

Benefit Sharing as a Legal Protection Mechanism for Traditional Cultural Expressions: A Comparative Study of Indonesia and Malaysia under International Law

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Abstract

This study examines the benefit-sharing mechanism as an instrument for the protection of Traditional Cultural Expressions (TCEs) from the perspective of international law through a comparative analysis between Indonesia and Malaysia. TCEs constitute part of intangible cultural heritage that embodies economic, social, spiritual, and collective identity values of indigenous communities, yet they remain vulnerable to exploitation and misappropriation without fair distribution of benefits to their rightful custodians. This research aims to analyze the regulation of benefit sharing concerning TCEs in Indonesia and Malaysia, assess its conformity with principles of international law, and formulate an ideal regulatory model for TCE protection. The study employs normative legal research using statutory, conceptual, and comparative approaches. The legal materials consist of international instruments such as the Convention on Biological Diversity (CBD), the Nagoya Protocol, UNDRIP, and WIPO-IGC documents, as well as national regulations of Indonesia and Malaysia concerning cultural protection and communal intellectual property rights. The findings indicate that both Indonesia and Malaysia have provided normative recognition of TCEs; however, benefit-sharing arrangements remain partial and lack operational mechanisms. Indonesia emphasizes cultural preservation and recognition of indigenous communities, while Malaysia adopts a more pragmatic approach through specific regulatory initiatives and cultural commercialization. Nevertheless, both countries have not fully implemented the principles of Access and Benefit Sharing (ABS) and Free, Prior and Informed Consent (FPIC) as developed under international law. This study proposes a

responsive law-based benefit-sharing model that positions indigenous communities as the primary legal subjects through meaningful participation, recognition of collective rights, transparency, and equitable and sustainable distribution of benefits.

Keywords: Benefit Sharing; Traditional Cultural Expressions; Indigenous Communities; International Law; Cultural Protection.

Introduction

Traditional Cultural Expressions (TCEs) represent manifestations of the collective creativity of indigenous communities, arising from social, historical, and cultural processes that have been passed down through generations (Khumairoh et al., 2022). TCEs do not merely function as aesthetic expressions but also contain economic, social, spiritual, and cultural identity values that are strongly attached to their originating communities (Dzikri & Zulkifli, 2025). The forms of TCEs include various expressions, such as batik, woven textiles, traditional dances, regional music, carving motifs, customary symbols, and cultural rituals. In Indonesia, TCEs are reflected in, among others, Javanese Batik, which has been recognized by UNESCO, Nusa Tenggara Ikat Weaving, which carries profound cosmological meanings, the Saman Dance from Aceh, which represents religious values and social solidarity, and Wayang Kulit (shadow puppetry), which serves as a medium for moral education and philosophical teachings (Herzani, 2021).

Meanwhile, in Malaysia, TCEs are embodied through Kelantan Batik, Malay Songket, Zapin Dance, and Malay wood carvings, which reflect the values, history, and beliefs of local communities (Ismail et al., 2023). The existence of these TCEs demonstrates that traditional culture is not merely a legacy of the past, but rather a living resource that continues to evolve and contribute to the social and economic sustainability of indigenous communities (Kusuma & Roisah, 2022). At the international level, the protection of TCEs and benefit-sharing mechanisms have gained normative foundations through various global instruments and forums, although they remain neither comprehensive nor legally binding. The principle of benefit sharing has primarily developed within the framework of the Convention on Biological Diversity (CBD) and the Nagoya

Protocol, which emphasize the fair and equitable sharing of benefits arising from the utilization of genetic resources and traditional knowledge (Widyananda, 2024).

On the other hand, discussions regarding Traditional Cultural Expressions within the WIPO Intergovernmental Committee demonstrate international recognition of the need to protect TCEs, although such protection remains primarily within the scope of soft law (Triadi et al., 2025). Indonesia and Malaysia have developed their respective legal frameworks to protect TCEs as part of communal intellectual property, through intellectual property regulations, cultural policies, and recognition of indigenous communities. However, benefit-sharing arrangements within these frameworks remain insufficiently integrated, limiting their ability to address the challenges of cross-border and commercial utilization of TCEs.

In Indonesia, the protection of Traditional Cultural Expressions (TCEs) is normatively placed within the framework of communal intellectual property law, which emphasizes the role of the state as the rights holder on behalf of the community (Disemadi et al., 2023; Disemadi & Andarini, 2024). This regulatory framework is reflected in Law No. 28 of 2014 concerning Copyright, which stipulates that TCEs are protected by the state and that their utilization by other parties must consider cultural values and the interests of the originating communities. This framework is further strengthened through Law No. 5 of 2017 concerning the Advancement of Culture, which positions TCEs as objects of national cultural development that must be protected, developed, utilized, and preserved sustainably. Furthermore, recognition of communal intellectual property is reinforced through Government Regulation No. 56 of 2022 concerning Communal Intellectual Property, which regulates mechanisms for the recording and management of traditional cultural expressions by the state.

In the context of benefit sharing, Indonesia's legal framework has begun to move toward the principle of benefit distribution through licensing mechanisms, registration systems, and management by the state or local governments, although such arrangements have not yet been explicitly and comprehensively integrated (Agustianto et al., 2024). This model demonstrates that TCE

protection in Indonesia remains largely state-centered, where the state acts as a facilitator and controller of TCE utilization, while the position of indigenous communities as beneficiaries of economic value has not yet been fully regulated in a clear and operational manner.

Meanwhile, in Malaysia, the protection of TCEs exists within a more fragmented legal framework, with regulations dispersed across various cultural policies, customary laws, and state administrative instruments. Protection of traditional cultural expressions is generally associated with national cultural policies and the recognition of Malay customs and traditions as part of national identity, including through the National Heritage Act 2005 (Act 645) and Malaysia's national cultural policies. These instruments provide a legal basis for the state to protect and manage both tangible and intangible cultural heritage, including traditional cultural expressions.

In terms of benefit sharing, Malaysia's approach tends to emphasize the management of TCEs through state institutions and local governments, particularly within the tourism sector, creative industries, and cultural promotion activities. However, to date, Malaysia has not enacted a specific comprehensive law regulating benefit-sharing mechanisms arising from the utilization of TCEs. Benefit-sharing mechanisms are primarily implemented through contractual arrangements, community empowerment programs, and creative economy policies involving indigenous communities as partners rather than as exclusive rights holders. This condition demonstrates that both Indonesia and Malaysia face similar challenges in formulating a benefit-sharing legal framework capable of balancing cultural preservation, legal certainty, and economic justice for communities that own and preserve TCEs.

