

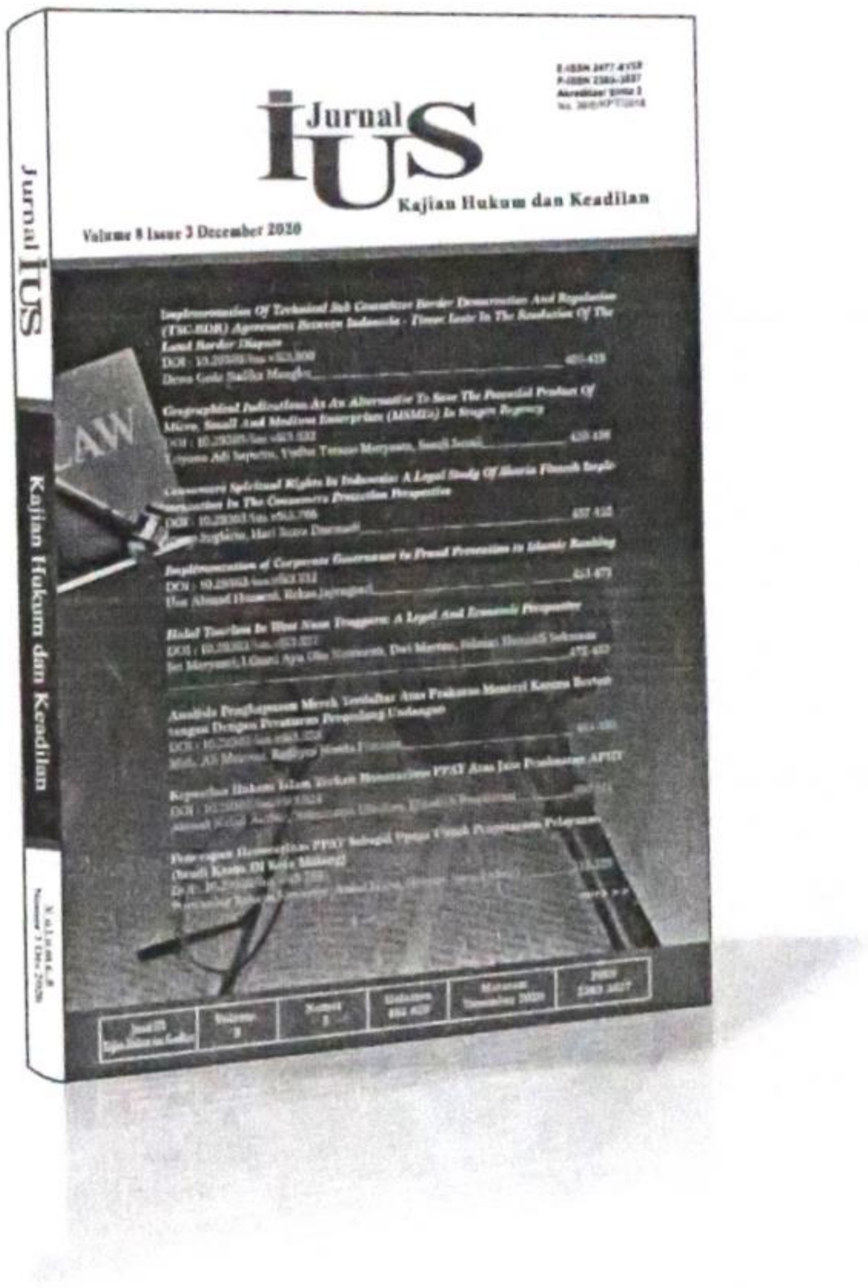
Jurnal IUS Kajian Hukum dan Keadilan

E-ISSN : 2477-815X P-ISSN : 2303-3827
Nationally Accredited Decree No. 30/E/KPT/2018

Program Studi Magister Ilmu Hukum
Fakultas Hukum Universitas Mataram

Jurnal IUS Kajian Hukum dan Keadilan

Jurnal IUS Kajian Hukum dan Keadilan is published by Magister of Law, Faculty of Law, Universitas Mataram. Jurnal IUS Kajian Hukum dan Keadilan established December 2012, is an institution that focuses on journal development for post graduate students and all law activists in general and specialized topics. Jurnal IUS Kajian Hukum dan Keadilan published three times a year in April, August, and December. This journal provides immediate ***open access*** to its content on the principle that making research freely available to the public supports a greater global exchange of knowledge.



