Traditional Cultural Expressions Management: A Legal Perspective From Indonesia

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Abstract
The issue of the importance of legal protection for Traditional Cultural Expressions (TCEs) in Indonesia has begun to become a concern since the claims for the *Reog Ponorogo* and *Pendet* dances were widely published as part of Malaysia's tourism campaign. Using a normative legal approach, this paper aims to examine the legal protection of TCEs in Indonesia based on several important regulations ranging from Law Number 28 the year 2014 on Copyright, Law Number 5 the year 2017 on the Advancement of Culture, and Government Regulation Number 56 / 2022 on Communal Intellectual Property, some observations concerning the implementation of TCEs management in Indonesia is also addressed. The result shows that First; TCEs-based regulations in Indonesia are the emphasizing of state's authority. Second, the preservation, protection, and productive utilization require government action and community participation. Third, *Sui generis* regulation developed from plurality and the core concepts of communality around TCEs perceived to be more adaptive for the dynamic society that keeps growing and fosters the growth of culture and cultural expressions. Fourth, inventory of TCEs is the important initial step of protection as the implementation of defensive mechanism protection and to prevent the misappropriation of TCEs, ensure disclosure of origin and proper attribution of benefit sharing to the custodian and provide the participative opportunity for the custodian in the preservation, protection and productive utilization of the TCEs. Lastly, in terms of implementation, the government needs to empower the cultural human resources, cultural organization, and cultural institutions.

Keywords: Culture Preservation, Legal Protection, Traditional Cultural Expressions

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Introduction

At the 39th UNESCO General Assembly took place in UNESCO Headquarters – Paris, Francesco Bandarin, UNESCO's Assistant Director General of Culture stated that UNESCO has considered Indonesia to be a superpower country in terms of culture (Purwanto, 2017). Indonesia is located at the intersection of 2 continents and 2 oceans consists of more than 17,500 islands and is one of the most culturally and linguistically diverse nations composed of more than 500 ethnic groups practicing 746 vernacular languages (Butler, 2016). Various local cultures are integral parts of Indonesian cultural heritage. The expressions of culture are practiced, preserved, maintained, and developed among generations of local communities in Indonesia for the sake of their well-being and existence (Roisah, 2017). The diversity of tribes, languages, customs, and beliefs in Indonesia is in line with the birth of various traditional cultural expressions and contributes highly valuable intellectual property to Indonesia (Rachmanullah et al., 2018).

Traditional Cultural Expressions (TCE) is one of the most emerging issues in protecting traditional and communal intellectual property (Purwandoko et al., 2021). The issue of the importance of legal protection for TCEs in Indonesia has begun to become a concern in the last few years when the issue of allegations of claims for the *Reog Ponorogo* and *Pendet* dances by Malaysia was widely published as the part of Malaysia tourism campaign (Ariani et al., 2022). Several cases of claims by developed countries on Indonesia's TCEs raise the tension as well as raise the awareness of urgency concerning the proper protection for TCEs.

The Constitution of the Republic of Indonesia mandates the state to develop its national culture, guarantee the rights and freedom of all components of its people in preserving and developing the culture, and benefit from the product of cultures. Operationally, the constitutional mandate raises the obligation and authority of the state to formulate policies, regulations, and administrative measures concerning the preservation, protection, and productive utilization of TCEs (Roisah, 2017). In terms of regulation, TCEs are regulated by several legal regulations, however, it is important to note that many custodians of TCEs still maintain traditional way and are mostly not equipped with adequate legal literacy and cultural sensibility concerning TCEs as legal rights of certain communities and state, thus the legal and cultural implications haven't understood comprehensively.

This paper aims to examine the legal protection of Traditional Cultural Expressions in Indonesia based on several important regulations ranging from Indonesian Law Number 28 year 2014 on Copyright (Copyright Law), Indonesian Law Number 5 year 2017 on Advancement of Culture (ILAC – 2017) and Government Regulation Number 56 / 2022 on Communal Intellectual Property and some observations concerning the implementation of Traditional Cultural Expressions management in Indonesia.