Based on the current legal framework, the *das sein* demonstrates that the protection of Traditional Cultural Expressions (TCEs) in Indonesia and Malaysia has not yet fully ensured the equitable distribution of benefits for indigenous communities as the collective owners of cultural heritage. In practice, the regulation of TCEs is largely positioned within cultural and intellectual property regimes that are administrative and symbolic in nature, without being accompanied by an operational, transparent, and enforceable benefit-sharing

mechanism (Enggriyeni & Medina, 2024). In Indonesia, although the state is recognized as the holder of rights over TCEs, the utilization of such expressions by third parties—whether in the creative industry, tourism sector, or cross-border commercialization—has often not been followed by a proportional distribution of economic benefits to indigenous communities (Salsabilla, 2024). A similar condition can also be observed in Malaysia, where the management of TCEs is primarily oriented toward national cultural promotion and the creative economy, while indigenous peoples or local communities remain positioned merely as supporting actors rather than as the primary legal subjects entitled to receive benefits. This situation reveals a structural imbalance between the economic value generated from the utilization of TCEs and the legal protection afforded to the communities that own such cultural expressions, thereby making TCEs vulnerable to misappropriation without adequate legal remedies or restoration of rights (Hasibuan et al., 2025).

The *das sollen* requires that legal protection for TCEs should not be limited merely to normative recognition but should also be implemented through a fair, participatory, and collective rights-based benefit-sharing mechanism for indigenous communities. Ideally, the law should ensure that every utilization of TCEs, particularly those involving commercial and cross-border activities, is conducted based on free, prior, and informed consent (FPIC) and accompanied by tangible benefit-sharing arrangements, whether in the form of economic benefits, social advantages, or community capacity-building. The legal frameworks in Indonesia and Malaysia should move away from a state-centered or policy-driven approach toward a more community-centered model by placing indigenous communities as the primary legal subjects in the management and utilization of TCEs (Nurdin et al., 2025). Therefore, benefit sharing should not only function as an economic instrument but also as a corrective mechanism to address power imbalances, strengthen distributive justice, and preserve the sustainability of TCE cultural values amid globalization. The gap between *das sein* and *das sollen* constitutes the core legal issue and forms the basis for the urgency of research on strengthening benefit-sharing mechanisms in the protection of TCEs in Indonesia and Malaysia.

The author introduces novelty into the study of communal intellectual property by positioning benefit sharing as the primary mechanism to ensure the equitable distribution of benefits for indigenous communities arising from the utilization of Traditional Cultural Expressions (TCEs). Previous research has identified the weakness of TCE protection within the national intellectual property rights regime; however, such studies have not yet addressed the mechanism of benefit distribution at the international level (Kusuma & Roisah, 2022). Other studies have highlighted the protection gaps affecting indigenous communities but have not formulated benefit sharing as a clear normative mechanism (S. M. D. Hutabarat, 2015). Furthermore, several studies have focused primarily on preservation aspects without developing an international legal framework concerning benefit-sharing arrangements (Kusumadara, 2011). Other research has demonstrated the dominance of the state in TCE protection, which has resulted in the marginalization of indigenous communities' rights, yet it has not proposed concrete international legal reforms (Enggriyeni & Medina, 2024). Meanwhile, other studies remain limited to discussing the urgency of establishing national legal frameworks (Hasibuan et al., 2025).

In contrast to these previous studies, this research examines benefit sharing comprehensively through the approaches of *ius constitutum*, *ius operatum*, and *ius constituendum*, while formulating a TCE protection model based on principles of justice and international legal reform within the framework of the World Intellectual Property Organization (WIPO). Based on the review of previous studies, it can be concluded that research on the protection of Traditional Cultural Expressions (TCEs) has generally focused on the normative recognition of communal ownership, criticism of the individualistic nature of intellectual property rights regimes, and the role of the state in managing TCEs at the national level. Most studies emphasize the gap between declarative legal protection and the reality of commercial utilization of TCEs, which often fails to provide tangible benefits for indigenous communities. However, these studies tend to stop at identifying problems and providing structural critiques, without developing an operational legal mechanism capable of ensuring fair benefit distribution, particularly in the context of cross-border utilization. Moreover, the

international legal dimension has been addressed only to a limited extent, either merely as a normative background or as a complement to national-level analysis, and has therefore not yet established a comprehensive framework integrating TCE protection with the principle of distributive justice.

This research has both theoretical and practical significance because it offers a new normative framework for the protection of Traditional Cultural Expressions (TCEs) by placing the benefit-sharing mechanism as the primary instrument for achieving distributive justice for indigenous communities. Theoretically, this research contributes to the development of communal intellectual property law studies by integrating theories of justice and progressive law into the evaluation of international legal regimes. Practically, this research provides a conceptual foundation for reforming international legal instruments and national policies that are more responsive to the interests of collective cultural owners. The limitation of this research lies in the scope of its normative and comparative approach, which does not include empirical analysis regarding the economic impacts of benefit sharing on specific indigenous communities. Furthermore, the comparative analysis is limited to several relevant jurisdictions; therefore, the findings of this research are intended to serve as a conceptual and normative framework rather than a universal generalization of all practices concerning TCE protection.

Research Method

This research employs a normative legal research method, namely a legal research approach that aims to examine law as a system of norms and rules by analyzing legislation, legal principles, legal doctrines, and relevant international legal instruments (Disemadi, 2022). This method was chosen because the focus of the research is directed toward assessing the adequacy and legal construction of international legal frameworks governing the protection of Traditional Cultural Expressions (TCEs) through benefit-sharing mechanisms, rather than examining empirical social behavior. The research adopts several approaches, including a statutory approach to analyze relevant international and national legal instruments, a conceptual approach to examine the concepts of benefit

sharing, collective rights, and distributive justice, as well as a comparative approach by comparing the legal frameworks of Indonesia and Malaysia. The data used in this research consist entirely of secondary data, which are classified into primary, secondary, and tertiary legal materials.

The primary legal materials include international legal instruments such as the *Convention on Biological Diversity (CBD)*, the *Nagoya Protocol*, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, as well as documents and draft negotiation texts of the *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO-IGC)*. They also include national legal instruments, such as Indonesia's *Law Number 28 of 2014 on Copyright*, *Law Number 5 of 2017 on the Advancement of Culture*, *Government Regulation Number 56 of 2022 concerning Communal Intellectual Property*, and Malaysia's *National Heritage Act 2005 (Act 645)*. The secondary legal materials consist of scholarly journal articles, legal textbooks, previous research findings, and official reports issued by international organizations. Meanwhile, the tertiary legal materials include legal dictionaries and encyclopedias. Data collection was conducted through library research, involving the identification, collection, and review of relevant legal sources. The data were analyzed using a qualitative-normative approach by interpreting legal norms, comparing the existing legal framework (*ius constitutum*), examining its practical implementation (*ius operatum*), and formulating an ideal future legal framework (*ius constituendum*) based on theories of justice and progressive law.

