

# Study Assessment Legal Law and Protection of a Regional Culture

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## ABSTRACT

This Study discussed about traditional knowledge (PT) and traditional cultural expressions (EBT) is a state asset that is very potential for prosperity nation because it has high economic value, but ownership many recognized (claimed) by foreign parties without any benefit sharing, resulting in a conflict of interest between developed countries and the state developing like Indonesia. Our weakness in developing the protection system there is no proper protection system and adequate and limited data, documentation and information about PT and EBT. The struggle of Indonesia as one of the developing countries for legal protection to continue form a proper protection system for traditional knowledge at the international level in 2000 IGC-GRTKF was formed(Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklor) by WIPO to discuss the possibility of holding a binding agreement, in an effort the law to protect internationally, then at the national level The government is conducting a discussion on the DraftLaw (RUU) concerning SDGPTEF (Genetic Resources, Traditional Knowledge and Expression of Traditional Culture. While which already exists, namely Law Number 19 of 2002 concerning Rights Cipta is not fully operational, because there is no regulation Implementation.

**Keywords:** Assessment Legal, Regional Culture, Draft Law

## INTRODUCTION

Indonesia as one of the developing countries, and is an archipelagic country has more than 20,000 islands where each island

has customs, customs, and cultural diversity with its own regional characteristics.

The cultural diversity of this region is clearly seen in geographical, ethnic, socio-cultural, religious and belief aspects. Indonesia has a rich culture, both historical heritage and traditional knowledge with enormous potential to produce various kinds of works and traditions from all regions in Indonesia from Sabang to Merauke where there are more than 900 ethnic groups spread across 33 provinces in Indonesia.

Traditional works of art, traditional techniques that have long been "alive" in traditional societies, are considered as assets of economic value. Traditional Knowledge and Expression of Traditional Culture is an invaluable wealth of Indonesia as a national identity, so that the culture of this region can be juxtaposed with culture and international work and is a state asset that is second to none

In the Preamble of the 1945 Constitution it has been confirmed, the purpose of the establishment of the Indonesian state, namely to protect all of Indonesia's bloodshed and promote public welfare. Referring to the objectives of the country, the duty of the state is to protect and seek public welfare. In this case, among others, by providing protection to traditional knowledge and culture, belonging to the Indonesian people since time immemorial.

Such protection is very necessary to prevent products belonging to Indonesian people, especially those based on traditional knowledge, so that their ownership is not recognized without permission by other

countries. Therefore, these products need legal protection. Moreover, it is clear that all wealth based on traditional culture has very high economic value.

These efforts will certainly encourage an increase in the Indonesian economy and can improve people's welfare.

Regarding its utilization by foreign parties, actually the community is open and not possessive. This is due to the orientation of the local community, which has not fully thought of material happiness, but rather spiritual happiness. <sup>8</sup> However, developing countries, such as Indonesia that have these assets, do not participate in enjoying the economic benefits of using these traditional knowledge.

The struggle of developing countries for legal protection of biological resources and traditional knowledge emerged with the signing of the 1992 Convention on Biological Diversity (CBD). Since that time various meetings at the world level, especially within the framework of the World Intellectual Property Organization (WIPO), have been held to formulate appropriate protection systems for these traditional knowledge.

Aim idea of utilizing the Intellectual Property Rights (IPR) system, the Sui generis system, the documentation system and the prior informed consent system to protect traditional knowledge continues to roll on, but it has not yet been achieved. Although in the CBD it has been mentioned about the protection of traditional knowledge. But until now there has been no agreement between CBD participating countries.

## **LITERATURE REVIEW**

The emergence of injustices felt by developing countries occurs because their knowledge and expressions of traditional culture are not protected, as is intellectual property in developed countries. Meanwhile developed countries try to protect their intellectual property from abuse, by pressuring countries in the third world, to protect their intellectual property rights.

The reluctance of developed countries to recognize the knowledge and cultural expressions of developing countries is because they do not want to lose access to the knowledge and expression of traditional culture of local people, which has proved to be very beneficial for them, both economically and knowledgeably and technologically.

The same thinking above, described by Agus Sardjono by saying, that developed countries have applied unfairly in the use of traditional knowledge of local communities in third countries. In this case, Sardjono refers to the case of taking intellectual property of the Indonesian people, in the field of medicine, which later claimed itself, as an inventor of pharmaceutical technology that was actually taken from knowledge that has been practiced by traditional communities on Java.

By taking an example in the field of medicine, it is proven that it is now protection of the knowledge and traditional culture of the Indonesian people, as intellectual property is increasingly felt and important. This awareness arises because of the process of abuse (misappropriation) towards traditional knowledge of the Indonesian people, which is carried out by developed countries.

