



THE INTERNATIONAL DIMENSION OF COMMUNAL AND TRADITIONAL INTELLECTUAL PROPERTY RIGHTS PROTECTION IN INDONESIA

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Abstrak

Artikel ini membahas dimensi internasional dalam upaya perlindungan hak kekayaan intelektual komunal dan tradisional di Indonesia. Dalam konteks ini, UNESCO sebagai aktor internasional terlibat di dalam upaya pelestarian warisan budaya, termasuk dalam kasus Batik dan Wayang. Namun, isu yang paling penting adalah bagaimana mendorong pembuat kebijakan publik untuk menyediakan sistem yang memadai dalam melestarikan sekaligus melindungi keberadaan masyarakat tradisional dan warisan mereka. Melalui metode studi pustaka, temuan penelitian ini menunjukkan bahwa keberadaan aktor internasional seperti UNESCO memberikan sumbangan terhadap pembentukan kerangka kebijakan Pemerintah Indonesia dalam upaya melindungi warisan-warisan budaya dan tradisi sebagai bagian dari hak kekayaan intelektual komunal, khususnya melalui instrumen-instrumen legal internasional.

Kata Kunci : hak kekayaan intelektual komunitas, komunitas tradisional, pengetahuan tradisional, UNESCO

Abstract

This article discusses the international dimensions of communal intellectual property rights protection in Indonesia. In this context, UNESCO as an international actor has been actively involving in cultural heritage preservation, including in the case of Batik and Wayang. Nevertheless, the most important issue is how to encourage policymakers to provide an appropriate system in conserving and protecting traditional communities and their heritages. Through the literature review, this study has found that international actors such as UNESCO have contributions in formulating policy framework regarding the efforts of protecting cultural heritage and traditions as part of communal intellectual property rights in Indonesia, especially to provide international legal instruments.

Keywords : communal intellectual property rights, traditional community, traditional knowledge, UNESCO

Introduction

In the midst of globalization, which massively connects the world and enables the spread of all forms of ideas and technology, the discussion about traditional community and traditional knowledge becomes more relevant than it used to. The importance of traditional knowledge can be seen from the fact that the sustainability of traditional community is heavily reliant on traditional knowledge. Besides, traditional knowledge has shown significant contribution towards global problems, which range from human rights issue to environment issue in the context of cooperation and conflict. These issues increasingly involve more actors, not only states, but also sub-states, international and global organization, and even society.

As an international actor, United Nations Educational, Scientific and Cultural Organization (UNESCO) has played a crucial role in the protection and preservation of culture, which is known as traditional knowledge. UNESCO is a United Nations' special agency which has engaged in the activities related to education, science and culture. UNESCO was initially made to protect a wide range of tangible cultural heritage, such as Indonesia's Borobudur and Batik. However, UNESCO recently has given attention to the protection of cultural heritage, not only the tangible but also the intangible one. It has actively initiated various projects and regulatory mechanisms to further deepen and broaden the positive impact on the protection of cultural heritage.

Problems of Communal Intellectual Property Rights Protection

Modernity in general is often regarded as opposition to various traditional views. Globalization, which is seen as the acceleration engine of modernity, has created a threat to the existence of traditional notions, especially the traditional knowledge, which regarded as indigenous knowledge. United Nations defines indigenous knowledge as a form of rational and reliable knowledge developed through generations of intimate contact by native people with their lands (UNEP, 1998). The term has raised scepticism between scientists since it has inevitable relation with superstition, irrationalism and tribalism. The term has also debated since it contains tendencies of marginalization, as it is often perceived as the subordinate to Modern Western epistemology. No matter how debatable the term is, traditional or indigenous knowledge has been recently regarded as

world's intellectual property that needs to be protected and preserved by international community.

The basic formulation of intellectual property rights is a major tenet of the liberal West that protects the property rights of individuals, which is known as private property rights (Coombe, 1998). Private property rights per se refer to the rights of individual to accumulate, hold, delegate, rent or sell their property, whether it is goods, services, or even intellectual property (Coombe, 1998). In several countries, including United States, the national law officially allows individuals to own property under their own names using patents and copyrights. Thus, their property rights cannot be intruded by the claim from others. This Western tenet, however, does not comply with the notions of Eastern tradition that is more communal. In Indonesia, for example, Batik is considered as a traditional technique of decorating cloth owned by Javanese people as a communal, not individual. Hereupon, nobody apprehends as person who first invented Batik and when it was invented. Batik – and other numerous world's cultural heritages – is in fact a communal and traditional intellectual property that needs the protection of Intellectual Property Rights.