The aims of this journal is to provide a venue for academicians, researchers, and practitioners for publishing the original research articles or review articles. The scope of the articles published in this journal deals with a broad range of topics in the fields of Criminal Law, Civil Law, International Law, Constitutional Law, Administrative Law, Islamic Law, Economic Law, Medical Law, Adat Law, Environmental Law and another section related contemporary issues in law.

The articles published in Jurnal IUS Kajian Hukum dan Keadilan are going through a ***double-blind peer-review*** process. Hence, the decision on whether the scientific article is accepted or not, will be the Editorial Board's right based on the peer reviewer's recommendation.

Jurnal IUS was founded by a group of young lecturers who had a passion to spread their ideas, thoughts and expertise concerning law. Jurnal IUS focuses on publishing research about law reviews from law students, lecturers and other activists on various topics. As an academic center, we organize regular discussions around various selected topics twice a month.

Jurnal IUS Kajian Hukum dan Keadilan with ***Link ISSN (2477-815X)*** is **Nationally Accredited Journal by the Ministry of Research, Technology, and Higher Education of the Republic of Indonesia (2021-2025) Decree No. 158/E/KPT/2021** with DOI prefix 10.29303 by crossref, Google Scholar

Based on the developments of Jurnal IUS Kajian Hukum dan Keadilan from 2013 to 2018, there were several changes that can be seen in the following link Journal History

E-ISSN 2477-815X P-ISSN 2303-3827

Author Guidelines | Manuscript Template | Submit Your Paper

Page not found

The webpage might be temporarily down or it may have moved permanently to a new web address.

ERR_INSECURE_RESPONSE

INFORMATIONS FOR AUTHOR

» AUTHOR GUIDELINES
» MANUSCRIPT TEMPLATE
» PEER REVIEW PROSES
» DECLARATION OF ORIGINALITY
» PUBLICATION ETHICS
» FOCUS AND SCOPE
» JOURNAL POLICY
» CITEDNESS IN SCOPUS
» CONTACT US
» PLAGIARISM CHECK

PUBLICATION INFORMATIONS

» PEER-REVIEWERS
» AUTHOR INDEX
» JOURNAL INDEX
» GOOGLE METRICS
» PROFILE IN GOOGLE SCHOLAR
» JOURNAL HISTORY

SCAN QR Code

Citation Journal

Page not found

The webpage might be tempo
may have moved permanentl
address.

Associated with

9 772477 815005

E-ISSN 2477-815X
P-ISSN 2303-3827

Vol 10, No 3: December 2022 : Jurnal IUS Kajian Hukum dan Keadilan

NEW This issue (Jurnal IUS Kajian Hukum dan Keadilan Volume 10 Issue 3 the Year 2022) has been available online published in December 2022. The DOI number in this issue is not registered yet

Table of Contents

Articles

Legal Enforcement for IUU Fishing in Indonesian Sovereignty And Jurisdiction: A Case Analysis of The Capture of Foreign Vessels by The Indonesian Government PDF 448-461

Ninin ernawati, Maya Shafira, Deni Achmad, Rehulina Tarigan, Ninne Zahara Silviani

The Role of Coping Strategy And Legal Protection on Migrant Workers: A Literature Review PDF 462-474

Fitri Hasdianti, Johanna Debora Imelda

The Urgency Of Mediator's Good Faith In Mediating Legal Disputes: The Critical Analysis Study PDF 475-488

Jasmaniar Jasmaniar, Zainuddin Zainuddin

Urgency of Extradition Agreements in Eradicating Corruption Crime in Indonesia PDF 489-501

Andi Rachmad, Zaki Ulya, Yusi Amdani

Renewal of the Criminal Justice System Through the Constante Justitie Principle That Guarantees Justitiabelen's Satisfaction PDF 502-510

Fence M. Wantu, Jufryanto Puluhulawa, Anis H. Bajrektarevic, Mellisa Towadi, Vifi Swarianata

IUS Constituendum of Suistainable Agricultural Policy: The Aftermath of Job Creation Act PDF 511-522

Ermanto Fahamsyah, Ruetaitip Chansrakaeo

The Problems and Forthcoming Ideal Concepts of Employment Social Security: An Indonesia's Perspective as a Welfare State PDF 523-540

Nyoman Satyayudha Dananjaya, Anak Agung Gede Duwira Hadi Santosa, Kadek Agus Sudiarawan, Made Dwita Martha

