

EXISTENCE AND FORMULATION OF REGIONAL LAWS ON INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL COMMUNITY IN INDONESIA

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ABSTRACT

At present, misuse of intellectual property of traditional communities in Indonesia is so massive and continues until now. So, the need for legal protection under regional laws to safeguarding and preservation for it should be determined. Unfortunately, Laws No.28 of 2014 on Copyright and Law No. 23 of 2014 on Regional Government, traditional communal traditional wealth is no longer the concurrent authority of regional government. The aim of this study is to track back histories of regional laws in the past and to search a regional laws formulation to construct the protection of the intellectual property of regional communities that can be carried out by the local government. Method for this research based on a juridical-normative approach. To answer the issue of existence laws used legal history and statute approach. In search to formulate regional regulations concerning protection of intellectual property of traditional communities used synchronization of law, based on Law No. 12 of 2011 on the Formulation of Law and Regulations

Keywords: *protection, regulation, intellectual, community, traditional*

A. Introduction

Intellectual property of traditional communities or indigenous peoples includes many things, ranging from traditional knowledge systems and artworks to be known as traditional cultural expressions (TCE). Intellectual property produced by traditional indigenous people has become interesting because this has not been accommodated in the regulation of intellectual property rights, especially in the international sphere in sui generis. Arrangement of intellectual property rights in the international scope as contained in the Trade Related Aspects of Intellectual Property Rights (TRIPs), for example, until now it has not accommodated the intellectual property of indigenous / traditional communities. With this phenomenon, it can be said that the legal protection of intellectual property produced by traditional indigenous people is still weak.

However, Misuse of intellectual rights of traditional communities still existing until now. Not only in the east but in the Western, some case about misuse of indigenous people intellectual property can be found. For example, In Year 1998, Disney adapted the Chinese folktale “The Ballad of Mulan” into an animated musical. This action Professors Weimin Mo and Wenju Shen accused Disney of being a “bulldozer [that] rolls over the Chinese culture” by modifying the story and removing the cultural context of the tale (Michael Jon Andersen, 2010). The story based on the Chinese legend Hua Mulan and was nominated for a Golden Globe and an Academy Award, and earned \$303.4 million. (“Disney's 'Mulan' Headed For A Live-Action Adaptation”, 2015).

In Indonesia the case of misuse of traditional culture, among others, is Harrison & Gil Java Catalogue vs Peter Nicholas Zaal case (cahyono, 2018). Peter was charged with plagiarizing a design claimed by Harrison and sentenced to one year and eight months in

Semarang District Court and at Semarang High Court raised to three years. However, the catalogue contains Jepara traditional carving furniture. This misappropriation phenomenon can be threat to local community.

From those cases raised question. First, are there any local Laws that protect the intellectual property of traditional communities? Second, how to formulate of local law that can be protecting intellectual property of traditional communities?

B. Material and Method

Arts and culture had recognized as a phenomenon of the most progressive human life, both in terms of physical movement of people or ideas. Therefore, many countries are now making culture, commercial or non-commercial, as a major part of its development strategy. Furthermore, cultural industry system will be formed as a main factor of life style.

Primary legal material for this research are regional laws, law No. 28 of 2014 on Copyright, Law Number 23 of 2014 on Regional Government and Law No. 12 of 2011 on the Formulation of Law and Regulations. Secondary legal materials include Books, journals and commentaries which discuss the law and then, Reference tools which help find the law (dictionaries and encyclopedias).

Method for this research based on a juridical-normative approach with legal inventory studies, legal history, and statute approach. In search to formulate regional regulations concerning protection of intellectual property of traditional communities used synchronization of law.

Data collection techniques with this literature study use catalog search, while the catalog is a list that provides information about collections held in a library (Lexy J. Moleong, 1991). Data analysis method used qualitatively. The conclusions taken by using deductive way of thinking is the basic way of thinking to things that are general and then drawing specific conclusions according to the subject matter (Winarno Surahmat, 1994). After the data analysis is complete, the results will be presented descriptively, that is, by telling and describing what they are according to the problem under study (Sutopo, H.B.,1998). From these results conclusions are drawn.

