

PROTECTION AND SUSTAINABILITY OF INDONESIAN TRADITIONAL KNOWLEDGE AND FOLKLORE: LEGAL AND NON-LEGAL MEASURES

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The challenge toward the sustainability of Indonesian cultural heritage demands urgent attention, as it has given Indonesia intangible wealth which is equally important to other tangible economic wealth. Indonesian cultural heritage which is in most part, represented by its traditional knowledge and folklore (TKF), has been seen by the Indonesian government only from its commercialization point of view. The government effort to legislate the protection of Indonesian TKF is in major part, based on the concept to protect the intellectual property (IP) and commercial values of the TKF. This concept can be seen on the texts of the Bill of Protection and Utilization of Intellectual Property of Traditional Knowledge and Traditional Cultural Expression. It means that the Bill does not particularly aim on the preservation and sustainability of Indonesian TKF that underlies Indonesian culture. The protection of Indonesian TKF only from commercial misappropriation and misuse cannot prevent Indonesia from losing its TKF and thus, losing its intangible wealth. This is because Indonesian communities rarely see their TKF from its economic aspect, but rather they see it from its spiritual value, way of life, cultural identity, and social tie that unites the country. The economic aspect of TKF will become apparent only if the TKF is well sustained. This paper argues that the present Bill of Protection and Utilization of IP of TK and TCE will be difficult to be implemented and accepted by Indonesian communities, if the Bill only focuses the protection on the IP and commercial aspects of the TKF. Besides that, the Bill will be unable to prevent the loss of Indonesian TKF. Therefore, this paper argues that the Bill must broaden the scope of TKF protection to include creating new efforts to preserve, sustain, and respect Indonesian TKF, including its IP and relevant communities. To successfully achieve its goal to protect Indonesian TKF, the government must support the Bill with some legal and non-legal measures, such as: Revitalization of Indonesian customary law (Adat law) that has often guided Indonesian communities in managing their TKF; Documentation of Indonesian TKF; Passing the Bill of Recognition and Protection of Adat Communities; Education of government officials and courts who in majority,

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do not understand fully the concept of TKF protection and confuse it with conventional IP protection. Moreover, the government must also tackle problems of increasing radicalization among Indonesian Moslems that often attack communities that practice their TKF deemed in contrary to Islamic norms. In summary, this paper aims to discuss how the legislation to protect Indonesian TKF should be drafted and what must be done to implement the legislation to protect and sustain Indonesian TKF that constitutes our cultural heritage.

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INTRODUCTION

Among Asian countries, Indonesia starts very late to give attention on protecting its traditional knowledge and folklore. In Indonesia, the attention toward this issue only arises in the past three years following the disputes between Indonesia and its neighbor, Malaysia, over some traditional knowledge and folklore belong to Indonesian communities,¹ and following the disputes between Indonesia and Japan over Japanese patent on some Indonesian traditional knowledge.² Most Indonesians see the misuse and misappropriation of Indonesian TKF especially by its neighboring country, Malaysia, as a very sensitive issue, because it adds to other existing conflicts³ that insult the identity and pride of Indonesians. Therefore, the

¹ For example, Malaysia included some dances and songs that belong to Indonesian folklore, such as: dance *Pendet* of Bali, dance *Reog Ponorogo* of Ponorogo, East Java, song *Rasa Sayange* of Ambon, in its tourism promotion advertisements. There was also dispute over Indonesian traditional knowledge, such as: *batik* that was claimed as Malaysian heritage.

² For example, Shisheido, a Japanese cosmetic company, had patented Indonesia's traditional knowledge and 11 different compounds of Indonesian traditional medicinal plants (*Jamu*), although in 2002 they withdrew those patents from the European Patent Office amid strong protests by some Indonesian NGOs, such as BioTani PAN Indonesia. See

http://www.biotani.org/BioTaniPAN_Indonesia2005.htm (last visited 23 June 2011).

³ For example, disputes over sea and land territory, illegal logging, and treatment of Indonesian labors in Malaysia.

Indonesian government is forced to start paying attention on protecting Indonesian traditional knowledge and folklore (TKF).

For Indonesians, the issues of TKF is not about the economic or commercial aspects of Indonesian TKF. Jaszi reports that the concern among Indonesians, especially traditional artists and community leaders, is about the acknowledgment and recognition from others that they are the custodians of Indonesian TKF and the cultural-bearers.⁴ Foreign claims to Indonesian TKF have hurt them. Moreover, TKF has been way of life for many Indonesians. It encompasses tradition, wisdom, values, knowledge of communities that are passed through stories, legend, folklore, ceremonies, and gradually form the social norms and way of life of Indonesians. Losing this TKF means losing Indonesian social norms and way of life that can bring social implications, such as social tension among communities that is usually found in multi-ethnic countries, like Indonesia.