Research Method

The research uses a normative legal approach combined with a conceptual approach. The legal approach is carried out by analyzing the Traditional Cultural Expressions – related regulations in Indonesia consisting of Law Number 28 year 2014 on Copyright (Copyright Law), Indonesian Law Number 5 year 2017 on Advancement of Culture (ILAC – 2017), and Government Regulation Number 56 / 2022 on Communal Intellectual Property. Conceptual approach carried out through observation concerning the implementation of Traditional Cultural Expressions management in Indonesia. The analysis model used secondary data

sourced from the regulations supported by tertiary legal materials including journal articles and literature related to TCEs.

Discussion

1. Legal Protection of Traditional Cultural Expressions in Indonesia

1.1. Legal Protection of Traditional Cultural Expressions Under Indonesia Copyright Regime

The ratification of international agreements such as the *Berne Convention* and *TRIPs Agreement* provides the background for IP protection in the national legal system. Article 15 paragraphs 4 Berne *Convention* regulates the protection of an anonymous work/creation, whose creator is not known through the appointment of a competent authority in a country to administer, manage, and report the copyrighted work in the form of TCEs to the Director General of WIPO. Ownership of creative works in the form of TCEs is exclusively owned by the country that deposits the TCEs with the Director General of WIPO as a representative for the interests of the creator who created the creative work in the form of a cultural expression.

In this section, TCEs will be examined from the legal perspective based on Law Number 28 year 2014 on Copyright (Copyright Law). The rights of copyright are the intellectual property in the field of science, art, and literature that have a strategic role in supporting the development of the nation and promoting the general welfare as mandated by the Constitution of the Republic of Indonesia 1945 (Annalisa Y, 2018).

According to the Copyright Law, copyright-protected TCEs include both singular and multiple expressions, such as verbal textual, the scope of which oral and written in the form of prose and poetry with a variety of themes, as well as in the form of literature and narrative; Music (vocals, instrumentals and/or combinations); Motion (dances), Fine Arts (two or three dimensions made of leather, wood, bamboo, metal, paper, ceramics, textiles); Theatre (folk plays and puppets); traditional ceremonies (Erlina et al., 2023). The copyrights for TCEs are held by the state (Article 38 verse [1]) and the state is obliged to formulate inventory, preserve, and maintain TCEs (Article 38 verse [2]). In addition, the utilization of TCEs shall consider the values that live in the custodians that practice them. However, further provision on the right held by the state on TCEs as mandated by Article 38 verse (4) Copyright Law is not regulated yet. In addition, legal protection of TCEs by Copyright laws and treaties does not appear to have been particularly effective or expedient since there are no sufficient measures to control the proper utilization, commercial use, and benefit sharing of TCEs.

Indonesian Copyright Law shows that the state acknowledges communal rights over TCEs while also acknowledging the protection of the individual as the creator of the derivative works that are potentially sourced from TCEs. In this case, the Indonesian Government attempts to balance between the legal protection for the communities as the custodian of TCEs and the legal protection for the individual creator by placing the fundamental rights of TCEs in the hands of the custodian community to prevent the exclusive monopoly of TCEs while still maintain the proportional access for utilization, creativity, and innovation.

However, despite the regulation of TCEs in Copyright Law, numerous contentions and debates arose for several reasons: **First:** TCEs are related to a collective entity (a collection of people, communities, or groups). TCEs do not have individual characteristics because

TCEs express a shared cultural identity.(Lily Martinet, 2020). **Second,** the copyright emphasizes the aspect of originality, while TCEs are handed down and shared from generation to generation. (Wendland, 2004) **Third,** TCEs are constantly evolving, developing, and being recreated within the community.

Naomi Mezey has noted that TCEs as the property is in contradiction with the core concept of copyright as intellectual property. In addition, the traditional communities in Indonesia are more concerned about the survival and maintenance of their cultural expressions than the legal exclusivity of their works. (Susanti et al., 2019) This condition demands an active role from the government to provide legal protection that is not just appropriate but also easy to comprehend and implement by the community as the custodian of TCEs. The comprehension and acknowledgment of the community are important aspects of the legal protection of TCEs as Satjipto Rahardjo argues that legal protection is protecting one's interests by allocating power where the legal protection is provided as the form of shared interest in national development efforts.