The Comparative Law on the Distribution of Power in the 1945 Constitution of the Republic of Indonesia and the Constitution of the Republic Timor Leste PDF 541-554

I Nyoman Prabu Buana Rumiartha, Ni Luh Gede Astariyani, Armindo Moniz Amaral

Implications of the Constitutional Court Decision Number 91/Puu-Xviii/2020 Toward Job Creation Law in The Mineral and Coal Mining Sector PDF 555-570

Lelisari Lelisari, Ridho Aulia Tanjung, Zainal Abidin Pakpahan, Imawanto Imawanto, Hamdi Hamdi

Settlement of Juvenile Offenders Based on Restorative Justice PDF 571-580

Syafruddin Syafruddin

Effectiveness of Islamic Law in Protecting The Copyright of Indigenous Peoples of Indonesia in The Form of Traditional Knowledge & Traditional Cultural Expressions PDF 581-594

Baiq Ratna Mulhimmah, Ridwan Olagunju

The Implementation of Notary Inclusive Rights in The Frame of Law Enforcement As a Public Official PDF 595-608

Ikhsan Lubis, Taufik Siregar, Ismail Koto, Ruetaitip Chansrakaeo, Duma Indah Sari Lubis

Problematic of Implementation of Electronic GMS on Deeds Made by Notaries PDF 609-619

Absori Absori, Aidul Fitriciada Azhari, Kelik Wardiono, Syifa Rana Tsary, Silaas Oghenemaro Emovwodo

The Problems of International Civil Law of Indonesia in Protecting Transnational E-Commerce Consumers PDF 620-630

Musleh Herry, Meisy Fajarani

Jurnal IUS Kajian Hukum dan Keadilan
Volume 10, Issue 3, December 2022, E-ISSN 2477-815X, P-ISSN 2303-3827
Nationally Accredited Journal, Decree No. 158/E/KPT/2021
open access at : http://jurnalius.ac.id/

EFFECTIVENESS OF ISLAMIC LAW IN PROTECTING THE COPYRIGHT OF INDIGENOUS PEOPLES OF INDONESIA IN THE FORM OF TRADITIONAL KNOWLEDGE & TRADITIONAL CULTURAL EXPRESSIONS

Baiq Ratna Mulhimmah[1], Ridwan Olagunju[2]
[1]State Islamic University of Mataram, Indonesia, Email: ratnamulhimmah@uinmataram.ac.id
[2]University of Ilorin, Nigeria, Email : ridwanolagunju@gmail.com

Received: 2022-09-11; Reviewed: 2022-11-12; Accetped: 2022-12-25; Published: 2022-12-26;

Abstract

Copyright Protection of Indonesian Indigenous Peoples in the form of Traditional Knowledge (TK) &Traditional Cultural Expression (TCE) currently does not meet the sense of justice. The state is obliged to provide comprehensive protections capable of guarding the rights of Indigenous peoples under an adequate legal umbrella. Because the existence of Indigenous peoples, along with copyrights in the form of TK & TCE is part of the wealth and identity of the nation, this research focuses on how the view of Islamic law (Legal Opinion of Indonesian Ulama Council No.1 of 2003 concerning Copyright and Legal Opinion Of Indonesian Ulama Council No.1 of 2005 concerning Intelectual Property Right) with the maqasid al Shari'ah approach in protecting the rights of indigenous peoples. Islamic law is one of the secondary legal materials in determining state law and is expected to strengthen in providing solutions to this problem. The research method is normative with a concept and case approach to conclude that Islamic law (legal Opinion Of Indonesian Ulama Council) with the Maqasid al Shari'ah approach in protecting Traditional Knowledge (TK) &Traditional Cultural Expression (TCE) is a must. This is based on an obligation order covering several matters, including; the protection of life and hifzul nafsi/hifzul 'irdhi, protection of reason (hifzul aqli), and protection of property (hifzul maal).

Keywords: Indigenous Peoples; Traditional Knowledge & Traditional Cultural Expressions; Islamic Law (Legal Opinion of Indonesian Ulama Council);

1. INTRODUCTION

Every owner of Intellectual Property Rights (IPR), including the owner of a copyrighted work, has the human right to be protected and fulfilled by their moral and economic rights. Likewise, as part of citizens, indigenous peoples have the right to the fulfillment and protection[1] of their moral rights and economic rights to Traditional Knowledge and Traditional Cultural Expressions that are owned. This is following the constitutional mandate in article 18b of the 1945 Constitution of the Republic of Indonesia that[2] : The *state recognizes and respects the unity of indigenous peoples and their*

[1] In this paper, we use the term indigenous people as an equivalent of the word for the term *indigeneous people* with the meaning of a community group that has its origin (for generations) in certain geographical areas, and has its own value system, ideology, economy, politics, culture, social, and territory. This is to equate terms that are often used differently. The use of the term indigenous peoples was chosen considering that this term is more socially and politically accepted and has a wider scope of meaning.
[2] Constitution of the Republic of Indonesia of 1945.