Results and Discussions

A Comparative Analysis of Benefit-Sharing Regulations for Traditional Cultural Expressions in Indonesia and Malaysia

Traditional Cultural Expressions (TCEs) are an integral part of intangible cultural heritage that live and develop within specific communities across generations (Ayu et al., 2022). TCEs encompass various forms of expression,

such as traditional music, regional dances, performing arts, handicrafts, textile motifs, folklore, and oral traditions that possess historical and symbolic value for their originating communities (Agustianto et al., 2024). The existence of TCEs not only represents the cultural identity of a particular community but also reflects values, knowledge systems, and worldviews transmitted across generations, while simultaneously contributing to the economic and social development of indigenous peoples (Disemadi & Sudirman, 2023).

In Indonesia, for instance, the utilization of Pekalongan Batik and Nusa Tenggara Ikat weaving has contributed to increasing community income through cultural-based tourism and creative industries. Meanwhile, in Malaysia, the preservation of Malay Songket and traditional crafts of indigenous communities in Sabah and Sarawak has also supported the economic empowerment of local communities while strengthening their cultural identity at both national and international levels. In multicultural states such as Indonesia and Malaysia, TCEs constitute an essential element in the formation of national identity as well as a social cohesive force among diverse communities. In Indonesia, various cultural festivals such as the Lake Toba Festival and the Nusantara Palace Festival serve as platforms for preserving traditional culture while reinforcing national unity among diverse ethnic groups and regions. In addition, government programs recognizing intangible cultural heritage further promote national pride in local cultures. Similarly, in Malaysia, the organization of the Rainforest World Music Festival in Sarawak and various cultural preservation programs implemented by the government play a role in strengthening interethnic relations among Malay, Chinese, Indian, and indigenous communities. Consequently, TCEs are not only regarded as cultural heritage but also as instruments of social integration and national identity (Zahra, 2025). Therefore, a conceptual understanding of TCEs is a crucial starting point for discussing their legal protection and benefit-sharing mechanisms.

In the era of globalization and cultural commercialization, TCEs face serious challenges in the form of unauthorized exploitation or misappropriation by external actors, including corporations, creative industries, and even other states (Muda, 2026). Misappropriation frequently occurs when TCEs are

utilized for economic purposes without proper consent or benefit to the originating communities. This condition places indigenous and local communities in a vulnerable position, as they often lack strong bargaining power within formal legal systems (Muda, 2026). Therefore, the urgency of TCE protection is not only related to cultural preservation but also to ensuring justice and recognition of the economic, social, and cultural rights of source communities. Legal protection of TCEs becomes increasingly important as traditional culture is increasingly treated as a high-value commodity in the global market (Lanjahi et al., 2023).

One of the relevant instruments to address these challenges is the concept of benefit sharing, namely a mechanism for distributing benefits arising from the utilization of traditional knowledge or TCEs to their respective communities (Simatupang, 2024). Benefit sharing is grounded in principles of justice, recognition of collective rights, and respect for the contributions of indigenous communities in preserving and developing cultural heritage (Siswoyo, 2024). This mechanism is not limited to financial compensation but may also include capacity building for communities, participation in decision-making processes, as well as moral and legal recognition. Within both international and national legal frameworks, benefit sharing is regarded as a bridge between cultural preservation interests and the economic utilization of cultural heritage (Siswoyo, 2024). Accordingly, benefit sharing plays a strategic role in ensuring that the commercialization of TCEs does not result in unilateral exploitation.

Traditional Cultural Expressions (TCEs) fundamentally possess significant economic and cultural potential when managed in a fair and sustainable manner. From an economic perspective, TCEs can serve as a source of income through the creative industries, cultural tourism, and community-based economies (Sinaga et al., 2025). Culture-based products often have high market value due to their uniqueness and authenticity (Hartati & Mala, 2025). On the other hand, the utilization of TCEs also contributes to strengthening national cultural identity and collective societal pride (Zulhuda et al., 2025). However, in the absence of a clear benefit-sharing framework, these economic benefits are often not returned to the originating communities, thereby creating inequality and a

sense of injustice. Therefore, the balance between the economic and cultural values of TCEs becomes a central issue in legal regulation in Indonesia and Malaysia.

In Indonesia, the national legal framework concerning the protection of Traditional Cultural Expressions (TCEs) is not only dispersed across Law No. 5 of 2017 on the Advancement of Culture and Law No. 28 of 2014 on Copyright, but is also implemented through mechanisms aimed at preventing unauthorized use of traditional culture. The Law on the Advancement of Culture provides a basis for the government to carry out the inventory, safeguarding, maintenance, and dissemination of cultural objects as a form of state protection over national cultural heritage. Meanwhile, the Copyright Law positions the state as the holder of rights over TCEs, meaning that any party wishing to utilize TCEs for commercial purposes must take into account cultural values, the interests of indigenous communities, and applicable legal provisions. Through these mechanisms, the state holds authority to prevent unilateral claims, unauthorized use, and commercial exploitation of TCEs by foreign parties or business actors who do not provide recognition or benefits to the cultural communities of origin. In addition, protection of TCEs is also grounded in Article 18B paragraph (2) and Article 32 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which affirm state recognition of indigenous peoples and their traditional rights, as well as the state's obligation to promote national culture (Irawan et al., 2025). Under the Law on the Advancement of Culture, Article 5 designates oral traditions, customs, rituals, traditional knowledge, and arts as objects of cultural advancement, while Articles 32 to 36 emphasize the utilization of cultural objects to improve community welfare through their transformation into products while maintaining their noble values and local wisdom (Salsabilla, 2024). Furthermore, the Copyright Law provides protection for TCEs as rights controlled by the state for the benefit of their supporting communities. Government Regulation No. 87 of 2021, as the implementing regulation of the Law on Cultural Advancement, further clarifies mechanisms for the protection, development, utilization, and promotion of national culture. Nevertheless, existing regulations remain largely oriented toward preservation, inventory, and

normative recognition, while concrete and operational benefit-sharing mechanisms for indigenous communities have not yet been comprehensively regulated, resulting in limited protection of the economic rights of indigenous communities as holders of TCEs (Onibala et al., 2025).

The regulation of benefit sharing in Indonesia remains partial and has not yet been integrated into a unified legal framework. This is evident from the fragmented regulation of TCEs across various national and regional laws with differing approaches. The central government tends to position the state as the primary authority in protecting TCEs, whereas several regional regulations place greater emphasis on recognizing indigenous communities as holders of traditional cultural rights. These differences have resulted in the absence of standardized mechanisms for benefit sharing, including the distribution of economic benefits and licensing of cultural utilization. (Hanifuddin, 2021). The approach adopted largely relies on the recognition of indigenous communities' existence and moral protection of TCEs as collective heritage (Agustianto et al., 2024). In practice, there is still no clear mechanism regarding who is entitled to receive benefits, what form those benefits should take, and how the utilization of TCEs by third parties should be monitored (Agustianto et al., 2024). This condition is reflected in various cultural appropriation cases, such as batik, which demonstrate the weakness of the recording system and the lack of benefit distribution to artisans or originating communities (Nina et al., 2025). As a result, the protection of TCEs in Indonesia is often reactive in nature and fails to prevent disputes or exploitation from the outset (Rizka et al., 2024).

