

# Legal Problematics: The Existence of Paliasa Leaf in South Sulawesi Society

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## Abstract

Traditional knowledge as a work which is a communal property opposites characteristically to the legal regime of Intellectual Property rights. Thus, imposing for a regime of intellectual property rights used as a system to protect traditional knowledge will only cause anomalies in Indonesian society itself. While Intellectual Property rights regime in Indonesia is not yet capable protecting traditional knowledge, especially associated with genetic resources. The present of local wisdom of the communities in South Sulawesi to genetic resources is to use Paliasa leaf as a medicinal plant which are documented well in ancient texts "Iontarak pabbura" and organized by Ammatoa as Kajang indigenous leaders. Therefore, it needs protection model to protect traditional knowledge and their genetic resources associated with traditional knowledge through a sui generis system as positive protection and defensive protection models in order to provide comprehensive protection against traditional knowledge belong to Indonesian people.

**Keywords:** The Paliasa leaf; Legal protection; Traditional knowledge; Genetic resources; Kajang indigenous people; Local community in South Sulawesi

## Introduction

There are various issues related to genetic resources and traditional knowledge occurred in Indonesian domestic area and other countries as well. One of the examples of these cases is "Sambiloto and Brotowali" case in which one of Japanese cosmetics companies has got patents on products made from Sambiloto and Brotowali plants [1]. This case shows that how weak the cultural defence mechanisms in protecting traditional knowledge and anything associated with genetic resources.<sup>1</sup> This has called an urgency to provide immediately protection on Indonesian traditional knowledge and genetic resources particularly on Paliasa leaf as one among thousands of species of Indonesian genetic resources that is also associated with traditional knowledge of people in South Sulawesi. Traditional knowledge itself is a general term referring to the international area.<sup>2</sup> While genetic resources is as defined in Article 2 of CBD.<sup>3</sup>

Protection of traditional knowledge associated with genetic resources has become a trending issue in WIPO *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (hereinafter referred to as WIPO ICG) [2]. To date, this forum has not succeeded in regulating international legal instrument for this issue. Another trending issue is an issue discussed in Conference of the Parties of Convention on Biodiversity (hereinafter referred to as COP CBD) [3]. This second forum has regulated international legal instrument in protocol model as the complement of Convention on Biodiversity (CBD). This protocol aims at further implementing one of three CBD's goals which consist of the fair and

<sup>1</sup>Shri Lalu gde pharmanegara, "Gagasan Pelestarian Sumber Daya Genetik di Kerajaan dan Kedaduan di Pulau Lombok", available at <http://pharmanegara.blogspot.com/2009/06/gagasan-pelestarian-sumber-daya-genetik.html> last accessed on 1 April 2016

<sup>2</sup>Generally expressed in the community and include an expression of folklore, religion (eg. Holy places, plants, and animals), craft (eg. Technological development for textile production, food), agriculture (eg. Ecosystem management, plant development and animals with certain properties, and medicine (eg. Herbal products). In (IP Dialogue Working Group II (Argumentation "Protection of Traditional Knowledge), p. 2

<sup>3</sup>Art. 2 of CBD defines the genetic resources as a genetic material of actual or potential value. Genetic material itself is any material of plant, animal, microbial or other origin containing functional units of heredity.

equitable sharing of benefits arising from the utilization of genetic resources. This protocol has also been ratified by Germany which was the last country to ratify it on 22 April 2016 as part of the 74 countries which ratified the protocol.<sup>4</sup>

This article will emphasize on the protection of traditional knowledge and anything related to genetic resources. This study focuses on Paliasa leaf (*Kleinhovia Hospita Linn*) as genetic resources as well as traditional knowledge of South Sulawesi society. The ability of intellectual property rights legal regime (hereinafter referred to as IP) to provide protection on traditional knowledge that belongs to communal society will also be covered.

## Methodology

Non-doctrinal method with socio-legal approach was used to analyze problems in this paper. This paper was done as result of observing community in Makassar Local Community and Kajang Indigenous People in South Sulawesi for Paliasa leaf as genetic resources associated with traditional knowledge in the societies. While data collection was done by interviewing, observing and searching ancient manuscripts.

Interviews were conducted with informants from The Traditional Community Health Center (*Balai Kesehatan Tradisional Masyarakat*) in Makassar, elite figure in Lembanna and Kajang Indigenous leader in Bulukumba. Observation was carried out in the community of South Sulawesi such as observing Makassar Local Community and Kajang Indigenous People when using the leaves for one of the tools of traditional ceremony and as traditional medicine. After observation

<sup>4</sup><http://www.cbd.int/new/> last accessed on 26 June 2016.

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was done around Makassar, There was also another community using and preserving Paliasa Leaf located in Gowa. Ancient manuscript was used in this paper for a purpose of supporting information.

