

Legal Protection on Traditional Culture Expression of the Indigenous Society

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Abstract:

The abundance of traditional culture expression variety in Indonesia is one of the main factors in TCE (traditional Culture Expression) protection for Indonesian people. Further, the TCE utilization by foreign parties without considering the economic and moral aspects that caused from the utilization on the TCE on the Indigenous society, and the inadequate system of Conventional Intellectual Property Rights (IPR) in giving effective and efficient protection for TCE, and also in terms of supporting the international convention in the field of TCE, are the factors of why Indonesian Culture must be protected. This dissertation in normative legal research, the approach used is concentrating on 4 (four) approach methods such as: (1) statutory approach, (2) comparative approach, (3) conceptual approach and (4) case approach. The establishment of principles and rules on legal protection must first consists of paradigm changes in terms of protecting TCE that more supportive on cultural values on Indonesia that are communal and spiritual or in Sajipto Rahardjo term, rooted of social lifsystem become an important thing to do.

Keywords : Legal Protection, Traditional culture expression, Indigenous Society

1. Introduction

Traditional Cultural Expression hereinafter referred to as TCE is the material manifestation of ethnical and tribal diversity in Indonesia. All this time, Indonesia is included into top five of nations in the world that have the most diverse traditional ethnicity treasure. In its development, Intellectual Property Rights regime is used as legal protection instrument of the diverse national culture. The plus side is that in one side, if this IPR protection is used as legal instrument in creation of individuals or groups that create new creation, it will stimulate the creator to produce more innovative creation, but in the other hand, there are creations that has been owned communally by indigenous community cannot be included into IPR legal instrument and must be differentiated with new creations that must be protected through IPR regime.¹

Related to the important role of TCE protection for Indonesia, it is clear that TCE has very strategic value. This strategic value can be seen from cultural, economical and social aspects. From cultural aspect, it is clear that with protection towards TCE, the preservation of national culture will be achieved. Today, Indonesia is famous for its cultural diversity, in terms of culture, medicine, and others. If it is identified, there are abundant amount of TCE owned by Indonesia.

From social aspect, it is clear that with protection towards TCE, the preservation of social values will be kept and preserved. Because with this, the government will not be able to ignore the TCE owned by Indonesian society. Traditional cultural expression if Indonesia also has promising economic value especially related to tourism and creative economic industry. In tourism industry for example, tourism industry in Bali that almost all are based on TCE has huge contribution for local income and make Bali known across the world.

In creative economic field, especially TCE-based craft products, for example, Batik, wood carving, copper carving, silver are products that have quite significant role on national income, but modern technology

¹Achmad Zen Umar Purba, *Traditional Knowledge: Subject Matter For Which Intellectual Property Protection Is Sought*. WIPO Asia Pacific Regional Symposium On Intellectual Property Rights, 2001, hal 17-19.

development especially in telecommunication field can cause inappropriate uses of the existing TCE. Various commercialization on TCE even in global stage without the permission of the indigenous society. This commercialization is also followed by various inappropriate changes or modification on TCE which are shown in several cases in Indonesia, and until today, there are no legal resolution done for these cases.¹

As the essence of state law which principally giving legal protection for people based on Pancasila and constitution of Republic of Indonesia of 1945 As one of the main issues related to TCE is the legal protection towards TCE on indigenous society. Legal protection here must be able to give justice for the recipients of rights. Related to legal protection, the state takes full responsibility on actions or absent of actions in the effort of protection and fulfillment of human rights, including communal rights and cultural rights fulfillment.² Related to indigenous community right fulfillment on TCE, it is important for us to see what justification of legal protection of Indigenous community TCE.

2. Research Purpose

The purpose of this research is to analyze that find the justification of legal protection towards TCE of Indigenous community.

3. Research Method

The type of this research is normative law research, the review is performed on the identification of just, lawful, beneficial legal protection in positive law especially presenting national law that emphasizes on indigenous community TCE. Legal theory basis performing review on theories used as analysis knife in law implementation problems. Legal philosophy layer found the value and legal principles to explain comprehensively related to legal protection on Indigenous society TCE for indigenous society to be contextual so that it can clarify the legal problems.