The approaches to commercialization and the involvement of local communities in the protection of Traditional Cultural Expressions (TCEs) demonstrate significant differences between Indonesia and Malaysia. Malaysia tends to adopt a more aggressive stance in monetizing TCEs through the development of the creative industries sector, cultural tourism, and the promotion of traditional cultural products as part of its national economic strategy. This is evident in the promotion of Malaysian Batik as a national cultural identity and a commodity within the creative industries, as well as the utilization of traditional Malay music and dance in various cultural tourism

programs and international festivals to attract tourists while simultaneously enhancing the economic value of local culture (Ma'ruf, 2026). The state, through institutions such as the Intellectual Property Corporation of Malaysia (MyIPO), plays an active role in managing the utilization of traditional culture so that it generates economic value contributing to national revenue (Ng, 2024). In contrast, Indonesia places greater emphasis on the protection of TCEs in terms of cultural preservation, safeguarding cultural identity, and strengthening cultural values, as reflected in Law No. 5 of 2017 on Cultural Advancement. This non-commercial orientation has resulted in underdeveloped economic utilization schemes, particularly in providing direct benefits to indigenous communities as the custodians of cultural heritage (Hasbullah et al., 2025).

In the context of local community participation, Malaysia does provide space for traditional cultural actors, yet it remains within a framework of strong state control (Damayanti, 2026). The state acts as the primary actor in determining the direction of commercialization, licensing arrangements, and the distribution of economic benefits. This is reflected in the formulation of the Traditional Knowledge and Traditional Cultural Expressions Bill, which seeks to regulate rights, obligations, and benefit-sharing mechanisms from the utilization of TCEs in a more systematic manner (KP, 2023). Conversely, in Indonesia, constitutional recognition of indigenous peoples is stronger under Article 18B paragraph (2) of the 1945 Constitution; however, the implementation of indigenous community involvement in the economic management of TCEs remains weak (Gunawan, 2025). Many indigenous communities have not been actively involved in decision-making processes or in the distribution of economic benefits derived from their inherited cultural expressions.

The strength of cultural documentation and inventory systems is also a crucial factor in the effectiveness of legal protection of TCEs (Nurdin et al., 2025). Malaysia has a more centralized, systematic, and integrated cultural documentation system through state institutions with specific authority in managing intellectual property and national cultural assets. This centralized approach facilitates the identification, registration, and monitoring of TCE utilization, thereby minimizing the potential for misuse by external parties

(Safitri, 2024). A well-developed inventory system also supports legal certainty in determining the rightful beneficiaries of economic gains derived from traditional cultural expressions (Atsar, 2017).

In contrast, Indonesia continues to face serious challenges in the national documentation and inventorying of TCEs. Many traditional cultural expressions have not been adequately documented, particularly those located in remote areas and within indigenous communities that have not been fully reached by the state administrative system (Salama, 2024). Limited inter-institutional coordination, insufficient funding, and the absence of an integrated national database have resulted in the legal protection of TCEs often being reactive, typically occurring only after foreign claims or unauthorized commercial exploitation have taken place (Rubi et al., 2024). This condition illustrates that normative recognition without strong documentation support is insufficient to ensure effective protection (Nendrawan & Rastika, 2021).

The weaknesses in legal implementation represent a common issue faced by both Indonesia and Malaysia. Although both countries have established legal frameworks governing the protection of Traditional Cultural Expressions (TCEs), implementation on the ground still reveals a significant gap between legal norms and social realities (Muda, 2026). In Indonesia, legal protection is often hindered by weak inter-agency coordination, low public legal awareness, and limited access for indigenous communities to formal legal protection mechanisms (C. P. Hutabarat & Anggusti, 2026). In Malaysia, although regulations are more structured, strong state dominance in the management of traditional culture has raised concerns regarding the limited substantive participation of indigenous communities in determining their own rights and interests (Sahara & Aini, 2025).

Comparatively, Malaysia may be considered more advanced in terms of specific legislation, centralized institutional frameworks, and economic incentive systems for the management of TCEs (Asri, 2018). The development of specific regulatory efforts such as the Traditional Knowledge and Traditional Cultural Expressions Bill reflects the state's commitment to creating more operational legal certainty (Ayu et al., 2022). Meanwhile, Indonesia holds a comparative

advantage in its stronger constitutional and philosophical recognition of indigenous peoples. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides an important legal foundation for the protection of indigenous collective rights, although this has not yet been fully translated into concrete economic mechanisms (Hammar et al., 2025).

Legal and cultural justice gaps remain a central issue in both countries due to the absence of a truly operational benefit-sharing mechanism (Merdiani & Ruslina, 2025). The utilization of traditional culture often generates economic benefits for third parties such as corporations, tourism industries, or other commercial actors, while indigenous communities as the original custodians of the culture do not receive proportional benefits (Vuspitasari, 2025). This condition creates structural inequality between users and owners of cultural expressions and may lead to cultural exploitation that contradicts the principles of social justice and cultural human rights (Gunawan, 2025).

From the perspective of legal protection theory, the state is not only obliged to preserve traditional culture as part of national heritage, but also to guarantee participation rights, economic rights, and recognition rights for indigenous communities as rightful cultural owners (Febriantini, 2022). An ideal legal protection framework should include both preventive and repressive measures (S. Sulaiman et al., 2025), including mechanisms such as free, prior and informed consent (FPIC), fair benefit-sharing arrangements, and access to dispute resolution mechanisms (NA et al., 2025). This represents a concrete form of distributive justice that positions indigenous communities as legal subjects rather than mere objects of cultural preservation.

The comparative study between Indonesia and Malaysia is relevant as it opens opportunities for mutual learning in improving their respective national regulatory frameworks. Indonesia may adopt Malaysia's approach in developing a more integrated documentation system and more operational benefit-sharing regulations, while Malaysia may learn from Indonesia regarding the importance of constitutional recognition of indigenous rights and stronger community participation in policymaking. By integrating legal certainty, community

recognition, and fair benefit-sharing mechanisms, the protection of TCEs can be directed toward a more just, inclusive, and sustainable legal system.

