Volume 16 Issue 45
Originally issued as E4



Global Journal of HUMAN-SOCIAL SCIENCE: E
Economics
Volume 16 Issue 4 Version 1.0 Year 2016
Type: Double Blind Peer Reviewed International Research Journal
Publisher: Global Journals Inc. (USA)
Online ISSN: 2249-460x & Print ISSN: 0975-587X

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As a multicultural ethnicity, Indonesia is a set of different types of people from various characters and original culture. Indonesia has a lot of artistic and cultural expression that comes from indigenous peoples which is inherited and can be used by anyone and at any time (the common heritage of mankind).

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GJHSS-E Classification: *FOR Code: 149999*



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Protection of Indigenous Peoples the Owner of Traditional Cultural Expressions in Indonesia

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Abstract- Indonesia has 33 provinces with different ethnics and cultures that the presence is highly valuable.[1] Therefore, Indonesia is known as the rich country with great diversity of art legacies and traditional culture expressions. This diversity is possibly prominent due to various ethnics living in Indonesia with their high level of creativity to invent the art and traditional cultural expression.

As a multicultural ethnicity, Indonesia is a set of different types of people from various characters and original culture. Indonesia has a lot of artistic and cultural expression that comes from indigenous peoples which is inherited and can be used by anyone and at any time (the common heritage of mankind). As a national asset that has existed for hundreds of years ago, needs to be addressed more seriously in providing protection to traditional cultural expressions (EBT), which can be useful for the welfare of the nation because it has a high economic value. but ownership of traditional cultural expressions that vary have been used by foreigners, especially the developed countries without distribution of profits to Indonesia. at this point the protection of traditional cultural expressions in Indonesia simply by copyright (copyright) which in practice is very difficult and needs to urgently regulate specific legal rights (sui generis) regulating the use of traditional cultural expressions for the sake of national interests and the interests of indigenous peoples as the owner of expression traditional culture.

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I. Introduction

Traditional cultural expressions is a state asset with huge potential for the prosperity of the nation because it has a high economic value, but ownership widely recognized (claimed) by foreign parties in the absence of benefit sharing, resulting in a conflict of interest between developed countries and developing countries like Indonesia. Our weakness in developing protection systems lack appropriate systems and adequate protection and limited system of protection of traditional cultural expressions. Struggle Indonesia as a developing country for their legal protection continue to be held to formulate a proper protection for traditional knowledge, at the international level in 2000 formed ICGRTKF (Inter-governmental Committee on Genetic Resources, Traditional Knowledge, and Folklore) by WIPO to discuss possible Possibility holding of a binding agreement, in an effort to protect international law, then at the national level the Government is conducting the discussion on the bill (the bill) on SDGPTEBT (Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions). While existing namely Law No. 28 of 2014 on Copyrights have not been fully able to provide protection for traditional cultural expressions.

That requires a new legal regime that is responsive and specifically relating to the rights and obligations in the use of traditional knowledge and traditional cultural expressions and needed the protection of the indigenous peoples as owners of traditional cultural expressions.

a) *Protection of indigenous peoples as owners of traditional cultural expressions*

Protection of traditional cultural expressions have deep meaning for human dignity and considers important with regard to indigenous peoples. Despite the recognition of indigenous rights and cultural heritage has been gaining momentum in international law since the adoption of the UN Declaration on the Rights of Indigenous Peoples, states have interpreted the right to develop "on their own terms" in order to Achieve the welfare of indigenous peoples.[2] While traditional cultural expressions as a supporter of the international economy has emerged and brought the wound for the indigenous owners of traditional cultural expressions.[3]

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[1] Eva Damayanti, Hukum Merk Tanda Produk Industri Budaya, PT. Alumni, 2002, P.12

[2] Klaus Bosselmann, Introduction to State Sovereignty, Indigenous Governance and International Law, in Democracy, Ecological Integrity and International Law, No. 116,2010, P. 116 ; J. Ronald Engel, Laura Westra and Klaus Bosselmann, Democracy, Ecological Integrity and International Law, Cambridge Scholars Publishing, 2010, P.50

[3] Samuel P. Huntington and Lawrence E. Harrison, Culture Matters: How Values Shape Human Progress, April ,No.3, 2001, P.27; Richard D. Lamm, The Culture of Growth and the Culture of Limits, Soc. Cont, No.9, 1999, P. 163

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Attempt to show the indigenous owners of cultural expression of traditional order Increasingly protected intensified through international forums, Including the Year of the UN International Indigenous Peoples of the World (United Nations International Year for the World's Indigenous), the which aims to preserve, protect and develop embodiment of the past, present and future of Reviews their culture as heritage, designs, ceremonies, technologies, visual and performing arts and literature, as well as the right to sue redress of cultural property, intellectual, religious and spiritual they are taken without the consent of free and fair or Contrary to the laws and customs. The first international conference on Cultural and Intellectual Property Rights of The natives held in New Zealand in 1993, the roomates managed to Mataatua Declaration states that:[4]