The existing abuse process starts with a one-sided acknowledgment that the knowledge of former local communities, for example in the field of medicine, is recognized as a result of their findings. And furthermore, the findings are requested for patent protection which provides economic benefits to its holders through monopolization of the relevant pharmaceutical products.

In addition to the reasons for abuse and injustice, awareness to protect the knowledge and expressions of traditional culture is also due to the fact that the Intellectual Property Rights (IPR) system is not fully relevant to protect traditional cultural knowledge and expressions, as intellectual property.

The irrelevance of the IPR system for efforts to protect cultural knowledge and expressions is caused by various things. First, the IPR system encourages the process of utilizing biological resources on a large scale, when the investment is concerned; it actually requires large-scale exploitation of biological resources.

Second, even though the IPR system allows for increased use of technology and knowledge, traditional medicine to a higher level. But it cannot prevent the occurrence of abuse and commercialization carried out by the pharmaceutical industry. Therefore, as an alternative, a *sui generis* protection system is needed for traditional cultural knowledge and expression.

With a system of protection on the basis of *sui generis* legislation, the home country can protect the knowledge and expression of traditional culture from the misuse of other parties. Included in this *sui generis* protection system, is regulating the problem of foreigners' access to knowledge and expressions of traditional culture.

### **2.1. The Law Teachings Are Responsive To The Protection of Knowledge and Expression of Traditional Culture**

Facing the current crisis of thought and practice of protecting knowledge and expressions of traditional culture, the team felt the need to provide an analysis of the model of legal reform in the transitional period facing the Indonesian people today.

Developed countries such as the United States overcome the crisis of thought and practice of law by choosing the theory of modernization. This theory has triumphed since the 60s, but began to recede since the 70s. Modernization theory, simply says, developing countries will achieve a level of legal development enjoyed by developed or modern countries before, as long as they want to follow the path taken by these developed countries.

If developing countries are able to remove obstacles to modernization, then the guarantee of becoming a developed country will be assured. But then it was proven, the

guarantee was more unproven and the theory began to be abandoned. Since the 1970s, alternative ideas for legal reform have been born, namely the development model, which was initiated by Philippe Nonet and Philip Selzenik.

The strength of the development model lies in its understanding of the complexity of the reality of the relationship between law and society. By the theory of modernization, the complex realities, it is reduced to very simple, so that the theory fails, making predictions about the role of law in the development and change of society. 18

The basic concept that underlies legal reform in the field of protection of knowledge and expression of traditional culture, is first to be initiated in the study of responsive law. The views of Nonet and Selzick, look at the law from the point of view of sociological jurisprudence and the realist jurisprudence. Both of these legal thoughts, seeing and understanding the law empirically with a focus more emphasis, are not merely on the boundaries of formalism, but rather expanded, and include the role of policies and legal decisions in development. Nonet and Selzick are fully aware of the complex reality of the relationship between law and society.

There in lies the strength of their model development. This makes us, members of the team, argue that the more solid a legal thought is based on reality, the greater the strength of the law, to the desired change of society.

Legal analysis of legal protection reforms on the knowledge and replication of traditional culture, as stated above, is associated with sociological thinking

### **2.2. Legal Relations and Legal Principles for the Protection of Knowledge and Expressions of Traditional Culture**

The essential purpose of responsive law in relation to the protection of traditional knowledge and traditional culture, is to direct the law to the realization of the juridical values and will of the

Indonesian people, in accordance with the Pancasila legal ideals and the 1945 Constitution, should be justice for the community.

The law (*rechtsidee*) is a construct of thought (*idea*) that directs the law to the desired legal ideals. *Rechtsidee* serves as a guiding star for the realization of the ideals of a society. From this recipe, a concept and legal politics are developed in the life of a nation.<sup>23</sup> Or in other words, legal protection against cultural knowledge and expression should be based on legal concepts and politics, for the benefit of society.

The law is *apriori* normative and constitutive, which is a transcendental prerequisite that underlies every positive law that is dignified. Without legal ideals, there is no law that has a normative character. *Apriori* in this connection is understood as an ontological belief regarding the concept of justice adopted by a society.

In line with the above quote, Radruch said the ideals of the law functioned as a constitutive basis for the formation of law. The function of the ideals of law in this sense are: (1) without legal ideals, all legal rules lose their meaning as law; and (2) the ideals of the law are regulative benchmarks for judging fairness or unfairness of a positive law.<sup>25</sup>

Next, the understanding of the principle of law and its relation to the ideals of the law in the meaning of the law will be examined, for the protection of knowledge and expressions of traditional culture, for justice, public benefit, and legal certainty.

