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Protection of Communal Intellectual Property as the Identity of Indigenous people: Comparative Practice of the Roles of Indigenous peoples of Indonesia and Vietnam

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Abstract

Communal intellectual property originates from natural and cultural resources rich with local wisdom owned by indigenous people, who have a role in maintaining and maintaining communal intellectual property. Indigenous people is a term agreed upon in international law to refer to a community entity that has its own characteristics due to its historical, economic, social, and cultural background. Various definitions and criteria regarding indigenous peoples in the Indonesian legal framework need to be linked to the concepts contained in the international discourse on indigenous peoples. This is at least to provide an overview of the extent to which international concepts are in line with reality and concepts developed in policies at the national level. In order for the implementation of the law to run properly, as a comparison, Indonesia can implement the policy measures used by Vietnam. Vietnam has unique traditional customs and has managed to maintain them from generation to generation. This research was conducted using normative research with data collection through a literature study. As countries that share cultural wealth, traditional knowledge, and geographical potential that produce superior products, Indonesia and Vietnam have both given attention and recognition to the existence of cultural wealth as the identity of indigenous people whose existence has been recognized internationally. constitutional rights through policies that are certainly in favor of the rights of indigenous peoples.

INTRODUCTION

Indonesia is a country with diverse cultures. If this diversity can be managed properly and correctly, there is a great opportunity for Indonesia's economic revival. Intellectual property rights include exclusive communal rights, namely economic rights and moral rights. In this digital era, communal intellectual property must be protected. The development of technology and information has made countries in the world seem without borders, making it easy for

irresponsible parties to unilaterally claim traditional wealth that may not be known to many people.¹

One part of Communal intellectual property in traditional societies in Indonesia is traditional knowledge. The basic concept of traditional knowledge is placed on the reality or the fact that traditional knowledge is based on tradition.² Traditional knowledge is said to be traditional because this knowledge is created in a way that reflects the traditions of the people. Thus, the traditional understanding here is not about the nature of knowledge that is created, preserved, and disseminated.

Communal intellectual property originates from natural and cultural resources rich with local wisdom owned by indigenous people, who have a role in maintaining and maintaining communal intellectual property. Indigenous people³ is a term agreed upon in international law to refer to a community entity that has its own characteristics due to its historical, economic, social, and cultural background.⁴

Various definitions and criteria regarding indigenous peoples in the Indonesian legal framework need to be linked to the concepts contained in the international discourse on indigenous peoples. This is at least to provide an overview of the extent to which international concepts are in line with reality and concepts developed in policies at the national level.⁵

The first criterion of indigenous peoples is the historical continuity of colonialism. This criterion is very suitable for countries in the Americas and Australia where colonialists are still entrenched and dominate the country even though colonialism is formally considered to have ended. In the United States, for example, it is not the natives who dominate today, but the immigrants who come to power and build the country. This is different from Indonesia where,

¹ Robiatul Adawiyah dan Rumawi, "Pengaturan Hak Kekayaan Intelektual Dalam Masyarakat Komunal di Indonesia", *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 10, no.1 (Mei, 2021): 8.

² Zainul Daulay, *Pengetahuan Tradisional Konsep, Dasar Hukum, dan Praktiknya*, (Jakarta: PT Raja Grafindo Persada, 2011), 27.

³ Secara harfiah istilah *indigenous people* diterjemahkan kedalam bahasa Indonesia menjadi "masyarakat asli". Sebagian penulis ada yang menggunakan istilah masyarakat asli, dan sebagian lainnya menggunakan istilah "masyarakat adat", "Bumi Putra". Dalam perundang-undangan di Indonesia ditemukan istilah "masyarakat hukum adat" dan juga istilah "masyarakat adat" istilah masyarakat asli (*Indigenous people*) digunakan oleh organisasi buruh internasional (*international Labor Organization-ILO*) untuk pertama kali. Konvensi-konvensi organisasi internasional ini, misalnya, menggunakan dua istilah sekaligus yakni "*indigenous people*" dan "*tribal people*". Pada mulanya, organisasi ini telah merekomendasikan agar Perserikatan Bangsa-bangsa (PBB) juga merujuk dan menggunakan kedua istilah tersebut, tapi dalam kenyataannya PBB hanya menggunakan satu kata saja, yakni, "*indigenous people*", penjelasan lebih jauh lihat, Zainul Daulay, (2011), 40.

