

# THE PROTECTION OF INDONESIAN INDIGENOUS HERITAGE IN THE INTERNATIONAL CONVENTIONS AND THEIR IMPLICATION TOWARD INDONESIAN LAW

Irma Rachmawati Maruf

Pasundan University  
[rachma71wati@yahoo.com](mailto:rachma71wati@yahoo.com)

## Abstract

As an archipelago, Indonesia consists of 17.507 islands. The regions of Indonesia have some of their indigenous ethnic groups. However, in the light of the geographical aspect, Indonesia has 128 ethnics groups which have different cultures. Meanwhile, since the end of 1990s, the topic of genetic resources, traditional knowledge and Indigenous heritage ambit of Intellectual property discussions. Batik and Angklung are Indonesian Indigenous heritage which have been acknowledged by UNESCO as Intangible Cultural Heritage. One of the purposes of the acknowledgment is to avoid any claim from another country which has the same culture. Besides batik and angklung, there are so many indigenous heritages that have not been acknowledged as Intangible Cultural Heritage. Due to this condition, the research is made to know what the protection should be given by law to Indigenous heritage in international law perspective. There is also how the implementation of International convention to Indonesian law can protect and maintain the cultural heritage. The method used in this study is a juridical normative with the specifications of analytical description. The research was conducted by collecting primary, secondary and tertiary legal materials through library and field research, and then analyzed with qualitative method. Based on the results of this study, it is revealed that: Firstly, the legal basis of the application of the Implementation of Protection of Indonesian Indigenous heritage have been already very relevant but still insufficient in implementation. Hence, it is not impossible that Indonesian government can take economic advantages of Indigenous Heritage. Secondly, there are various forms of Legal protection of Indigenous Heritage, these are Law of Intellectual Property Right and Legal Protection besides Intellectual Property.

**Keyword :** *Indigenous Heritage, Intangible Cultural Heritage, Intellectual Property Right Law.*

## 1. Background of Study

Angklung and batik are Indonesian Indigenous Heritage, which have awarded by UNESCO as Indigenous Heritage in 2010. Beside Angklung and Batik, Wayang Puppet Theatre and Indonesian Keris have been acknowledged by UNESCO in 2003 and 2005. That is the fact that Indonesia has a large amount of Intangible and tangible assets. There are various approaches to indigenous knowledge within Indonesian ethnic communities of which the Javanese would be the largest.

Batik, Angklung, Wayang puppet and keris are a small number of Indonesian indigenous knowledge, fortunately, they have been awarded by UNESCO. Furthermore, there are large number of Indonesian Indigenous knowledge that have not been acknowledgement by UNESCO. As mentioned above, Indonesia is An Archipelago State. There are more than three hundred and fifty ethnic groups, living on more than thirteen thousand tropical islands stretching more than five

and half thousand kilometres along the equator. That is why Indonesia has a large number of Indigenous knowledges such as folklore, spices and tonic herb traditional medicine, traditional food industry.

One of the purposes of the acknowledgment is to avoid any claim from another country which has the same culture. For Example A case that happened in 2007, when the Malaysian Government used the folk song Rasa Sayang for a tourism campaign. On that occasion the song is widely regarded as having originated in Moluccan Islands of Indonesia. However, while the Malaysians regarded the song as heritage of entire Malay archipelago. The Indonesian Minister for Tourism and culture wanted to investigate whether Indonesia could claim copyright for the song.<sup>1</sup>

<sup>1</sup> Peter Tobias Stoll, et.all, 2009, Indigenous People, Indigenous Knowledge, and Indigenous Resources in International Law, in Traditional Knowledge, Traditional Cultural Expressions and

Another case till in 2007 Malaysia registered batik "Parang rusak" from Yogyakarta of Indonesia as Malaysian design.<sup>2</sup> In 2004, an artist from Bali island has been sued by United States government in case of "Borobudur" handicraft which made of silver and the artist reported the sue to Human Right Commission of Indonesia.<sup>3</sup>

Current Indonesian intellectual property law provides traditional knowledges protection especially for Folklore as part of the Copyright Act and for local varieties as part of the Plant Varieties Protection Act.<sup>4</sup> Within these laws, part of folklore and traditional knowledge have the concept of equitable benefit sharing, although recognized as important, until now these laws were insufficiently implemented.<sup>5</sup> As for copyright the Indonesian state is regarded and implemented to prevent foreign exploitation of Indonesian indigenous knowledge without the state's priority consent.<sup>6</sup> As well as the Plant Variety Protection Act provides that Local varieties owned by communities are controlled by the state.