For the last few decades, the protection of Intellectual Property Rights (IPR) has gain international attentions. The pattern of interaction between actors has been more open following the swift development and expansion of information, technology, communication and transportation. Moreover, the exchange of goods, services, and ideas occurred between those actors has also become more complex. For that reason, neither individuals nor groups can avoid the inevitable opening of global network through the freer movement of actors along with goods, services, and ideas across national borders.

In Indonesia, the IPR protection system was first introduced in the 20th century after Berne and Paris Conventions (Djumhana and Djubaedillah, 2003). At that point, Indonesia was still under Dutch colonization and therefore dependent on the political decision from the colonial government. The colonial government arranged several laws related to the Conventions, which were Patent Law, Trademark and Copyright. After its independence in 1945, Indonesia newly-established government, gradually replaced colonial laws on IPR with national laws. By 1994, Indonesia officially became the member of World Trade Organization, which was followed by the ratification of Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. Indonesian

government has embarked on IPR reform several times, which consequently made major and minor changes to the existing Indonesia's IPR laws. The implementation of IPR protection regime in Indonesia are now administered by the Ministry of Law and Human Rights, specifically the Directorate General of Intellectual Property Rights.

The issue of the struggle for the ownership of Intellectual Property Rights has occurred in various parts of the world since the first time IPR was formulated, including in Indonesia (Sardjono, 2006). The bilateral relations between Indonesia and Malaysia have not always been favorable; there are several disputes arising from the interpretation of IPR. In the early 2000s, the headlines of national media, both printed and electronic, were discussing Malaysia's claim over Indonesian cultural heritages, namely Rasa Sayange Song, Reog Ponorogo and Pendet Dance in 2007; Batik in 2009; and the latest one Tor-Tor Dance in 2012. The issue is rather complicated because of a bias against communal knowledge position in the discourse of intellectual property rights protection. Relations between two countries would be worsened if there was no significant action from the related actors, in which UNESCO announced that it would add Batik to the list of Intangible Cultural Heritage. The IPR-related cases happened between Indonesia and Malaysia have proven that the protection of traditional knowledge is inseparable from international dimension (Gelling, 2017).

The traditional knowledge and cultural heritage are beneficial not only for the indigenous community who own them, but also for the world's community as a whole (Mauro and Preston, 2000). In the case of environmental damage caused by a vast but uncontrolled development of science and technology, "traditional wisdom" can be used to mitigate the damage. Most of the indigenous communities that still exist in the world generally share the same traditional wisdom, in which praising the relationship and harmony with nature becomes the important one. In the case of arising level of greenhouse effect caused by carbon footprints, traditional wisdom can once again be used to minimize the negative impacts. The wisdom teaches humans to only take what is needed from nature. By doing so, humans indirectly contribute to the sustainability of the one and only Earth. Besides two examples that have been discussed above, there are other examples that reinforce traditional knowledge to be relevant in human life in the era of globalization.

There are several things inherent in the notions of traditional knowledge and cultural heritage, which will be important in deciding the most appropriate IPR protection methods. First, most of the traditional knowledge and cultural heritage, both tangible and intangible, are related to the belief system or spiritual tradition that have sacred meanings. This needs to be carefully considered since sacredness is what binds the local community together. Second, those knowledges or heritages are usually owned collectively as a reflection of shared cultural values. In practical terms, the local community use them as part of their tradition. Third, many people bear the common misconception that traditional knowledges and cultural heritages are considered static, in which they are whereas dynamic. Numerous existing traditional communities show that these traditions are not only dynamic, but also evolving and adaptive.

The discussion above shows that formulating a method or scheme to protect Intellectual Property Rights is quite challenging. In an attempt on protecting traditional knowledge and cultural heritage of a local community, the community's dignity needs to be safely remained. The dignity of community appears in many forms, ranging from the sacredness of physical objects to the unique pattern of interaction between people of the community. At the same time, the rights of owner(s) of traditional knowledge and heritage, whether individual or communal, needs to be considered as well. In most cases, traditional IPRs are not treated as other IPRs with patents, they are often regarded as subordinate to the scientific ones.