⁴ *Ibid*, 39 .

⁵ Yance Arizona, *Mendefinisikan Indigenous Peoples di Indonesia*, 13 Juni 2022, <https://yancearizona.net/2014/06/18/new-york-2014-mendefinisikan-indigenous-peoples-di-indonesia/>,

after Indonesia's independence, the Dutch colonialists were no longer the dominant force in the Republic of Indonesia which was built by the indigenous Indonesians themselves. Thus, this criterion, although it is the main criterion in the discourse on indigenous peoples, is not very relevant to the Indonesian context.

The second criterion is the distinctiveness of the social, economic, political, cultural, and linguistic systems. This second criterion is very important but can be very tricky. Distinctiveness on the one hand can be a sign of the difference between one community and another. At this point, the feeling of homogeneity of a community emerges because they are collectively different from other communities. This homogeneity can occur if there are efforts to purify and reject external elements that may arise from voluntary interactions, for example through trade and education. In fact, it is very difficult to find a community that is truly homogeneous and has a distinctive social, economic, political, cultural, and linguistic system. Even if there is something purely unique and different, it means that the community is a community that has never been in contact with the outside world.

The third criterion is not a dominant power (non-dominance). This criterion is very elementary as the basis for fighting for justice for marginalized communities. The criterion that indigenous peoples are not the dominant power on the contrary shows that there is a dominant power over indigenous peoples. The dominant power can be the state, the market, or a particular culture that oppresses indigenous peoples. This element is very important in identifying indigenous peoples in Indonesia as a movement of citizens who have been victims of discrimination and development that has robbed indigenous peoples of their homeland.

The fourth criterion is a strong connection to the ground. This criterion is also very relevant to the context of the struggle of indigenous peoples in Indonesia, which is basically a struggle to defend or reclaim their homeland in the face of development programs that come from outside. For indigenous peoples, a strong relationship with land does not only mean that land is an economic factor for meeting the needs of daily life, but in many cases, land and other natural resources become identity, and self-esteem and become a place to hold traditional rituals. In accordance with the communal nature of indigenous peoples, a strong relationship with the land is a communal relationship, not in terms of individual land rights, although in communal land individuals may also be allowed to cultivate.

The fifth criterion is to have hereditary traditions and customary laws that are used to manage their lives. The aspect of tradition shows the continuity between generations in

indigenous peoples, both between the past and present generations or with the next generation. The presence of traditions and social institutions such as customary law is a criterion that distinguishes indigenous peoples from other communities. The problem is that not all traditions and customary laws are still intact, but many have shifted either naturally or due to external coercion.

In order for the implementation of the law to run properly, as a comparison, Indonesia can implement the policy measures used by Vietnam. Not much different from Indonesia, Vietnam has unique traditional customs and has managed to maintain them from generation to generation.

This research is a normative legal research type. The approach used is the statutory approach and the concept approach. The data sources used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials consist of international legal conventions, Indonesian laws and regulations as well as various government policies related to research. As empirical legal research, research activities are carried out on the real conditions of society or the community environment with the intent and purpose of finding facts (fact-finding), which then leads to identification (problem identification), and ultimately leads to problem-solving.⁶

PROTECTION OF COMMUNAL INTELLECTUAL PROPERTY AS THE IDENTITY OF INDIGENOUS PEOPLE IN INDONESIA

The existence of the customary law community has been recognized since before the independence phase of the Republic of Indonesia. This recognition contains the essence of the plurality of cultural value systems that are guided for the life and lives of indigenous peoples. The existence of indigenous peoples is a historical fact that cannot be avoided or denied by the government. Indigenous peoples are a real segment of Indonesian society. Formally, the acknowledgment, acceptance, or justification of the existence of indigenous peoples in the new constitutional structure is regulated in Article 18 of the 1945 Constitution. The existence of the community has actually been recognized by the state. However, the granting of rights to the community is often neglected.

⁶ Soejono Soekanto, *Legal Research Understanding*, (Jakarta: UI Press, 1982), 10.

