights), *Jurnal Hukum De’rechtsstaat* 7, no. 2 (2021).

b. Traditional Cultural Expressions

Traditional Cultural Expression is all forms of openness, both material (objects) and immaterial (non-objects) or a combination of both in the fields of art and culture, including literary expressions containing the characteristics of traditional cultural heritage that are produced, developed through generations, and also managed by the custodian (Traditional Society). A Traditional Cultural Expression custodian is an authority and/or heir who is a traditional community that lives in a certain area and has equal social values to protect, maintain and develop Traditional Cultural Expression in a traditional, communal, and cross-generational manner.

c. Genetic Resources

Genetic Resource is the genetic material that has beneficial value, both real and potential, contained in the germplasm of plants, animals, and other organisms. Genetic Resources were regulated for the first time in the 1992 Convention of Biodiversity (CBD). Genetic Resources are an important issue in the TRIPS Agreement. The protection for the Genetic Resources is related to aspects that are affected by industrialization in international trade, both from an environmental and humanitarian perspective, which are often ignored by business owners. Genetic resources in the environmental context must pay attention to traditional practices that use traditional knowledge. For example, in relation to human rights, the genetic resources used are traditional cultural expressions as the central identity of traditional societies.

d. Geographical Indication

Geographical Indication is the origin or sign indicating the original area of an item and/or product due to geographical environmental factors including natural factors, human factors, or a combination of these two factors which give certain characteristics to the goods produced, reputation, and production quality, for example, the production of public goods and services.

Internationally, Communal Intellectual

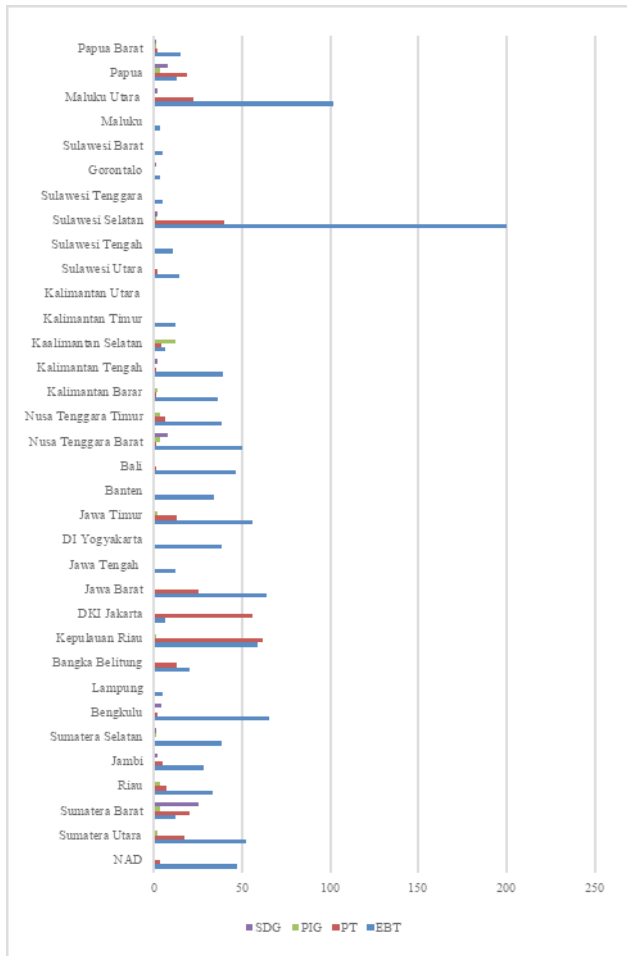
Property has also received recognition as a world cultural heritage. This can be seen in the 2003 UNESCO Convention on the recognition of Communal Intellectual Property rights to regulate Intangible Cultural Heritage through various expressions, representations, practices, skills, knowledge, and instruments. They also consider objects, artifacts, and related cultural environments for various groups and communities and in some cases, individuals who are recognized as part of the cultural heritage.²² The cultural heritage continues to evolve which is passed down from generation to generation and over time as groups respond to changes in their environment and react to historical events. These actions may shape individual identities and create respect for cultural diversity and human creativity.²³