In this research, approach method used is adapted to the type of the research, in which this research is normative legal research.³ Based on the legal issues contained in the research, the approach uses are emphasizing on four methods such as: (1) statutory approach, (2) *comparative approach* (3) *conceptual approach* (4) *case approach*. The legal resources that have been collected are reviewed systematically using normative method in perspective optic.⁴

4. Discussion

Legal protection towards TCE in Indonesia as discussed above, is included into Intellectual Rights Law regime. It is because the existence of TCE belongs to knowledge, art and literature. It is also emphasized in Article 38 of Law Number 28 of 2014 on Copyright State Gazette of Republic of Indonesia of 2014 number 266, additional State Gazette Number 4131, hereinafter referred to as UUHC 2014. Regulation in article 28 point (1), (2), (3), and (4) states:

(1) "Copyright on traditional cultural expressions are held by the State". Explanation :

What is meant by Traditional cultural expression including either one of or combination of the form of the following expressions:

- a. Verbal textual, both verbal or textual, in the form of prose or poetry, in various theme and meanings of the message, in the form of literary products or informative narration;
- b. Music, including vocal, instrumental or its combinations;
- c. Movements, including for example, dances;
- d. Theater, including for example, puppet show and folklore performance;

¹Edy Sedyawati, Makalah : "Upaya Perlindungan Hukum (HKI) terhadap Produk Kerajinan Nasional yang Menjadi Warisan Budaya", Diskusi Panel, Semarang, 18 Oktober 2002, hlm 3

²R. Herlambang Perdana Wiratramana, *Konstitusionalisme dan Hak-Hak Asasi Manusia: Konsepsi Tanggung jawab Negara dalam sistem Ketatanegaraan Indonesia*, 2005, <http://herlambangperdana.files.wordpress.com/2008/06/herlambangkonstitusionalisme-dan-tanggung-jawab-negara.pdf>, (01/09/2016), hlm. 10

³Peter Mahmud Marzuki. *Penelitian Hukum Edisi Revisi*, Jakarta: Kencana Prenada Media Group, p. 29-36

⁴This method aims on hermeneutically find the legal principle that determine that becomes the juridical obligation and rights of the legal subject in particular community situation based on the existing legal order with always refer to positivity, coherence, justice and human dignity, which the implementation can and often utilize the method and product of social study research products. For further information refer to B. Arif Sidharta. Refleksi tentang....p 218.

- e. Art, in the form of two dimensional or three dimensional, made from various media such as leather, wood, bamboo, metal, stone, ceramic, paper, textile and others or the combination; and
 - f. Traditional ceremonies
- (2) The State shall inventory, maintain, and preserve traditional cultural expressions as referred to in paragraph (1).
 - (3) The use of traditional cultural expressions as referred to in paragraph (1) must consider the values that live in the carrier community.

Explanation:

What is meant by values that live in the carrier community is customs, customary law norm, custom norms, other noble norms upheld by the local community that maintain, develop, and preserve the traditional Cultural expression.

- (4) Further provisions on the rights held by the State on traditional cultural expressions as referred to in paragraph (1) is regulated by the Government.

As regulated in Article 38 point (1) UUHC of 2014 that stated the copyrights of TCE is held by the state and meant that all matters related to TCE is automatically managed by the state. But, the problem is the state protection is limited only to the object of TCE, whereas TCE is not something that automatically exist but there is a preservation system in managing the sustainability of said TCE so that it keeps on thriving in communal indigenous society. So, it is best that not only TCE object that become the emphasis of protection by the state, but also the indigenous society that preserve it. Because TCE's growth and development cannot be separated from the role of the indigenous society itself

Community cultural creation such as angklung, gamelan, and other traditional artwork, grow naturally accompanied by innovations that full of artistic value as traditional artwork, should receive the attention from society, and preserved with love so that it will not be used by other parties that take economic advantages.

The differences in ownership concept in TCE with IPR system is generally giving another consequence, which is TCE must be preserved and maintained from generation to generation with the purpose of giving benefit for all stakeholders. While the ownership protection concept in IPR concept is that the protection basically means that the exception of use without authorization by the third party. The main reasons of the protection on TCE are:¹ (1) for justice consideration, (2) conservation effort, (3) preserving culture and traditional living practices, (3) preventing deprivation, (4) developing the use and interest of TCE

Therefore, it can be understood that only small part of regulation in IPR system in Indonesia discussing TCE. In above law, explicitly or implicitly stating about TCE is not enough to accommodate indigenous society's interests. The articles from the law are too abstract in the implementation so they need a more concrete regulations or a special law to regulate it.² Therefore, it is important for us to see the justification of legal protection towards indigenous society's TCE as a consideration in giving legal protection for indigenous society's TCE.

Related to legal protection justification on indigenous society's TCE, there are four sub-chapters in this chapter, such as: Tce concept, indigenous society concept, legal protection justification for TCE of carrier indigenous society in the perspective of indigenous society as legal subject and legal protection justification for TCE of carrier indigenous society in the perspective of human rights.

