



Cultural Heritage: Belongs to Indigenous People or The State?

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Abstract. This article discusses the legal protection of cultural heritage ownership and the fulfillment of indigenous peoples' exclusive rights to Traditional Cultural Expressions. Through a juridical review, this article explores the role of national and international law in protecting indigenous peoples' rights to cultural heritage. The protection of cultural heritage is the responsibility of the state, as stated in Article 38, paragraph (1) of Law Number 28 of 2014 concerning Copyright. Still, the state must also respect the rights of indigenous peoples as the owners of the exclusive rights of these cultural products. This is stipulated in the United Nations Declaration on the Rights of Indigenous Peoples, which states that the world government protects and guarantees customary law communities, including history, language, tradition, oral, writing systems, philosophy, and literature owned by customary law communities.

Keywords: Indigenous people, cultural heritage, legal protection

1. Introduction

Indonesia is a country that has extraordinary cultural diversity (culturally mega-diverse country). Indonesia has a rich cultural heritage that is very diverse, each region in Indonesia has a unique culture, language, customs, and artistic expressions. This diversity includes tangible cultural heritage, such as historical sites, artifacts, and traditional buildings, as well as intangible cultural heritage, such as dance, music, traditional ceremonies, languages, and traditional knowledge.[1]

Indonesia's cultural diversity is rich, reflected in the differences in geography, ethnicity, society, culture, religion, and beliefs in each region. Indonesia's historical heritage and traditional knowledge have great potential to be developed into various unique works and traditions from Sabang to Merauke.[2]

Traditional arts and techniques are valuable assets of Indonesia that have high economic potential. As the nation's identity, this cultural heritage is equivalent to international works and has become an invaluable asset.[3]

The intellectual ability of human beings by devoting their time, energy, thoughts, creativity, taste, and Karzai, which is called intellectual property (IP) becomes the object of intellectual property rights (IPR). Although individual rights are respected, the communal togetherness of Indonesian people is a factor that affects the protection of IPR. The concept of IPR gives exclusive rights to inventors or inventors, involving economic and moral rights.[4]

The concept of IPR gives exclusive rights to inventors or inventors, not only on economic rights but also on moral rights. Economic rights are the right to obtain an economic advantage over intellectual property. The creator or inventor has an exclusive right for himself or others to be able to exploit the economic value of his creation. Meanwhile, moral rights are the exclusive rights of the creator, which contain a prohibition for others to make changes to their creative works.[5]

The purpose of the formation of the Indonesian state as stated in the Preamble to the Constitution of the Republic of Indonesia in 1945, is to protect all Indonesian bloodshed and promote public welfare. Referring to the country's goals, the state must protect and strive for public welfare. In this case, among others, by providing protection to traditional knowledge and culture, belonging to the Indonesian nation since the State of Indonesia became sovereign as an independent country.

One of the manifestations of the state's protection of traditional culture is the Government's efforts to return historical objects looted during the colonial period. This is an effort to preserve the cultural heritage of former colonial countries. One example is the repatriation of 288 artifacts from the Netherlands to Indonesia involving the relics of the Singasari Kingdom and the Badung Kingdom. These objects are believed to have great historical, social, and spiritual value for their region of origin before the formation of Indonesia as a state. [6]The return of historical objects from the Netherlands to Indonesia is an important step in a broader global repatriation effort. These traditional cultural heritage artifacts are not only a symbol of cultural identity but also pose new challenges related to preservation and management after being returned to the country. Collaborative efforts between governments, local institutions, and indigenous peoples are needed to ensure that this cultural heritage can continue to be preserved and accessed by future generations and can also provide benefits to the indigenous people of the region where the artifacts originate.

In the current era of globalization, countries in the world are starting to look for alternative new products to trade. Including products based on traditional knowledge and traditional cultural expressions without any contribution to the state or to the community of the owner. The commercialization of traditional knowledge and traditional cultural expressions is a problem because it is obtained without the permission of Indigenous peoples as creators. Therefore, the Government of Indonesia needs to take important steps

to protect traditional knowledge and traditional cultural expressions, as communal intellectual property that also protects the rights of indigenous peoples.