Despite the lack of its seriousness in issuing the implementing regulations, the Indonesian government has recognized the importance of intellectual property (IP) of Indonesian folklore since they enacted the first national Copyright Act in 1982 (see Article 10 of the Copyright Act No. 6/1982, Article 10 of the Copyright Act No. 19/2002 and, Article 13 of the 2010 Bill of Copyright). In these Copyright Acts, the state holds copyright on Indonesian cultural heritage that includes prehistoric relics, historical heritage, artifacts and folklore to protect them from being exploited by foreigners, while in the 2010 Bill of Copyright, the state holds copyright on Indonesian traditional cultural expression (TCE) on behalf of its custodians, without particularly mentioning the foreign use of the TCE. The 2009 Bill of Patent will be the first Indonesian Patent Act that provides patent protection toward Indonesian traditional knowledge related to genetic resources. So far, the government has not issued any implementing regulations required by Article 10 of the Copyright Act No. 19/2002 regarding how the government enforces its copyright on Indonesian cultural heritage.

The recent cultural dispute with Malaysia over some TKF has forced the Indonesian government to become more serious in their effort to protect Indonesian TKF. Since 2008, the Indonesian government has started the process of drafting a new *sui generis* law to protect the intellectual property use of Indonesian traditional knowledge and traditional cultural expression or folklore. The Bill, which has the title, Bill of Protection and Utilization of

⁴ See generally PETER A. JASZI, TRADITIONAL CULTURE: A STEP FORWARD FOR PROTECTION IN INDONESIA (2009), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1000&context=pjip_trad_knowledge&sei-redir=1#search=%22peter%20jaszi%20step%20forward%20protection%20indonesia%22.

Intellectual Property of Traditional Knowledge and Traditional Cultural Expression, is listed in the priority national legislation program (*Prolegnas*) for the year of 2010-2014. Unlike in the other Indonesian IP legislations that do not give explicit definition of traditional knowledge and folklore, this Bill gives definition of traditional knowledge (*Pengetahuan Tradisional*) as intellectual work in the field of knowledge and technology that contains elements characteristic of traditional heritage that are created, developed and sustained by local communities or indigenous communities.

For the term of folklore,⁵ this Bill translates folklore as *Ekspresi Budaya Tradisional* (Traditional Cultural Expression) and defines it as intellectual work in arts, including literary expression that contains elements characteristics of traditional heritage that are created, developed and sustained by local communities or indigenous communities.

This Bill is drafted together with Indonesia's participation in international forums to gain international recognition and protection of TKF. In 2007 in Bandung, the Indonesian government held the Asia Africa Forum on the Protection of Genetic Resources, Traditional Knowledge, and Folklore which was based on the Declaration on the New Asian African Strategic Partnership (NAASP) adopted previously in Bandung on 24 April 2005. In 2009 in Bali, the government hosted the Meeting of the Like-Minded Countries (LMCs) on International Legal Instrument for the Protection of Genetic Resources, Traditional Knowledge and Folklore, to gain common understanding among developing countries for their negotiation with developed countries in the WIPO-Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resource, Traditional Knowledge and Folklore. The government also actively participates in all sessions of WIPO-IGC meetings.

Despite its participation in international forums to protect TKF, the Indonesian government has come to realize that these international forums have not achieved much progress in the effort to find a meeting point between the two groups of countries, developing and developed countries.⁶ The different perspective between developing and developed countries on

⁵ For the purpose of writing this article, the author will keep using the term "folklore", interchangeably with "traditional cultural expression" as these two terms are also interchangeably used in international forums, such as in the WIPO-Intergovernmental Committee in their drafting of Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore.

⁶ The protection of traditional knowledge and genetic resources in indonesia, ASIA-PACIFIC ECONOMIC COOPERATION (Aug. 12-14, 2008), http://aimp.apec.org/Documents/2008/IPEG/SEM2/08_ipeg_sem2_010.pdf, at 3. *Seni Budaya, Tak Ada Perlindungan secara Internasional* [Cultural Expression, No International Protection], KOMPAS, Sep. 1 2009, at 12.

many issues of TKF protection has remained the same.

The urgency to protect Indonesian TKF from being misused and misappropriated by Indonesia's neighboring countries, prompts the government to focus on the establishment of national legislation, while waiting for a binding international legal instrument for TKF protection.