Has become a world recognition, Indonesia is a country that has an extraordinary cultural heritage that is directly proportional to the number of tribes spread from Sabang to Merauke. The number and potential of Communal Intellectual Property in Indonesia can be seen in the following 2 (two) tables. Table 1 data on the number of Communal Intellectual Property distributions ranging from Traditional Cultural Expression, Traditional Knowledge, Potential Geographical Indications, and Genetic Resources based on data from the Directorate General of Intellectual Property of the Ministry of Law and Human Rights of the Republic of Indonesia. Table 2 determination of Indonesian Intangible Cultural Heritage based on data from the Directorate of Diplomacy and Cultural Heritage of the Directorate General of Culture, Ministry of Education and Culture.

²² Philippe Cullet, "Human Rights, Knowledge and Intellectual Property Protection" 11, no. 1 (2006): 7-14.

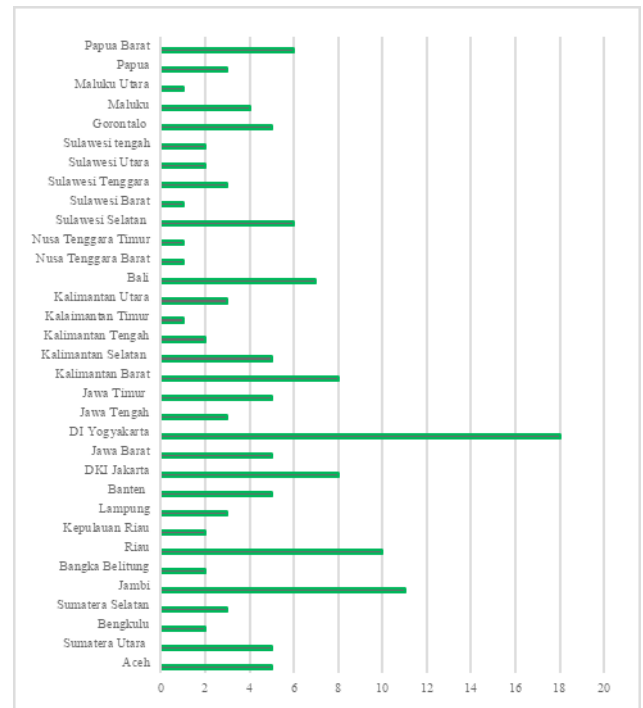
²³ Ibid.

Graph 1. Distribution of Indonesian Communal Intellectual Property Data



Source: <https://kikomunal-indonesia.dgip.go.id/>, accessed on 16 February 2022

Graph 2. Data Distribution of Indonesian Intangible Cultural Heritage



Source: Directorate General of Culture, Ministry of Education and Culture in 2020

Until now, Indonesia has had Intangible Cultural Heritage registered and recognized internationally as can be seen in the table below:

Table 2. Data Distribution of Indonesian Intangible Cultural Heritage

No.	Year	Intangible Cultural Heritage	Property Rights
1.	2020	Pantun	Indonesia dan Malaysia
2.	2019	Tradition of pencak silat	Indonesia
3.	2017	Pinisi, the art of boat-building in South Sulawesi	Indonesia
4.	2015	Three genres of traditional dance in Bali	Indonesia
5.	2012	Noken tie bag or multifunctional woven, Papuan handicrafts	Indonesia
6.	2011	Saman dance	Indonesia
7.	2010	Angklung	Indonesia

No.	Year	Intangible Cultural Heritage	Property Rights
8.	2009	Education and training of Indonesian Batik, Intangible Cultural Heritage for elementary, junior high, high school, vocational and polytechnic students, in collaboration with the Batik Museum in Pekalongan	Indonesia
9.	2008	Keris	Indonesia

