

THE PROTECTION FOR TRADITIONAL CULTURAL EXPRESSION IN INDONESIAN CONSTITUTION AND NATIONAL LAW SYSTEM

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ABSTRACT

Indonesia is a country with cultural diversity, ethnicities, customs arts, and literature. It contributes to the abundance of Indonesia's cultural expressions that originated from indigenous people and might earn economic values. Unfortunately, there are several cases of abuse by foreigners like Malaysia that inappropriately claim Indonesian traditional cultural expression as theirs. This even shows in an ad on Discovery Enigmatic Channel in Malaysia, showing pendet dance, Wayang, and Reog Ponorogo in Malaysia Tourism advertising. They may become harm for the existence of Indonesian traditional cultural expression and its economic values. This study used the normative law method, which is perspective by reviewing The 1945 Constitution and Law 28 of 2014 on Intellectual Property and several other supporting regulations. This study intends to examine the protection of traditional cultural expressions in the Indonesian constitution and in the national legal system. As the result Traditional culture is mentioned in the 1945 Constitution in the article 28I (3), 32 (1), 32 (2). While preventive protection is regulated in Regulation of the Minister of Law and Human Rights number 13 of 2017 on communal intellectual property Data that communal intellectual property, and repressive protection is regulated in Law Number 28 of 2014 on Intellectual Property and several local regulations, such as West Java provincial regulation Number 10 of 2018, Gorontalo provincial regulation Number 7 of 2017, Bengkulu Mayor Decree number 212 of 2020.

Keywords: Law protection, traditional cultural expression, Indonesian national law system.

INTRODUCTION

Indonesia is the largest archipelago in the world with an estimated total of 17.504 islands.¹ Besides, Indonesia is a country with cultural diversity, ethnicities, customs arts, and literature.² It contributes to the abundance of Indonesia's cultural expressions that originated from indigenous people. However, Indonesia has 1.128 tribes spread throughout territory of Indonesia with more than 300 dialects of regional languages, and more than 3000 native Indonesian dance.³ It demonstrates a national potential that needs to be safeguarded, preserves and developed as a solid point to attract domestic and international tourists. As for economic values obtained include the following:

1. Traditional cultural expression can be a source of income in an area when tourists want to know the characteristics of Traditional Cultural Expressions that exist. It is even hoped that it can introduce traditional cultural expressions to the international community.
2. Provide employment for people who work as actors of Traditional Cultural Expression.⁴

One of the several cases of abuse of expression traditional Indonesian culture by foreigners is the inappropriate claim by Malaysia, where on the Discovery Enigmatic Channel in Malaysia, pendet dance, Wayang, and Reog Ponorogo are advertise as the culture of Malaysia in their Tourism advertising.⁵ Then the other case of traditional cultural expressions is the registration of stone motif in silverware from Bali by John Hardy International, Ltd. The registration of this stone motifs makes Balinese craftsmen, Ketut Deni Aryasa, unable to use motifs similar to what he has long known as crocodile skin motif.⁵ These cases are certainly closely related to the legal protection of traditional cultural expressions in Indonesia.

Indonesia is a state of law. Formal conception of a state law aimed at the way in which the law was announced (by the authorities), the clarity of norms and temporal dimensions of the promulgation of the norm. The state law is not addressed to resolve legal proceedings on the fact of the law itself, and is not related to whether the law is good or bad. While the substantive conception of law state moves over it, it still recognize the formal attributes. While the substantive conception of law state moves over it, while recognizing the formal attributes. The conception of substantive law states moves further. Basic rights or derivatives become the foundation used to distinguish between good law that meets the basic rights and bad laws that ignore basic rights. Formal concept of state laws focuses on the feasibility of legal sources and forms of legality while substantive concept also includes requirements on the content of legal norms.⁶ Furthermore, legal norms in Indonesia derived from the 1945 Constitution that act as the basis of all laws in Indonesia.

¹ Mahendradhata, Y. Trisnantoro, L. Listyadewi, S. Soewondo, P. Marthias, T. Harimurti, P. Prawira, J. (2017). "The Republic of Indonesia Health System Review". *Health System in Transition*. Vol. 7(1).