In connection with legal reform efforts, for the protection of knowledge and expressions of traditional culture, it was explained that laws that were not based on legal principles had an adverse effect on the people who possessed the knowledge and expression of traditional culture. Here the legal principle is understood, as one of the basic legitimacy of protection for the traditional community of the owner of the knowledge and expression of the relevant culture.

It must be realized that traditional knowledge and expression of traditional culture is a part of cultural heritage that can provide motivation to increase intellectual creativity for the community, even through intellectual creativity that can improve the economy of the people, so that protection from the arbitrariness of foreigners who want to take advantage of Indonesian culture is needed.

The main task of the government, in this case the Ministry of Culture and Tourism, the Department of Law and Human Rights and related institutions, needs to carry out conservation which includes efforts to excavate, preserve, develop and protect the cultural treasures of ethnic groups in Indonesia.

Efforts can be made to protect traditional culture as a manifestation of nationalism, one of which can be taken through inventory. Inventory or documentation of traditional culture is an activity of collecting data on a traditional culture in a region, which in the presence of these data traditional culture of a society can be inventoried. Inventory itself can be carried out in various forms, including the issuance of written knowledge inventories (in the form of books), or can also be in the form of inventory using databases on computers.

Considering that most of the people who develop activities based on traditional culture are people who are still far from the culture of writing, inventory cannot only rely on the role of local communities. Moreover, the local community itself is not too concerned about claims by foreign parties. Therefore, the role of the government is very important in this inventory, which certainly does not leave the role of local communities as traditional cultural informants. Concretely, it should be the government who plays an active role in carrying out this inventory activity.

Inventory is a step in Defensive protection. This defensive protection is intended as an effort to prevent unlawful use of the traditional culture of a society. The

steps taken by various countries and communities in utilizing this positive protection are by building databases related to the culture of their country. Thus, this database can be used as a comparison

document (prior art) when there is a claim against the traditional knowledge in question. Thus an inventory of the country's culture provides several advantages including:

**Table 1 Indonesian Cultural Assets Claimed by Other Parties**

No.	Types Of Cultural Assets And Regions	The Country / Company Claims
1	Batik, Jawa	Adidas
2	Ancientcodex, Riau	Malaysia
3	Ancient codex, west sumatera	Malaysia
4	Ancient codex, South Sulawesi	Malaysia
5	Ancient codex, Sultra	Malaysia
6	Rendang, west sumatera	Malaysia Citizen
7	Sambal Bajak, Central Java	Deutch Citizen
8	Sambal Petai, Riau	Deutch Citizen
9	Sambal Nanas, Riau	Deutch Citizen
10	Tempe, Jawa	Several Foreign Companies
11	Rasa Sayang-Sayange, song Maluku	Malaysia
12	Reog Dance, Ponorogo	Malaysia
13	Soleram song, Riau	Malaysia
14	Injit-Injit Semut Song, Jambi	Malaysia
15	Gamelan music instrument, Jawa	Malaysia
16	Kuda Lumping dance , Jatim	Malaysia
17	Piring dance , Sumbar	Malaysia
18	Kakak Tua song, Maluku	Malaysia
19	Anak Kambing Saya song, Nusa	Malaysia

## RESULTS AND DISCUSSION

### Efforts made in the Protection of SDGPTEF

#### a. International level

In 1967 an Amendment to the Berne Convention was carried out in article 15.4; provide international protection against Expression of Folklore (EF). In 1976 in Tunis Model Law the Copyright for Developing Countries included the protection of national protection specifically for EF. In 1982 WIPO and Unesco established a protection regulation model for EF. In 1978 the WHO first recognized that there was relevance between traditional medicines and pharmaceutical products.

In 1992 the Rio de Janeiro declaration was approved, known as the Convention on Biological Diversity (CBD), which had recommended the existence of benefit sharing for commercial use of natural resources. In the TRIPs Agreement, although it does not explicitly regulate the issue of SDGPTEF, the linkages between SDGPTEF and TRIPs standards are debated issues, and in 2001 the Doha WTO Ministerial Conference instructed TRIPs

Council to review several articles in TRIPs in TK protection efforts.

In 1996 the WIPO approved a Treaty that protects EF actors (WIPO Performance and Phonogram Treaty). In 1997 the WIPO-UNESCO World Forum on Protection of Folklore was held which approved an action plan:

- There needs to be an international standard of legal protection for EF.
- There needs to be a balance of acquisition between local communities as EF managers and users for commercial purposes.

In 1999 WIPO held a regional consultation on EF protection, for African countries carried out in March 1999, for the Asia-Pacific countries in April 1999, for Arab countries in May 1999 while for Latin American countries and Caribbean in the month of June 1999.