## Wipo Intergovernmental Committee on Intellectual Property and Genetic Resources, Raditional Knowledge and Folklore

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) is a committee that is established in order to negotiate texts from an international legal instrument, particularly the ones which guarantee the protection of genetic resources, traditional knowledge and traditional cultural expression [4]. This committee presents the indigenous panel from the representative of indigenous peoples and local community.<sup>5</sup> This committee has held as many as 29 sessions and the 30<sup>th</sup> session was held on the 30 of May 2016 in Geneva, Switzerland.<sup>6</sup> There are some discourses discussed in the WIPO IGC, that is including the discussion of the draft on policy objective, guiding principle, substantive principle,<sup>7</sup> core principle, the draft article for genetic resources, traditional knowledge and folklore.<sup>8</sup> The most recently meeting on 30th session discussed the topic around glossary of key terms related to IP and genetic resources, traditional knowledge and folklore.

## Conference of The Parties of CBD

The 12<sup>th</sup> meeting of COP of CBD was held in Pyeongchang, The Republic of Korea from the 6 to 7 of October 2014. The 13<sup>th</sup> meeting will take place in Cancun, Mexico on December 2016. COP has the highest authority among the countries which ratified Convention on Biological Diversity in every biennial meeting to discuss the advance, set priority and commit to work plan, agree on various international issues in

<sup>5</sup>In this committee, the presentations was about protection, promotion and preservation of traditional knowledge, traditional cultural expression and also genetic resources. For example, a presentation delivered by Australia representative, Mr. Robert Leslie Malezer, the *Co-Chair National Congress of Australis's First Peoples* entitled '*...the right to maintain, control, protect and develop their intellectual property over...traditional knowledge...*'. Here Mr. R. L. Malezer emphasized his presentation on the rights of indigenous people particularly by comparing rights of indigenous people contained in Article 31 *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) with the right for everyone contained in Article 29 *Universal Declaration on Human Rights* (UDHR). He explained that Article 31 states that it is the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, their traditional knowledge and culture including the people and genetic resources etc. Furthermore, Mr. R. L. Malezer explained that meanwhile according to Article 29, it is not only indigenous peoples that have rights as mentioned in Article 31, but also everyone should have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression, etc. Therefore, everyone has right to maintain, control, protect and develop their intellectual property of cultural heritage, traditional knowledge and traditional cultural expression. WIPO Doc. WIPO/GRTKF/IC/24/REF/GRTKF/24/INDIGENOUS PANEL/LES MALEZER, can also be accessed at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=235882](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=235882), last visited 12 April 2016. Also take a look at presentation delivered by Mr. Yanuar Nugroho as the representative of *Indonesian Traditional Wisdom Network* from Indonesia with entitled "*Experience from Indonesia*"

<sup>6</sup>[http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=39724](http://www.wipo.int/meetings/en/details.jsp?meeting_id=39724), last visited 12 April 2016, see further WIPO docs. WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/8/5, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/11/5, WIPO/GRTKF/IC/17/5, WIPO/GRTKF/IC/18/5, WIPO/GRTKF/IC/19/5, WIPO/GRTKF/IC/21/4, WIPO/GRTKF/IC/25/6, WIPO/GRTKF/IC/27/4, WIPO/GRTKF/IC/28/5 for genetic resources can be referred to documents on WIPO/GRTKF/IC/11/8, WIPO/GRTKF/IC/16/6, WIPO/GRTKF/IC/17/6, WIPO/GRTKF/IC/18/9, WIPO/GRTKF/IC/19/6, WIPO/GRTKF/IC/20/4, WIPO/GRTKF/IC/20/5, WIPO/GRTKF/IC/23/4, WIPO/GRTKF/IC/25/5, WIPO/GRTKF/IC/26/4, WIPO/GRTKF/IC/28/4, WIPO/GRTKF/IC/29/4.

<sup>7</sup>7th session in WIPO Doc. WIPO/GRTKF/IC/7/5.

<sup>8</sup>The discussion continued until the draft to be transmitted in the General Assembly of WIPO that was held in 2013, such a mandate of IGC in WO/GA/40/7.

order to achieve the goal of Convention on Biological Diversity which is sustainable use of biological diversity and equitable and fair benefit sharing of the result of genetic resources utilization.

There have some discourses and decisions discussed in COP, among others, decision to establish The Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol.<sup>9</sup> Discussion on Article 8(j) and provisions related to CBD.<sup>10</sup> As well as adopted the *Protocol on Access and Benefit Sharing of genetic resources and Associated Traditional Knowledge*. Principally, *Protocol on Access and Benefit Sharing of genetic resources and Associated Traditional*

<sup>9</sup>10th COP, In this 10<sup>th</sup> COP, *The Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on ABS* (ICNP) was established. This establishment was intended to solve issues as stated in work programme contained in Annex II COP decision X/1 of COP CBD. As for the issues in Annex II COP decision X/1 on the first meeting and second meeting as follows:

The modalities of operation of the Access and Benefit-sharing Clearing-House, including reports on its activities (Art. 14, para. 4).

Measures to assist in the capacity-building, capacity development and strengthening of human resources and institutional capacities in developing countries, in particular the least developed countries and small island developing States amongst them, and Parties with economies in transition, taking into account the needs identified by the Parties concerned for the implementation of the Protocol (Art. 22).

Measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues (Art. 21).

Cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance, including procedures and mechanisms to offer advice or assistance, where appropriate (Art. 30).

Development of a program budget for the biennium following the entry into force of the Protocol.

Elaboration of guidance for the financial mechanism (Art. 25).

Elaboration of guidance for resource mobilization for the implementation of the Protocol.

Consideration of rules of procedure for the Conference of the Parties serving as the meeting of the Parties to the Protocol (Art. 26, para. 5).

Elaboration of a draft provisional agenda for the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (Art. 26, para. 6).

The need for and modalities of a global multilateral benefit-sharing mechanism (Art. 10).

Continued consideration of items taken up at the first meeting of the Intergovernmental Committee, as needed.

Available at <https://www.cbd.int/decision/cop/?id=12267>, last accessed on 25 June 2016

<sup>10</sup>Art. 8(j) and provisions related to CBD was discussed in the 11 COP and was continued in 12th COP meeting. In the 11th COP, it has been decided to require the parties, particularly the ones which have not completed the submission of information about the implementation of work programme of 8(j) and related provisions of the convention. The information, then, will be analysed by executive secretary. The executive secretary will also summarize and provide it in the 8th meeting of the Working Group about 8(j) and related provisions. This decision also urges the parties to fully integrate Aichi Biodiversity Target 18 into their revision and renew their national biological diversity strategy. This decision has also demanded the parties, governments, international organisations and indigenous people organisations as well as local community to consider collaboration with CBD secretariat in order to facilitate specific workshop for indigenous peoples and local community through the right method and mechanism development. Discussion of Art. 8(j) in COP CBD had started in the 3rd COP. This COP meeting affirmed that spirit and intention of CBD as stated by Art. 8(j), admitted that Art. 8(j) is closely related to other Arts. of CBD, particularly Art. 10(c), Art. 17.2 and Art. 18.4. the 12th COP whose decision was that one of the meetings of the Ad-hoc Open-ended Inter-Sessional Working Group about Art. 8(j) and related provisions was organized before the 13th COP with full and effective participation of indigenous peoples and local community. The 12th decision urges the party countries and indigenous peoples as well as local community to consider how indigenous peoples and local community participate effectively in the development, collection and data analysis, including through the basis of people monitoring, and explore further how people monitoring basis and information system of indigenous people and local community can contribute in monitoring Aichi indicator target, and how the approach of Multiple Evidence Base is applied in the validity of data resulted from various knowledge systems over the same term.

*Knowledge* regulates protection on traditional knowledge associated with genetic resources based on the following principles:

a) Material which is protected is biological diversity which is also associated with genetic resources using protection model which is through the access and equitable and fair benefit sharing of the result of genetic resources utilization with the providers of genetic resources through monitoring system, contract clausal model, technology transfer as well as Mutual Agreed Term and mechanism of financial sources so that it can contribute to the conservation and its sustainable use of the components of biological diversity.

b) Protection criteria, the requirement to receive protection is by establishing national regulation system and through Prior Informed Consent (hereinafter referred to as PIC) as well as mutual agreement by considering indigenous law, community protocol and procedures which can be applied so that there will be particular condition to promote and improve researches which will contribute to conservation and the sustainable use of biological diversity and simplify actions for access of non-commercial research activities.

c) The holder of traditional knowledge right associated with genetic resources is stakeholders which in this case is indigenous peoples and local community.

d) Rights that are protected is economy right and moral right, which are:

(1) Economy right in this protocol emphasizes on equitable benefit sharing over the benefit of the use of genetic resources and also which is related to traditional knowledge of indigenous peoples and local community.

(2) Moral right in this protocol obliges parties that use genetic resources and anything related to traditional knowledge to have PIC, agreement and involvement of indigenous peoples and local community as the providers of genetic resources as regulated in national laws.

e) Protection law. This protocol obliges the parties to appoint one national focal point that is in charge as a liaison with CBD secretariat, and appoint one or more national authorities that are competent to the access and benefit sharing, and the establishment of clearing house mechanism based on Article 18 section (3) of CBD stating that in order to give information about access and benefit sharing, there must be access for the information provided by every relevant party for the implementation of Nagoya protocol. The information is about legislative, administrative, and policy measures of access and benefit sharing; information about national focal point and competent national authorities; permit or anything equal to it which is issued at access as a proof of the decision for PIC guarantee.