Indonesian culture is the old and original culture that exists as regional peaks throughout Indonesia. Culture is reflected in various areas of people's lives in all regions of Indonesia. Each area has different cultural characteristics, for example, cultural ceremonies, which are a form of hereditary tradition that is carried out regularly and orderly according to cultural norms, and citizens' cultural laws in the form of a series of application activities as an expression of gratitude. Among other things, the ceremony of birth, marriage, death, burial, and so forth. circumstances and geographical location also influence local culture, thus making Indonesia have a diversity of cultures and ethnic groups. As is well known, Indonesian culture is very diverse. It is this cultural diversity that can become the hallmark of the Indonesian nation and a differentiator between the Indonesian nation and other nations.⁷

The culture is the identity of the indigenous people (Indigenous people). In its development, it is grouped into communal intellectual property. Communal intellectual property which is the identity of indigenous people in Indonesia is a wealth that comes from the wealth of living and non-biological natural resources that have uniqueness or characteristics that are not found elsewhere. Communal intellectual property is also born from cultural diversity which is continuously maintained from generation to generation and becomes the identity of the group, henceforth it can be maintained and passed on to the next generation and become a communal identity.

However, the existence of Indonesian communal intellectual property was claimed to be a culture from other countries. So it is very necessary to recognize and be legally disabled by the state. This is of course for the sake of protection, preservation, development, and utilization to support the welfare of the community, especially the local community that owns the communal intellectual property. Communal intellectual property is defined as intellectual property whose ownership is group and not private. This generally arises through the traditional cultural heritage that develops in certain communities, which often become part of the identity of that community, and therefore must be protected so that intellectual property can be preserved.

Based on the Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal Intellectual Property Data, Communal intellectual property is defined as Intellectual Property in the form of Traditional Knowledge, Traditional Cultural Expressions,

⁷ Muthia Aprianti *et.all*, "Kebudayaan Indonesia di Era Globalisasi terhadap Identitas Nasional Indonesia", *Universitas Pendidikan Indonesia: Edumaspul Jurnal Pendidikan* 6, no. 1 (2022): 996.

Genetic Resources), and Potential Geographical Indications. In general, Communal intellectual property is IP whose ownership is group, in contrast to other types of Intellectual Property whose ownership is exclusive and individual. Communal intellectual property is a traditional cultural heritage that needs to be preserved, considering that culture is the identity of a group or society.

Traditional cultural expressions as part of Communal intellectual property, known as folklore, have several characteristics, namely:

- a. The spread and inheritance is done orally, that is, it is spread through speech.
- b. Folklore is traditional, that is, it is spread in a relatively fixed form among their collectivities over a long period of at least two generations.
- c. Folklore is anonymous, that is, the name of the creator is no longer known to others.
- d. Folklore is usually patterned and spontaneous, for example using clichés.
- e. Folklore has uses in the common life of a collective society, for example, dances for traditional or religious ceremonies.
- f. Folklore is paralogical, that is, it has its own logic that is not in accordance with general logic, especially for oral folklore.
- g. Folklore is a collective property of indigenous peoples.⁸

In general, there are at least 5 (five) underlying the importance of protecting communal intellectual property, namely:⁹

- a. Protection based on Justice. This protection emphasizes the existence of fairness and justice in the use of communal intellectual property whose knowledge is utilized and commercialized by certain people or by the State and the results of such utilization are given royalties in accordance with profit sharing or compensation, both monetary and non-monetary;
- b. Protection as part of the Conservation. Protection for communal intellectual property, defined as protection for the maintenance of genetic resources that exist in a country;
- c. Cultural Maintenance. Protection of communal intellectual property can be used to maintain the culture that has been attached to certain communities or indigenous peoples and the

⁸ Simona Bustani, "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat", *Jurnal Hukum Prioris* 2, no. 4 (Februari, 2010): 249.