Source: <https://ich.unesco.org/>, accessed on 16 February 2022

One of the Communal Intellectual Property arrangements related to Traditional Cultural Expression is already regulated in Copyright Act. Article 38 Copyright Act paragraph (1) Copyright on Traditional Cultural Expression is held by the State; paragraph (2) The state is obliged to make an inventory, maintain and maintain Traditional Cultural Expression as referred to in paragraph (1); paragraph (3) The use of Traditional Cultural Expression as referred to in paragraph (1) must pay attention to the values that live in the community that bears it; paragraph (4) Further provisions regarding Copyrights held by the State on Traditional Cultural Expression as referred to in paragraph (1) shall be regulated by a Government Regulation. Furthermore, in the Elucidation of Article 38 paragraph (1), limitations have also been given regarding what is meant by “Traditional Cultural Expression” namely everything that includes one or a combination of the following forms of expression: (1) Verbal, textual, both oral and written, in the form of prose or poetry, in various themes and contents of messages, which can be in the form of literary works or informative narratives; (2) Music, including among others: vocal, instrumental, or a combination thereof; (3) Movement, including among others: dance; (4) Theatre, including among others: puppet (*wayang*) shows and folk plays; (5) Fine arts, both in two-dimensional and three-dimensional forms made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, and others or a combination thereof; and traditional ceremonies.²⁴

²⁴ Fadjar Ramdhani Setyawan, “Inkonsistensi Konsep Perlindungan Hukum Ekspresi Budaya Tradisional Dengan Teori Ajaran Cita Hukum,” (The Inconsistency

However, in practice, this arrangement is not easy to implement. This is because, First, the definition contains an unclear formulation; Second, there is no regulated procedure to distinguish the Work categorized as Traditional Cultural Expression and the Work that is not Traditional Cultural Expression; Third, there is no regulated implementing agency that is authorized to determine a Work as a Traditional Cultural Expression.²⁵

The implementation of Article 38 Copyright Act related to state authority still requires clarity about which agency is meant. This is considering that the Traditional Cultural Expression inventory is carried out by various government ministries/agencies. With the current conditions, it is unclear whether the Directorate General of Intellectual Property Rights of the Ministry of Law and Human Rights, the Ministry of Education and Culture, the Ministry of Tourism or the Regional Government as an extension of the Ministry of Home Affairs.²⁶

However, the problem does not stop there, both in Article 10 of Law Number 19 of 2002 and Article 38 of the Copyright Act there is no Government Regulation made according to what is written in the law.

where all matters relating to Copyright held by the State will be regulated in a Government Regulation. This has resulted in the vacuum of law for the protection of Traditional Cultural Expression which has a communal nature.

2. Communal Intellectual Property Protection in Cultural Advancement Act

Furthermore, in 2017 Law Number 5 of 2017 concerning the Advancement of Culture (Cultural

of the Concept of Legal Protection of Traditional Cultural Expressions with Theory of Legal Aspirations), *De Jure: Jurnal Hukum dan Syari'ah* 13, no. 1 (2021): 126–139.

²⁵ dan Reh Bungana Beru Perangin-angin Yusna Melianti, Julia Ivanna, “Pengaturan Folklor Secara Sui Generis Dalam Undang-Undang Tersendiri,” (Regulation of Folklore by Sui Generis in a separate law), *Masalah-Masalah Hukum* 45, no. 1 (2016): 75–84.

²⁶ Rindia Fanny Kusumaningtyas, “Perlindungan Hak Cipta Atas Motif Batik Sebagai Warisan Budaya Bangsa,” (Copyright Protection for Batik Motifs as National Cultural Heritage), *Pandecta Research Law Journal* 6, no. 2 (2011).