1.2. Legal Protection of Traditional Cultural Expressions Under the Law of Advancement of Culture

Article 38 verse (1) Copyright Law states that the Copyright for TCEs is held by the state. In addition, Article 38 verse (2) regulates that the State is obliged to inventory, safeguard, and preserve TCEs, and further, Article 38 verse (4) Copyright Law regulates that further provision regarding custodianship in the form of state's copyright for TCEs will be regulated by Government Regulations, however, to date, there has been no government regulation that specifically regulates the legal protection of TCEs. As a consequence, the protection of TCEs within the scope of Copyright Law is still experiencing several obstacles in its implementation.

On April 27, 2017, Indonesian Law Number 5 of 2017 on Advancement of Culture (ILAC-2017) was enacted as the legal-formal basis for managing Indonesia’s culture. Cultural development and community advancement are inseparable aspects; therefore it's very important to engage the society in the implementation of advancement of culture. Article 1 point 3 ILAC defines the Advancement of Culture as the effort to improve cultural resilience and Indonesian cultural contribution to the development of world civilizations through Cultural Protection, Development, Utilization, and Capacity Building / Empowerment. **Protection** is defined as the effort to preserve the sustainability of Culture through inventorying, safeguarding, sustentation, salvation, and publication. **Development** is the effort to vitalize the ecosystems of Culture and to improve, enrich, and propagate Culture. **Utilization** is the effort to use Objects of Advancement of Culture to strengthen national ideology, politics, economy, social life, culture, defense, and security in achieving national goals. **Capacity Building / Empowerment** is the effort to empower Cultural Human Resources, organizations, and institutions to improve and expand the community's active roles and initiatives.

In relation to the database, article 1 point 12 ILAC regulates the Integrated Database on Culture is a system of primary data on Culture that integrates all data from various sources. Article 15 ILAC regulates the Minister [1] establishes an Integrated Database on Culture to support the execution of the Advancement of Culture. The Integrated Database on Culture

[1] Minister refers to the Minister responsible for Cultural Affairs

contains data on objects of Advancement of Culture, Cultural Human Resources, Organizations, and institutions, cultural facilities and infrastructures, and other relevant data on culture. The data managed by the ministries or agencies are linked to the Integrated Database on Culture which must be accessible to any person. However, the management of the Integrated Database on Culture must take into account national sovereignty, security, and resilience.

Article 16 ILAC regulates the inventorying of the Objects of Advancement of Culture consisting of the following stages: recording and documenting, stipulating, and data updating that is conducted through the Integrated Database on Culture. According to Article 17 ILAC, the Central Government and/or Regional Government in accordance with their authority must record and document the objects of the Advancement of Culture. As a form of participatory measure, Article 18 ILAC regulates that any person[2] may record and document objects of Advancement of Culture with the facilitation of central government and/or regional government. In addition, further provisions are regulated by Government Regulation. Article 19 ILAC regulates that the Minister stipulates the result of the recording and documentation of Objects of Advancement of Culture through the stages of verification and validation. Considering the evolving and growing nature of TCEs, Article 20 of ILAC regulates that any person may update data on Objects of Advancement of Culture the Central Government and/or Regional Government must update data on Objects of Advancement of Culture that have been stipulated. These updates of data must be conducted periodically and continuously.

1.3. Legal Protection of Traditional Cultural Expressions Under the Government Regulation of Communal Intellectual Property

Indonesia as an archipelagic country has a diverse cultural diversity that produces communal intellectual property (Communal IP). Cultural aspects are an important element in the development of Communal IP in Indonesia considering that Communal IP is generally based on community culture. Communal IP has a distinctive characteristic, in that it contains an element of collectivity in the sense that the benefits and common interests are the ultimate priority. According to Government Regulation Number 56 / 2022 on Communal Intellectual Property, Communal IP consists of Traditional Knowledge, Geographical Indications and Traditional Cultural Expressions. This regulation was prepared based on the consideration that Indonesia's Communal IP potentially become the basic capital of national development and for the purposes of protection, preservation, development and the purposes of protection, development and/or utilization needs to be managed and maintained in the form of inventory.