C. Result

The existence of regional regulations that have protected the intellectual property of traditional communities through a regional regulation traced from the Ministry of Internal Affairs legal documentation network (<http://jdih.setjen.kemendagri.go.id>).

Divide in two ways, sui generis and generis can be explained below:

No.	Type of regulations	Name of regulations
1	Sui Generis	West Java Local Act No. 5 of 2012 on intellectual property protection Special Local Act of Papua Province No 19 of 2008 on Protection of Intellectual Property of Indigenous people of Papua
2	Generis	Qanun Nanggroe Aceh Darussalam No. 12 of 2004 on Aceh Culture, Lampung No 2 of 2008 on preservation on Lampung culture, Jakarta Province law No. 4 of 2015 on Preservation of the culture of Betawi, Riau Local law No. 9 of 2015 on Consevation of Melayu

		Riau Culture, Local Law of Jambi No 7 of 2013 on Conservation and development of Melayu Jambi Culture
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D. Discussion

1. Existence of Local Law on Protection of Intellectual Property of Traditional Communities in Indonesia

Intellectual Property Rights (IPR) are rights arising or born due to human intellectual ability (Bambang kesowo in Kholis Roisah, 2015). Therefore, understanding this right is basically an understanding of the rights to property that arise or are born from human intellectual property.

The concept of IPR includes the right of ownership (intellectual), attached to the owner, is permanent and exclusive. Rights obtained by other parties with permission from the owner and temporary (Muhammad Abdulkadir, 2001).

a. West Java Province Regional Regulation No. 5 of 2012 on Intellectual Property Protection.

West Java Province is the first province in Indonesia that has regional regulations related to intellectual property rights (IPR). Philosophy of this act is maintain and preserve local culture as the identity of the people of West Java as National Assets, Protect cultural heritage, genetic resources for food, and agriculture (genetic resources for food and agriculture), traditional cultural expressions (folklore), and products of West Javanese society from recognition by other parties, bot tangible and intangible.

In this regulation, traditional Knowledge is defined as intellectual work in the field of knowledge and technology which contains elements of traditional inheritance characteristics that are produced, developed and maintained by the custodian. Then the definition of Traditional Cultural Expression (Folklore) is a culture of intellectual work in the field of art, including literary expressions that contain elements of traditional inheritance characteristics that are produced, developed and maintained by the custodian.

Specifically, the protection of traditional knowledge and traditional cultural expressions by Regional Government that provides protection first, traditional cultural expressions (folklore), including one or a combination of forms of expression:

1. textual verbal, both oral and written, in the form of prose or poetry, in various themes and content of the message, which can be in the form of literature or informative narratives, including folklore and folk poetry;

2. music, including vocals, instrumental or combinations thereof, in the form of folk songs and traditional instrument music; 3. Customary ceremonies, including the manufacture of tools and materials; 4. Custom clothing; 5. movement, including dance, martial arts, and traditional games; 6. theater, including folk puppet shows and plays; 7. heritage objects; 8. fine art, both in two-dimensional and three-dimensional forms made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile or a combination thereof, in the form of paintings, drawings, carvings, carvings, mosaics , jewelry, handicrafts, musical instruments, as well as textiles, and traditional textile products; and traditional food. Second, traditional knowledge includes: 1. traditional medical knowledge, including drugs and treatment procedures; 2. traditional ecological knowledge; 3. traditional astronomical knowledge;

b. Province of Papua

The protection of the intellectual property of indigenous Papuans is based on the many works of art and culture of the indigenous Papuan people which their motifs and designs are copied and traded as products that take place in an industrial system. On the other hand, in the Papuan community, a culture of mutual respect and respect for the work of others is still very strong in them (Victor Mambo, 2008).

The above arguments philosophically then carried out by the regional government of Papua to issue a Special Regional Regulation of the Province of Papua No. 19 of 2008 on the Protection of Intellectual Property Rights of the Indigenous Papuans. Philosophical reasoning is that Papua has many natural and cultural resources which are a reflection of the intellectual creativity of indigenous Papuans, who, if used and empowered, will have high benefits to improve the welfare of the community, especially indigenous Papuans.