While the primary objective in international forums for TKF protection is the preservation of cultural heritage, and IP protection is the consequence of it,⁷ the primary objective in Indonesian national legislation is the regulation of IP utilization and commercialization of TKF, not the preservation of the cultural heritage. This can be seen in the Consideration of the Bill of Protection and Utilization of IP of TK and TCE which considers [t]hat the ethnic and tribe diversity, and intellectual work which constitute valuable cultural heritage are attractive for commercial use therefore, this commercial use must be regulated for the benefit of society (Emphasize from the author).

Majority of Indonesians consider the issues concerning IP and commercial use of Indonesian TKF less important than the issue of the survival of Indonesian TKF due to the lack of government's acknowledgment, attention, and documentation on Indonesian TKF and the communities that sustain it. Indonesian traditional communities do worry about the IP misuse and commercialization of their TKF, but it is not their main and major concern. Their main concerns are: Their cultural sustainability; the maintenance of system to sustain and transmit their culture to next generations, and a balanced system that will provide some level of protection on their culture against economic and moral harm, while at the same time allowing everyone access to their culture to promote creativity and useful innovations. According to them, regulating these issues should be the goal of any new legislation on TKF protection.⁸

The different perspective of the government and Indonesian communities on the goal of TKF protection presents potential problems when the Bill will be passed and implemented in the near future as part of the priority national legislation program 2010-2014. Those problems will be discussed in the following section of this paper. This paper will also discuss what must be done by the government to preserve and sustain Indonesian TKF through comprehensive range of measures, combining legal and non-legal measures, IP and non-IP measures. The term "protection" that will be

⁷ See for example, the WIPO-IGC Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore and the WIPO-IGC Draft Provisions for the Protection of Traditional Knowledge.

⁸ PETER A. JASZI, *supra* note 4, at 21-22.

used through out this paper will have broad meaning to include sustaining and preserving Indonesian TKF as well as protecting the IP of Indonesian TKF. The term “IP protection” will be used when this paper particularly discusses the IP protection of Indonesian TKF.

I. NOT ONLY ABOUT IP PROTECTION

Some Indonesian academics are skeptical about the practical importance of the Bill of Protection and Utilization of IP of TK and TCE as they see that in reality, the government, both central and local governments, even do not care about the loss of tangible cultural heritage, such as cultural artifacts that are left ruined and stolen all over Indonesia.⁹ The latest incident was that the *Kerinci* regency government, in Sumatera, was found to almost deliver some *Kerinci* historical heritages, such as, ancient manuscripts and artifacts, to a gallery in Malaysia for an exhibition, without any permit from the Indonesian Minister of Culture and Tourism. The delivery could be prevented by the central government because of the media coverage on this incident.¹⁰

Besides that, most Indonesians still hold to *Adat* norm (an extensive system of Indonesian customary norms) that values the ethic of sharing and does not recognize ownership and monopoly in intellectual works.¹¹ With this *Adat* background, Indonesians consider the concept of IP protection on TKF as vague as the concept of conventional IP rights such as, copyright, neighboring right, patent, trade secret, industrial design, and so forth. Therefore, arguably the Bill will be more welcomed by Indonesian people if the Bill does not exclusively provides IP protection but provides more comprehensive protection on Indonesian TKF for the purposes of preserving and sustaining it and provides IP protection as the part of the comprehensive TKF protection.

⁹ *Akademisi Kritik RUU Pengetahuan Tradisional dan Ekspresi Budaya Tradisional* [Academics Criticize Bill of Traditional Knowledge and Traditional Cultural Expression], HUKUM ONLINE (Sep. 16, 2009)

<http://www.hukumonline.com/berita/baca/hol23152/akademisi-kritik-ruu-pengetahuan-tradisional-dan-ekspresi-budaya-tradisional>.

¹⁰ *Pengiriman Benda Bersejarah Tanpa Izin* [Delivery of Historical Heritage is Without Permit], KOMPAS, Apr. 14, 2011, at 12. *Disiapkan Jerat Hukum* [Legal Sanction is Ready], KOMPAS, Apr. 16, 2011, at 12.

¹¹ For an extensive discussion on the incompatibility between *Adat* norms and the concept of IPR, please read Afifah Kusumadara, *Analysis of the Failure of the Implementation of Intellectual Property Laws in Indonesia*, DISSERTATION (October 2000) <http://hdl.handle.net/2123/820>.