The Level of Conformity of Indonesian and Malaysian Regulations with International Legal Principles on the Protection of Traditional Cultural Expressions

In the development of international law, the protection of Traditional Cultural Expressions (TCEs) is understood as part of human rights protection in the cultural domain, particularly the rights of indigenous peoples and local communities to maintain, develop, and control their cultural heritage (Hajattulloh, 2025). This principle arises from the global recognition that TCEs are not merely cultural products, but expressions of collective identity with social, spiritual, and economic value. TCEs are closely linked to the collective cultural rights of indigenous peoples and national identity, as they reflect history, values, and traditions transmitted across generations. In Indonesia, for example, the Saman Dance is not only regarded as a performing art but also as a symbol of solidarity and the identity of the Acehese people. Meanwhile, in Malaysia, Wayang Kulit Kelantan constitutes an important element of Malay cultural identity. The exploitation of TCEs without permission may lead to social and cultural impacts, such as the loss of indigenous communities' control over their cultural heritage, the diminishing sacred value of traditional culture, and the emergence of cultural claims conflicts between countries or communities (Nurdin et al., 2025). Therefore, international law situates TCEs within the framework of safeguarding intangible cultural heritage as well as preventing unauthorized exploitation by external parties. These efforts are carried out through mechanisms of inventorying, heritage recognition, and the protection of indigenous community rights by various international bodies. The United Nations Educational, Scientific and Cultural Organization (UNESCO), for instance, encourages states to register traditional cultural elements as intangible cultural heritage in order to strengthen global recognition and preservation. In addition, the World Intellectual Property Organization (WIPO), through

discussions on instruments for the protection of traditional knowledge and TCEs, seeks to prevent the commercial use of traditional culture without consent and without fair benefit-sharing with the communities of origin. The protection of TCEs is also closely related to the principle of distributive justice, particularly when TCEs are commercially exploited (Nurdin et al., 2025). In this context, states are regarded as having a positive obligation to ensure that cultural communities receive proper recognition and equitable benefits.

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage is the primary international instrument affirming the importance of preserving and protecting TCEs (Widyanti, 2023). This Convention emphasizes that intangible cultural heritage must be safeguarded through documentation, inventorying, education, and intergenerational transmission. One of the key aspects of the UNESCO 2003 Convention is its emphasis on the active role of communities, groups, and individuals as both creators and custodians of cultural heritage. Its implementation can be seen in the involvement of indigenous communities in preservation processes, cultural transmission, and the nomination of cultural elements as intangible heritage. In Indonesia, for example, local communities play an active role in maintaining the continuity of the Saman Dance through cultural education and traditional performances passed down across generations. However, in practice, challenges remain, such as limited funding support, excessive cultural commodification, and minimal involvement of indigenous communities in decision-making processes regarding the utilization of their cultural heritage (Widyanti, 2023). The state is not positioned as the absolute owner, but rather as a facilitator ensuring the sustainability of TCEs (Husyam & Sos, 2025). This principle of community participation serves as an important benchmark in assessing the conformity of Indonesian and Malaysian national policies with international standards.

In addition to the UNESCO Convention, the protection of TCEs is also closely related to the Convention on Biological Diversity (CBD) and the Nagoya Protocol, particularly through the concept of Access and Benefit Sharing (ABS) (Rizkia & Fardiansyah, 2023). Although the CBD regime explicitly focuses on

genetic resources and associated traditional knowledge, its underlying principles are relevant to the protection of non-genetic TCEs (Rizkia & Fardiansyah, 2023). The Nagoya Protocol emphasizes the fair and equitable sharing of benefits arising from the utilization of genetic resources and traditional knowledge. This principle reinforces the idea that local communities should not be positioned merely as objects, but as legal subjects entitled to economic benefits (Medina & Azmi, 2024). In the context of TCEs, the ABS principle serves as an important normative reference, although its implementation remains limited.

The principle of Free, Prior and Informed Consent (FPIC) is another key principle in international law relevant to the protection of Traditional Cultural Expressions (TCEs) (NA et al., 2025). FPIC requires that indigenous peoples provide free, prior, and informed consent before their TCEs are utilized or commercialized (Saly et al., 2024). This principle aims to prevent cultural appropriation practices that may harm the communities of origin. In practice, FPIC demands transparency, meaningful participation, and an equal bargaining position between communities and cultural users (Saly et al., 2024). It serves as an important indicator for assessing the extent to which national policies respect the cultural rights of indigenous communities.

At the global level, the World Intellectual Property Organization (WIPO), through the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), continues to promote the development of a dedicated international instrument on Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) (Samsithawrati et al., 2024). This initiative stems from the recognition that conventional intellectual property regimes are not fully capable of protecting the collective and intergenerational characteristics of TCEs (Samsithawrati et al., 2024). WIPO seeks to formulate protection principles that accommodate community rights, prevent misappropriation, and establish benefit-sharing mechanisms. Although it has not yet resulted in a binding global instrument, WIPO's efforts serve as an important reference for states in formulating national policies (Samsithawrati et al., 2024).

From the Indonesian perspective, Law No. 5 of 2017 on Cultural Advancement and the Copyright Law demonstrate normative alignment with the spirit of cultural preservation as stipulated in the 2003 UNESCO Convention (Asmorowati & Nashihah, 2022). The state is explicitly mandated to protect and promote TCEs as part of national identity (Mahadewi et al., 2025). However, this alignment remains largely conceptual and has not been fully operationalized, particularly with regard to benefit-sharing mechanisms and the implementation of FPIC (Free, Prior and Informed Consent). In practice, recurring challenges include the limited involvement of indigenous communities in granting permission for the use of their TCEs, the absence of clear standards for benefit distribution, and weak oversight of the commercial use of traditional culture. In several cases, traditional cultural expressions are promoted for tourism or creative industry purposes without the full consent of indigenous communities or without proportionate economic benefits being returned to the cultural owners. National regulations tend to emphasize preservation and symbolic recognition, while aspects related to economic benefit-sharing and community consent have not been elaborated in detail (Asmorowati & Nashihah, 2022). This condition indicates a gap between international norms and national implementation.

The limited implementation of the principles of Access and Benefit Sharing (ABS) and Free, Prior and Informed Consent (FPIC) in Indonesia is also reflected in the weak institutional framework and implementation mechanisms at the practical level (Indriasari et al., 2025). Although recognition of indigenous peoples has been guaranteed under Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and reinforced in various sectoral regulations, their involvement in decision-making processes regarding the utilization of Traditional Cultural Expressions (TCEs) remains highly limited (Maulana et al., 2025). In practice, processes of licensing, commercialization, and utilization of traditional culture are often carried out in a top-down manner by the state, local governments, or third parties such as businesses and creative industry actors, without adequate consultation with the cultural communities concerned (Gunawan, 2025).