Article 9 stipulates that the data concerning TCEs inventory should at least contain the name of TCEs; the Custodian of the TCEs; the Classification of TCEs; the Region / Location of TCEs and the Description of TCEs. Inventory is carried out through electronic or non-electronic documentation/archiving; Articles 14 and 15 mandate the establishment of a Data Center that at least contains the name, form, and nature of the Communal IP, the custodian of the Communal IP, the custodian of the Communal IP, the location/area of IP, the description of Communal IP, the documentation of Communal IP and other supporting data. This Data Center is open to the public unless otherwise determined by the Minister.

[2] Any person is an individual, a group of individuals, a community organization, and/or a business entity in the form of a legal entity in the form of a legal entity or a non-legal entity

Article 16 of Communal IP law regulates that every person can submit an objection to the Minister regarding the Communal IP contained in the Data Center in the event that the data of communal IP is not in accordance with the social institutions that apply in communal society and / or the custodian. In the event that there are objections, the Minister mediates with the relevant parties to examine the objections and can then accept or reject the objections from the applicant. If the Minister receives an objection, the Minister can change or delete the Communal IP from the Data Center.

2. The Management of Traditional Cultural Expressions in Indonesia: Some Observations

Indonesia has the highest diversification of cultures and cultural expressions in the world. Ironically, the lack of awareness, appreciation, understanding, and proper infrastructure raises the threat to the existence of TCEs, thus, numerous of Indonesia's cultures and cultural expressions are prone to experience extinction due to the inexistence of proper mechanisms of preservation and protection.

In the context of natural rights from the concept of ownership based on John Locke's labor theory of acquisition people/groups of people who make labor/work on resources that are in the public domain get natural property rights as the result of their labor/work (Moore, 2012). This property rights is acknowledged and protected by law. The utilization, preservation, and maintenance of TCEs carried out by the community is a form of "labor" and this becomes the basis and legitimacy for communal ownership of TCEs which must be respected and protected.

The development of a knowledge-based economy where intellectual property is not only related to legal protection assets but also has an impact on the macro economy of a country, among other things, it can be used to increase exports of quality products, promote technological progress, and encourage research and development, carrying out product development as a local and national identity.

Communal ownership of TCEs is naturally inherent in the community which has created, used, maintained, and developed TCEs in a long tradition, across generations and has become a part of the community's social identity (Roisah, 2014). Cultural globalization represents massive chances for Indonesia to showcase the nation’s culture and creativity through TCEs (Santyaningtyas & Noor, 2016). However, research from Kastowo (2020) argues that the economic right to TCEs has not been used optimally in the measures to improve the regional economy (Kastowo, 2020).

The development of a knowledge and culture-based economy places TCEs in a central position not only in the dimension of legal protection but also in relation to productive and sustainable commercial utilization through product development as a local and national identity. Therefore, rules related to IP combined with technological instruments may function as both a facilitator and an inhibitor to appropriately accommodating TCEs and indigenous communities as TCEs custodians and producers within the global marketplace for cultural content (Burri, 2010).

TCEs-based regulations in Indonesia (Copyright Law, ILAC, and Government Regulation) show the emphasis on the state's ownership over TCEs. The ownership is in the dimension of the state's authority. According to Jean Jacques Rousseau, the state's authority is built from

the social contract to form the unity to defend and protect the individual rights, communities' rights, and ownership of each individual and community. In this sense, the state's ownership over TCEs comes from the people and communities, therefore it is considered to be the implementation of sovereignty where the state's rights over TCEs are not absolute but are still bound by law. State sovereignty also raises the obligation of the state to regulate, manage, preserve, and support the whole potential utilization of TCEs.

Top-down approach addressed by Indonesian Law Number 5 of 2017 on Advancement of Culture (ILAC-2017). Article 37 ILAC regulates that major industry and/or foreign parties that will utilize objects of advancement of culture for commercial purposes must have a license from the Minister. The requirements for a license are approval based on informed consent, providing a benefit-sharing scheme, and acknowledging the origin of the objects of advancement of culture. The central government must address the benefit sharing to vitalize and sustain the ecosystem related to the object of the advancement of culture. Further, Article 38 ILAC regulates that major industries and/or foreign parties that violate the provisions/requirements of ILAC and/or misuse the license shall be subject to administrative sanctions. The administrative sanctions shall be in the form of: verbal admonition, written admonition, administrative fines, and temporary suspension of activity and / or revocation of license.