Sociological reasons stated that the management and utilization of the natural and cultural wealth of the Papua Province had not been carried out optimally to improve the living standards of the indigenous Papuans.

so that it had resulted in a gap between the Papua Province and other regions, as well as neglecting the basic rights of indigenous Papuans. Then in this era of free trade there were parties without the right to use and exploit Intellectual Property Rights (IPR) of indigenous Papuans. Then the juridical reason that the Intellectual Property Rights of indigenous Papuans who have high economic value prospects have not been implemented optimally, while the laws and regulations governing the field of Intellectual Property Rights that have so far been applied cannot yet be fully implemented and have not specifically accommodated IPRs. native to Papua.

Then the specific definition of content regulated in this regulation is the provision regarding the protection of the rights of indigenous Papuans, namely the protection of rights based on respect for adat and culture, women's empowerment and strengthening religious harmony.

The gradation of IPR arrangements for indigenous Papuans as referred to in paragraph (1) shall be carried out in accordance with the priorities, interests and objective conditions of IPR in Papua. Intellectual Property Rights of indigenous Papuans if a. owners of IPR objects, inventors, brand owners, industrial design owners, integrated circuit layout designs, trade secrets and protection of plant varieties are the rights of indigenous Papuans; and b. if the IPR object owner, inventor, brand owner, industrial design owner, integrated circuit layout design, trade secret, plant variety protection consists of several people then ownership must be at least 70% owned by indigenous Papuans.

The regulation of the subject of the creator and the inauguration of the Regional Government as the right holder is defined definitively in Article 11 which regulates the indigenous community to be considered as the creator if the indigenous community announces it, the creator is not clear. If no community recognizes, the copyright holder is the provincial government.

2. Formulation on Protection of Traditional People's Intellectual Property

After Law No. 28 of 2014 on Copyright and Law No. 23 of 2014 on regional government exist, those sui generis regional law that protected intellectual property of traditional people cannot implemented by local government. The gap between local and

central government to protect intellectual property of traditional communities lies down on authority.

Law No.28 of 2014 on Copyright in article 38 explained that state have right to hold the intellectual property of traditional community (is called traditional cultural expression). Utilization of it is ruled by government regulation. So, In Presidential Decree No.10 of 2016 on the Government Preparing Program Regulation Year 2016, there is draft of government regulation on Rights held by the state for traditional cultural expressions. Content of the draft consist of criteria for traditional knowledge and traditional cultural expression are protected; and utilization of traditional knowledge and traditional cultural expressions. But until now, it has not been released.so, there is problem with regulation to implement rules about protect the utilization of traditional cultural.

Besides that, law No. 23 of 2014 on Regional Government in chapter 3 ruled about powers of government.in this law stipulated Government Affairs and the implementation based on the principle of decentralization, deconcentration, and Assistance. Government Affairs consists of absolute government affairs, government affairs concurrent, and general government affairs. Government affairs concurrent include Protection of intellectual property of traditional community. Based on article 15, the division of government affairs concurrent between local and central government and the province of districts central government affair that listed in the annex.

Policy formulation based on its terminology as a formulation of a regulation, as a form of action review of local governments in an effort to protect the existence of intellectual property of traditional communities government policies in providing intellectual property protection can be done by forming regional regulations specifically sui generis or using hybrid methods by regulating content through a variety of integrated legal products both vertically and horizontally.

Efforts to overcome the problem of intellectual property of traditional communities should be carried out comprehensively between central and regional governments. As in the Medium Term Development Plan (RPJMN) and the Short Term Development Plan as the Government's strategic plan.

For that specific formulation in the form of regional laws, it is certainly based on the principles of the formation of good legislation. I.C. van der Vlies in his book entitled "Handboek Wetgeving" (BPHN, 2008) is divided into two groups, Formal principles and Material Principle. The formal principle consist of the principle of clear objectives; The right organ / institution principle; Principle of tightness in making arrangements; Principle of implementation; Consensus principle. The material principles consist of The principle of correct terminology and systematics; The principle can be recognized; The principle of equal treatment in law; Legal certainty principle; and The principle of law enforcement is in accordance with individual circumstances.