As mentioned before, there will be the 13<sup>th</sup> COP this December 2016 in Cancun, Mexico. One of the agenda in this meeting is the report of the *Ad-hoc Open-ended Inter-Sessional Working Group*<sup>11</sup> about Article 8(j) and related provisions of CBD of the 9<sup>th</sup> meeting in Montreal, Canada on 4 to 7 of November 2015. Five recommendations

<sup>11</sup>Working Group of Art. 8(j) and related provisions were established in 1998 through the fourth meeting of *Conference of the Parties*. Then, in the fifth meeting in 2000, adopting work programme to implement the commitment of CBD Article 8 and to improve role and involvement of indigenous peoples and local community in the achievement of convention goals. The adoption of *Akwé: Kon Guidelines* was meant to provide collaborative outline that ensures full involvement of indigenous peoples and local community in cultural and environmental assessment and social concern and interest of indigenous peoples and local community from developer idea. Those *Guidelines* is a significant task that has been achieved as part of work programme towards Art. 8(j). <http://www.cbd.int/convention/>, last accessed on 2 May 2016.

about voluntary guidance for the mechanism development, rules or other proper initiatives have been adopted in order to ensure *the* [free] prior informed consent or approval and involvement of indigenous peoples and local community to access their knowledge, innovation, and practice, equitable benefit sharing arising from the utilization and application of the knowledge, innovation and relevant practice for conservation and sustainable use of biological diversity, and for reporting and prevention the stealing of traditional knowledge which is against the law.

## Legal Regime of Intellectual Property in Indonesia and The Inability to Protect Genetic Resources Based on Traditional Knowledge

### Legal regime of intellectual property in Indonesia

Legal regime of intellectual property in Indonesia is derived from WTO-TRIPS *Agreement*. As the member of WTO, regulations related to IP need to in harmony with TRIPS *Agreement* [5].<sup>12</sup> Because of it, Indonesia enacted and promulgated some laws related to intellectual property, that is Act No. 28/2014 on Copyrights (*UU No. 28 Tahun 2014 tentang Hak Cipta*), Act No. 13/2016 on Patent (*UU No. 13 Tahun 2016 tentang Paten*), Act No. 15/2001 on Trademark (*UU No. 15 Tahun 2001 tentang Hak Merek*), Act No. 31/2000 on Industrial Design (*UU No. 31 Tahun 2000 tentang Desain Industri*), Act No. 32/2000 on Layout-designs of Integrated Circuits (*UU No. 32 Tahun 2000 tentang Desain Tata Letak Sirkuit Terpadu*), Act No. 30/2000 on Trade Secret (*UU No. 30 Tahun 2000 tentang Rahasia Dagang*), and Act No. 29/2000 on Plant Varieties (*UU No. 29 Tahun 2000 tentang Varietas Tanaman*).

Copyrights Act is one of the newest regulations which was amended in 2014. This regulation, in one of the provisions, states that all creations and product related to people's rights are protected by the Copyrights Act. In other words, all work owned by Indonesian people including work of indigenous people itself can be protected by the Copyrights Act. However, this regulation is formed to protect literature work, art and knowledge not work in the form of invent. While the Patent Act is the newest one intended for work in the field of technology. The right is given by the state in certain amount of time as stated in the Patent Act.<sup>13</sup> A patent of invention may be granted if the applicant well describes that the invention covers inventive steps that can be applied in industry and the patent examiner is convinced that the claim is absolutely novel after the prior art search.<sup>14</sup> Regarding traditional knowledge, Indonesia's Patent Act does not regulate protection over traditional work of indigenous peoples unless the traditional knowledge is absolutely a new work, covering inventive steps and can be applied in industry. Unfortunately, the element of novelty has never been fulfilled because the process of shifting is transmitted from one generation to another generation.

There is also protection through trade secret. Trade secret is one form of IP protection in the field of technology or business. However, IP may be protected by trade secret only if the information is not widely spread, it has economic value, and the secrecy is well kept by

<sup>12</sup>Also see Abdulqawi A. Yusuf, "TRIPS: Background, Principle and General Provisions", in Carlos M. Correa and Abdulqawi A. Yusuf (Ed.), *Intellectual Property and International Trade: The TRIPS Agreement* (2008), (The Netherlands: Kluwer Law International), pp. 17-18; Tomoko Miyamoto, "International Treaties and Patent Law Harmonization Today and Beyond", in Toshiko Takenaka (Ed.), *Patent Law and Theory: A Handbook of Contemporary Research* (2008), (Northampton, USA: Edward Elgar), p. 185.

<sup>13</sup>Art. 1 No. 1 of Indonesia's Act No. 13/2016 on Patent.

<sup>14</sup>Art. 3 of Indonesia's Act No.13/2016 on Patent.

the owner.<sup>15</sup> Some traditional knowledge is still kept its secrecy for some reasons including precious spiritual secret and sacred things that need to be protected by its community. In addition, the concept of the ownership of trade secret is individual and monopolistic as stated in Article 4 of Trade Secret Act regulating that [6]:

The owner of trade secret has rights to:

- a. Use the trade secret he owns for himself only;
- b. Grant license to another party or forbid another party to use the trade secret or reveal the trade secret to the third party for commercial use.

The concept of the ownership of this individual and monopolistic trade secret is different from the concept of the ownership of traditional knowledge which is communalistic. Therefore, trade secret regime cannot be applied for legal protection of traditional knowledge which is based on genetic resources. Traditional knowledge can be guaranteed its position as medicine derived originally from plants through protection of plant varieties. Protection of plant varieties is granted by the state and is conducted through plant breeding.<sup>16</sup> It is also explained that protection of plant varieties can be granted when there is novelty, uniqueness, regularity and stability, as well as naming.<sup>17</sup> Traditional knowledge based on this rule also notes that local varieties are developed collectively as the ownership of local community controlled by the state.<sup>18</sup> Same as patent, the protection of plant variety also requires novelty. This will make it impossible for traditional knowledge to be guaranteed by the Plant Varieties Act because traditional knowledge is not a new thing anymore and it is also not a variety of plants.