DOI: http://dx.doi.org/10.29303/ius.v10i3.1141

traditional rights as long as they are alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia regulated in law".

This recognition and respect for the rights of Indigenous peoples are also contained in the *United Nations Declaration instead of one Indigenous Peoples* in article 31:[3]"..... *they also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".* The Indonesian nation is known for its diverse tribes, customs, languages, and beliefs, making Indonesia a country rich in traditional culture. The number of ethnic groups in Indonesia reaches 1340, 15 ethnic groups have members of more than 1 million people (BPS, 2010). The rest are ethnic groups with less than 1 million members throughout the Indonesian archipelago.[4]Meanwhile, the composition of the Islamic population, which occupies the top ranking, reaches 207,176,162 or 87.18%. This means that Muslims are the main contributors to the realm of thought, so western rules need to be adapted to the conditions of Indonesian society, which is thick with religious and cultural values[5].

Currently, no specific legal formwork regulates the protection of Traditional Knowledge and Traditional Cultural Expression (TK & ETC). These two types of communal intellectual property are regulated separately in several laws and other regulations. They are not complete and rudimentary, so the current protection is still inadequate and vulnerable to utilization and piracy. Currently, TKETC is included in intellectual property rights protection, where Cultural Expression is part of the copyright regulated in copyright law No. 28 of 2014, while Traditional Knowledge is regulated separately in other laws.

Of course, a complete regulation will strongly support the protection of communal wealth in the form of TK & ETC. This is important considering that the aspects of Indonesia's Intellectual Property Rights currently refer more to the TRIPs (*Trade-Related Intellectual Property Rights*) agreement as one of *the* World Trade Organization (WTO) agreements that developing countries, including Indonesia must implement.

There is a difference in principle between the rules applied by conventional IPR and the conditions of Indonesian society, where in the conventional IPR rules, the requirements for copyright protection must be based on creative works that have been materialized, have a new value, are owned by individuals, and are part of the modification and industrial process.[6]Of course, this is incompatible with Traditional Knowledge and Traditional Cultural Expression, a Communal Intellectual Property (CIP) owned for generations by indigenous peoples (communal property)and not an industrial product. Because of this incompatibility, indigenous people have not received justice for their ownership of these traditional rights. This difference in conditions

---

[3] United Nation Declaration on The Rights of Indigenous People, article 31.

[4] Ministry of National Development Planning/National Development Planning Agency Directorate of Community Protection and Welfare, ***Indigenous Peoples in Indonesia Towards Inclusive Social Protection***, (Jakarta: Directorate of Community Protection and Welfare ministry of NATIONAL DEVELOPMENT PLANNING/BAPPENAS, 2013), p. 15.

[5]View population census results, http://www.mikirbae.com/2015/05/komposisi-penduduk-menurut-agama.html accessed on March 7, 2017

[6] Miranda risang Ayu et al, Sistem Protection Of Intangible Cultural Resources In Palembang, South Sumatra, Indonesia, *pulpit of law* 2 no. 2 (2017): 205-220.

is affirmed by hayyanul haq that; "*the substantive problem in this context refers to the regulation or legislation related to Copyright. It includes philosophy, concepts, perceptions, definitions, principles, the norm which exists and develop in society, and which are embodied in copyright regulations.*" [7] These differences, of course, Indonesia requires regulations to protect its traditional wealth that is more in line with the conditions and characteristics of the Indonesian people.