Law of the Republic of Indonesia Number 12 of 2011 on the Establishment of Legislation Regulates that to form a Regional Law, there are principle how to of Establishing Good Legislation, which includes 7 (seven) principle : 1. The principle of clarity of purpose, 2. Appropriate institutional or official principles, 3. The principle of conformity between type, hierarchy, and content material, that in the Establishment of Legislation must really pay attention to the content material that is appropriate in accordance with the type and hierarchy of the Legislation; 4. The principle can be implemented;5. Principle of usefulness; 6. Principle of clarity in the formulation, 7. The principle of openness.

Contents of the law must reflect the guiding principle, principle of humanity, national principle, principle of kinship, principle of independence, the principle of unity

in diversity, principle of justice, principle of equality in law and government, principle of order and legal certainty, principle of balance and harmony.

In forming the legislation, there are several theories like the norm level theory. Hans Nawiasky, one of the students of Hans Kelsen, developed his teacher's theory of the level theory of norms in relation to a country. Hans Nawiasky in his book "Allgemeine Rechtslehre" argues that in accordance with Hans Kelsen's theory, a country's legal norms are always multi-layered and tiered, namely the norms that apply, based on, and derive from higher norms and so on until a norm the highest is called the basic norm. From this theory, Hans Nawiasky added that besides the norms were layered and tiered, legal norms also grouped. Nawiasky classified into 4 major groups, namely: 1) Staatsfundamentalnorm (fundamental state norms), 2) Staatsgrundgezets (basic rules of the country); 3) Formell Gezetz (formal laws); 4) Verordnung and Autonome Satzung (implementing rules and autonomous rules) Therefore, by relying on the principle of law formation both formally and materially and based on the theory of legal divisions, the policy formulation carried out by the regional government to rechtsvorming will certainly look at the rules of the rules above especially by looking at them as regional government affairs. Based on Law No. 23 of 2014 concerning Regional Government referred to as Government Affairs is the power of government which is the authority of the President whose implementation is carried out by state ministries and administrators of Regional Governments to protect, serve, empower and prosper the community. Then the affairs of absolute government are Government Affairs which are fully the authority of the Central Government. Concurrent government affairs are Government Affairs which are divided between the Central Government and the provincial and regency / city regions. Seeing from the classification of the functions, the protection of intellectual property of traditional communities is included in the classification of concurrent affairs that are divided between the central government and regional governments. In the annex of Law No. 23 of 2014 concerning Regional Government, it is included in the division of government affairs in the field of culture. In this division, the protection of communal Intellectual Property Rights (IPR) in the field of culture becomes the affairs of the central government while the regions only carry out traditional preservation actions. Based on these provisions, the formulation of local government policies must comply with the provisions of Law No. 23 of 2014 concerning Regional Government. In Article 17 (3) is clearly explain that In the case of regional policy made in the course of which the authority of the Government Affairs area is not guided by norms, standards, procedures, and criteria referred the Central Government to cancel the policy of the region.

Synchronization and harmonization of the establishment of regional law must be aligned in accordance with the principles of the establishment of laws and regulations stipulated in Law No. 12 of 2011 Establishment of Legislation. Because Law consist of norms that guidelines or standards of conduct or appropriate or expected behavior. In legal procedures, the structure and process of the device of legal norms that apply at a certain time and place and in the form of written (Prasetyo, Teguh dan Barkatullah, Abdul Halim, 2015).

E. Conclusion

1. Regional regulations that specifically (Sui generis) regulate the protection of intellectual property of traditional communities are still minimal by local governments. Based on data on the legal documentation network of the internal ministry Affairs there are only 2 (two) regional law at the provincial level. But after existing law No. 28 of 2014 on Copyright

and Law No. 24 of 2014 on Regional Government, the existing of regional Law (west Java and Papua) cannot be implemented.

2. Formulation policy for the establishment of regional Laws to protect and preserve cultural traditional communities have to create for certain justice to traditional communities. But, it still's remain in line with the guidelines for the formation of laws in accordance with Law No. 12 of 2011 on Establishment of laws and regulation

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