The challenges in formulating a method to protect traditional Intellectual Property Rights does not end there. Many problems arise since traditional IPR are often positioned as economic commodity, which is related to economic motive. Once a traditional intellectual property becomes a commodity, its sacred value will be neglected and eventually disappeared. Nowadays, it is common to see tourism advertisement of a country that include sacred rites and rituals, namely funeral, marriage, fertility, or even harvest, as mere "tourist attractions". These traditions, which should be highly valued as it has been passed from one generation to another, are considered no more that a spectacle. In other words, these traditional knowledge and cultural heritage are undergoing cultural commodification that brings more drawbacks than benefits.

However, one must consider the philosophical and historical background of Intellectual Property Rights in order to formulate the most appropriate scheme to protect

traditional intellectual property. IPR per se is derived from the Liberalist view on the protection of individual rights, or known as private property rights. The main implication of this view is that Intellectual Property Rights cannot be separated from the context of economic interests. This dilemmatic condition slowly galvanizes the marginalization of the protection of communal and traditional Intellectual Property Rights. In practice, the framework of the current IPR protection, contributes to the erosion of the intrinsic meaning of traditional intellectual property, since they are in the same position with economic commodity. Beside the framework, the socialization on IPR that has not been done efficiently, leads to the lack of understanding on (1) why traditional IPR needs to be treated quite differently from common IPR (2) why IPR seems to be controlled by certain parties, excluding the owner(s) of IPR. Since the access to such insight is very limited, there are Intellectual Property Rights cases in which the owner(s), whether individual or communal, of traditional IPR become victims – in one case, they do not receive what they should receive as mentioned in the IPR document. In other cases, their inventions are often commercially made, used, and even distributed without their knowing.

The absence of the scheme to protect traditional intellectual property is related to the community's identity and sustainability. In other words, the traditional knowledge and cultural heritage will most likely vanish following the eventual declining number of a community members. The genocide of specific ethnic or religious group – later known as ethnic cleansing – throughout the 20th century have always followed with the extermination of cultural representation, starting from the Greek Genocide (1920), Holocaust (1939), Rwandan Genocide (1962), Bangladesh Genocide (1971), Srebrenica Massacre (1995), ISIS Massacre (2015), until the most recent one, Rohingya persecution in Myanmar (2016-now). The Greek Genocide in 1920s included not only the massacre of native Greeks, but also a destruction of Christian Orthodox cultural, historical and religious monuments. The same pattern of of cultural extermination can also be found in the following massacres. During a bloody war in Syria, ISIS emphasized its propaganda through the destruction of Syrian cultural heritage that had been preserved for thousand of years. They believe that it was the right way in order to spread the ideology of radicalism and extremism in the name of Islam.

The spreading of so-called Islamic radicalism and extremism that threatens the existence of cultural heritage can also be found in Indonesia. There is an outgrowing

stigma that many forms of cultural tradition are contradicted and violated the Islamic tradition. For example, Jaipong dance from West Java is considered too vulgar and therefore unsuitable for Muslims; Gending Sriwijaya dance from South Sumatra contains movements adopted from the prayer movement of Hindus and Buddhist; Wayang Kulit is seen as exaggerated representation of humans, in which drawing human or human-like is prohibited in Islam, hence it must be avoided. This stigma and its examples raise criticism since the Indonesian cultural traditions – whether it is Jaipong, Gending Sriwijaya, Wayang Kulit, or other traditions – has been in existed in Indonesia, much longer than the Islamic tradition.

In order to establish the most appropriate scheme to protect communal and traditional Intellectual Property Rights, there are abounding aspects need to be considered. The aspects ranging from the sacredness of traditions, communal ownership, general misconceptions on tradtion's disposition, until community's identity, dignity and sustainability. This condition is in line with how international law view Intellectual Property Rights:

“What would it mean to recognize intellectual property rights as international human rights? This is a speculative question because although there is a case to be made that intellectual property rights (IPRs) are already human rights, they are rarely approached in this fashion, either by governments or by the holders of such rights. By situating intellectual property in the human rights framework, we may consider some of the challenges that full recognition of intellectual property as a human right would pose. Conflicts over the meaning and location of culture create fundamental ambiguities with respect to the scope of intellectual property protections. An examination of recent controversies over the use of IPRs to protect indigenous knowledge and as a means to implement provisions of the Convention on Biological Diversity will illustrate the point and demonstrate the limitations of traditional understandings of sovereignty. The recognition of PRs as human rights entails a renewed concern for social justice issues in an era of so-called global harmonization of intellectual property protections that further challenges our considerations of sovereignty.”