II. DOCUMENTATION OF INDONESIAN TKF

The Bill also faces the risk of losing its relevance and legitimacy as Indonesians still cannot see the targets of the Bill protection. There have no been documentation and data-base provided by the State that compile works categorized as Indonesian TKF. This raises the question of what the government will protect through this Bill. To show its seriousness in protecting Indonesian TKF, without having to wait the passing of the Bill in the parliament, the government should have enacted the 2009 Draft of Presidential Decree of Database of State-Protected Genetic Resources, Traditional Knowledge, and Traditional Cultural Expression. This state data-base has been long mandated by the Indonesian Copyright Acts 1982 and 2002 that give the State copyright control over Indonesian cultural heritage, and has been authorized by the Presidential Decree No. 78/2007 concerning the Ratification of Convention for the Safeguarding of the Intangible Cultural Heritage.¹² Of course, this documentation process must respect the wish of local communities that want to keep their TKF secret or undisclosed.

So far, the most visible documentation effort by the government on Indonesian TKF is only on the most famous Indonesian TKF, such as, *wayang*, *keris*, *batik*. For most other TKF, the government effort is only up to the inventory process. There is no clear procedure and coordination among Indonesian ministries on how to organize documentation and data-base on Indonesian TKF. At the moment, the Ministry of Culture and Tourism and the Ministry of Law and Human Rights, the Directorate General of IPR conduct separate inventory process of Indonesian TKF. The Bill of Protection and Utilization of IP of TK and TCE even does not clarify which ministry that is assigned to make documentation and compile data-base on Indonesian TKF. Article 1 paragraph 17 of the Bill only defines the Minister for the TKF protection as [t]he Minister in charge of governmental affairs in the field of the protection and utilization of the IP of traditional knowledge and traditional cultural expression.

The Bill should already clearly mention an exact institution or ministry that is assigned to do documentation and compile data-base on Indonesian TKF. Early clarification on who to do the job of TKF documentation and data-base can prepare the particular ministry or institution in advance to avoid a legal loop-hole in the enactment of this Bill.

Local communities and local governments that have made inventory of

¹² See UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. art. 2 and 13, Oct. 17, 2003.

their local TKF often express their disappointment over the central government neglect and lack of appreciation on their local inventory effort. The inventory of local TKF made by local communities and governments are not followed up by the central government with the verification process, documentation or data-base compilation. This leads to some local communities give up their involvement in the local TKF inventory process.¹³ The reason often given by the central government on apparent neglect of TKF documentation is lack of funding.¹⁴

It is true that documentation process on TKF can be expensive and time-consuming, because it must involve careful verification process to avoid dispute and controversy later on. However, together with local communities and local governments, the central government can reduce the cost and time of documentation process by involving Indonesian media that regularly publish unique Indonesian traditions that can be categorized as TKF.¹⁵ Besides the media, the government can also involve big national private companies that base their products on Indonesian traditional knowledge to support the documentation project.¹⁶ There are also national and international private foundations that can be involved in this documentation project, since they already independently and regularly make publication on Indonesian TKF.¹⁷

It is clear that to protect Indonesian cultural heritage, it is not enough for the government only to pass the Bill of Protection and Utilization of IP of TK and TCE. Documenting and compiling data-base on Indonesian TKF, even before passing the Bill, is very important for its continuation and to prevent it from being extinct. When Indonesian TKF is extinct because it is no longer practiced by its relevant community in Indonesia, the IP protection of the extinct TKF would lapse and the TKF enters the 'public domain'.¹⁸ Indonesian local communities and even the government may face

¹³ KOMPAS, *supra* note 6.

¹⁴ *Tak Ada Anggaran Pembelian Naskah Kuno [No Budget to Acquire Ancient Manuscripts]*, KOMPAS, April 27, 2011, at 12.

Seni Budaya NTB, 58 Seni Tradisi Belum Dapat Hak Cipta karena Dana [West Flores Cultural Expression, No Funding to Copyright 58 Cultural Expression], KOMPAS, Sep. 8, 2009, at 12.

¹⁵ One of Indonesian media that has commitment to promote Indonesian culture is KOMPAS Newspaper.

¹⁶ For example: Traditional cosmetic companies, such as: PT. Mustika Ratu and PT. Sari Ayu; Traditional herbal companies, such as PT. Air Mancur, PT. Nyonya Meneer and PT. Sido Muncul.

¹⁷ For example: Yayasan Dana Bakti that publishes a series of encyclopedia, titled *The Indonesian Heritage Series*; Yayasan Harapan Kita; and the Ford Foundation.