From several international conventions the result of this research is the awareness to give legal protection on TCE that is starting to be implemented in several discussion in international conventions by introducing The Tunis Model Law on Copyright for Developing Countries. In this model it is introduced that Tce protection is not limited to physical form of TCE, but also on ideas of moral rights contained in this TCE³. Further, there is development until international conference about cultural rights and IPR issue Mataatua declaration that in principle see that protecting culture is a part of human right⁴

¹Miranda Risang, *Opini: Pikiran Rakyat*, diakses pada Rabu 10 Mei 2017

²Tantono Subagyo, *Meraih Masa Depan Bermadankan Kekayaan Masa Lalu (Perlindungan Dan Pengembangan Sumber Daya Genetika, Pengetahuan Tradisional Dan Ekspresi Folklore Di Negara-Negara ASEAN*, Media HKI, Vol. II/No.5/Oktobre 2005.

³Kamal Putri, (1999). *Protection of Expressions of Indigenous Cultures in the Pacific*. Bulletin UNESCO Vol 23 No 4, 1999, 6-7.

⁴Whitt, L. A. (1998). *Indigenous Peoples, Intellectual Property and the New Imperial Science*. *Oklahoma City University Law Review* Vol 23 Nomor 1 dan 2 Spring and Summer .

The latest development is in 2003 in the UNESCO convention about intangible cultural heritage from Article 2 point (1) of this UNESCO convention can be concluded that immaterial heritage is the practice, expression and others acknowledged by social community as their heritage. This convention has been ratified by Indonesia in the form of Presidential Regulation Number 78 of 2007. In this convention, the terms used are “Safeguarding” and not “Protection” this convention has the characteristic of preserving the objects inside the scope so that it can be preserved from time to time¹

TCE concept in national law is started from article 18 letter b point (2) of 1945 constitution that stated: The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.

Article 28C of 1945 Constitution of Republic of Indonesia after amendment, especially article 28 C point (1), stating:

“Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race.”

The formulation of this article is similar with formulation of customary rights in Article 27 of Human Rights Universal Declaration and Article 15 of International Covenant on Economic, Social and Cultural Rights that textually strengthen the existence of intellectual property rights as the right that protect human creativity. In national law, this cultural rights become Constitutional Rights as stated in Article 28 C point (1) 1945 Constitution of Republic of Indonesia. Nevertheless, in relation to ownership that has non-individual characteristic on cultural rights and intellectual property right objects in point (1) of article 28 C must be compared to its point (2), stating that: “Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.”

The relation of point (1) and (2) of article 28 C in 1945 Constitution of Republic of Indonesia ensures that customary rights that are implicitly stated in point (1) can be collectively fought for, in terms of national development framework. Article 28 of the Constitution of Republic of Indonesia is the article about human rights, so customary rights are included in collective customary right that becomes the part of human rights.

Article 28 (3) 1945 Constitution of Republic of Indonesia stated that: “The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations.” Related to communal rights on TCE, therefore this article ensures that traditional society rights especially communal right is respected even substantially this article also emphasizes the acknowledgement of one of communal rights of the indigenous society which is rights on cultural identity. But the regulation in articles of 1945 Constitution of Republic of Indonesia above still in the form of general regulations and need to be explained in details about regulations that specifically concretely regulate about indigenous society’s TCE.

TCE is a part of culture that produced by indigenous society, therefore, acknowledgement on the existence of indigenous society in Indonesia face several problems such as the requirements that must be fulfilled: as long as it still thrives, in compliance with the development of the era, in compliance with Republic of Indonesia’s principles, and regulated in the law. Then it is developed when National Indigenous Society Alliance or hereinafter referred to as AMAN propose legal testing on 1945 Constitution and based on Constitutional Court hereinafter referred to as CC number 35/PUU-X/2012 that granted the proposal and therefore, indigenous society is considered as legal subject and can file lawsuit to CC by considering four requirements stated above.

From human right perspective, therefore, customary rights as stated in *International Labour Organization Convention* hereinafter referred to as ILO that acknowledge the right of each individual to participate in culture and gain benefit from the products to said culture, and regulated about the indigenous society rights such as acknowledging the spiritual and cultural values in them.

From several concepts of TCE that become the findings of this research, the researcher consider that several international conventions that has been established has accommodated right ideas about TCE both in terms of preservation, conservation and passing through generations.