1. The right to protect traditional knowledge is part of the right to Determine fate
2. Indigenous people should Determine for itself what constitutes intellectual property and their culture
3. Protection tools that exist are inadequate
4. The code of conduct should be developed to be adhered to the outside when the recorded knowledge traditional and customary
5. An agency should be established to conserve and monitor the works and commercialization of this knowledge, to recommend to the indigenous people on how they can protect Reviews their cultural history and to negotiate with government regarding the laws that Affect the traditional rights
6. An additional system regarding cultural and intellectual property rights should be established Recognizes that: (1) collective ownership and passed retroactively, (2) protection against debasement of culturally significant items (protection against the abuse of objects cultural significance), (3) co-operative rather than competitive framework (framework that is concerned with cooperation than competition), (4) first beneficiaries to Be direct Descendants of the traditional guardians of the knowledge (most eligible is a descendant of the keepers of traditional knowledge).

Furthermore, It also has conference held in Bolovia indigenous people in Fiji in 1994 and 1995, Efforts intensified further while WIPO to prepare a report on the fact-finding traditional knowledge.

In Indonesia the implementation of protection of traditional cultural expressions made by the Directorate General of the Department of Intellectual Property Law and Human Rights. At this time the traditional cultural expressions which are in Indonesia are being inventoried to find a format appropriate protection. traditional cultural expression is the result of creativity and intellectual made by groups and individuals in the community who demonstrate social and cultural identity based on the standards and values of the spoken or followed from generation to generation, Including: folklore, folk songs and instruments traditional music, folk dances, traditional games, art works such as paintings, drawings, engravings, sculptures, mosaics, jewelry, crafts, clothing, musical instruments and traditional weaving.[5]

Traditional Cultural Expressions safeguards do with the intellectual property rights system. Characteristics of intellectual property rights protection system in providing protection to copyrighted works is an individual and distinct identity of its creator, as well as the period of protection is limited. This is different to the characteristics of traditional cultural expressions that has existed since a long time that the creator is not clear and the communal property and the limited term of protection for Traditional Cultural Expressions are closely linked to the identity of indigenous peoples or those who have it.

In Indonesia, the protection of traditional cultural expressions contained in Article 10 Copyright Act No. 28 of 2014 on "the copyright of the author is unknown protected by the state". In Article 10 it appears that folklore is part of the culture of the area of copyright held by the state. But in fact, traditional cultural expressions still do not get protection. Article 10 of Law No. 28 Copyright 2014 actually directed specifically to protect the native culture of indigenous peoples. But for a traditional society would be difficult to use and are entitled to benefit from the stranger who exploit traditional works without the authorization of the work's creator traditional, through the State.

b) Benefit Sharing of Traditional Culture For traditional communities in Indonesia

Traditional cultural expressions in Indonesia can provide economic value or with a major contribution to the national wealth. It is not realized between Indonesia that traditional cultural

[4] IASTP AUSAID, P. 381

[5] Naskah Akademik Pengetahuan Tradisional, 2006, Jakarta, BPHN dan Ditjen HKI RI, P. 38; Endang Purwaningsih, Perlindungan Hukum Terhadap Kekayaan Intelektual Warisan Bangsa Sebagai Implikasi Yuridis Nilai-Nilai Kebangsaan Menuju Ketahanan Nasional, Negarawan Kementerian Sekretariat Negara RI, Vol.26, 2012, P.4

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products, including textiles, may get a price of 100,000 dollars in the United States per year.[6] At this time the lack of awareness of Indonesia to protect traditional cultural expressions they have encouraged developed countries to take advantage of traditional cultural expressions in Indonesia.[7]

Utilization of traditional cultural expressions is defined as the use of traditional cultural expressions as a commercial asset and consolidation right through the system without benefit sharing of intellectual property. The concept of access to benefit sharing of traditional cultural expressions can be understood from an international perspective. There are two (2) different aspects of benefit-sharing framework, especially the universal distribution of specific benefits and profit sharing. As revealed by Kadri Simm, "shared universal profit sharing represents a potential positive for the company to use traditional cultural expressions that without a specific profit sharing and participate directly in the company." It is also said that the "universal profit sharing have been based on the absence of justice in a situation of use of traditional cultural expressions".[8]

Michael Finger and Philip Schuler has reported that the purpose of the distribution of profits is to enable indigenous peoples to use their traditional knowledge to take advantage of the creativity and their thinking. Profit sharing is also possible their development strategy to gain edge facilities that can be used for the utilization of their traditional cultural expressions.[9] such an arrangement can be beneficial to all members of the indigenous peoples and the general public, especially if the traditional cultural expression tersebutdapat clearly identified and the protection is not going to cost significant transactions, or does not produce what is called the "tragedy of the anti-commons" by Michael Heller and Rebecca Eisenberg.[10]

Maximizing the benefits of this arrangement, commentators advocated the use of property or intellectual property rights by creating a limited monopoly system, or similar to what has been offered in the intellectual property system. Model exclusive rights will enable traditional communities to get a higher return from the use and exploitation of their traditional culture. As Professor Daes disclosed, the results of the traditional culture that can be easily reproduced at a lower cost with the machine, or produced in large quantities, will quickly lose the new values or commercial.[11]

Although the traditional cultural expressions have economic value, indigenous peoples do not view their heritage through the perspective of the property. This legacy will remain the responsibility of society and the individual. Therefore, for indigenous peoples, heritage is a relationship in the community, not the unity of the economic rights.