² Widiastuti. (2013). "Analisis Swot Keragaman Budaya Indonesia". *Jurnal Ilmiah WIDYA*, Vol. 1(1), 8-14.

³ Wedhatami, Bayangsari, Budi Santoso. (2014). "Upaya Perlindungan Ekspresi Budaya Tradisional Dengan Pembentukan Peraturan Daerah". *Law Reform*, Vol. 9(2), 32-48, 33, DOI: 10.14710/lr.v9i2.1244432-48.

⁴ Putri, S.W. Suryadi, Nuraini, L. (2021). "Analisis Yuridis Problematika Pencatatan Ekspresi Budaya Tradisional di Kabupaten Natuna". *Student Online Jurnal*, Vol. 2(1). 706.

⁵ *Ibid.*,

⁶ Hamzani, A.I. (2015). "Towards Indonesia As a State Law Be Happiest People". *International Journal of Business, Economics and Law*. Vol. 6(4), 152.

The term constitution comes from the word *constituer* which means to form, that is, the whole of the rules both written and unwritten which regulate in a binding manner the way a government is held in a society.⁷ In the explanation of the 1945 Constitution it is said: "The constitution of a country is only a part of its basic state law. The basic law is written basic law, while in addition to the National Law it also applies to an unwritten basic law, which is a basic rule that arises and is maintained in the practice of state administration, even if it is not written."⁸

In the current Indonesian law, the hierarchy of legal norms is regulated in MPR Decree of 2000 on The Source of Law and Hierarchy of Laws. The basic hierarchy includes The 1945 Constitution, the "Decree of the People's Consultative Assembly, the Laws, an Interim Law, the Government Regulation, Presidential Decree, and Regional Regulation."⁹

As described above that Indonesia has a wealth of traditional cultural expressions that have the potential to become a source of income as well as a legal state, so by taking into account the legal hierarchy in Indonesia, this study intends to examine the protection of traditional cultural expressions in the Indonesian constitution and in the national legal system.

RESEARCH METHOD

This is a normative law research applying a legal approach and a conceptual approach. The legal protection is carried out to review the laws and regulations relating to traditional cultural expression in Indonesia.

The model data used in this research was a secondary data sourced from the literature study. The secondary data made up of primary legal material, such as The 1945 Constitution, Law Number 28 of 2014 on Intellectual Property, Regulation of the Minister of Law and Human Rights number 13 of 2017 concerning communal intellectual property Data that communal intellectual property, Government Regulation No. 38 of 2007 on the division of government affairs between the Government, Provincial Government and District/City Government, West Java provincial regulation Number 10 of 2018, Gorontalo provincial regulation Number 7 of 2017, Bengkulu Mayor Decree number 212 of 2020 and tertiary legal materials, including dictionaries, research result, literature, journal articles, especially those related to traditional cultural expression and other sources from internet.

DISCUSSION

According to the World Intellectual Property Organization (WIPO), the definition of Traditional Cultural Expression is as follow:¹⁰ "Traditional cultural expressions also called "expression of folklore" may include music, dance, art, design, names, signs, symbols, performances, ceremonies, architectural forms, handicrafts, narratives, or any other artistic or cultural expressions."

This enormous cultural potential must be protected by the state because it has a very high economic value.¹¹ In connection with this, it becomes very important to always maintain and preserve it so as not to be eroded by modern cultural currents, including preventing the possibility of transferring the work of Traditional Cultural Expression through modern cultural means without the knowledge and permission of local communities that develop and preserve the work of Traditional Cultural Expression.

Traditional cultural expressions nationally and internationally are protected through copyright mechanisms, where protection is more to the commercialization of Traditional Cultural Expressions. When commercialization is carried out by the party who did it, so it also sets aside the interests and will of the traditional group in question and changes the original essence of the culture.¹²

While traditional culture is mentioned in the 1945 Constitution in the following articles:

Article 28I (3) "The cultural identity and the right of traditional societies shall be respected in harmony with the development of the age and civilization."

Article 32 (1) "The state advances Indonesia's national culture amidst the world civilization by guaranteeing freedom of the society to maintain and to develop its cultural values."

Article 32 (2) "The state respects and maintains regional languages as a national cultural treasure."