The problem is, however, whether concepts derived from the debates on ownership and control of cultural resources and also knowledge in other countries can be easily applied at the national level in Indonesia. Indonesians point to different concepts and philosophy held by indigenous people in Asia and other such as Australia, New Zealand, the United States and Canada. Indigenous Indonesians have the position in terms of politic and culture. The meaning of "indigenous" in Indonesian law terms has to be re-evaluated,

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Intellectual Property Law in The Asia Pacific Region, Netherlands, Kluwer Law International p. 55

<sup>2</sup> Jakarta Post, Oct 8<sup>th</sup>, 2007

<sup>3</sup> Pikiran Rakyat, 30<sup>th</sup> July 2007.

<sup>4</sup> Christoph Antons dan Rossy Antons Sutanto, 2009, Traditional Medicine and Intellectual Property Rights: A case study of the Indonesian Jamu Industry, in Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in The Asia Pacific Region, Netherlands, Kluwer Law International p.109

<sup>5</sup> Abdul Bari Azed, 2002, Kepentingan Negara Berkembang Terhadap Hak Atas Indikasi Geografis, Sumber Daya Genetika dan Pengetahuan Tradisional, Jakarta FHUI, in Christhop Antons. Ibi.

<sup>6</sup> Ibid.

because Indonesian terms Indigenous people tends to cultural property right.

The notion of cultural property stems originally from the indigenous movement in settler colonies, where indigenous leaders and activities have embarked on a campaign to halt the flow of indigenous cultural appropriation and stress the importance for indigenous minorities to regain control over their own cultures, which they have inheritance from their ancestors.

This perception differs from the Indonesian perception of the relation among culture, ethnic community and the state, in which the concept of indigenous culture is interwoven with the concept of the Indonesian nation and national culture.

The traditional Indonesian medicine (jamu), for example is one of Indonesian Indigenous knowledge that has not been acknowledged by UNESCO. The term of Indigenous in Jamu industry is an example describing the difference in the terminology as mentioned previously.

Immediately after independence, The Indonesian government constructed the term asli or "indigenous Indonesian" to reserve the marginalized position of ethnic Indonesians as indigenous people of the archipelago during the colonial period. The terms asli Indonesian and later the term pribumi or "indigenous Indonesian" were used until now to assert the majority position of ethnic Indonesians against Indonesian citizen of foreign descent.

Further, the Indonesian government has used the concept of "indigenous" in the process of nation building to emphasize the authentic characteristics of the Indonesian nation. The relation of the concept of nation is the concept of the Indonesian culture. The Indonesian national culture has been constructed under the national motto of Bhineka Tunggal Ika or "unity of diversity". The motto signifies an attempt to unite the diversity of local culture and tradition into a single national culture, which nevertheless at the same time allows every ethnic community to uphold its custom and characteristic.

## 2. Literature Review.

Silke define that term of Indigenous, from the beginning up to now, has not led to a clear definition.<sup>7</sup> International law does not provide for

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<sup>7</sup> Silke von Lewinski, 2009, Indigenous Heritage and Intellectual Property: Genetic Resources,

an agreed definition, at the national level the membership of indigenous groups is often determined by state recognition or registration.<sup>8</sup> Firstly United Nation attempt a definition of indigenous people. It Stated that :<sup>9</sup>

Indigenous communities, people and nation are those, which having a historical continuity with pre invasion and pre colonial societies that developed on their territories, consider themselves distinct from other sector of the societies now prevailing in those territories, or part of them. They form at present non dominant sectors of the societies and are determined to preserve, developed and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their cultural partners, social institutions and legal system.

Christops Anton said, in Indonesian terms is different from concept above. After Independence ,the Indonesian government constructed the term native or “indigenous Indonesian” to reserve the marginalized position of ethnic Indonesians as indigenous people of the archipelago during the colonial period vis a vis the European colonizers and foreign minorities such as Chinese, Indians and Arab, who were permanent residence of the colony.

<sup>10</sup> Peter Mahmud determined ,In this case, the term “indigenous” does not mean one who is born or grown up in Indonesia but it refers to ethnological notion in that one is of Indonesian ethnics.<sup>11</sup> Those who were neither Europeans nor Indigenous Indonesians fell into the Foreign Orientals. Hence Sudargo Gautama said, Indigenous Indonesian is the one who living under their customary or “adat law” and not registered in the civil registration.<sup>12</sup>

Later, The terms native Indonesian and later the term pribumi or “indigenous Indonesian” were used until now to assert the majority position of ethnic Indonesians against Indonesian citizen of

foreign descent. Pribumi means sons of the soil.<sup>13</sup> It can say that The Indigenous Indonesians were native who did not change their status into other group and those who were people of other group that have made self absorption into native Indonesian people.