### The Indonesia's regulation for traditional knowledge and genetic resources

In the realm of legal protection in Indonesia, Indonesia has had some regulations governing the problems of legal protection of traditional knowledge which are related to genetic resources. However, the regulations only cover in sectorial scale and are still considered as rules giving lack of protection on traditional knowledge and anything related to it. Those regulations are in the form of Presidential Decree No. 100/1993 on Research Permit for Foreigners (*Keputusan Presiden No. 100 Tahun 1993 tentang Izin Penelitian bagi Orang Asing*). Through this decree, Indonesia Researches and Sciences Institution (*Lembaga Ilmu Pengetahuan Indonesia/ LIPI*) forms permit granting coordination team for foreigners, and then this policy is renewed with governmental regulation No. 41/2006 on Permit of Conducting Research Activity and Development for Foreign Universities, Foreign Research and Development Institutions, and Foreign Business Entities and Foreigners (*Peraturan Pemerintah No. 41 Tahun 2006 tentang Perizinan Melakukan Kegiatan Penelitian dan Pengembangan bagi Perguruan Tinggi Asing, Lembaga Penelitian dan Pengembangan Asing, Badan Usaha Asing, dan Orang Asing*). The regulation obliges applicant to propose research permit to the minister, in this case ministry of research and technology by enclosing required documents including research proposal, Curriculum Vitae and recommendation from research fellow in Indonesia. Previously, Act No. 18/2002 on National System of Research, Development and Application of knowledge has been issued (*UU No. 18 Tahun 2002 tentang Sistem Nasional Penelitian, Pengembangan, dan Penerapan Ilmu Pengetahuan dan Teknologi*).

<sup>15</sup>Art. 1 No. 1 of Indonesia's Trade secret Act.

<sup>16</sup>Art. 1 No. 1 of Indonesia's Plant Varieties Act.

<sup>17</sup>Art. 2 of Indonesia's Plant Varieties Act.

<sup>18</sup>Art. 7 of Indonesia's Plant Varieties Act.

In addition, some sectorial regulations such as Forestry Ministerial Decree No. 447/kpts-11/2003 (*Keputusan Menteri Kehutanan No. 447/kpts-11/2003 tentang Tata Usaha Pengambilan atau Penangkapan dan Peredaran Tumbuhan dan Satwa Liar*), Health Ministerial decree No. 723/menkes/SK/VII/2008 (*Keputusan Menteri Kesehatan No. 723/menkes/SK/VII/2008*), Agriculture Ministerial Regulation No. 15/permentan/OT.140/3/2009 on Guidance of the Making of MTA (*Peraturan Menteri Pertanian Nomor 15/PERMENTAN/OT.140/3/2009 tentang Pedoman Penyusunan Perjanjian Pengalihan Material (Material Transfer Agreement)*), Health Ministerial Regulation No. 657/Menkes/per/VIII/2009 on The Delivery and Use of Clinical Specimen, Biological Material and the Information content (*Peraturan Menteri Kesehatan Nomor 657/MENKES/PER/VIII/2009 tentang Pengiriman dan Penggunaan Spesimen Klinik, Materi Biologi dan Muatan Informasinya*). Meanwhile, CBD and Nagoya Protocol has been ratified through Act No. 5/1994 on the legalization of Convention on Biological Diversity and Act No. 11/2013 on the Legalization of Nagoya Protocol.

### The inability of IP regime to protect genetic resources-based traditional knowledge

Some contexts of IP protection tend to provide protection for each individual or inventor. This has caused work or creation owned communally to be rejected by IP regime to get protection. It is impossible for communal ownership to be protected in IP regime because of some reasons. The first, the owner identity of the work or the creation is anonymous. The second, the time term given by the law has been overdue. The third, the process of making and the formula contained in the creation has been widely known and definitely, it is no longer a new creation.

The concept of communal right still attaches within Indonesian people. This fact that later on causes problems of Indonesian work whose ownership is communal. Knowledge gained from Indonesia indigenous peoples or local community that then developed by foreign party is a form of development of knowledge. However, if the result of the use is intended for gaining an individual right and for commercial need, there will be business interest here in the form of monopoly of the ownership of the developed knowledge to become the main product used to collect capital and profit as much as possible. If the developed knowledge is given back to the people for common interest and is owned collectively, the monopoly of the product cannot be done because this product has become communal ownership. This will effect on the developer company capital enhancing and the inhibition of a company development process. This is why IP regime protection cannot grant protection holistically for communal ownership and tends to admit individual ownership for the sake of supporting the fulfilment of the goal of a company establishment which is to gain maximum profit. And most of those companies are in developed countries.