Advancement Act) was issued. The issuance of the Cultural Advancement Act, which was initially deemed capable of responding to the vacuum of law, actually added to the series of problems. Article 17 of the Cultural Advancement Act states “The Central Government and/or Regional Governments in accordance with their respective authorities are obliged to record and document the Objects of Cultural Advancement”. This means that the Central Government and/or Regional Governments have full authority to make an inventory of Traditional Cultural Expression in accordance with the previous law, namely Article 38 paragraph (2) of the Copyright Act that the State is obliged to take inventory, safeguard and maintain Traditional Cultural Expression. However, there was a blurring of norms in the next article, Article 18 paragraph (1) of the Cultural Advancement Act of 2017, it is stated “Everyone can record and document the Objects of Cultural Advancement”. Article 18 paragraph (1) of this Copyright Act gives freedom to everyone to take an inventory of culture, this is contrary to the previous article which states that the authority to take an inventory of culture belongs to the Central Government and/or Regional Government. In the explanation of the Cultural Advancement Act of 2017, it is stated that Article 17 and Article 18 are quite clear, this adds to the confusion between the 2 articles.²⁷

3. Disharmony of Communal Intellectual Property Protection in Copyright Act and Cultural Advancement Act

The disharmony of Communal Intellectual Property arrangements between one statutory regulation and another and the unclear framework of the regulatory concept has in the end added to the long list of claims and uses of Indonesian cultural heritage by other countries, either partially or wholly, for commercial purposes. Forcing the Communal Intellectual Property concept to be part of the arrangement in the Intellectual Property Rights concept, in particular being part of the Copyright, would need to be reviewed because some of the arrangements in the laws and

²⁷ Fadjar Ramdhani Setyawan, “Inkonsistensi Konsep Perlindungan Hukum Ekspresi Budaya Tradisional Dengan Teori Ajaran Cita Hukum.” (The Inconsistency of the Concept of Legal Protection of Traditional Cultural Expressions with Theory of Legal Aspirations).

regulations, as discussed previously, did not solve the problem.

B. The Idea of the Sui Generis Concept of Communal Intellectual Property Protection in the Perspective of the Philosophy of Science

Failure in the Traditional Cultural Expression arrangements as part of the Communal Intellectual Property in the Copyright Act and Cultural Advancement Act, one of which is the perspective of legal protection against rights owners, the existence of a conflicting philosophy of protection against rights owners, the Copyright regime is individualistic while Traditional Cultural Expression is communal.²⁸ Some characteristics of Traditional Cultural Expression that are not completely regulated in the Copyright Act, for example, Traditional Cultural Expression are creations that do not have a time limit and are always passed down from generation to generation without going through a grant mechanism and so on. Traditional Cultural Expression is part of an oral tradition, it is not written, and it is known where and who created it because it is only passed down from generation to generation and preserved, which later becomes culture.²⁹

Included in the Bill on the Protection and Utilization of Intellectual Property of Traditional Knowledge and Traditional Cultural Expressions, which provides the definition “Traditional Cultural Expression is an intellectual work in the field of art, including literary expressions that contain elements of traditional heritage characteristics that are produced, developed, and maintained by local communities or indigenous peoples”, this definition does not include material about Intangible Cultural Heritage.

The principles of copyright protection, such as originality, fixation work, and identification of the author will eventually have problems

²⁸ Simona Bustani, “Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat,” (The Urgency of Regulating Cultural Expression (Folklore) of Indigenous Peoples), *Jurnal Hukum PRIORIS* 2, no. 4 (2016): 46–55.