The legal instrument is therefore needed to ensure the protection and sustainability of traditional and communal heritage. In addition to that, a legal instrument is also necessary to ensure that the protection of actors whose roles are to protect traditional and communal heritage, such as indigenous community. In other words, the indigenous community owns the communal and traditional Intellectual Property Rights. They need technical and non-technical support not only from their surrounding, but also from other actors, both state and non-state actors. The national and local governments' supports are in the form of legislation, which will be implemented by related ministries. However, non-state actors, namely international non-governmental organization (INGO) and

international government organization (NGO), started to exercise significant roles to reinforce the importance of the protection of communal and traditional IPR. INGO and NGO are recently encouraging higher legal legitimacy of communal and traditional IPR.

UNESCO and the Protection of Communal Intellectual Property Rights and Cultural Heritage in Indonesia

The study of the role of international organizations is becoming more prominent with the wide development of issues. Bennett argued that increasing role of non-state actors is inevitable since the state system is not stagnant, but dynamic in its transformation. Globalization has allowed countries to be more open to various forms of cooperation without losing their sovereignty through the formation of international intergovernmental organizations (IGO). The existence of IGO has brought a new pattern of interactions between international actors following the newly-emerging issues and problems. One of the most interesting examples is how countries in Europe embodied a supranational institution, known as European Union (EU), despite each country's different agendas. In a broader scope, United Nations (UN) is also growing along with these dynamics since it covers a wide range of issues, starting from human rights to the environment issue. In order to deal efficiently with specific issue, UN established specialized agencies or bodies, in which shows its dynamic characteristic. The more dynamic international actors are, the tendency towards cooperative interaction patterns and peace are getting stronger as well.

“As Adjuncts of the state system, international organizations can and do play a number of significant roles. Their chief function is to provide the means of cooperation among states in areas which cooperation provides advantages for all or a large number of nations. In many cases they furnish not only a place where decisions to cooperate can be reached but also the administrative machinery for translating the decisions into actions. Another function is to provide multiple channels of communication among government so that areas of accommodation may be explored and easy access will be available when problems arise. In conflict situations not only may grievances by the parties directly involved be aired but also the influence of other nations may be exerted to prevent precipitous action that may threaten the interest of many states.”¹

The dynamics within the UN can be seen through how the organization deals with various issue, which is done through its specialized agencies. In addition to the main bodies, specialized agencies of the UN are the key of multiple channels of communication. These agencies are aimed to shape and accommodate new discourses,

¹ A. Leroy Bennet, (1995), *International Organizations: Principles and Issues*, London: Prentice-Hall, Inc., p. 3.

such as the shift of the Millennium Development Goals (MDGs) towards Sustainable Development Goals (SDGs). This shifting shows a stronger communication network between actors towards wide range of issues. Theoretically, the international organizations, in which UN becomes prominent example, have become a new arena of the multi-track diplomacy.

The UN specialized agency that has been dealing with the protection of communal and traditional Intellectual Property Rights is United Nations Educational, Scientific and Cultural Organization (UNESCO). Since it was first established, UNESCO has actively initiated and encouraged the formation of international legal instruments and regulations related to its field-work, namely education, science and culture. In term of communal and traditional IPR, this organization supports the arrangement of IPR protection scheme, whether in the form of legal instrument or practical one. In some conventions that become the subject of attention of UNESCO, it can be seen that there are efforts to adapt, even to anticipate the rapid development of the issues of traditional knowledge and cultural heritage.