¹Kholis Roisah, (2014). *Perlindungan Ekspresi Budaya Tradisional dalam Sistem Hukum Hak Kekayaan Intelektual*. Jurnal Universitas Diponegoro Nomor 3 Jilid 43, 2014, hlm 7

Protection is considered as an action to protect. The word “protect” (verb) means to make or cause something to be protected, while “Protect” (verb) means preserving, maintaining and caring.¹ If something is protected, it means that it is protected so that it will not be disturbed, it is preserved and maintained so that it will thrive or develop as it is.

According to researchers, the acknowledgement of indigenous society on TCE is not only limited to the form of acknowledgement in the state law, but because factually, Indonesian people is plural, therefore acknowledgement must also be gained through the law that thrives among the society, which is the value system. It is in compliance with the opinion of Van Vollenhoven that customary system is not based on the regulations created by the government or other authorities, but on actions that are considered appropriate and binding, besides, the people have the same belief stating that customary laws must be preserved by the head of the tribe and other officers and have the sanction.²

The term justice does not mean that each member of society receive the same amount of things, but it means that the interests protected by the law is balanced.³ In defining justice, Plato is very much influenced by collectivism vision, that see justice as harmonious relation with various social organisms. Each civilian must perform their duties according to their positions and natural characteristics. Plato's opinion is the statement of class, therefore Platonic Justice means that each member of society must complete their duties and cannot interfere the business of other class members. The law makers must state clearly the position of each social group, in which place and situation is most suitable for an individual. This opinion is based on the assumption that human is not isolated soul and free to do what they desire, but human is bounded soul with regulations and universal order that must subdue their individual desires towards collective organisms.

As Indonesian heritage, traditional cultural expression must be conserved as a form of nation's sustainability. Sunaryanti Hartono proposes that there are two ways to define nation's sustainability, first is preservation, that prevents changes, second is Indonesia's life sustainability, that has great dynamics, so from time to time can develop and sustain itself from changes and attacks from external factors, as well as internal factors, and in the future will contribute to the life sustainability of the world's population.⁴

Reformulation of legislation or regulation becomes important in protecting TCE as well as the rights of its carrier in Indonesia. Legislation reformulation in this context according to researchers can be divided into two groups, which is short term reformulation that can be performed by formulation sui-generic law that regulates about TCE and the carrier indigenous community rights by ensuring the position of indigenous society position as the carrier of TCE by implementing legal protection concept oriented not only towards the culture, but also the carrier society. It means that the formulation of special regulation that abolish the more general law for indigenous society that is the carrier of TCE.

The use of this system is very reasonable or even become new solution because the implementation and the use of legal system that has sui-generic characteristic is very possible to be “inserted” or implemented in Indonesia TCE that until today, there are still collectivity or communal system in the ownership concept. This sui-generic regulation is initiated because there is copyright concept that cannot be implemented in particular work.

Traditional cultural expression can be protected using *sui generis* legal system or independent outside IPR. Igansius Subagyo from BPPT stated that TCE has unique and holistic characteristic. Unique means distinctive and different, while holistic shows a unity. Traditional cultural expression not only has economical value but also has magical and cultural value. It makes several countries such as Thailand, Philippines, and Costa

¹Kamus Besar Bahasa Indonesia, www.sms-anda.com, accessed 25 February 2017, and Kamus Besar Bahasa Indonesia Edisi Kedua, Departemen Pendidikan dan Kebudayaan dan Balai Pustaka, 1994, hlm. 595, defining protection as: method, process, act of protecting.

² Husen Altung, *Dinamika Hukum Dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat atas Tanah*, Yogyakarta: Laksbang PRESSindo, 2010, p. 67

³ JB. Daliyo (et.al), *Pengantar Ilmu Hukum*, Gramedia Pustaka Utama, Jakarta, 1992, p. 39, Kamus Besar Bahasa Indonesia, Departemen Pendidikan dan Kebudayaan, Penerbit Balai Pustaka, Jakarta 1995, Second Edition, p. 67, just means 1. Does not favor one party, does not take sides; 2 in favor of the truth; 3. Appropriately, does not abuse power. Compared to Kamus Umum, Politik dan Hukum, Telly Sumbu dkk, Jala Permata aksara, Jakarta 2010, hl.6. in his writings, Sonny Keraf in buku Etika Perdagangan bebas, published by Universitas Atmajaya, Jakarta 1998, hlm.63-78 stated, while the definition of justice itself in the first time expressed by Ulpianus that quotes Celcus ideas that justice is: *tribuere cuique suum*; or to give everybody his own.

⁴ Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia*, Bina Cipta, Bandung, 1988, hlm. 82.

Rica chose sui generis system to regulate traditional knowledge and their TCE so they can give more comprehensive protection.