⁹ Maya Ruhtiani, "Perbandingan Perlindungan Hukum Hak Kekayaan Intelektual Komunal Antara Indonesia dan China", *Jurnal Ilmiah Universitas Batanghari Jambi* 22, no.2 (Juli 2022): 888.

maintenance of communal intellectual property values that are used as traditional and cultural practices;

- d. Prevention of abuse by unauthorized parties or avoiding bio-piracy (avoiding biopiracy)

COMPARISON OF PROTECTION OF COMMUNAL INTELLECTUAL PROPERTY AS THE IDENTITY OF INDIGENOUS COMMUNITIES BETWEEN INDONESIA AND VIETNAM

Vietnam is a unique phenomenon in the application of the protection of indigenous people, because the country applies basic policy principles, including:

- a. Principles based on fairness, solidarity, and mutually beneficial relationships with Indigenous People.
- b. Creating favorable conditions for Indigenous Peoples/Communities to develop and be able to adapt to the culture of other communities in general.
- c. Respect the interests, traditions, culture, language, customs, and beliefs of all Indigenous Peoples/Communities.
- d. Synergize social and economic policies based on regional and ethnic characteristics of Indigenous Peoples/Communities.¹⁰

This policy principle has been reflected in the constitution and the constitution which stipulates that the state protects, strengthens, and consolidates the unity of indigenous peoples/communities and prevents all forms of activities that may threaten indigenous peoples. All indigenous peoples are positioned fairly. They automatically become part of Vietnamese citizens who have the same rights and obligations. The Vietnamese government is always looking for a way to reduce the economic and cultural gap of the Indigenous Peoples.

Although Vietnam has low economic growth and does not yet have a specific law on traditional knowledge, Vietnam has developed a comprehensive system to protect geographical indications and has had a biodiversity law since 2008. requirements for access to genetic resources and profit sharing with related parties. Vietnam issued a Decree in 2017

¹⁰ Direktorat Perlindungan dan Kesejahteraan Masyarakat Kementerian Perencanaan Pembangunan Nasional/ Badan Perencanaan Pembangunan Nasional, *Masyarakat Adat di Indonesia: Menuju Perlindungan Sosial yang Inklusi*, (Jakarta: PPN/Bappena, 2013), 52.

(59/2017/ND-CP) setting out in detail the Access Benefits Sharing (ABS) requirements of 2008 biodiversity.¹¹

Vietnam has a long history of traditional medicine, starting around 2,000 BC under the influence of traditional Chinese medicine. Traditional Vietnamese medicine has played an important role in Vietnam's healthcare system, but it still faces many difficulties. Over the past few decades, as well as the integration of traditional and modern medicine, positive developments have been made in research and documentation related to traditional medicine, education, and training.

Great efforts have been made to combine traditional and modern medicine and to bring traditional medicine into the national public health care system. The objectives of the national policy are further development of integration, network renewal and refinement, mobilization of financial resources, and technical level improvement and development. Interestingly, Vietnam established the Museum of Traditional Vietnamese Medicine, where nearly 3,000 relevant items are kept.¹²

Although Vietnam does not yet have a specific law on traditional knowledge and benefit sharing, it has been recognized by the government in support of the public release of mandatory information on genetic resources and traditional knowledge on patents. The government and the National Intellectual Property Agency (NIPA) encourage the registration of various types of IP. For example, the trademark is used to protect the traditional balm of the medicinal plant Truong Son Balsam. A collective mark has been given to Bat Trang porcelain. Some of the geographical indications listed include Nuoc Mam (fish sauce) from Phu Quoc; Shan Tuyet Tea from Moc Chau; Buon Ma Thuot (coffee); Do An Hung (pomelo); Binh Thuan (dragon fruit); and Dai Hoang Ngu (banana).¹³

Vietnam is a unique phenomenon, although it has low economic growth and is strongly influenced by socialist values, Vietnam has developed a comprehensive system to protect geographical indications. Geographical indications and indications of origin are classified as protected by Intellectual Property, and the organization authorized to issue protection certificates is the Intellectual Property Department of the Ministry of Science and Technology.

¹¹ United Nations Conference On Trade And Development, *Towards An Effective And Practical Verification And Transparency Mechanism On The Utilization Of Genetic Resources And Associated Traditional Knowledge In Viet Nam's Intellectual Property System*, (2020), 4.

¹² *Ibid*, 251.

¹³ *Ibid*, 252.