Naomi Mezey has noted that traditional culture as the property is in contradiction with the core concept. The property is kept, owned, controlled by the owner, and transferable. Traditional culture is collectively owned, and thus, there are no attributes remain self-interested in this property. Claims for traditional cultural property is to improve the traditional culture if something should not be fixed, dynamic and unstable.[12]

Society and government, especially local government, plays an important role in contributing to the protection of the basic potential of traditional culture. The interesting part of the protection of traditional culture is that foreigners are allowed to use and benefit from traditional culture through a profit-sharing arrangement. This arrangement offered to improve the utilization of traditional cultural expressions. An appropriate method for the distribution of profits is through agreement or contract. The method is consistent with the significance of profit sharing that benefit must be received by the participants of the collective interest, which in this case is the traditional cultural expressions.

Significance contract for the utilization of traditional culture refers to access benefit sharing

[6] Kanti Rahayu, Arti Penting Folklore dan Tradisional Knowledge bagi Indonesia sebagai The Country Of Origin, Jurnal Hukum dan Pembangunan, Vol I,No.XI,2013

[7] Lukman Hakim, Upaya Harmonisasi Terhadap Perlindungan Pengetahuan Tradisional "Traditional Knowledge" di Indonesia, Yustika, Universitas Airlangga, Vol. 12, No.2, Desember, 2009

[8] Simm Kadri, Benefit Sharing Frameworks - Justifications for and against benefit sharing in human genetic research, A Report for GenBenefit, 2007, P.18

[9] Bhagirath Lal Das, The WTO Agreements: Deficiencies, Imbalances and Required Changes, Zed Books, World Network, London, 1998, P.128; Michael Finger and Philip Schuler Poor People's Knowledge: Promoting Intellectual Property in Developing Countries (Trade and Development), World Bank Publications; 1 edition, January 29, 2004,183

[10] Michael Heller, The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives, Basic Books, 2010,P.49–78; Michael A Heller and Rebecca S Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research', No.280,2008, P. 698

[11] Erica A. Posner, The International Protection of Cultural Property; Some Skeptical Observation, CHI.J. INT'L, Vol.8, 2007, P.217; Peter K.Yu, Currents and Crosscurrents in the International Intellectual Property Regime, LOY.L.A.L.Rev, Vol.38, No.323, 2004, P.429.

[12] Naomi Mezey, 'The Paradoxes of Cultural Property' Columbia L Rev, No.204, Vol.107,2007, P. 200-205

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of traditional cultural expressions. Therefore, contract or agreement must be understood in the perspective of law. The contract or agreement must also be prepared based Burgerlijk Wetboek which explains the validity of the contract. Participants of the contract or agreement should be legally restricted and proportionate assigned to justify justice for local people. In Section 1320 Burgerlijk Wetboek, stated that the validity of the contract includes four items such as:

1. Agreement
2. Skills
3. A specific case
4. A legitimate case

subjective requirements that must be met in a "contract utilization of traditional cultural expressions" are as follows:

1. Parties are presented to the use of traditional cultural expressions (alien); and
2. The Parties are presented to capitalize on traditional cultural expressions (custodian).

The top of the provision also states that access to benefit sharing of traditional cultural expression is determined based on the principles of decency and fairness. In making the deal, both decency and fairness are key principles that must be attended by participants from the contract if they want to access benefit sharing in the use of traditional cultural expressions. "Agreement" means the legal validation of the contract if the contracting parties wish to accept what the purpose of the contract.

The purpose of the contract is the objective requirements that affect the question whether the contract provides "lawful" purposes that are permitted by law. If these requirements fail to be met, or the purpose of the contract would be contrary to law, decency and fairness, or disrupt morality, then the contract is deemed as invalid.

All three principles (treaties, decency and fairness) is a unity that must be understood by the parties in the access contract profit sharing in the use of traditional cultural expressions. Act No. 11 of 2013 on Ratification of the Covenant Diversity on Genetic Resources, and also access to benefit sharing in the use of traditional cultural expressions by way of fairness and balance, will open up the opportunity to manage the utilization of genetic resources and traditional knowledge. traditional cultural expressions by way of justice and balancing is one such opportunity. Implications This law affects the way to recognize the existence of indigenous peoples, local knowledge and the rights of this community.

II. Conclusion

The use of traditional Indonesian cultural assets with developed countries is very dramatic in recent years. As shown by the newspapers and the electronic media, traditional cultural expressions asset utilization done not only by foreign business people, but also by developed countries. utilization of traditional cultural expressions can lead to frustration among members of indigenous peoples, and therefore the government needs to do to protect the asset protection of traditional cultural expressions. An attempt to provide protection of traditional cultural expressions in Indonesia in improving economic development can be done with access to the sharing of benefits from the utilization of traditional cultural expressions for improving the welfare of indigenous peoples.

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