Meanwhile, there has been a lot of economical use of Traditional Knowledge and Traditional Cultural Expression by parties outside the Indigenous community itself, which of course, as the copyright owner of indigenous peoples, is very disadvantaged. One of the contributing factors is the lack of legal protection against the existence of Traditional Knowledge and Traditional Cultural Expression. The occurrence of *abuse (misappropriation)*, piracy, the destruction of cultural values, and exploitation by other parties, both from within and foreign parties, is very detrimental to Indigenous peoples as owners of rights to their traditional wealth. Some cases of violations that have occurred include; 1). The issue of Traditional Knowledge in 1995 patent claims for several products of Indonesian plant origin by the Japanese *Sheisedo* cosmetics company such as rapet wood plants (*Parameiria Lairigata*), Kemukus (*Piper Cubeba*), Tempuyung (*Sonobus Arvensis L*), Belantas (*Pluchea Indica*), Mesoyi (*Massoia Aromatic Becc*), Pule (*Alstonia Scholaris*), Pulowaras (*Aliycia Indarwatii BL*), Sintok (*Cinnamomum Sintoc BL*). 2). The case of traditional cultural exploitation belonging to the Indonesian nation that foreign parties have exploited the actions of British citizen Christopher Harrison through his company Harrison & Gil, who claimed the copyright of the Jepara carving, as well as several issues that have occurred in Indonesia such as the case of Malaysia's claim of Traditional Knowledge and Traditional Cultural Expressions, in an advertisement on *the Discovery Channel In Enigmatic Malaysia*, pendet dance, wayang, and Reog Ponorogo, are claimed to be Malaysian traditional heritage.[8]Although the Malaysian side later apologized to Indonesia, this experience can be a valuable lesson so that the country should pay more attention to the existence of traditional wealth belonging to the nation.

The enactment of Islamic law in Indonesia is a form of recognition of legal pluralism in this country, so its existence is expected to contribute to solving existing legal problems. As for the adjustment of the rules regarding copyright protection, Islamic law has a method of determining its law, namely through the *Maqasid al-Shari'ah* approach (the purposes of legal determination), where the purpose of the law will boil down to *maslahah* (goodness).

Islamic law, as one of the legal materials in the formation of national law, should have an essential role in contributing to every solution to legal problems in Indonesia, including the copyright of Indigenous Indonesians on Traditional Knowledge and Traditional

---

[7] L.M. Hayyan ul Haq, Requestioning The Existence Of The Indonesian Copyright Regime In Protecting Cultural property, Intellectual property Law Articles on Crossing Borders Between Traditional and actual, Netherlands: Intersentia antwerp-oxford (2004) 225.

[8] Human Rights Research and Development Agency of the Ministry of Law and Human Rights of the Republic of Indonesia, *Intellectual Property Protection of Traditional Knowledge &Traditional Cultural Expressions*, (Bandung, PT. Alumni, 2013).

Cultural Expressions. Currently, the legal legitimacy used to protect copyright is the existence of the Legal Opinion Of Indonesian Ulama Council (MUI fatwa No. 1 of 2003 concerning Copyright and MUI Fatwa No. 1 / MUNAS VII / MUI / 5/2005 concerning Protection of Intellectual Property Rights (IPR).

This fatwa shows the attention to Islamic law as one of the laws that play a role in Indonesian society, with most adherents of the highest religion. However, it is a matter of the extent to which the state is willing to accommodate the fatwa in making regulations to protect indigenous peoples' copyrights to communal intellectual property in the form of Traditional knowledge and Traditional Cultural Expressions.

Although this fatwa is weak because it only serves as advice, its contribution to Islamic legal thought can affect PTEBT's position in the legal view. The determination was carried out through the *Maqasid al-Shari'ah* method, Islam answers how significant a *benefit is* for human life. So that if *the benefit* is achieved automatically, the legal goals that lead to justice, expediency, and legal certainty will also be performed.

Based on the background description above, the problem studied in this work is how Islamic law views, in this case, the fatwa of the Indonesian Ulema Council through legal determination with the *Maqasid al Shari'ah* method in protecting the copyright of indigenous Indonesians for traditional wealth in the form of Traditional Knowledge and Traditional Cultural Expression.

Analyze how the view of Islamic law through the *Maqasid al Shari'ah* method in providing legal protection for the rights of Indigenous Indonesians to Traditional Knowledge and Traditional Cultural Expressions and grounding them into National law as a contribution of Islamic law in the formation of a national law that is just, useful and certain.

This study uses normative legal research on laws, regulations, and concepts related to the issues. The data is used as secondary data obtained through library research. The data are relevant regulations, court verdicts, and previous scientific journals. Then, the data were analyzed qualitatively.

2. DISCUSSION

2.1.Copyright of Traditional Knowledge and Traditional Cultural Expressions Within the Framework of National Laws and International

Copyright is one part of Intellectual Property Rights (IPR), where IPR itself is a right to property that arises due to human intellectual abilities. Indeed someone who has tried to do something to produce something of high value must have sacrificed time, mind, and energy, which costs a lot. Based on this conception, it then encourages appreciation of the work created in the form of legal protection for IPR. This protection is no exception to all copyright forms produced by its inventors.