### The Existence of Paliasa Leaf as Genetic Resources and Traditional Knowledge of South Sulawesi Society

Traditional knowledge which is based on genetic resources discussed in this research is traditional medicine<sup>19</sup> derived from Paliasa leaf and is believed by people in south Sulawesi to have efficacy, especially in the cure of hepatitis disease. This knowledge has also been proved through laboratory researches to find the substances

<sup>19</sup>According to Health Ministry Regulation No. 246/Menkes/Per/V/1990, Art. 1 provides that traditional medicine is the substance or ingredients in the form of plant material, animal material, mineral material, the preparation galenic or mixture and these ingredients, which traditionally been used for treatment of experience.

contained in Paliasa leaf. For instance, research conducted by Rafizlar, Cornelis Adimunca, Sulistyowati Tuminah in Research and Development Centre of Disease Eradication, Health Research and Development Agency, Republic of Indonesia Department of Health, Jakarta examined the efficacy and benefit of Paliasa leaf on a mouse suffering liver inflammation. The research concluded that Paliasa leaf extract can protect liver inflammation caused by  $CCl_4$ . However, at that time, the researchers have not been able to identify which chemical substance that is efficacious.<sup>20</sup> Similar research has also been conducted by Nunuk Hariani Soekamto and the result of her research has been presented in the Scientific Oration of the acceptance of the position of professor in organic natural material in chemistry field. Nunuk said that plants belong to *famili Sterculiaceae* has potential to be developed as anti-hepatitis medicine. In another type of Paliasa, which is *Kleinhovia Hospita*, particularly in its stem and leaf, based on her research in 2008, she found coumarin compound group, which is 7-hidroksi-6-metoksi coumarin (scopoletin). This compound which was further examined by M.H. Farah and Saelsson G (1992) has anti-hypertension, anti-inflammation, and anti-allergy effect and can inhibit prostaglandin synthetase.<sup>21</sup> In June 2011, Faculty of Pharmacy of Hasanuddin University (*Fakultas Farmasi Universitas Hasanuddin*) has launched herbal product whose the raw material is leaves of Paliasa plant (*Kleinhovia Hospita Linn*) for the cure of liver disease.<sup>22</sup> Research and Development of Paliasa leaf are still conducted by Hasanuddin University Board of Researchers in order to cultivate and ensure that traditional knowledge is still used by people in South Sulawesi, in particular and Indonesia people in general.

For people in south Sulawesi, Paliasa leaf contains efficacy as medicine to cure hepatitis disease. Those people concoct Paliasa leaf by boiling seven dried leaves using 2 glasses of water until there is only one glass of water left then the potion is drunk 1-3 times for each potion for seven days. Knowledge about efficacy of that plant is obtained from information inherited from one generation to another generation. To date, it is not only local community but also community of indigenous people who has interest of the use Paliasa leaf in daily life and as tradition ceremony ritual material. The existence of the community of traditional knowledge stakeholders is as important as the existence of the creativity itself because the community that so far has maintained from generation to generation the way of its use and its development.

The existence of Paliasa leaf as genetic resources associated with traditional knowledge in Kajang Indigenous People in Tanah Toa Village, Bulukumba represents the existence of genetic resources associated with traditional knowledge in community of indigenous

people. The existence of Paliasa leaf in Makassar people and Gowa people represents genetic resources associated with traditional knowledge in local community.

These stakeholders either from indigenous people or local community who still cultivate Paliasa leaf as genetic resources associated with traditional knowledge will become the approver based on Prior Informed Consent as the formulation of agreement of genetic resources use and also will determine to whom benefit sharing will be given.

### Stakeholders of Kajang indigenous people

The existence of Kajang Indigenous People is supported with strong effort by managing ecosystem in balance and sustainably. This because of cultural value system contained in *Pasang ri Kajang*. The sacredness of values contained in *Pasang ri Kajang* for Kajang Indigenous People if not implemented in daily life will have bad impact on the life of Kajang Indigenous People. As local wisdom, *Pasang* contains various ancestor teachings whose substances are collection of messages, advices, guidances and rules on how someone can position him/herself in macro and micro cosmos and also custom of creating harmonisation of nature-human-God [7]. This *Pasang* becomes a parameter whether something is "good" or "bad", or whether something is "allowed" or "forbidden", or whether something will be "intended" or, in the opposite, it will be "opposed".<sup>23</sup> *Pasang* does not explain specifically the use of Paliasa leaf as medicine and how to make it as potion. However, in *Pasang* there are some messages that are also particularly related to some *Pasang* teachings that are intended to preserve the environment.<sup>24</sup>

In Kajang Indigenous People, the use of Paliasa leaf, apart from its use as medicine, is also used in tradition ritual.<sup>25</sup> One of tradition rituals using Paliasa leaf is *Andingingi*.<sup>26</sup>

As explained by Erica-Irene Daes that a number of unique elements in indigenous peoples has always relation with natural resources, which are [8]:

<sup>23</sup>Yusuf Akib, *Potret Manusia Kajang*, *Ibid*. p. 53.