This condition results in indigenous peoples being positioned merely as objects of cultural preservation rather than as legal subjects with rights to determine consent, oversight, and the distribution of economic benefits derived from their own cultural heritage. In Indonesia, such conditions frequently lead to injustice, such as the use of traditional cultural motifs for commercial purposes without the involvement of indigenous communities, or the promotion of regional culture within the tourism sector without clear benefit-sharing arrangements for the cultural custodians. Consequently, indigenous communities lose control over their cultural heritage, while economic benefits are largely enjoyed by external parties or local governments rather than the communities that have preserved and transmitted the culture across generations (Rannu et al., 2023). As a result, the principle of Free, Prior and Informed Consent (FPIC) has not been fully realized, while benefit-sharing mechanisms under the Access and Benefit Sharing (ABS) framework also lack clear and binding operational instruments. To address this issue, Indonesia needs to develop specific regulations governing procedures for indigenous consent, mechanisms for equitable benefit-sharing, and oversight of the utilization of TCEs by commercial actors. The development of such instruments may refer to international standards, such as the FPIC principle under the United Nations Declaration on the Rights of Indigenous Peoples and the ABS mechanisms under the Convention on Biological Diversity and the Nagoya Protocol, so that the protection of TCEs is not merely symbolic but also provides legal certainty and fair benefits for indigenous communities (Setiawan, 2022). The absence of a dedicated institution effectively overseeing the implementation of these two principles further weakens the protection of indigenous collective rights, resulting in continued instances of cultural exploitation without consent and without equitable benefit distribution. This indicates that Indonesia is still at an early stage in effectively internalizing international principles, both in terms of regulation and institutional implementation (Wibawa & Sholikah, 2026).

On the other hand, Malaysia demonstrates a relatively more structured approach through the Copyright Act 1987 and the development of a draft law on Traditional Knowledge and Traditional Cultural Expressions (D. Sulaiman,

2022). This initiative reflects an effort to align national law with international principles developed by WIPO. The draft regulation explicitly governs the protection of community rights, prevention of unauthorized exploitation, and clearer benefit-sharing mechanisms (Safitri, 2024). From a legislative perspective, Malaysia's approach can be considered closer to international standards (D. Sulaiman, 2022). The protection of community rights and benefit-sharing mechanisms constitute among the most prominent aspects of the draft regulation. The Traditional Knowledge and Traditional Cultural Expressions Bill explicitly affirms that cultural communities have the right to control the use, reproduction, commercialization, and distribution of their traditional cultural expressions (Ayu et al., 2022). Accordingly, the utilization of TCEs by third parties, whether for creative industries, tourism, or international trade purposes, cannot be conducted unilaterally without the consent of the relevant communities (Yuniar & Najicha, 2024). This model reflects the principle of Free, Prior and Informed Consent (FPIC) as developed in international law as a form of protection for indigenous collective rights. In Malaysia, the implementation of FPIC can be observed in several cases of natural resource and indigenous cultural management in Sabah and Sarawak, where indigenous communities are involved in decision-making processes prior to the utilization of their territories and cultural expressions. Such practices demonstrate that indigenous participation through free, prior, and informed consent can strengthen the protection of collective rights and prevent cultural exploitation without the consent of the communities concerned.

In addition, the benefit-sharing mechanism in the draft is also directed toward ensuring a more equitable distribution of economic benefits to cultural communities. Profits derived from the commercial utilization of Traditional Cultural Expressions (TCEs) are not intended to belong solely to the state or business actors, but must be shared with the originating communities as a form of recognition of their cultural contributions (Roisah, 2014). Such benefit-sharing may take the form of financial compensation, community capacity building, local cultural preservation, or the socio-economic empowerment of indigenous communities (Triatmanto et al., 2024). This approach demonstrates

that legal protection is not merely symbolic, but also oriented toward economic justice and community welfare.

The implementation of the FPIC principle in Malaysia is also not free from structural and administrative constraints. As a federal state, policies related to culture and customary practices often vary across states, resulting in non-uniform application of the FPIC principle (Abdullah et al., 2020). In practice, the participation of indigenous communities remains highly dependent on local policies and economic development priorities (Abdullah et al., 2020). Although progress has been made in regulatory aspects, consistency in implementation remains a key challenge. This indicates that normative conformity with international law does not always correspond to effective implementation on the ground (Sutrisno, 2025).

Comparatively, the level of conformity between Indonesia and Malaysia with international legal principles exhibits different characteristics (Lois & Bakhtiar, 2025). Malaysia is relatively more advanced in terms of specific legislation and the formulation of benefit-sharing mechanisms (Safitri, 2024), while Indonesia is stronger in normative recognition of indigenous peoples (Soetijono et al., 2025). However, both countries face similar challenges in harmonizing international norms with complex national legal systems. The gap between the *das sollen* (what ought to be under international law) and *das sein* (what exists in national practice) remains a central issue. Normatively, international instruments emphasize the recognition of indigenous rights, the implementation of Free, Prior and Informed Consent (FPIC), and fair benefit-sharing for the utilization of TCEs. However, in Indonesian practice, regulations still position the state as the primary authority, resulting in suboptimal involvement of indigenous communities in decision-making processes. Meanwhile, in Malaysia, although the utilization of traditional culture is more integrated into economic and tourism policies, the mechanisms for protecting indigenous rights and distributing economic benefits have also not been fully clearly regulated. This condition demonstrates that both countries still face challenges in translating international principles into operational and effective regulations. Therefore, institutional strengthening, enhanced community

participation, and the formulation of operational benefit-sharing mechanisms constitute important agendas for both countries to ensure that the protection of TCEs is truly aligned with international standards.

An Ideal Benefit-Sharing Regulatory Model as a Mechanism for the Protection of Traditional Cultural Expressions in the Context of Indonesia and Malaysia

The need for an ideal benefit-sharing regulatory model has become increasingly urgent in line with the growing utilization of Traditional Cultural Expressions (TCEs) across various sectors of the creative economy, tourism, and transnational cultural industries. Commercialization practices of TCEs that are not accompanied by fair benefit-sharing mechanisms have created structural inequalities between users and cultural communities as the collective holders of such heritage (Gunawan, 2025). In many cases, indigenous communities are merely positioned as objects of cultural promotion without receiving economic benefits proportional to the commercial value generated from TCEs (Fitria & Supriono, 2024). This condition demonstrates that a purely legal-formalistic approach is no longer sufficient to address the complexity of the relationship between culture, economy, and social justice. Therefore, a benefit-sharing model is required that not only provides legal certainty but is also responsive to real community needs, cultural values, and the bargaining position of TCE holders (Fitria & Supriono, 2024).