The Intelectual Property Rights regulated in Indonesian law include Copyright, Patents, Trademarks, Trade Secrets, Integrated Circuit Layout Design, Industrial Product

Design, and Plant Variety Protection. [9] While some legal instruments for protection at the international level, there are several agreements, including; the UNESCO *Convention for the safeguard of the Intangible Cultural Heritage* 2003, ratified by Indonesia through Government Regulation 78 of 2007. This convention regulates intangible cultural heritage, which is created and practiced continuously from generation to generation. *The UNESCO Convention on the Protection of the Diversity of Cultural Expression 2005* aims to protect and promote the diversity of cultural expressions and several other agreements whose forms of protection are more towards fostering and preserving.

Of course, these conventions will be stronger if implemented in the form of laws and regulations at the National level. The national law that regulates this Traditional Cultural Expression, in addition to copyright law No. 28 of 2014, there is also law No. 11 of 2010 concerning Cultural Heritage which regulates Cultural Resources that are material or material, law No. 5 of 2017 concerning the Promotion of Culture, Regulation of the Minister of Law and Human Rights No. 13 of 2017 concerning Communal Intellectual Property Data, and Regulation of the Minister of Education No. 106 of 2013 concerning Indonesia's Intangible Cultural Heritage. But unfortunately, some of the protections in the National law do not provide for the rights of Indigenous peoples, specifically as owners of Traditional Knowledge and Traditional Cultural Expression. Related to the contribution of Islamic law through the fatwa of the Indonesian Ulema Council, it has been stipulated on copyright protection with the Legal Opinion Of Indonesian Ulama Council (MUI fatwa decree No.1 / MUNAS / VII / 15/2015 concerning Intelectual Property Right (IPR) protection and MUI fatwa No. 1 of 2003 concerning Copyright. However, the power of fatwas is not binding because fatwas are merely religious advice given based on requests from one or a group of people to answer legal issues whose answers are not found in *the nash* of the Qur'an or hadith.

Meanwhile, the regulations in article 38 of the Copyright Law No. 28 of 2014 related to the expression of Traditional Culture are still ubiquitous and sumir. This situation provides an opportunity for differences in interpretation and understanding of the rules so that it can cause disputes between regions and countries regarding ownership claims. Fitriatus shalilah, in his research, says, "*The constraints in protecting traditional cultural expressions in Indonesia are mostly due to the understanding of the traditional owners of traditional cultural expressions in Indonesia over communal ownership.*"[10]

This means that further explanation and regulation are needed in implementing government regulations. Similarly, the regulation of Traditional Knowledge in the promotion of culture only regulates Traditional Awareness as one of the objects of

---

[9] Aprillyana Purba, et al, *TRIPs-WTO & Indonesian IPR Law Study of Copyright Protection of Indonesian Traditional Batik Art,* (Jakarta: PT. Asdi Mahasatya, 2005), 16.

[10] Fithriatus Shalihah & Ali Zuryat Hakim, The Obstacles of Copyright Protection Against Traditional Cultural Expression in Indonesia, *Atlantis Press. Advances in Social Science, Education and Humanities Research*, Vol 317, (2019): 114-118.

cultural promotion, so it does not explicitly regulate its position as a property right to the communal property of the community.

There are still vague norms in some of these regulations, so a particular legal umbrella (*sui generis*) is needed to follow the character of Indonesia, which is inseparable from moral and religious values. In this condition, Islamic law is required to reinforce state law so that the ideals of legal justice for citizens, especially Indigenous peoples, can be fulfilled for their traditional rights.

1.2.Islamic Law's View of Copyright in the Form of Traditional Knowledge and Traditional Cultural Expression

a. Traditional Knowledge and Expression of Traditional Culture Part Of The Copyright Belongs To indigenous people's

The term Traditional Knowledge appeared first in international legal instruments with various meanings and different scopes of the international organization. Apart from that, in the end, Traditional Knowledge has almost the same purpose, related to the wealth of traditional knowledge possessed by indigenous people.

In general, Traditional Knowledge can be seen as *cultural heritage (traditional knowledge as cultural heritage*) and Traditional Knowledge as resources (*traditional knowledge as resources*). Suppose you look at Traditional Knowledge as a cultural heritage. In that case, the domains are the same as Cultural Expression, consisting of oral traditions and expressions, performing arts, social customs, rituals and ceremonies, and handicrafts.