2. Method

This study adopts a normative juridical approach by analyzing in depth the laws and regulations that are the legal basis for the management of traditional knowledge. This approach emphasizes the study of applicable legal norms, although empirical data can make a valuable contribution to enriching legal analysis.[7]

3. Result and Discussion

3.1. Legal Protection of Communal Intellectual Property Rights

Legal protection is a manifestation of the principles of justice for the community, legal certainty, and utility. Legal protection can also be interpreted as protection given to a person or group of people to provide a sense of security, certainty, and justice to rights in the community and the life of the nation and state. Such protection can be in the form of services, laws, regulations, or other policies, including in the field of law enforcement, in this case, against intellectual property. In the context of intellectual property, this legal protection is becoming increasingly crucial in encouraging innovation and economic growth.[8]

Legal protection for Traditional Cultural Expressions has received increasing attention in line with the awareness of the value and unique contribution to human cultural diversity. The reason for the importance of this protection is based on a strong philosophical and practical foundation. First, legal protection reflects the principle of justice by providing recognition and protection to communities of traditional knowledge owners and users of their collective intellectual rights. Second, legal protection serves as an important conservation tool in preserving traditional knowledge from the threat of extinction due to modernization and globalization. In addition, this protection also helps preserve a community's cultural identity and traditions, thereby strengthening social ties and cultural continuity. Legal protection also acts as a shield that protects local communities from the irresponsible exploitation and commercialization of traditional knowledge to ensure the sustainability and well-being of society as a whole.[9]

The awareness of the Indonesian people about the urgency of legal protection of cultural heritage is still low. Although this concern cannot be generalized, certain communities have significant concerns about this issue, especially in the context of commercial exploitation of cultural heritage. This is in line with the global dynamics where developing countries are

often victims of cultural appropriation practices by developed countries. The injustices arising from the use of traditional knowledge without a fair benefit-sharing mechanism have prompted the emergence of an awareness of the importance of comprehensive legal protection of cultural heritage.[10]

The protection of traditional culture has been regulated by national and international legal instruments, which is not a new thing. The protection of Traditional Culture internationally was started by the World Intellectual Property Organization (WIPO) in 1976 by developing The Tunis Model Law on Copyright (Tunis Model Law). After the Tunis Model Law, in 1982 WIPO and the United Nations on Education, Social and Cultural Organization (UNESCO) created an instrument for the protection of Traditional Culture by drafting The Model Provisions for National Laws on the Protection of Expressions of Traditional Culture Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions). [11]

Negotiations on whether or not to protect Communal Intellectual Property at the international level have been going on for approximately 18 years since the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional (IGC GRTKF) forum in 2001. IGC GRTKF itself is under the auspices of the World Intellectual Property Organization (WIPO). Indonesia itself is one of the countries that supports the establishment of an international agreement on the protection of KIK. This was done, among others, through the establishment of the Bandung Declaration of the New Asian African Strategic Partnership (2007), where the Government of Indonesia together with the signatory countries of the declaration, said that it is very necessary to accelerate the formation of a binding international agreement to provide IP protection for PT and NRE: "... the Bandung Declaration of the New Asian African Strategic Partnership submitted to WIPO that same year by Indonesia stresses the "urgent need to expedite the establishment of international legally binding instruments" to protect traditional knowledge, including sui generis mechanisms (WIPO Doc. WIPO/GRTKF/IC/11/12 (2007)(submitted by Indonesia)).[12]

The Berne Convention for the Protection of Literary and Artistic Works (Bern Convention) provides in paragraph 4 of Article 15 which authorizes States parties to the Bern Convention to protect works whose owners are unknown, for and on behalf of such owners, as long as it can be ascertained that the person concerned is a citizen. The State may appoint a competent institution at the domestic level to provide protection and carry out law enforcement to realize the protection: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."[13]

The United Nations Declaration on Indigenous Peoples Rights or known as the 2007 United Nations Declaration on the Rights of Indigenous Peoples, explicitly recognizes and regulates traditional cultural knowledge and expressions. The rights of indigenous peoples

that are recognized cover a wide scope, originating from social and cultural structures, political economy, history, and spiritual philosophy. Recognition is also given to traditional actions or practices as well as indigenous peoples' cultures that provide benefits or contributions to balanced and sustainable development, as well as to good environmental management. [14]