²⁹ dan Rini Susrijani Diah Imaningrum Susanti, Raymundus, I. Made Sudhiarsa, *Ekspresi Budaya Tradisional Dan Hak Kekayaan Intelektual* (Traditional Cultural Expressions And Intellectual Property Rights) (Malang: Percetakan Dioma, 2019).

when dealing directly with Traditional Cultural Expression protection. The principle of the work must be tangible is considered an obstacle when applied, this is because almost all Traditional Cultural Expression works have an oral transmission characteristic or can be said to be unwritten such as fairy tales, myths, legends, folk songs, and dances.³⁰

*Sui generis*³¹ in legal terms means that jurisprudence is a science of its kind. In a closed system, all fields or branches of science can also claim to have a *sui generis* character, namely in terms of a distinctive way of working and a different scientific system because of the different objects of attention. So actually it's not only the jurisprudence that has this *sui generis* character. It's just that in jurisprudence the *sui generis* character is used to show that in the jurisprudence its normative character should never be forgotten or ruled out, which is on the one hand legal science has an analytical empirical nature, but on the other hand, it is a normative practical science. With all the scientific attributes attached to it, jurisprudence directs its reflection on solving concrete and potential problems in society. It differs from the nature of empirical jurisprudence as a part of social science which is studied to predict and control social processes. With this character, it is indeed rather difficult to include jurisprudence in one branch of the tree of knowledge.³²

³⁰ Dyah Permata Budi Asri, "Perlindungan Hukum Preventif Terhadap Ekspresi Budaya Tradisional Di Daerah Istimewa Yogyakarta Berdasarkan Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta," (Preventive Legal Protection Against Traditional Cultural Expressions in the Special Region of Yogyakarta Based on Law Number 28 of 2014 concerning Copyrights), *JIPRO* 1 (2019): 13–23.

³¹ "Sui Generis Digunakan Dan Diperkenalkan Dalam Ilmu Hukum Oleh D.H.M. Meuwissen Dalam Tulisan Yang Berjudul 'Rechtswetenschap' Dalam Van Appeldorn's. 1985. Inleiding Tot de Studie Vant Het Nederlandse Recht, W.E.J. Tjenk Willink. Zwolle. ("Sui Generis Used And Introduced In Law By D.H.M. Meuwissen in an article entitled 'Rechtswetenschap' in Van Appeldorn's. 1985. Inleiding Tot de Studie Vant Het Nederlandse Recht, W.E.J. Mr Willink. Zwolle), Page. 447-448," n.d.

³² Mohammad Jamin, "Hukum Adalah Disiplin Ilmu Sui Generis: Kajian Perspektif Filsafat Ilmu," (Law Is a Discipline Sui Generis: A Study of the Perspective of the Philosophy of Science), *JOLSIC* 5, no. 2 (2017):

The philosophy of science distinguishes science based on two points of view, namely the positivistic view that generates empirical science and the normative view that generates normative science. It further describes the paradigm difference between the positivistic view (generating empirical jurisprudence) and the normative view (generating normative jurisprudence) by using the following parameters:³³

Table 3. Differences between Positivistic Views and Normative Views

Description	Empirical Law	Normative Law
Basic Relationship	Subject-Object	Subject-Subject
Scientist attitude	Audience (toeschouwer)	Participants (doelnemer)
Perspective	External	Internal
Theory of Truth	Correspondence	Pragmatics
Proposition	Only Informative or Empirical	Normative and Evaluative
Method	Only Methods that can be observed by the senses	Also Other Methods
Moral Relationship Between Morals and Law	Non-Cognitive	Cognitive
Knowledge	Strict Separation	No Separation
	Only Sociology of Empirical Law and Empirical Theory of Law	Jurisprudence in the Broadest Meaning

Source: Mohammad Jamin. "Hukum adalah Disiplin Ilmu Sui Generis: Kajian Perspektif Filsafat Ilmu," *JOLSIC*, 5 2, (2017): 1-16.

The nature of jurisprudence is a *sui generis* science because in English '*ilmu hukum*' is referred to as jurisprudence³⁴, not the science of law, although sometimes the two terms are also synonymous. Both jurisprudence and the science of law have the same natural object of study, namely law. However, the word science in the science of law is different from the term science used in the natural and social sciences. Both in the natural sciences and the social sciences, the word science implies empirical verification which is

1–16.