Meanwhile, if you look at Traditional Knowledge as a resource, the definition can be referred to the *Convention on Biological Diversity* (CBD), 1992, and the *World Intellectual Property Organization* (WIPO). The CBD associates Traditional Knowledge with environmental resources such as biodiversity and genetic resources, while WIPO associates Traditional Knowledge with intellectual property resources.[11] Furthermore, this paper will refer to all the meanings in question, regardless of the differences.

As for the regulation of Traditional Cultural Expressions, copyright law No. 28 of 2014 has directly hinted that Cultural Expressions are part of Copyright. Previously Traditional Cultural Expressions were known as *folklore*, which this term was contained in the Recommendation *On Safeguard Of Traditional Culture and Folklore* 1989, *"folklore (or traditional and popular culture) is the totality of tradition based-creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect is cultural and social identity; its standard and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture, and*

[11] Zaenul Daulay, *Traditional Knowledge of Basic Concepts of Law and Its Practice,* (Jakarta: PT Grafindo Persada), 21.

other arts".[12] Based on these recommendations, the Indonesian Copyright Law regulates objects that must be protected.

For an expression to qualify as a Traditional Culture Expression (EBT) or *Traditional Culture Expression* (TCE), it must exhibit individual or collective intellectual activity, be characteristic of the identity and heritage of a community, and have been maintained, used, or developed "by that community, or by a person who has the right or responsibility to do so following the laws and customs/customs practices in those communities."[13] Its substance is the same as Traditional Knowledge when viewed from the point of view of cultural heritage.

The traditional wealth of Indigenous peoples in the form of Traditional Knowledge and Traditional Cultural Expression has become an inseparable part of indigenous people's lives. Traditional expressions (*folklore*) are used only in the owner's community. However, along with the rapid development of technology and knowledge, Traditional Knowledge and Traditional Cultural Expression (TK & TCE) are not only in the owner's society but also growing more widely. This development is not only in the creative industry but also includes other aspects such as the art of knowledge of traditional medicines, raw materials from biodiversity, expressions in the form of dance, music, drama, and fine arts such as carving, weaving, and others, all of which are traditional wealth that has extraordinary value for the economic development of society, especially the people who have utilized it. Of course, this is also unfair if the owning communities, such as indigenous peoples, do not enjoy the rapid progress of traditional wealth.

This weak protection of traditional wealth also provides opportunities against unnatural exploitation (*misappropriation*) or piracy by other parties. Related to this, Indonesia's state has not finished protecting traditional communal wealth. On this issue, an adequate form of legal protection is needed for the right of indigenous peoples to their ownership in the form of Traditional Knowledge and Traditional Cultural Expression.

So it becomes an obligation for the state to protect the rights of its citizens, including indigenous peoples, as part of Indonesian citizens have the right to protection. The protection of indigenous peoples' rights to traditional wealth in the form of Cultural Expressions has consequences for preserving these traditional wealth objects, which are also part of the country's wealth. If protection can be provided adequately, the goal of welfare and justice in forming state law will automatically be realized because all citizens, without exception, have been able to enjoy it. This is the hope for the future, namely the realization of justice provided by the state in the form of protection of the traditional rights of indigenous peoples so that their existence is always appreciated, respected, and upheld.

b. Copyright in Islamic View

---

[12] Point A Recommendation on the Safeguarding of Traditional and Folklore 15 November 1989.
[13] Peter Jaszi et al, *Traditional Culture a Step Forward for Protection in Indonesia"* (Jakarta; LSPP, 2009), 51.

Copyright is the result of the hard work of a person who has sacrificed energy, time, and costs, as well as the hard work of the brain in thinking to realize a helpful creation and benefit himself. The reality is that Traditional Knowledge and Traditional Cultural Expressions have not only provided benefits for Indigenous peoples but have also provided many benefits and benefits for others who use them. The definition of copyright also refers to the definition of Intellectual Property Rights (IPR) in general. IPR (*Intellectual Property Rights*) is defined as property in the form of rights that receive legal protection where other people are prohibited from exercising these rights without the owner's permission.[14] According to Oran's *dictionary of the law, intellectual property* is defined as follows "*intellectual property or similar intangible right in an original tangible or perceivable work. The right obtains copyright, patent, etc.*"[15]. The point is that copyright that is part of IPR is wealth generated from the copyright that has economic value.