Traditional cultural expressions are common (communal) and no individual has a traditional cultural expression. It is in contrast to individuals' copyrights such as songs, brands and patents. Therefore, it is necessary to distinguish the appropriate arrangement of protection components to be applied between copyright and traditional cultural expressions. So that the necessary preventive protection measures are also repressive. Preventive legal protection is protection provided by the government with the aim of preventing before the occurrence of a dispute or violation. For example, establish a separate legislation governing the expression of traditional culture with the aim to prevent a violation and provide limits in performing an obligation. Repressive legal protection is the final legal protection provided in the event of a dispute or violation in the form of a fine, imprisonment and other additional penalties.¹³

Indonesia's cultural diversity and natural wealth in the form of traditional knowledge, traditional cultural expressions, genetic resources and potential geographical indications are the basic capital of national development. Because of the importance of preserving and maintaining these communal intellectual property assets, so as not to be claimed by other countries, the government needs to undertake initiatives to provide protection in the form of an inventory. Inventory is carried out through

⁷ Jurnal Daulat Hukum 2019 Praptini, S. Kusriyah, S. Witasari, A. (2019). "Constitution And Constitutionalism of Indonesia. *Jurnal Daulat Hukum*, Vol. 2(1). 7.

⁸ Busroh, A.D. Busroh, A.B. (1991). *Asas-asas HTN*, (Ghalia Indonesia, Jakarta). 12.

⁹ ASEAN Law Association.(2019, October) Indonesian Legal System. <https://www.aseanlawassociation.org/wp-content/uploads/2019/10/LegalSystem.pdf>

¹⁰ Bustani, Simona. (2010). "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat". *Jurnal Hukum Prioris*, Vol. 2(4), 246-255, 253.

¹¹ Nendrawan, P. Rastika, G. (2021). "Implementasi Perlindungan Hukum Hak Kekayaan Intelektual (HKI) Terhadap Ekspresi Budaya Tradisional (EBT) Ditinjau Dari UU Nomor 28 Tahun 2014 Tentang Hak Cipta. *Jurnal Pacta Sunt Servanda*, Vol. 2(1). 37.

¹² Herzani, A.P. (2020). "Peran Pemerintah Dalam Menginventarisasi Ekspresi Budaya Tradisional Indonesia". *Jurnal Hukum & Pembangunan*, Vol. 50(4). 958.

¹³ Sulasno, Wahyuddin. Agustin, F. (2021). "Pengembangan Dan Strategi Perlindungan Hukum Atas Ekspresi Budaya Tradisional Di Kabupaten Lebak". *AJUDIKASI: Jurnal Ilmu Hukum*, Vol. 5(1). 77.

management to the form of a Data Center as regulated in Article 7 of regulation of the Minister of Law and Human Rights number 13 of 2017 concerning Data Communal Intellectual Property that states communal intellectual property must be taken inventory. Then in conducting an inventory, the minister can cooperate with Ministries/ Agencies and / or local governments.

The protection regime used by the government in protecting the potential of this culture is the intellectual property regime.¹⁴ Indonesia is a state that officially became members of the WTO when ratifying this convention by law Number 7 of 1994 on the ratification of the agreement Establishing the World Trade Organization (Approval of the establishment of the World Trade Organization) which means through this ratification Indonesia is bound by the provisions of the WTO.¹⁵ The protection of traditional cultural expression itself is included in the regime of copyright law, which is in Indonesian positive law as stipulated in Law Number 28 of 2014 concerning copyright. In the Copyright Law, especially in Article 38 paragraph 1, states: "copyright on traditional cultural expression is held by the state", while the explanation of Article 38 paragraph 1 Law Number 28 of 2014 concerning copyright, states : what is meant by "traditional cultural expression" includes one or a combination of the following forms of expression:

- a. Textual Verbal, both oral and written, in the form of prose or poetry, in various themes and content of the message, which can be literary works or informative narratives;
- b. Music, including, among others, vocal, instrumental, or a combination thereof;
- c. Movement, including, among others, dance;
- d. Theater, including, among others, puppet shows and folk plays;
- e. Art, both in the form of two-dimensional and three-dimensional made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, and others or a combination thereof; and
- f. Traditional ceremonies.