³³ J.J.H. Bruggink, *Refleksi Tentang Hukum Pengertian Dasar Dalam Teori-Teori Hukum* (Reflections on Law Basic Understanding in Legal Theories), (Bandung: Citra Aditya Bakti, 2015).

³⁴ Peter Mahmud Marzuki, *Penelitian Hukum (Legal Research)* (Jakarta: Prenada Media, 2005).

different from philosophy which is in the scope of an evaluative study. An interesting point is what Jan Gijssels and Mark van Hoecke put forward. The two authors translated the Dutch word *rechtswetenschap* into English as jurisprudence. When translated *rechtswetenschap* means science of law. However, the term is avoided because the term science can be identified with empirical studies. Whereas in reality, legal studies are not empirical studies.³⁵

The jurisprudence as a *sui generis* science can be proven from the perspective of the philosophy of science. Ontologically, legal studies are substantial in terms of written and unwritten legal rules as well as normative legal rules and empirical legal rules. Epistemologically, jurisprudence knowledge comes from reason itself and is not obtained from experiments and sensory observations. From an axiological perspective, the usefulness of jurisprudence lies in the process of applying the law and developing the jurisprudence. As a normative science, the substance of jurisprudence is the essence of the teaching of jurisprudence where its existence has an important role and position in the teaching of *sui generis* jurisprudence, and its placement is not based on consensus but through studies in the view of the philosophy of science.³⁶

Bearing in mind and considering that Communal Intellectual Property does not sufficiently fulfill the elements of Copyright, especially personal nature and clarity of ownership, as part of TRIPS and WTO, the position of Communal Intellectual Property should be viewed from the perspective of a stand-alone normative legal philosophy (*sui generis*).

Protection of Communal Intellectual Property with the concept of *sui generis* through special laws has been carried out in several countries, including Australia by enacting Traditional Cultural Expression through the Australian Heritage Protection Act which is more efficient and more adequate. China has also proposed a *sui generis* law with several strategies by speeding up the declaration of “intangible cultural heritage”,

³⁵ Ibid.

³⁶ Sifaal Amin, “The Independence And Uniqueness of Law In Ontology, Epistemology and Axiology,” *Jurnal Multidisiplin Madani (MUDIMA)* 2, no. 1 (2022): 187–196.

appointing people and units who can inherit and practice traditional arts, building ecological museums in minority areas, drafting local laws through local community congresses because there is no single law protecting Traditional Cultural Expression in China. Malaysia also uses the *sui generis* model through the enactment of the National Heritage Act 2005. Tunisia uses the Copyright protection model, but is not given a period of protection, because it is special, non-litigation dispute resolution patterns are the right choice. The success of this *sui generis* law is of course still very dependent on cooperation between local communities, benefit-sharing mechanisms, and the ability of local stakeholders who feel that community interests are represented in national law.

CONCLUSION

Legal protection of Indonesian Communal Intellectual Property (Traditional Cultural Expression, Traditional Knowledge, Potential Geographical Indications, Genetic Resources) has not been implemented because of the disharmony of regulation between one statutory regulation and another. Communal Intellectual Property does not meet the elements of Copyright, especially the personal nature and clarity of ownership, as is customary in Intellectual Property in TRIPS and WTO. Therefore, the position of Communal Intellectual Property must be seen from the perspective of a stand-alone normative legal philosophy (*sui generis*) and the idea of the legal protection of Communal Intellectual Property with the concept of *sui generis* through special laws is an inevitability, considering that many countries already have implemented it.

SUGGESTIONS

Indonesia needs to immediately regulate the legal protection of Communal Intellectual Property in particular (*sui generis*) in the form of a law by taking into account the communal aspects in it. Including and not limited to include the content materials related to the benefit-sharing mechanisms, community (society) rights and strictly regulates Institutions/Ministries that are authorized and responsible for inventorying, safeguarding, and maintaining Indonesian Communal Intellectual Property.

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