<sup>24</sup>Messages that are contained in *Pasang ri Kajang* are, *Nikasipalliangi ammanramanraloa borong* (it is prohibited to damage forest); *Napa'jari inne linoa lollong bonena lapipakkagunai risikonjo tummantanga ri bahonna linoa. Mingka u'rangi to'i, larroi linoa rikau talarie' nalapanggu' rangia* (earth and anything on it is created for the benefit of human. But also remember, if the mother nature is angry at you, nothing can stop it); *Angnganre na rie', care-care na rie, Pammalli juku na rie', tan koko na galung rie, Balla situju-tuju* (the formulation of this *Pasang* shows that the simplicity of life that influences the system of environment management of indigenous people); *Punna nitabbanggi kayua, Nipappiranggangngi angngurangi bosi, Appantanre'tumbusu, napau turiolowa* (if wood is cut down, this will reduce rain and diminish the source of springs); *Parakai lino a'rurung bonene, kammaya tompa langika siagang rupa taua, siagang boronga* (take care of the care and all the things on it, and so for the sky, for the human, and for the forest); *Anjo boronga anre nakulle nipanraki. Punna nipanraki boronga, nupanraki kallenu* (forest can not be damaged, if you damage the forest, it is the same as you damage yourself); *Anjo natahang ri boronga karena pasang. Rettopi tanayya rettoi ada'* (forest can be preserved by tradition. If the earth is destroyed, then tradition is destroyed as well); *Talakullei nisambe kajua, iyato' minjo kaju timboa. Talakullei nitambai nanikurangi borong karamaka. Kasipalli tauwa a'lamung-lamung ri boronga, nasaba' se're wattu la rie' tau angngakui bate lamunna* (wood can not be replaced, the wood will grow. Sacred forest can not be expanded or reduced. People are not allowed to grow plants in the forest because one day there will be someone who will claimed the plants).

<sup>25</sup>Interview with Ammatoa as Kajang Indigenous leader, 31 July 2014.

<sup>26</sup>*Andingingi* is a ritual to cool down the whole universe. The core activity of this ritual is called abbebes. Abbebes activity is performed by wagging to the four the four cardinal points and surrounding all the participants which is intended to cool down the nature so that the nature will be cold, safe, serene and peace again. The action of wagging the water to the four cardinal points is performed using a big tied bunch of leaves. The leaves used is special plants, including Tobi (fruit of young Areca Palm), Biruppa (betel leaf), Paliasa Leaf, Koddoro buku and some leaves usually used as medicine.

<sup>20</sup>Rafizlar, et al., 'Dekok Daun Paliasa (*Kleinhovia hospita Linn*) sebagai Obat radang Hati Akut' (2006), *Cermin Dunia Kedokteran* No. 150, this information can also be found at <https://kelopakmas.wordpress.com/2014/09/20/manfaat-daun-paliasa/>, last accessed on 27 April 2016. Rafizlar, etc. Research were quoted by Aliyah, etc. In the article entitled 'Preference Level of Bees Apis Mellifera L. To The Supplementary Feed of Mixed Syrup and Paliasa Leaf Decoction And Physico-Chemical Characteristics of Produced Honey' published at International Journal of Scientific and Technology Research Vol 2, ISSUE 10, October 2013. See also further research conducted by Rafizlar over test toxicity against Paliasa leaf to be developed as phitopharmaca. The purpose of the research is for use of Paliasa leaf safely as phitopharmaca. Therefore the research is intended to obtain health safety in the use of it. Rafizlar, 'Sub Chronic Toxicity Test from Alcohol Extract Paliasa Leaves (*Kleinhovia Hospita Linn*) to Hepar/Liver and Kidney of Experimental Mice' (2009), *Media Peneliti dan Pengembangan Kesehatan*, Vol. XIX No. 4, pp. 204-212 available at <http://ejournal.libang.depkes.go.id/index.php/MPK/article/viewFile/775/1717>, last accessed on 28 April 2016.

<sup>21</sup><http://www.tempo.co/read/news/2010/09/24/060280280/paliasa-bisa-dikembangkan-sebagai-obat-antihpatitis>, last accessed on 28 April 2016.

<sup>22</sup><http://www.antarasulsel.com/berita/25426/unhas-akan-luncurkan-herbal-daun-paliasa>, last accessed on 28 April 2016.

- 1) There is a very close relation between indigenous people with land, area, and their resources;
- 2) The relation has various dimensions and social, cultural, spiritual, economical, and political responsibility;
- 3) Collective dimension of the relation is significant;
- 4) Aspects among generations of the relation is crucial thing for the identity, heritage and the sustainability life of indigenous people's culture;
- 5) Probably, some elements that are also related to indigenous peoples and its relation to land, territory, and resources have not covered in these examples.

As indigenous people that still use Paliasa leaf for medication and ritual instrument as well as for local wisdom that is still strongly supported by its people, Kajang Indigenous People include as one of stakeholders of genetic resources associated with the traditional knowledge.