All contents regarding geographical indications and Indications of origin were mentioned in 1995. Since then, there have not been many legal documents showing details. Among them:¹⁴

1. Civil law of the Socialist Republic of Vietnam on October 28th, 1995: referring concept of industrial property including creation, label of product, industrial design, useful solution, and appellation of origin.
2. Decree 63/CP of the Prime Minister issued on October 24th 1996, changed and supplemented according to Decree 06/2001/ND-CP on February 1st, 2001: prescribing the objects of intellectual property, industrial design, the label of the product, the appellation of origin as well as setting up intellectual property for them.
3. Circular 3055/TT-SHCN on December 31st, 1996 of the Ministry of Science and Technology guided how to implement the Decree 63/CP of the Prime Minister in setting up industrial property.
4. Decree 54/2000/ND-CP on October 3rd, 2006 of the government: indicating the protection of industrial property in terms of business secret, geographical indication, commercial name, and protection of the right against unhealthy competitiveness.
5. Circular 132/2004/TT-BTC on December 30th, 2004 of the Ministry of Finance: guiding the receipts, submission, management, and the use of fees for industrial property.
6. The Law of Intellectual Property was approved by the eleventh National Assembly of the Socialist Republic of Vietnam on November 29 th 2005.

On June 29, 2001, the National Assembly of the Socialist Republic of Vietnam adopted the Law on cultural heritage, of which, the entire chapter III is dedicated to intangible cultural heritage. The law recognizes that cultural heritage has played an important role in the national development and preservation of the Vietnamese people. Yang stated: “State policy should encourage the work of collecting, compiling, translating, inventorying, classifying, and preserving works of literature, art, science, oral traditions and folklore of the multi-ethnic Vietnamese community. It should be disseminated domestically as well as through foreign cultural exchanges.”¹⁵

¹⁴ Trong Binh VU dan Duc Huan DAO, *Geographical Indication And Appellation Of Origin In Vietnam: Reality, Policy, And Perspective*, (Hanoi: Institute of Policy and Strategy for Agriculture and Rural Development: MISPA Project, 2006), 43.

¹⁵ Nguyen Kim Dung, “*Intangible Cultural Heritage Safeguarding System in Vietnam*”, UNESCO, Expert Ministry of Culture and Information , 1. <https://ich.unesco.org/doc/src/00174-EN.pdf>

Further action for the protection of the intangible heritage is carried out with the “Decision on detailed regulations to implement several Articles of the Law on cultural heritage” (enacted on November 11, 2002, by the Government of Vietnam). Chapter II, Article 7 defines “States must protect and promote the values of the intangible cultural heritage.

Access and Benefit-sharing from utilization of genetic resources (Decree 59) decision 59 was issued in May 2017 and entered into force in July 2017. The decree consists of 28 articles in 5 chapters, with details: Procedure for registration and negotiation of ABS contracts for applications for access to resources genetic power, and profit sharing. The rights and obligations of the parties involved are also concreted, including the responsibility of the National Focal Point (NFP) and the National Competent Authority (NCA) to license ABS. To facilitate its implementation, the Presidential Decree stipulates 9 forms, which assist the implementation of the Decree in practice.¹⁶

One step ahead of Indonesia, Vietnam has paid more special attention to the protection of geographical indications and genetic resources through a special law that is comprehensively regulated by issuing more detailed requirements on the fair distribution of benefits to the use of genetic resources that are part of IP. Communal. This shows the seriousness of the government in optimizing the role of indigenous peoples by synergizing policies with the existence and needs of these indigenous people. Vietnam considers the important role of this culture in the development and preservation of its communal culture.

CONCLUSION

Practice Comparison of the roles of the Indigenous peoples of Indonesia and Vietnam in the protection of communal intellectual property as the identity of the Indigenous people, there are similarities and differences. As countries that share cultural wealth, traditional knowledge, and geographic potential that produce superior products, Indonesia and Vietnam have both paid attention to and acknowledged the existence of cultural wealth as the identity of indigenous people. This can be seen constitutionally, the two countries have recognized the existence of indigenous peoples and the inherent rights of these indigenous peoples, one of which is the right to communal intellectual property ownership. However, Vietnam is a unique phenomenon and one step ahead in terms of issuing special laws that are more comprehensive,

¹⁶ Msc. Ta Thi Kieu Anh, *Management Of Biodiversity Conservation And Access Genetic Resources In Vietnam*, (Hanoi: Nature and Biodiversity Conservation Agency Vietnam Environment Administration, 2019), 10.

especially on the protection of geographical indications and access to a fair share of benefits for genetic resources.

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