Further, the Indonesian government has used the concept of “indigenous” in the process of nation building to emphasize the authentic characteristics of the Indonesian nation.<sup>14</sup> Related to the concept of nation is the concept of the Indonesian culture. The Indonesian national culture has been constructed under the national motto of Bhineka Tunggal Ika or “unity of diversity” . The motto signifies an attempt to unite the diversity of local culture and tradition into a single national culture, which nevertheless at the same time allows every ethnic community to uphold its custom and characteristic.

Indigenous cultures find expression not only in their land but also in specific knowledge of the use of the land and its resources, in their medicinal and spiritual knowledge and in traditional art, beliefs and values as they have been pass on from generation to generation. To capture all of these elements, the term indigenous heritage has been proposed and now is reflected in Art 31 of the Declaration.<sup>15</sup> It stated :

Heritage is everything that belongs to the distinct of a people and which is theirs to share, with other people. It includes all of those things which International law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plant and animals which a people has long been connected.<sup>16</sup>

Indigenous cultural objects, knowledge, and resources have been inherited from the past, they have been passed on generation to generation. In the most cases. No written evidence exist, and the know how is transferred orally. As indigenous knowledge and artwork are constantly evolving, they are being adapted to the changing environment and to changing needs and priorities of their group.

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Traditional Knowledge and Folklore, Netherlands, Wolters Kluwer, p.11

<sup>8</sup> Ibid

<sup>9</sup> UN Doc. E/CN.4.Sub 2/1986/7/Add 4. Paras 379-380, in Silke von Lewinski Ibid.

<sup>10</sup> Christops Antons, Loc.cit.

<sup>11</sup> Peter Mahmud Marzuki , 2011, An Introduction To Indonesian Law, Setara Press, Malang, p.4

<sup>12</sup> Sudargo Gautama, 2006, Indonesian Business Law, Bandung, Citra Aditya BAKti, p.9

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<sup>13</sup> Chistoph Antons and Rossy Antons Sutanto, Op.cit.

<sup>14</sup> Ibid.

<sup>15</sup> Silke Von Lewiski,2009, Indigenous Heritage and Intellectual Property Right.,Netherland, Kluwer, p.20

<sup>16</sup> Ibid.



“Traditional” in this context is not to be equated with Old but refer to its indigenous origin.

Indigenous cultural heritage is an intellectual property right which is not owned and monopolized by individual members of the indigenous group but it is collective rights to be reserved for elders, shaman or healers.<sup>17</sup> The notions of Intellectual property right in this term is not the same as Intellectual property right in western legal system. It stated intellectual property right is an individual and exclusive right to something newly invented or created.<sup>18</sup> This concept is generally not shared by indigenous people and is not referred to when indigenous community talk about their intellectual property and heritage.

### 3. The Methodology

The methodology used for this research is library based on this study uses secondary data as the main data source, and the selected material is a matter of law concern. The information and data collected in this normative research and secondary data consists of primary law materials and secondary legal materials that are qualitative. These will be obtained by studying and analyzing various kinds of sources that relate either directly or indirectly to this research problem, such as Reports and research results, Indonesian legislation; International conventions; Global nature of international documents, such as conventions, declarations and guidelines; Books/references; and Journals, and other sources.

Examining information and data from books or references, journals and other sources will help to get the concepts, theories and strategies for indigenous knowledge. The data and information are considered to be important because they give a general description of the phenomena of the issues raised, which can serve as the conceptual basis for the analysis when confronted with the available factual data.

Besides library research, interviews and discussions or correspondence with relevant experts will be conducted against the issues raised. Discussions and correspondence will use an interview guide prepared in the form of opened (free-response) questions. The interviews will focus on the object of research and will use

<sup>17</sup> Darrell A Posey, *Beyond Intellectual Property, towards Traditional Resources Rights for Indigenous People and Local Communities* Ottawa, p 205-206

<sup>18</sup> Richard Schaffer, Filiberto Agusti, 2009, *International Business Law and Its environment*, Canada, Nelson Education, Ltd.

discussions and interviews conducted by researcher with government such as the private sector to seek official opinions.