The existence of copyright as part of Intellectual Property Rights (IPR) in Islamic law has not been explicitly found. Because the copyright issue is a new problem that arises today and has not been known by the previous public. However, copyright is a "right" whose assumption is that every right must be protected. The concept of rights in Islam is obvious where copyright is part of the property (*maal*) which must be protected following the principle of *hifzul maal* (protection of property) in the approach of *maqasid al shari'ah* (the purpose of legal determination).

If a person is given authority, that authority becomes a person's "right" to master something to which he is entitled. So, "rights," according to Fauzi are the authority that Syar' establishes concerning power. However, according to Islamic law, this authority must get recognition in Syar[16]a'. If it is not recognized in Syara' then it cannot be called "right ."For example, a thief cannot make stolen goods his right even though the goods are defacto his property. Hence the right in its application is always associated with the maintenance of the benefit of others and does not harm the public interest. This means that every individual does not have absolute freedom to exercise his rights, for he is not a complete owner who is not limited by the benefit of others in exercising his rights arbitrarily and harming others.

Then this similar right can be classified into *haqq adami* (man), a request intended to preserve man's benefit, namely the creator's right. To maintain the continuity of the benefit, legal protection is needed that can guard it against deeds that are zalim; related to this, Allah SWT affirmed in his word the letter As-Syuara: 183

وَلَا تَبْخَسُوا النَّاسَ اَشْيَآءَهُمْ وَلَا تَعْثَوْا فِى الْاَرْضِ مُفْسِدِيْنَ ۚ

"And ye shall not harm man to his rights, and ye shall not run rampant upfront of the earth by making mischief."

---

[14] Ridwan Khairandy, *Pokok-pokok Hukum Dagang Indonesia,* (Yogyakarta, FH UII Press, 2013), 423.
[15] Daniel Oran J.D, et all, *Dictionary of The Law, Third Edition*, (west legal studies, 2000), 253.
[16] Wahbah Al Zuhaili, *Fiqih Islam Wa Adillatuhu*, (Jakarta: Gema Insani, 2011), 364.

Against all forms of unnatural exploitation, whether in the form of piracy or theft of this act, it is clear that Islam has banned it. Allah swt said in surah Al Baqarah: 188

وَلَا تَأْكُلُوٓا اَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ

"and let not some of you eat the treasures of some of the treasures of the others among you by way of the poor."

Along with this, the MUI fatwa, one of the legal systems in Islamic law whose existence is recognized in Indonesia, argues that Intellectual Property Rights and including copyright, are property rights (*huquq maliyah*) that must get legal protection (*mashun*) like other assets. The MUI Fatwa No.1 of 2003 concerning Copyright is based on various scholarly opinions on copyright. Most scholars in the Maliki, Shafi'i, and Hambali schools said that the original copyright is valuable. [17] However, it does not speak directly about the copyright of Traditional Knowledge and Traditional Cultural Expression, its substance as communal property copyright has met the requirements of protection in this fatwa.

This opinion was then used as a basis for the Legal Opinion Of the Indonesian Ulama Council in issuing the following provisions:

1. In Islamic Law, copyright is seen as one of the *huquq maliyah* (property rights) that receives legal protection (*mashun*) as mal (wealth)
2. Copyright that receives the protection of Islamic law, as referred to in number 1, is the copyright of a creation that does not conflict with Islamic law
3. Like *malls,* copyright can be used as an object of the contract (*al-ma'qud alaih*), both *mu'awadhah* (exchange, commercial) and *tabarru'at* (non-commercial) contracts, and be represented and inherited
4. Any form of copyright infringement, especially piracy, is a tyranny whose law is illegitimate

Looking at the description above, it can be concluded that Copyright is part of *the maal* (property), which can also be used as an object of the contract, both in the form of a commercial and non-commercial contract and can be represented and inherited, which must be protected from all forms of tyranny.

Furthermore, it can be said that copyrights viewed as part of property have the same position as other property and are obliged to be protected for their existence. Of course, this copyright protection must benefit the creator as a legal subject and consumers as legal objects. Furthermore, it is also hoped that this protection will encourage experts to continue to work and produce new copyrighted works in their fields that can provide progress for the development of science without copyright in the form of Traditional Cultural Expressions, which have contributed wealth to their users.

[17] Fatwa of the Indonesian Ulema Council No. 1 of 2003 concerning Copyright.