In 1998-1999 WIPO conducted a Fact Finding Mission to 28 countries to identify the relevance of IPR and SDGPTEF and hopes for these countries and their local communities for protection that could benefit them.

In 2000 WIPO with recommendations from the General Assembly formed the Inter Governmental Committee on Intellectual Property and GRTKF, which until now has convened until X but there has not been a significant result in relation to SDGPTEF protection.

b. National level:

- a) Law Number 5 Year 1994 concerning Ratification of the United Nation Convention on Biological Diversity.
- b) Law Number 7 of 1994 concerning Ratification of the WTO including the TRIPs Agreement.
- c) Law Number 19 of 2002 concerning Copyright, in Article 10 provides protection for the nation's cultural heritage.
- d) The Government is conducting discussions regarding the Draft Bill on SDGPTEF.

Principles of Mind Regarding the Regulations on the Law of the Protection of Regional Culture. In order to preserve traditional culture which is the identity of the nation and can save the expression of regional culture so that it is not claimed by foreign parties, legal rules are needed that can protect it. In accordance with its allotment needs, the law on regional cultural protection includes the law of law as well as private law. With public law, it is expected that the State or Government based on its power and authority to carry out various activities to protect regional culture, with private law, is expected to guarantee the civil rights of copyright holders to folklore and traditional creativity. It must be stated in legislative material.

To meet these legal requirements, Indonesia has actually ratified several international agreements, namely the General Agreement on Tariffs and Trade (GATT), the ASEAN Free Trade Agreement (AFTA), and the Trade Related Intellectual Property Rights (TRIPs) but the problem is that there is no one in TRIPs mentioning the importance of traditional protection of knowledge. So that it can be

said that the regulation of intellectual property rights in TRIPs has not optimally accommodated the protection of traditional intellectual property.

Indonesia has enacted Law Number 19 of 2002 concerning Copyright, which Article 10 reads:

(1) The State holds Copyright on prehistoric heritage works, history, and other national cultural objects.

(2) The State holds the Copyright on folklore and the results of folk culture that are shared, such as stories, stories, fables, legends, chronicles, songs, handicrafts, choreography, dances, calligraphy, and other works of art.

Explanation:

In order to protect folklor and other folk cultural results, the Government can prevent monopolies or commercialization as well as destructive actions or commercial use without seizing the Republic of Indonesia as a Copyright Holder. This provision is intended to avoid the actions of foreign parties that can damage the value of the culture.

Folklore is intended as a collection of traditional creations, whether made by groups or individuals in society, which show other social identities and their culture based on standards and values that are spoken or followed from generation to generation, including:

- a. folklore, folk poetry;
- b. folk songs and traditional instrument music;
- c. folk dances, traditional games; Art products include: paintings, drawings, carvings, carvings, mosaics, jewelery, handicrafts, clothing, traditional musical instruments and weaving

(3) For the announcement or multiplication of the Work referred to in paragraph (2), people who are not Indonesian citizens must first obtain permission from the agencies involved in the matter.

(4) Further provisions regarding Copyright held by the State as referred to in this Article, are regulated by Government Regulation.

Through Article 10 of Law Number 19 Year 2002 concerning Copyright, it is clear that the law intends to protect Copyright over Folklorism and other Traditional Creativity and make the State as the Copyright holder. Furthermore regarding the registration of works, Article 35 of Law Number 19 reads:

- 1) The Directorate General shall register the Works and record them in the General Register of Works.
- 2) The General Register of Works can be seen by everyone without being charged a fee.
- 3) Each person can obtain for himself a passage from the General Register of Works subject to a fee.
- 4) Provisions regarding registration as referred to in paragraph (1) do not constitute an obligation to obtain a Copyright.

## CONCLUSION

Based on the explanation above, the following conclusions:

1. Knowledge and expression of the traditional culture of the Indonesian people has a very wide and broad content and coverage. However, the richness of knowledge and expression of traditional culture has not been enjoyed economically for its use, especially for the people who originally owned it. Now a certain part of the knowledge and expression of that culture has been commercialized by other people or other nations. However, the commercialization does not provide a guarantee of justice for the person or group of people who have the initial knowledge and expression of the culture.
2. Misuse of knowledge and expression of traditional culture, belonging to the Indonesian people by other nations has become a reality. The IPR regime is apparently not sufficient enough to protect the knowledge and expression of Indonesian traditional culture from abuse. This happened because KHI as a

legal regime was developed on the basis of Western domination, to developing countries, including Indonesia.

3. The role of local governments in protecting cultural knowledge and expressions in each region, has not been based on a comprehensive concept, starting from its inventory, development and empowerment. While knowledge and expression of regional culture have been controlled by other parties. Kleim is important because it leads to a commercial monopoly that is detrimental to the area concerned.

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