## 4. Results and Discussions

### 4.1. Indigenous Heritage in International Law and Its Implication to Indonesian Law

Traditional knowledge is regulated by The Indonesian Copy Right Act 28/2014, This Act apparently inspired by WIPO/UNESCO drafted Tunis Model Copyright Law for developing Countries of 1976 and The WIPO/UNESCO Model Provisions of 1982. In the previous Act 2002 the term folklore and community cultural expression or traditional knowledge was added to the protected subject matter. It stated that : copy right over creation held or implemented by state in folklore and community culture expression or traditional knowledge such as stories, tale, fairy tale, legends, chronicles, songs, handicrafts, choreography, dances, calligraphy and other artistic works are valid for unlimited period.<sup>19</sup> But in the latest Act 2014 it is not regulated in detail this act only stated on Traditional Cultural Expression and unknown creators.

A part from regional cross-border disputes, the centralized approach through copy right to folklore as national property with the ongoing process of decentralization in Indonesia. Indonesian government has an aim to transfer political decision making power as well as tax collection to the regions and districts and which has also led to a remarkable revival of the institutions of customary law (adat).

Articles 18 B (2) of the amended Constitution of 1945 states that the state “recognizes and respects community units based on adat law along with their traditional rights as long as these are still in existence and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. Also in 281 (3) in the new Chapter XA Human Rights, guarantees respect for “ the cultural identities and rights of traditional communities in accordance with cultural development and civilization. Further , the various qualifications used in the constitutional provisions leave no doubt that the policy changes with regards to such communities may not affect the predominant concerns of development and civilizations.

While the new reference to masyarakat adat (adat community) seems better and non discriminative term in comparison to the previously used

<sup>19</sup> Copyright Act , 2002 and Copy Right Act 2014.

“masyarakat terasing” (isolated community) or suku bangsa terasing (isolated ethnic group) its blur the distinction to majority ethnic groups in Indonesia, such as the Javanese, Sundanese, or Balinese which are communities based on their respective form of adat.<sup>20</sup>

In multi ethnic Indonesia with its thousands of islands, claims of the central government to things such as folklore are a highly political issue and its require to govern in an act for the implementation of Act 2014. This lack of implementation has not prevented various government department to begin the development of digitized inventories and registration systems, initially mainly for folkloristic material.<sup>21</sup> This action is very important to protect Indonesian folklore for a claim from another countries which have similar cultural with Indonesian such as Malaysia, Singapore, as ‘serumpun melayu’. Rasa Sayang is one example how Indonesian folklore not be protected by local government law.

Another problem is who will be the owner of Intellectual property right of indigenous knowledge? The element of regional cultural such as art music, craft, medical are the knowledge related to national culture as well as local indigenous traditions and Indonesians seem them selves as bearers of national and regional ethnic Indonesian culture at the same time .Local communities are perceived by the national government as using elements of cultures such as customs and religion to assert their distinctive ethnic identity.

The Indonesian traditional herbal medicines is an example for the ambiguity of the concept of “cultural property rights” because it uses knowledge, which can be claimed by the state in one side, by single ethnic community in other side. It can be happened in case of traditional medicine in particular may also involve the entire range of traditional knowledge and traditional culture expressions. Jamu may be transmitted by using folkloristic expressions and the raw materials used may come from farming and from maintaining herbal garden as well as from natural habitats and rainforests.<sup>22</sup> In Indonesia , knowledge of traditional health and medicine is generally transmitted orally from one generation to another. According to Javanese, Balinese, Madurese the knowledge belongs to the community and not to particular individuals .

People in those ethnic are sharing a common empirical knowledge of traditional herbal medicine, as historically there are cultural links among these islands. In any case , the Indonesian government in law of 1963 regulated traditional remedies such as jamu as indigenous Indonesian medicine. It defines as “ medicine that are obtained directly from materials available in Indonesia, processed in a simple manner based on experience and used in “ traditional (medical) treatment).<sup>23</sup> From the definition, it clear that Jamu belongs to all Indonesian people and can be used as national “cultural property” for the benefit of the nation. On the other hand owner of jamu companies, such as Mustika Ratu, Nyonya Meneer, etc , believe their knowledge of making jamu as their property which they have inherited from their ancestors. This is an advance problem to find many cases of Jamu came inter company. The cases of Mustika Ratu vs Martha Tilaar, Nyonya Meneer vs Keraton of Surakarta, are the examples of disputes of intellectual property of traditional knowledge, However Government declared Jamu as Indigenous Indonesian Medicine: and therefore it is as national traditional knowledge .

The potential to solve the cases is regional designation which regulated by Act 51 of 2007 on Geographical Indications. Under Article 1 of Government Regulation as “ good, which due to its geographical environment factors, the nature, the people or the combination to its geographical environment factors, the nature, the people, or the combination of the two factors give specifics characteristics and quality to the produced goods.” With this regulation the government will minimize such conflicts with its promotion of jamu as national heritage and as national asset. It means jamu appears of form of national medicine and in its specific regional form at the same time.

