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TOWARD ASIAN CENTRALITY

PROCEEDING
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THE 54TH UNIVERSITAS BRAWIJAYA DIES NATALIS

POLICY AND
PRACTICES
TOWARD
ASIAN
CENTRALITY



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*(International Conference
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Proceeding ICSPE 2017

(International Conference on Socio-Political Entrepreneurship)

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2. Dr. Nur Sin Shahrier, The National University of Malaysia
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Legal Protection of Traditional Culture in Indonesia

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Abstract: Indonesia is one of these countries is the owner of traditional culture that represents the characteristic of 33 provinces and 1128 ethnics occupying Indonesia. That is why Indonesia has a great potential to extract economic benefit if this characteristic is exploited commercially. However, it is not happening in Indonesia because traditional culture has been used by the developed countries to support their economic.

The emergence of injustice sense due to the arbitrary utilization of traditional culture is begun to be experienced by the developing countries. Protection and respect to the indigenous peoples as the owner of traditional culture are lacking. The utilization of traditional culture expression can be defined as the management of traditional culture as commercial asset without managing benefit-sharing with the developed countries. It is important hereby for the government to give protection to traditional culture.

Key Words: Legal protection, Traditional Culture Expression, Indonesia

Introduction

Traditional culture expressions are national assets with great potentialities for national welfare because it has economical values that have been widely acknowledged (claimed) by foreigners without mutual benefit-sharing. Reasonable consequence is the conflict of interest between developed countries and developing countries in Indonesia. The weakness in developing a proper and reliable system to protect traditional culture expressions is quite evident. Indonesia's struggle as the developing country to obtain legal protection for Indonesian traditional culture expressions is performed by attending the international committee to look for a suitable formulation to protect traditional knowledge. In 2000, ICGRTKF (International Committee across Governments for Genetic Resources, Traditional Knowledges and Folklores) is made by WIPO to discuss the possibilities of making a binding agreement to protect traditional culture expressions with international and national laws. The government of Indonesia itself has prepared Draft of Genetic Resources, Traditional Knowledges

and Traditional Culture Expressions. Law No.28/2014 on Copyright still fails to provide comprehensive protection for traditional culture expressions.

New legal regime that is responsive and specifically related to the rights and duties to use traditional knowledges and traditional culture expressions is therefore definitely needed to ensure that the existence of indigenous peoples as the owner of traditional culture expressions has been protected.

Protection for Indigenous Peoples as the Owner of Traditional Culture Expressions

Protection for traditional culture expressions has a deep meaning for human dignity, and it is considered as very important by indigenous peoples. Although the rights of indigenous peoples and the presence of cultural legacies have gotten their momentum into international laws since the adoption of UN Declaration of Rights of Indigenous Peoples, each country has interpreted the rights with their own terms as long as it cares about the welfare of indigenous peoples. Traditional culture expressions as the supporter to international economic have emerged and brought injuries to the original owner of traditional culture expressions.

The initiative to protect the original owner of traditional culture expressions is culminated with one international forum, called United Nations International Year for Worldwide Indigenous Peoples. This forum is designed to preserve, to protect and to develop the manifestation of old-days, current-days and future-days cultural objects. These objects may include legacies, designs, ceremonies, technologies, visual and performance arts, and literatures. It shall be there the rights to demand compensation for illegal looting of cultural, intellectual, religious and spiritual assets, without transparent and fair agreement because it defies laws and customs of indigenous peoples. First international conference for The Rights of Cultural and Intellectual Properties has been organized in New Zealand in 1993, which has produced what so called Declaration of Mataatua that contains several items such as:

1. The rights to protect traditional knowledge must be understood as the part of the rights of self-determination.
2. Indigenous peoples shall be able to use their rights of self-determination to establish their cultural and intellectual properties.
3. Unreliable protection is a great concern.
4. Ethical code must be obeyed to facilitate the recording of traditional culture expressions and customs.

5. An institution must be founded to preserve and to monitor the works and commercialization of the knowledge. The knowledge is then recommended to indigenous peoples in order to guide them in protecting their cultural histories and in negotiating with government about laws influencing traditional rights.
6. A system of how to use the rights of cultural and intellectual properties must be developed with several considerations: (1) collective ownership shall be respected; (2) the value of cultural items is protected against depreciation (protection from the abuse of cultural significance); (3) cooperative framework is considered rather than competitive framework (it emphasizes on cooperation rather than competition); and (4) the first receiver of utilization is the direct descendant of the guardian of traditional knowledge (the strongest holder of the rights is the descendant of the guardian of traditional knowledge).

Similar conference is also conducted in Fiji in 1994 and 1995 by theme about Bolovia Indigenous Peoples. WIPO is about preparing a report about traditional knowledge.

Within Indonesia context, the protection of traditional culture expressions remains under the responsibility of General Directorate of Department of Intellectual Property Laws and Human Rights. Nowadays, traditional culture expressions in Indonesia have been taken into account to find the proper protection format. Traditional culture expressions are the outcomes of creativities and intellectualities performed by groups and individuals in the communities. These outcomes then represent social and cultural identities that comply with standards and values spoken or followed throughout generations, and the resultant manifestation may include folklores, folk songs, traditional music instruments, folk dances, traditional games, and also work arts involving painting, picture, sculpture, statue, mosaics, ornaments, handicrafts, clothes, music instruments and traditional weaves.

Protection for traditional culture expressions shall be one important priority in the system of intellectual property rights. Early characteristics of the system to protect intellectual property rights seem less promising. Protection is given by the creators individually. The identity of intellectual property is not reflecting the creators in order to cover down the originality. Protection usually remains within a restricted schedule. It absolutely disadvantages the characteristic of traditional culture expressions because unclearly defined creator and restricted schedule for communal property protection will ruin Traditional Culture Expressions.