“To ensure that culture takes its rightful place in development strategies and processes, UNESCO has adopted a three-pronged approach: it spearheads worldwide advocacy for culture and development, while engaging with the international community to set clear policies and legal frameworks and working on the ground to support governments and local stakeholders to safeguard heritage, strengthen creative industries and encourage cultural pluralism. UNESCO renowned cultural conventions provide a unique global platform for international cooperation and establish a holistic cultural governance system based on human rights and shared values. These international treaties endeavour to protect and safeguard the world’s cultural and natural heritage including ancient archaeological sites, intangible and underwater heritage, museum collections, oral traditions and other forms of heritage, and to support creativity, innovation and the emergence of dynamic cultural sectors.”²

Below is the list of UNESCO conventions during the last sixty years, ranging from the year of 1954 until 2005. These conventions have become the instrument for the protection of cultural heritage and nature:³

1. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
2. The Convention on the Means of Prohibiting and Preventing the Illicit Traffic of Cultural Property (1970)

²“Protecting Our Heritage and Fostering Creativity,” <http://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity>.

³ *Ibid.*

3. The Convention on the Protection of Copyright and Neighbouring Rights (1952, 1971)
4. The Convention for the Protection of the World Cultural and Natural Heritage (1972)
5. The Convention on the Protection of the Underwater Cultural Heritage (2001)
6. The Universal Declaration on Cultural Diversity (2001)
7. The Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
8. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

In Indonesia, UNESCO in collaboration with the government have carried out several activities related to cooperation in the development of education, science and culture at various levels, starting from the individual, community, until the government per se. As an effort to implement the protection of natural and cultural heritage, UNESCO has also worked together with different parties. Hereupon, UNESCO has given recognition to numerous Indonesia's natural and culture heritage, both tangible and intangible, including: Borobudur Temple Compounds (1991), Cultural Landscape of Bali Province: the Subak System as a Manifestation of the Tri Hita Karana Philosophy (2012), Prambanan Temple Compounds (1991), Sangiran Early Man Site (1996), Komodo National Park (1991), Lorentz National Park (1999), Tropical Rainforest Heritage of Sumatra (2004), Ujung Kulon National Park (1991), Wayang (2003), Keris (2005), Batik (2009), Angklung (2010), Saman Dance (2011). And several other legacy that is in the process of filing.⁴

UNESCO's recognition on Indonesia's natural and cultural heritage emphasizes that protection, preservation and conservation efforts needs to be strengthened. The efforts come from not only UNESCO and the government of Indonesia, but also the international community as a whole. Even though the efforts to protect the heritage has got stronger, the challenges faced has got stronger as well. Wayang Kulit, which is an Indonesian cultural heritage that has been recognized by UNESCO, still receive inappropriate treatment from several parties. Not to mention the problems affecting

⁴ <http://whc.unesco.org>

traditional knowledge and cultural heritage that haven't been officially recognized by UNESCO.

In Indonesia, marginalization and discrimination against indigenous community still occur in many regions. Regrettably, the acts of marginalization and discrimination are often supported by the government of Indonesia. The government only officially recognizes six religions, namely Islam, Protestant, Catholic, Hinduism, Buddhism and Confucianism. Hence, the indigenous communities, who are not following any of those six faiths, are forced to choose one religion in order to fulfill the administration process. One example in Sumba island, which is one of the outermost area of Indonesia, most of the population still maintain Marapu as their genuine religion that has been there for centuries. Since Marapu is not included as the official religions, the people of Sumba are forced to choose one religion to be put on their citizenship card. Marapu is not the only case since there are about thousands local religions not officially recognized. This tendency is also exacerbated by the economic approach to the cultural heritage.

Through its various programs, UNESCO has pretty much embraced the involvement of various parties, including academics, bureaucracy and society, to protect the natural and cultural heritage. However, without strong commitment to be involved in collaboration to tackle this specific issue of traditional property rights, the natural and cultural heritage will soon be endangered. Worst comes to worst, it will be likely to be seen as an empty monument that can transmit neither philosophy nor sacredness to subsequent generations.

Conclusion

From the description and discussion above, the protection of the communal and traditional Intellectual Property Rights (IPR) requires full attention as well as strong commitment from various parties, including state and non-state actors. As one of the non-state actors which is aimed to deal with issue related to education, science and culture, UNESCO has introduced and implemented an appropriate series of methods on its current programs. Therefore, UNESCO is expected to encourage the creation of awareness and concrete action to realize the equitable protection and also maintain the existence of traditional communities as heir and holder of the IPR. The cultural and natural heritage

needs to be protected since it contribute directly to the preservation of mankind and the environment.

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