At the international level , things may be more complicated. Because of common language, culture, and traditional links and migration, Indonesia’s traditional knowledge is also shared by the ethnic Malay population in neighbouring Malaysia, Brunei, and Singapore. Same as folklore , Malaysia has the same similarity with Indonesian Jamu. The plant is popularity known in Malay and Indonesian speaking country as Tongkat Ali and Pasak Bumi respectively and is widely used in jamu ingredient.<sup>24</sup>As the Malaysian patenting of

<sup>20</sup> Christopher Antons. Op. cit. p. 55

<sup>21</sup> Detik, Oct 3<sup>rd</sup> 2017

<sup>22</sup> Christopher Antons, Ibid,

<sup>23</sup> AF Afdhal & RL Welsch, 1988, “The Rise of the Modern Jamu Industry in Indonesia, Dordrecht, Kluwer Academic Publisher, p. 151

<sup>24</sup> Grain&Kalpavrisikh, 2008, Traditional knowledge of Biodiversity in Asia Pssific. In Antons. Loc.cit.

Tongkat Ali demonstrates , claim to traditional medical knowledge become more sensitives., where the knowledge has crossed national boundaries.

#### 4.2. Protection to Indonesian Indigenous Heritage

Some International Convention can be used as a shield of protection of Indonesian Indigenous Heritage. As mentioned perviously, Batik, Angklung, Keris and Wayang Puppet have been awarded as Intengible Cultural Heritage by UNESCO.

On the other hand, there are a lot of Indigenous Heritage have not been acknowledged by UNESCO. In the name of nation's interest this matter is very important. The award not only will protect the culture but also to announce the culture to the world to prevent the claim from another country. Based on Article 2 (1) Convention on The Safeguarding of The Intangible Cultural Heritage stated : 'The Intangible cultural heritage means the practices representation, expressions, knowledge, skills as well as the instuments, object, artefacts, and cultural spaces associated the rewith, that communities, group am, in some cases, individuals recognize as part of their cultural heritage'.

From the article can conclude that indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, their traditional knowledge and traditional cultural expression, as well as the manifestations of their culture. They also have the right to maintain, control, protect and develop their intellectual property right over such cultural heritage, traditional knowledge and traditional cultural expressions. We can say that Indonesia have a right to an economic value from this intellectual property right.

A tradition can be categorized as intangible Cultural heritage firstly if the knowledge is an oral traditional and inheritance by their ancestors, secondly this knowledge is a custom for indigenous people. From the definition Jamu and Folklore have a big possibility to enter the representative list by UNESCO. Basically it is very important to collect basic information regarding the formation and development of element of culture in that area. The information could be the communities, religion and faiths, livelihood; languages and social system. This information will perfect when it is completed by examples and audio/visual illustration for cultural element having visual aspect. For folklore the information is accomplished by a text in the original language. If the text is an ancient heritage such as written in a

palm leaves or stone inscription , then a reference photograph will be included.

If a tradition awarded by UNESCO this tradition will be listed in representative list . Based on Article 17 of the Convention, representative list is a list in order to ensure better visibility of intangible cultural heritage and awareness of its significance, and to encourage dialog which respect cultural diversity, the committee, upon the proposal of the states parties concerned, shall establish, keep up to date and publish representative list of intangible cultural heritage of the intangible cultural heritage.

To maintain the representative list and also to improve the heritage to be awarded bay UNESCO, Government have to maintain the tradition to avoid this tradition became unlisted by UNESCO. In sum there are some cases in Indonesia describes a strong national interest in the promotion of folklore, traditional medicine and other forms of traditional knowledge. The Indonesian state regards most of these forms as national heritage and either property of the state or as property of local community to be administrated and controlled by government.

## 5. Conclusions and Suggestion

### 5.1. Conclusion

- A. The legal basis of the application of the Implementation of Protection of Indonesian Indigenous heritage have been already very relevant but still insufficient in implementation.
- B. It is not impossible that Indonesian government can take economic advantages of Indigenous Heritage.
- C. There are various forms of Legal protection of Indigenous Heritage, these are Law of Intellectual Property Right and Legal Protection besides Intellectual Property.

### 5.2. Suggestions

- A. Indonesian Government should have a cultural map to collect the Information regarding to indigenous heritage of Indonesia.
- B. Local government must have a plan to make investation to implement the UN Convention on The Safeguarding of The Intangible Cultural Heritage hence the program need huge money to implement.

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UN Doc. E/CN.4.Sub 2/1986/7/Add 4. Paras 379-380.

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