The protection of traditional culture expressions in Indonesia has been stated in Article 10 of Copyright Law No.28/2014. It is said that “the copyright from the anonymous is protected by the State”. Article 10 explicitly declares that folklores shall be the part of local cultures, and therefore, the copyright must be protected by the State. Traditional peoples are always difficult to demand for compensative benefits from foreigners who exploit traditional works without authorization of the creators, or without consent with the State.

Benefit-Sharing from Traditional Culture Expressions for Traditional Peoples in Indonesia

Traditional culture expressions in Indonesia provide economic values or great contributions to the national asset. However, it is beyond reality. One of traditional culture products, respectively textile, can be priced at 100,000 US dollars per year. Less attention from Indonesia to traditional culture expressions may stimulate developed countries to take benefits from Indonesian traditional culture expressions.

The utilization of traditional culture expressions can be defined as using traditional culture expressions as commercial and consolidated assets through a certain system without clearly defined benefit-sharing arrangement. The concept of giving access to benefit-sharing from traditional culture expressions has been understandable at international perspective. There are two (2) different aspects of benefit-sharing, respectively special benefit and profit-sharing. Both are universal in nature. As noted by Kadri Simm, “universal profit-sharing is the positive potential chance for any outsider companies to use traditional culture expressions without benefit-sharing arrangement with the insiders”. Universal benefit-sharing, therefore, can easily mislead into injustice, especially concerning with illegal utilization of traditional culture expressions.

Michael Finger and Philip Schuler have reported that the goal of benefit-sharing is to help indigenous peoples to use their traditional knowledge to take benefits from their creativities and thoughts. Benefit-sharing may allow indigenous peoples to use their development strategies to obtain ultimate facilities that may be useful for utilizing their traditional culture expressions. Such arrangement may benefit all members of indigenous peoples and also general communities, especially when traditional culture expressions are clearly identified and protected without significant transaction cost. It is seemingly structured into what so called “Tragedy of Anti-Commons” as suggested by Michael Heller and Rebecca Eisenberg.

By maximizing the benefits from this arrangement, thus, it is recommended to use the assets or the rights of intellectual properties within limited monopoly system, and it resembles to what has been offered into intellectual property system. Exclusive rights may help traditional peoples to have higher return from the use or the exploitation of their traditional culture expressions. As revealed by Professor Daes, the output of traditional culture expressions can still be easily reproduced by machining at lower cost, or manufactured in greater quantity but with the diminishing new or commercial values.

Although traditional culture expressions have economical values, indigenous peoples do not see their legacies through perspective of property. These legacies are the responsibility of peoples and also individuals. Therefore, for indigenous peoples, legacies are closely related to the peoples, not to the unit of economical rights.

Naomi Mezey has noted that traditional culture expressions as the property may be in conflict with the core concept. A property can be owned, controlled by the owner and transferred across some owners. Traditional culture expressions are collectively owned, and thus, there is no individual attribute adhered into this property. As a consequence, claim for the property of traditional culture expressions is always not fixed or dynamic at best, or unstable at worst.

Peoples and certain government levels, especially local government, play important role in the protection of base potentials of traditional culture expressions. The interesting part inside the protection of traditional culture expressions is that foreigners are allowed to use and to take benefits from traditional culture expressions through benefit-sharing arrangement. Proper method for benefit-sharing is by agreement or contract. This method may be consistent to the meaning of benefit-sharing that must be received by the participants of collective interest, especially the owner of traditional culture expressions.

The ideal contract for the utilization of traditional culture expressions must provide an access for benefit-sharing from traditional culture expressions. Therefore, contract or agreement for such traditional culture expressions must be understood from legal perspective. Indeed, such contract or agreement can be made pursuant to Burgerlijk Wetboek which has explained the requirements of contract validity. The parties in the contract or agreement must be legally restrained and proportionally assigned to justify the justice for immediate peoples. Section 1320 Burgerlijk Wetboek has stated that contract validity involves four items such as:

1. Covenant.
2. Skill.
3. A certain case.
4. A legal case.

There are subjective requirements to be met concerning with “the utilization of the contract of traditional culture expressions”. These are:

1. Contract must present the party or parties with interest to use traditional culture expressions (alien); and
2. Contract must present the party or parties with interest to take benefit from traditional culture expressions (custodian).

Access to the benefit-sharing from traditional culture expressions is regulated based on principles of proper and fairness. These principles must be attended by parties in contract especially when they make another deal or agreement, or when they intend to access the portions of benefit-sharing from traditional culture expressions. “Covenant” is a term referring to a requirement that the contract law shall be valid if the parties insist on accepting the goal of the contract.

The goal of contract is the objective requirements which influence the questions whether contract provides “legal goals” permitted by the law. If the requirements are not fulfilled, or when the goal of contract is defying the laws, contravening the principles of proper and fairness, or disturbing moralities, therefore, contract is considered not valid.

Covenant, proper, and fairness must be understood as the unity when the contracted parties desire the access to the benefits obtained from utilizing traditional culture expressions. Law No.11/2013 on The Validation of Covenant for Genetic Resource Diversity has several functions. It regulates the access to the benefit-sharing from the utilization of traditional culture expressions by using justice and balancing method. It also helps opening chance for better management and utilization of genetic resource and traditional knowledge. The distribution of benefits from traditional culture expressions through justice and balancing method is one example. Legal implication is that such method may influence the other peoples in assessing the presence of indigenous peoples, their local knowledges and the rights these peoples have.