### Stakeholders of Makassar local community and Gowa local community

Health Centre of Traditonal People or *Balai Kesehatan Tradisional Masyarakat* (hereinafter referred to as BKTM) in Makassar is one of government institutions whose goal is to provide information about traditional, alternative, and complementary health service development. In this centre, discussion, researches, testing, education and training of traditional health are conducted in eastern part of Indonesia. Cultivation in this centre is conducted on genetic resources that has been clinically tested and applied. In this centre, some Indonesian genetic resources in which some of it is Bugis-Makassar people traditional knowledge, including Paliasa leaf, has been cultivated. Sri Intanrani Widyastuti said that although the development of the efficacy of Paliasa leaf has been conducted by Hasanuddin University, BKTM Makassar has also cultivated Paliasa as one of plants which is efficacious medicine and as one of plants that is stated as safe traditional medicine to be consumed.<sup>27</sup> BKTM Makassar also serves the requests of seeds of genetic resources (medicine plants) to be given for the needed parties, such as, society health centre (*puskesmas*) of Manimpahoi Sinjai District of South Sulawesi. This health centre submitted attachment of seeds needed by them to BKTM Makassar. One of the seeds requested was Paliasa leaf.<sup>28</sup> One of local communities in Gowa also did cultivation of Paliasa leaf. The community is called Denassa Green House (*Rumah Hijau Denassa*). Denassa Green House was established to save and replant rare and endemic plants especially the ones from Sulawesi. Activities in Denassa Green House is not only looking after and plating, but also regularly gives seeds for free, using the house as group studying, growing concern for environment in school aged children and introducing ancestor culture. In this house also, the stories of plants from social, economical, and cultural perspective is documented.

Furthermore, Denassa Green House as local community that takes part actively in preserving various genetic resources of South Sulawesi endemic including Paliasa leaf and educate people about the efficacy of Paliasa leaf as well as those of other genetic resources is one of South Sulawesi local communities that can take role as stakeholders of Paliasa leaf and various genetic resources that are cultivated.

<sup>27</sup>Interview with Sri Intanrani Widyastuti, S.Si, Apt. as Asisstant Pharmacist Supervisor, on 16 May 2016.

<sup>28</sup>This information can be seen via <http://bktm-makassar.org/fag-online.html>, last accessed on 14 May 2016.

BKTM Makassar as a government institution can represent local communities of Makassar people as the institution which cultivates Paliasa leaf along with other genetic resources. As a matter of fact, the local communities in Makassar, based on the observation on the field, does not show any interest in planting and preserving Paliasa leaf. However, the knowledge about Paliasa leaf is still inherited to Makassar people to date.

### Conclusion

Protection of genetic resources associated with traditional knowledge has become a trending issue in WIPO IGC. WIPO IGC has not succeeded in formulating international legal instrument. In contrast, COP CBD has succeeded in formulating international legal instrument in the form of *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity*.

Characteristics of IP individual-monopolistic have been adopted by Indonesia as the consequence of WTO membership. IP rights legal protection through laws and regulations in Indonesia had similar characteristic which is individual-monopolistic as logical implication of the ratification of TRIPS Agreement by Indonesia. This Agreement was minimum provision standard of the enactment of intellectual property rights protection in Indonesia. Traditional knowledge as work or invention owned collectively had characteristic which was opposed to IP right legal regime. Therefore, forcing intellectual property regime as a system to protect traditional knowledge will only cause anomaly within Indonesia people themselves and IP right legal regime in Indonesia has not been able to protect traditional knowledge especially the one related to genetic resources.

Local wisdom of South Sulawesi Society towards genetic resources was to use Paliasa leaf as medicine plant by boiling seven dried leaves with 2 glasses of water until there would be one glass of water left. Then, the potion was taken 1-3 times for each potion for 7 days. Another local wisdom was to use Paliasa leaf in tradition ritual of Kajang Indigenous People as one of materials to cool down the whole universe as believed by Kajang Indigenous People. Local wisdom that still exists and has being preserved by indigenous people and local community in South Sulawesi in utilizing the *kleinhovia Hospita Linn* as genetic resources has also been well documented in ancient text *lontarak pabbura* and preserved in the leadership of Ammatoa as the custom leader of Kajang Indigenous People. Thus, as indigenous people and as people's local community in South Sulawesi, Kajang Indigenous People and local community of *Rumah Hijau Denassa* are the stakeholders of Paliasa leaf that have rights to grant approval based on Prior Informed Consent and also have right to gain fair and equitable benefit sharing for the utilization the Paliasa as genetic resources associated with traditional knowledge of the people.

Therefore, the protection of *Kleinhovia Hospita Linn* plant and other plants which are Indonesian's genetic resources associated with traditional knowledge through *sui generis* approach is an action that need to be immediately conducted because there has not been adequate laws and regulations that can protect traditional knowledge and anything related to genetic resources comprehensively. IP right legal regime was not an alternative to be used to protect Indonesia's genetic resources associated with traditional knowledge. Moreover, it is necessary to immediately hold a cooperation project among governmental elements and non-governmental institutions in identifying, inventorying and documenting all genetic resources

associated with traditional knowledge of indigenous peoples and/or local community.

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