In Government Regulation No. 38 of 2007 on the division of government affairs between the Government, Provincial Government and District/City Government, which is the implementing regulation of Law No. 32 of 2004, in Article 2 Paragraph (4) letter q states that the affairs of provincial and district / city government includes the field of Cultural Affairs and tourism. Furthermore, in Article 7 Paragraph (2) letter w states that mandatory affairs that must be organized by the provincial government and district/city government are related to basic services, one of which is culture. Appendix to Government Regulation No. 38 of 2007 distinguishes the division of government affairs in the field of culture and tourism, especially for the sub-field of culture into three affairs, namely government affairs, provincial and District/City Government Affairs.¹⁶

Expression protection concept of traditional culture is closely related with the region as a bearer of traditional culture, so that local governments both provincial and district/city holds important duties and functions in protection and utilization. There are several local regulations governing the expression of traditional culture, namely West Java provincial regulation Number 10 of 2018, Gorontalo provincial regulation Number 7 of 2017, Bengkulu Mayor Decree number 212 of 2020.

West Java provincial regulation Number 10 of 2018 States:

Article 9 (1): "*the provincial government manages the expression of traditional culture.*"

Article 10: "*the Provincial Local Government holds the copyright to traditional cultural expressions whose creation is partly or wholly funded by the Provincial Local Government.*"

Meanwhile, the Gorontalo provincial government has a regulation that technically and concretely regulates traditional cultural expressions. The regulation and protection of traditional cultural expressions is contained in Gorontalo provincial regulation Number 7 of 2017 on the protection and preservation of Gorontalo Traditional Cultural Expressions. The issuance of the Gorontalo provincial regulation is in the framework of the protection and preservation of traditional cultural expressions which is intended as a basis for local governments in implementing the protection and preservation of traditional cultural expressions in accordance with the authority of the province.

Furthermore, efforts to protect and manage traditional culture from the Bengkulu city government, issued Bengkulu Mayor Decree number 212 of 2020 regarding the determination of the Bengkulu 04 State Elementary School Building, Tuo House in the Tuo Bengkulu City area, Bengkulu Malay traditional house, York Fort Site and Tuo mosque in the Tuo Bengkulu City area as Bengkulu City rank Cultural Heritage.

CONCLUSION

Traditional culture is mentioned in the 1945 Constitution in the following articles:

Article 28I (3) "*The cultural identity and the right of traditional societies shall be respected in harmony with the development of the age and civilization.*"

Article 32 (1) "*The state advances Indonesia's national culture amidst the world civilization by guaranteeing freedom of the society to maintain and to develop its cultural values.*"

Article 32 (2) "*The state respects and maintains regional languages as a national cultural treasure.*"

There are necessary preventive protection measures and there are also repressive measures in Indonesia. The government also undertakes initiatives to provide preventive protection in the form of an inventory carried out through management to the form of a Data Center as regulated in Article 7 of regulation of the Minister of Law and Human Rights number 13 of 2017 concerning Data Communal Intellectual Property that states communal intellectual property must be taken inventory that communal intellectual property. While the repressive protection of traditional cultural expression is included in the regime of copyright law, which is in Indonesian positive law as stipulated in Law Number 28 of 2014 concerning copyright. Furthermore, In Government

¹⁴ Herzani, *loc.cit.*, 957.

¹⁵ Dirdjosisworo, Soedjono.(2006). *Pengantar Hukum Dagang Internasional*. (PT. Refika Aditama : Bandung).133.

¹⁶ Putra, K.S. Priyantini, G.A.P.N. (2021) "Perlindungan Hak Cipta Terhadap Ekspresi Budaya Tradisional Geguritan Bali di Indonesia". *Jurnal Media Komunikasi*, Vol. 3(2). 116.

Regulation No. 38 of 2007 on the division of government affairs between the Government, Provincial Government and District/City Government, states that mandatory affairs that must be organized by the provincial government and district/city government are related to basic services, one of which is culture. There are several local regulations governing the expression of traditional culture, they are West Java provincial regulation Number 10 of 2018, Gorontalo provincial regulation Number 7 of 2017, Bengkulu Mayor Decree number 212 of 2020.

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