Convention for The Safeguarding of The Intangible Cultural Heritage 2003 and Convention on The Protection and Promotion of The Diversity of Cultural Expression 2005 in the UNESCO forum. This convention has been ratified by the Indonesian government in Presidential Regulation of the Republic of Indonesia Number 78 of 2007 concerning the Ratification of the Convention for the Protection of Intangible Cultural Heritage. Meanwhile, the Convention The Protection and Promotion of the Diversity of Cultural Expression 2005 was ratified through Presidential Regulation of the Republic of Indonesia Number 78 of 2011 concerning the Ratification of the Convention on the Protection and Promotion of Cultural Expression. From the point of view of the concept of intellectual property rights, the two conventions have reaffirmed the importance of protecting "Communal Moral Rights" as part of the "Moral rights of a nation" of the owners of the inheritance of traditional knowledge and traditional cultural expressions. Therefore, law enforcement to maintain both economic rights and moral rights for the exploitation of each work of the nation's heritage is left to the government as the right holder so that it can be managed properly.[15]

The uniqueness and main characteristics important for recognition and protection are related to communal law over the ownership of traditional knowledge and traditional cultural expressions. [16]

3.2. State as A Guardian

Article 38 paragraph (1) of Law Number 28 of 2014 on Copyright states that the protection of cultural heritage is the responsibility of the state, as stated. Then, in the same Law, Article 10 states that the State is the copyright holder of Folklore, and cultural works produced by citizens will become collective products. This is stipulated in the United Nations Declaration on the Rights of Indigenous Peoples that world governments protect and guarantee Indigenous peoples, including history, language, oral traditions, writing systems, philosophy, and literature owned by Indigenous peoples

According to the explanation in Article 38 paragraph (1) of Law No. 28 of 2014 concerning Copyright, Traditional Cultural Expression includes one or a combination of the following forms of expression:

- a. Verbal textual, both oral and written, in the form of prose and poetry, in various themes and content of the message, which can be in the form of literary works or informative narratives;

- b. Music, including, among other things, vocals, instrumentals, or combinations thereof;
- c. Movement, including, among others, dance;
- d. Theater, including, among others, puppet performances and folk plays;
- e. Fine art, both in two-dimensional and three-dimensional forms made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, and others or a combination thereof; and
- f. Ceremonies.[17]

The inharmony of regulations regarding Communal Intellectual Property between one law and another, as well as the lack of clarity in the framework of the concept of its regulation, have exacerbated the problem of the claim and use of Indonesian culture by other countries, either partially or in whole, for commercial purposes. Efforts to impose the concept of ICC as part of the Intellectual Property Rights (IPR) system, especially under the protection of Copyright, need to be reconsidered. This problem can cause the result of cultural heritage of traditional cultural products to be abandoned because it is ignored by indigenous peoples because they consider this to be an obligation of the state.

So far, the Government, through the Director General of Intellectual Property Rights, has created an electronic information system for recording and inventorying various forms of Traditional Cultural Expression works in the country, although it must be admitted that it has not been running optimally. Therefore, the Regional Government as a custodian, must be more active in inventorying Traditional Cultural Expression works in their respective regions and recording them through the available electronic information system.[15]

The state, as the copyright holder of traditional cultural expressions, obtains exclusive rights to the copyrighted work. Exclusive rights, as referred to, are the rights to publish, reproduce, translate, adapt, transform, distribute, perform, and publish. However, culture is always synonymous with the people who carry it, in general, several parties may be the subject of property rights holders of traditional cultural expressions as for the parties in question are:[18]

- a. Indigenous peoples who are the original owners of traditional cultural expressions;
- b. The Central Government and Regional Governments that play the role of protectors and managers;
- c. Third parties who want to take advantage of culture while still paying attention to values and ownership of rights

4. Conclusion

Traditional Cultural Expression is a part of cultural heritage that can motivate to increase intellectual creativity for indigenous people; even though this intellectual creativity can improve the economy of Indigenous peoples, so protection is needed from deviant authority from certain groups or foreign parties who want to take advantage of the culture of the Indonesian nation. The role of the government, in this case the Ministry of Culture and

Tourism, the Department of Law and Human Rights, and related agencies, needs to carry out preservation, which includes excavating, preserving, developing, and protecting the cultural heritage of tribes in Indonesia. The government's role in the protection of cultural heritage originating from indigenous peoples must be regulated in a more specific regulation. This is to regulate the limits of state authority in control, but also to protect exclusive rights for indigenous peoples as creators of the Traditional Cultural Expression (TCE). The state is obliged to inventory and maintain traditional cultural expressions. The use of traditional cultural expressions must pay attention to and protect the values that live in the society in which they are carried out. Government regulation regulates copyrights held by the state for traditional cultural expressions, but copyrights related to traditional cultural expressions held by the state must have further government regulations.

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