The theoretical framework of responsive legal theory offers a relevant normative foundation for designing such a benefit-sharing model. This theory views law not merely as an instrument of state power that is repressive in nature, nor as a neutral and closed procedural system, but as a means of social emancipation that is sensitive to inequality and societal needs (Setyawan, 2025). In the context of TCE protection, responsive law promotes a paradigm shift from state domination toward the empowerment of cultural communities. This approach requires that legal norms do not stop at symbolic recognition but are translated into mechanisms that effectively protect the interests of indigenous

communities (Ariyanti & Asri, 2022). Accordingly, benefit sharing is positioned as an instrument of substantive justice that bridges the interests of cultural preservation and the fair distribution of economic benefits (Putri, 2022).

A responsive benefit-sharing model must possess key characteristics such as active community participation, transparency in governance, and flexibility in adapting to cultural and social dynamics (Kusniati, 2024). Community participation should not be understood merely as formal involvement, but as substantive engagement in decision-making processes related to the utilization of TCEs (Wulandari, 2024). Transparency is necessary to ensure that the distribution of benefits can be monitored and held accountable, thereby preventing domination by particular actors. In addition, the model must guarantee community control over their TCEs, not only through formal recognition of rights but also through their actual capacity to determine how, by whom, and for what purposes their cultural expressions are used (Wulandari, 2024). With these characteristics, benefit sharing becomes a living and functioning protection mechanism rather than a mere normative provision on paper.

Legal recognition of TCE-holding communities constitutes the primary foundation of an ideal benefit-sharing model. The state must explicitly recognize the collective rights of indigenous communities as legitimate owners of TCEs, including the right to grant or withhold consent for their utilization (Novianti et al., 2025). The principle of Free, Prior and Informed Consent (FPIC) serves as a key instrument to ensure that any utilization of TCEs is carried out freely, in advance, and on the basis of adequate information (Saly et al., 2024). Without such recognition and consent, benefit sharing risks being reduced to unilateral compensation that does not reflect justice (Saly et al., 2024). Therefore, strengthening the legal position of indigenous communities is not only normatively important but also determines the legitimacy and sustainability of the benefit-sharing model itself.

To support the effective implementation of benefit sharing, the establishment of an inclusive, representative, and legally legitimate management institution is required at both national and regional levels. Such an institution

should not merely function as an administrative body, but must serve as a forum for negotiation, supervision, mediation, and distribution of benefits arising from the utilization of Traditional Cultural Expressions (TCEs). The ideal institutional composition should involve representatives of indigenous legal communities as cultural owners, the government as regulator, and the private sector as users, positioned on an equal footing to prevent domination by any single party (Brink et al., 2024). The existence of such an institution is essential to ensure that benefit sharing does not operate unilaterally based on market logic alone, but is grounded in the principles of distributive justice and recognition of indigenous collective rights. Furthermore, this institution should also have the authority to formulate operational standards for TCE utilization, determine appropriate compensation levels, and resolve disputes in cases of violations of cultural community rights.

The documentation and registration system for Traditional Cultural Expressions (TCEs) should also be developed in a decentralized manner by positioning indigenous communities as the primary actors, rather than merely as objects of state data collection. In practical terms, this system can be implemented through the involvement of indigenous peoples in the processes of identification, recording, and monitoring the utilization of traditional culture at the local level, with the government acting as a facilitator. However, its implementation still faces various challenges, such as limited funding, low human resource capacity within indigenous communities, and unequal access to technology and administrative infrastructure across regions (Nurazza et al., 2025). A centralized approach that relies solely on the government often neglects local knowledge and creates risks of distortion of cultural meaning itself. Therefore, an ideal model must enable communities to develop cultural documentation based on their own internal perspectives, including explanations of philosophical values, boundaries of use, customary prohibitions, and parties authorized to grant consent. This mechanism needs to be integrated into the national legal system through formal recognition of community-based documentation as a basis for granting permits and protecting TCEs. However, in practice, there is potential for conflict between indigenous perspectives and

state regulations that tend to be centralized, particularly when the state positions itself as the primary authority over TCEs, while indigenous communities assert their rights to determine the use and benefit-sharing of their cultural heritage. Such a registration system does not only function as a national cultural inventory, but also as a legal protection tool against unilateral foreign claims and unauthorized commercial exploitation. Community-based documentation also serves as an important foundation in benefit-sharing negotiations, as it provides legal legitimacy and a stronger bargaining position for TCE holders in dealing with industry actors and investors.

In addition to documentation, benefit-sharing protection must be strengthened through written legal standards and contract-based mechanisms that are legally binding. Any utilization of TCEs by third parties, particularly for commercial purposes such as creative industries, tourism, traditional pharmaceuticals, and international cultural promotion, must be based on a written agreement between the user and the indigenous community as the cultural owner (Khumairoh et al., 2022). Such agreements must specify the scope of use, duration of utilization, form of consent, profit-sharing arrangements, protection against misuse, and dispute resolution mechanisms. These cultural contracts constitute a concrete implementation of the principles of Free, Prior and Informed Consent (FPIC) and Access and Benefit Sharing (ABS), ensuring that indigenous peoples are not only symbolically recognized but also possess genuine legal control over their inherited cultural expressions (Hakeem & Widiyanto, 2025). Without a clear contractual mechanism, the relationship between indigenous communities and users will remain inherently unequal.

In the Indonesian context, an ideal benefit-sharing model must be capable of accommodating legal pluralism and the diversity of customary legal systems that exist across regions. Indonesia cannot apply a uniform model, as each indigenous community possesses different social structures, cultural values, and decision-making mechanisms. Therefore, the integration of responsive legal principles into the national legal system is crucial so that state law adapts to societal needs rather than imposing centralized norms (Turmudzi, 2025). Recognition of customary law must be positioned as a substantive source of

legitimacy in determining who is entitled to cultural benefits, how consent is granted, and what forms of compensation are considered fair by the community itself. The state must ensure that harmonization between national law and customary law does not eliminate the autonomy of local communities, but instead strengthens their position as independent legal subjects (Tamam & Putra, 2025).

Meanwhile, in the Malaysian context, the ideal model requires reform of the prevailing top-down approach, which has historically positioned the state as the primary actor in the management of traditional culture. This approach is evident in the strong governmental control over national cultural promotion and the tourism industry, while the involvement of indigenous communities in decision-making processes remains limited. In several cases, traditional culture is more often treated as an economic asset and a symbol of national identity rather than as a communal right of indigenous peoples. This condition potentially reduces community control over the use of their cultural heritage and creates inequalities in the distribution of economic benefits. Therefore, corrective measures are required through the strengthening of indigenous participation, the provision of FPIC-based consent mechanisms, and the establishment of more transparent and equitable benefit-sharing frameworks. An overly centralized system risks reducing the participation space of local communities and state governments, particularly for minority ethnic groups with highly specific cultural characteristics (Abdussamad, 2021). As a federal state, Malaysia needs to expand institutional space for state governments to participate in determining TCE protection policies in accordance with local social and cultural conditions. In addition, indigenous community involvement must be strengthened not only as beneficiaries, but also as actors with substantive authority in decision-making processes (Ishak & Hos, 2025). Such reform is essential to ensure that cultural protection is not solely oriented toward national economic interests, but also guarantees cultural justice for the communities that are the original custodians of such heritage.