To formulate and provide the protection of TCEs, the state, and stakeholders need to have certainty about the scope of the object of protection. Roisah argues that the *sui generis* regulation model of TCEs would be more comprehensive since the *sui generis* regulation can be formulated to be more suitable for the characteristics of TCEs. *The Sui generis* system is expected to prevent individualism, privatization, and monopolistic ownership and utilization of TCEs. Formulating the protection of TCEs in *sui generis* regulation also presents the opportunities to craft the regulation according to the necessities of the state and stakeholders rather than to be bound by the obligation to build the law in accordance with standard norms of TRIPs agreement which is characteristically different with the cosmology of local communities as TCEs holder and custodian. (Roisah, 2017) *Sui generis* regulation developed from plurality and the core concepts of commonality around TCEs will create an adaptive and dynamic society that keeps growing and fosters the growth of culture and cultural expressions.

The inventory of TCEs is the important initial step of protection (Kastowo, 2020) as the implementation of defensive mechanism protection. It is argued that digital technology potentially generated various opportunities related to the inventory of TCEs (Burri, 2010). There are several ways in which digital technologies may act as benevolent factors. Some digital technologies can be the instrument to protect, preserve, and promote TCEs, especially in their dynamic utilization of TCEs. Digital tools can support the formulation of customized databases that enable the authorized members to define and control the rights, accessibility, and reuse of their digital resources, impose customary law of the custodian society about secret/sacred information or culture; prevent the misappropriation of TCEs or utilization in inappropriate ways, ensure disclosure of origin and proper attribution to the custodian and provide the participative opportunity for the custodian to describe and articulate their TCEs in their own words (THE WIPO PUBLICATION, 2003).

Safeguarding of TCEs in terms of preservation, protection, and productive utilization must involve individuals, communities, and government. However, with regard to community participation, the fact that local communities as the custodians of TCEs use digital media less

often is no doubt a challenge to the integration of government action and community participation. Further, many public sector units and institutions in general point to the lack of information available on digital culture. In addition, training technical teams tend to be complex and the links between the different units that collect cultural data are not always firmly established. Also within the realm of access, it should be noted that despite their potential to bridge the gap between urban and rural populations and to integrate persons belonging to minorities, new technologies can produce the opposite effect, in many cases, and they merely increase the disparity between the parties with the advance support of technology and access to technology.

Inventory as the form of defensive protection is important as proof of ownership in the event of cultural claims by foreign or private parties who want to get economic benefits from the use and utilization of TCEs, either directly or their derivatives. In addition, the database can be the source of information regarding the benefit sharing framework. The research from Finger and Schuler reveals that the purpose of benefit sharing is primarily the distribution of advantages and benefits from the creativity and their thinking.(Finger & Schuler, 2004) Benefit sharing is not just about economic benefit; ILAC mandates the capacity building and empowerment in Article 39: The Central Government and Regional Government must provide capacity building / empowerment for advancement of culture to increase the quantity and improve the quality of cultural human resources, cultural organization and cultural institution. Capacity building and cultural institutions are implemented through the improvement of education and training in cultural fields, standardization, certification, and capacity building for cultural institutions and cultural institutes' governance.

Conclusion

The assets of Traditional Cultural Expressions (TCEs) are the nation's resources that hold massive potential to be engineered to strengthen the nation's identity and increase communities' welfare. TCEs-based regulations in Indonesia show the emphasis on the state's ownership over TCEs in the dimension of the state's authority. It's important to formulate the integration of TCEs-related regulations, further, the government and the community must take necessary action as the supporter of the preservation, protection, and productive utilization of TCEs. *Sui generis* regulation developed from plurality and the core concepts of communality around TCEs perceived to be more adaptive for the dynamic society that keeps growing and fosters the growth of culture and cultural expressions.

The inventory of TCEs becomes the important initial step of protection as the implementation of defensive mechanism protection. There are several ways in which digital technologies may act as benevolent factors, however despite their potential to bridge the gap between urban and rural populations and to integrate persons belonging to minorities, digital technologies can produce the opposite effect, in many cases, and they are merely increasing the disparity between the parties with the advance support of technology and access to technology. In terms of implementation, the Central Government and Regional Government must provide capacity building/empowerment for the advancement of culture to increase the quantity and improve the quality of cultural human resources, cultural organization, and cultural institutions.

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