The most important substance from sui generis law meant is there is a bold acknowledgement that indigenous society is the “carrier” of said traditional cultural expression. The values live in the society which is their local wisdom can be one of the sources or materials to formulate the rights of this local community in sui generis law. Further, in the implementatio, other technical legal devices is also needed.

Legal devices refered above can be in the form of Government Regulation, if required, regional regulation that regulates further protection that is more detailed and operational for TCE so that it will be easier for the implementation. The most important thing here is how the Government give protection on the Indigenous society that becomes the carrier of TCE that gives justice for all Indonesian citizens. Adopting the local values and wisdom become important thing in the formation of sui generis law. It is de to the root of TCE or culture that comes from certain area which also means that each area has philosophical values that intend to be emphasized through the emergence of this TCE, so if a TCE that will be formulated in a national policy, inevitably must considering the area or custom aspect in which this culture emerge, develop and grow. Or in other words, in formulating the law must perform a research about customary and traditional values and policies.

Tendency to adopt customary values in customary law is unbiased, but very reasonable, which is that several principles contained in the customary law need to be reviewed together beside the customary law is the law that develops early in Indonesia and can be said that it is the natural law of Indonesians. Principles in indigenous law that can be accommodated into sui generis law is as follow:

1. Regulation in the law sui generis is simple, meant that what is regulated n this law is easy to understand and comprehend by majority, and the implementation does not need complicated procedures as shown in IPR law. This characteristic is in compliance with the society mindset that is also simple. This simple mindset is for example reflected in the customary law system that has clear and cash characteristics.
2. sui generis law should not ignore the religious norms, it is in compliance with the customary law that has magical-religious characteristics. This property become the main factor that cause the society tends to be not very materialistic. The measurement of benefit is not only economic, as reward in IPR system. The benefit also including the reward on belief system that TCE is the gift from God that we must be grateful for, and implemented for the welfare of humanity.
3. This suis generis law must be based on the social system that highly value togetherness. It is also in complianc with unindividualistic customarysystem. Adopting individualistic system will only repeat the IPR regime that proven to be not fully successful in its implementation.
4. Sui generis law must be able to guarantee or at least giving big protection so that the utilization of TCE and the related practices can truly give welfare for the indigenous society, the carrier of the TCE and general society. In this term, the law must give ensurance that the carrier society of the TCE will receive benefits if there are foreign parties that utilize heir culture for commercial needs.

At least, those points can become consideration in formulating sui generis law that will be used as legal protection concept for TCE carrier, in this case indigenous society in Indonesia. Special regulation about TCE should have the concept of **preserving, conserving and passing through the generations**. The cultural preservation means that culture is owned by community that included in a legal scope of the state in which that TCE grows and develop can utilize TCE both for research, performance or commercial use, in the principle that can preserve the national culture, while in the context of consrvation is protecting the indigenous society TCE from the parties that desired to claim the TCE because in the principle, culture is communal ownership and cannot be owned by individual or groups or other nation.

In the context of TCE that contains sacred or magical aspect must be considered the PADIA concept, in which the parties that intends to use TCE must be given approval from the carrier community that preserve and conserve the TCE as a form of keeping the values contained in this TCE so that it will not deviantly utilized. While in the concept of passing through from generation to generation in which TCE can stand by maintaining the sacred values contained inside. The harmonization of the three concepts above must be optimally strived by paying attention to and making it possible to preserve and develop the authentic culture of the nation. Benefit sharing concept can be considered in preserving culture and passing it through generations. With this concept, indigeneuse society’s TCE that are utilized by other parties will get profit not only from economical aspect, but in the form of activities that can improve the welfare of the community and the availability of the access towards their TCE. Good cooperation from all parties is needed from central government to regional government and indigenous society.

4. Conclusion

Based on the analysis and the results that has been explained in previous chapters, the following matters can be concluded: Protection towards traditional cultural expression must not only cover the physical aspect, but also protecting the sociological culture as an ethical and practical system that works in the society. Formulation of legal regulations that give legal protection for indigenous society that acts as the carrier of traditional cultural expression is an effort to prevent the action or attempts to deviantly use traditional cultural expressions both by individual as well as state and growing awareness among indigenous society about the importance of cultural preservation as national identity. The specific regulation related to TCE should not ignore indigenous society as the carrier of TCE by maintaining, preserving and passing through the culture from generation to generation based on social system that highly values togetherness and capable of guarantee or at least giving protection so that the utilization of TCE can give welfare for the indigenous society. Benefit sharing concept adopted from New Zealand by cooperation performed by the researcher with indigenous society can give mutual benefit that has economic value for the indigenous society can be regulated in this law so that it can give justice for direct stakeholders.

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