The benefit distribution scheme must also be designed in a measurable, transparent, and accountable manner. Benefit sharing should not be understood

merely as short-term royalty payments, but rather as long-term benefit distribution that supports the social and cultural sustainability of indigenous communities (Nurfatriani et al., 2022). Financial benefits may include royalties, community funds, licensing compensation, or profit-sharing arrangements, while non-financial benefits may include skills training, technology transfer, institutional capacity building, market access, cultural promotion, and educational support for future generations of cultural custodians (Hanifuddin, 2021). This distribution mechanism must be accompanied by a clear accountability system to prevent misuse by local elites, bureaucratic actors, or private entities. Transparency is a crucial element, as without proper oversight, benefit sharing may instead generate internal conflicts within the community itself (Mardiastuti, 2019).

Community-based monitoring and law enforcement constitute equally important elements in ensuring the effectiveness of benefit sharing, as supervision of the utilization of Traditional Cultural Expressions (TCEs) cannot be fully entrusted to state authorities, who often have limited understanding of local social contexts and cultural values. Philippe Nonet and Philip Selznick, in their theory of responsive law, emphasize that effective law must be able to respond to societal needs and provide meaningful space for public participation, rather than being merely formalistic and bureaucratic (Djauzie, 2025). In this context, indigenous communities must be positioned as the primary supervisory actors, as they possess the most comprehensive understanding of cultural boundaries and the social impacts of its utilization. In line with this, Satjipto Rahardjo argues that law must be oriented toward human protection and substantive justice; therefore, law enforcement should not rely solely on written rules but must ensure real protection of the rights of vulnerable groups (Azzahra & Triadi, 2026), including indigenous peoples as holders of TCEs. Accordingly, mechanisms such as cultural ombuds institutions, independent audits, customary deliberation forums, and community-based monitoring systems need to be developed as part of participatory and just law enforcement. Furthermore, Lawrence M. Friedman's legal system theory emphasizes that the effectiveness of law is strongly influenced by legal culture (Al Kautsar & Muhammad, 2022),

making community involvement in monitoring a crucial requirement for ensuring that benefit-sharing regulations function substantively. Communities must be granted access to raise objections, exercise social control, and demand accountability in cases of violations of benefit-sharing agreements. This approach not only strengthens legal legitimacy but also builds ownership, trust, and the sustainability of a culturally responsive and equitable protection system.

In the overall benefit-sharing model for Traditional Cultural Expressions (TCEs), the state must be positioned as a facilitator that ensures a fair relationship between users and indigenous communities as cultural owners, rather than as a dominator that unilaterally determines the direction of governance (Simatupang, 2024). The role of the state is not limited to regulatory functions but also includes providing an institutional framework that ensures equality of bargaining power, protection of collective rights, and mechanisms for free, prior and informed consent (FPIC) as well as fair benefit-sharing (S. Sulaiman et al., 2025). This is consistent with Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which affirm recognition and respect for indigenous peoples and their cultural identities (Burhanudin, 2021). If the state becomes overly dominant through a top-down approach, law risks becoming repressive, as indigenous communities are reduced to mere objects of policy without the ability to determine the use of their cultural heritage, while economic benefits are enjoyed by external actors. Conversely, a state functioning as a mediator and facilitator can create distributive justice through legal assistance, transparent oversight, fair dispute resolution, and capacity building for indigenous communities. From the perspective of responsive legal theory by Philippe Nonet and Philip Selznick, the success of benefit sharing is not measured by the quantity of regulations enacted, but by the extent to which law is able to ensure balance of power, protection of rights, and tangible welfare for TCE-holding communities (Nonet & Selznick, 2019).

Conclusion

The protection of Traditional Cultural Expressions (TCEs) through benefit-sharing mechanisms in Indonesia and Malaysia demonstrates a shared

normative recognition of cultural values as collective assets, albeit with different legal and institutional approaches. Indonesia tends to position TCEs within the framework of communal intellectual property, emphasizing cultural preservation and the recognition of indigenous peoples, with a highly dominant role of the state as both manager and rights holder. Although this approach provides symbolic and juridical legitimacy to the existence of indigenous communities, benefit-sharing arrangements have not yet been formulated in an operational and measurable manner, resulting in economic benefits from the utilization of TCEs not being fully returned to their rightful communities. In contrast, Malaysia adopts a more pragmatic approach through cultural policies, centralized governance, and the formulation of specific regulations that open space for the commercialization of TCEs. However, the strong dominance of the state in such management also has the potential to limit the position of cultural communities as the primary rights-holding subjects. This condition indicates that both countries remain in a transitional phase between symbolic protection and substantive distributive justice.

In relation to international law, the regulation of TCEs in Indonesia and Malaysia is broadly aligned with the spirit of safeguarding intangible cultural heritage and recognizing the cultural rights of communities as developed in international legal instruments. However, this alignment remains partial and has not yet addressed key operational aspects, particularly the implementation of Access and Benefit Sharing (ABS) and Free, Prior and Informed Consent (FPIC) principles. Indonesia has demonstrated normative commitment to the recognition of indigenous peoples, yet the implementation of participatory and consent-based principles remains weak in legal and economic decision-making processes. Malaysia shows progress through the formulation of specific regulations on traditional knowledge and traditional cultural expressions that are more aligned with WIPO initiatives, although their implementation faces structural challenges due to the federal system and policy differences at the state level. Thus, despite efforts toward harmonization with international standards, a significant gap remains between global legal norms and national-level practices in TCE protection.

The need for an ideal benefit-sharing model requires a paradigm shift in legal protection from a formalistic approach toward a responsive and substantively just approach. An effective model must position TCE-holding communities as the primary legal subjects through the recognition of collective rights, guarantees of meaningful participation, and transparent and accountable benefit-sharing mechanisms. The state should act as a facilitator that bridges the interests of cultural preservation, legal certainty, and community welfare, rather than as a dominant actor that assumes control over TCEs. In the Indonesian context, such a model must accommodate legal pluralism and the diversity of local communities, while in Malaysia, reforms are needed to adjust the top-down approach to become more inclusive of ethnic communities and state-level authorities. With such an approach, benefit sharing would function not only as a technical mechanism for distributing benefits, but also as a transformative legal instrument that realizes cultural justice and substantive recognition of the rights of Traditional Cultural Expression-holding communities.

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Declaration of Generative AI Use

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Competing Interest

The author declares that there is no conflict of interest