¹⁸ The Traditional Knowledge and Folklore may be extinct in the sense that the community or people of the country which the TKF is characteristic of abandon or no longer practice the TKF. Therefore, the TKF loses its 'traditional' characteristic that can be attached to the traditions of the community or country that used to bear and practice it.

the risk of losing their right to assert their IP control over the TKF.¹⁹

One example in which Indonesian community may face the risk of losing their TKF is in the case between John Hardy, Ltd. (“John Hardy”), a Hong Kong based jewelry company vs. I Ketut Deni Aryasa, a Balinese craftsman and jeweler. John Hardy owns a jewelry manufacturing company in Bali, *PT. Karya Tangan Indah* and Deni Aryasa who used to be an employee of John Hardy, later becomes a chief designer and share-owner of a company named CV. Bali Jewelry. Deni Aryasa was arrested in Bali and charged with illegally copying John Hardy’s two jewelry motifs, *Batu Kali* (“river stone”) and *Fleur* (“flower”), on jewelry motifs, “crocodile skin” and “bali” that were designed by Deni Aryasa for CV. Bali Jewelry. Deni Aryasa and Balinese public protested John Hardy’s copyright on those motifs, as those motifs are Balinese traditional arts that have been used for ages by Balinese. Although they have never been documented or compiled in data-base, those two motifs are widely used to decorate Balinese temples, portals of Balinese buildings, and in other art works. The trial also disclosed the fact that John Hardy has copyrighted around 800 other Indonesian traditional motifs both in Indonesia and the United States.²⁰ The Denpasar trial court found Deni Aryasa not guilty of violating John Hardy’s copyright as the court found that Deni Aryasa’s “crocodile skin” motif was different in shape and texture from John Hardy’s *Batu Kali* motif.²¹ However, the court did not deliver their judgment on the matter of the copyright infringement of *Fleur* motif by “bali” motif. Presumably, they also found that “bali” motif was different from *Fleur* motif. The above mentioned case must make the government aware that if their aim is to protect Indonesian TKF from being “captured” by foreigners, TKF documentation and data-base are the key to successfully challenge their inappropriate IP claim. They must also remember that the Patent Cooperation Treaty only recognizes written

¹⁹ Compare with WIPO-IGC Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, art. 1 and 6 and WIPO-IGC Draft Provisions for the Protection of Traditional Knowledge, art. 4 and 9.

²⁰ *Dituding Jiplak Motif Perak, Perajin Bali Dituntut 2 Tahun Penjara [Accused of Copying Silver Motif, Balinese Craftsman Facing 2 Year Imprisonment]*, DETIKNEWS (Sep. 12, 2008), <http://us.detiknews.com/read/2008/09/12/121704/1005035/10/dituding-jiplak-motif-perak-perajin-bali-dituntut-2-tahun-penjara>. *Expert Defends Local Artisan in Copyright Violation Case*, THE JAKARTA POST (Sep. 7, 2008) <http://www.thejakartapost.com/news/2008/07/09/expert-defends-local-artisan-copyright-violation-case.html>

²¹ Judgment of Oct. 10, 2008, Pengadilan Negeri [Trial Court], 302/Pid.B/2008/PN.Dps. (Denpasar, Indonesia).

disclosure as prior art for international patent application.²² Documentation of Indonesian TKF with the IP rights of documentation vested in the relevant communities, is a must to protect the TKF and consequently, to safeguard Indonesian cultural heritage.

III. EDUCATION OF INDONESIAN LAW OFFICIALS AND JUDGES

The Bill of Protection and Utilization of IP of TK and TCE also will face significant problem when it is implemented because many Indonesian law officials have very minimum level of understanding of TKF protection. Indonesian law officials came to learn of IP concept in the mid of 1990s when Indonesia faced the US threat of trade sanction over the violations of American IP rights, and law officials are still improving their IP knowledge after Indonesia fully implemented the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights in 2002. Understandingly, many of them cannot comprehend the new concept and objective of TKF protection and often confuse it with conventional IP protection that has different philosophy and objective.²³ Their confusion over the concept and objective of TKF protection can be seen in the above case of John Hardy, Ltd. vs. I Ketut Deni Aryasa. The Directorate General of IP Rights of the Ministry of Law and Human Rights granted copyright on *Batu Kali* and *Fleur* motifs to John Hardy, Ltd., although those motifs belong to traditional Balinese arts. Besides that, during the hearing process, the court in that case heard that the Directorate General of IP Rights granted copyright to John Hardy, Ltd. hundreds other motifs and designs that belong to Indonesian traditional motifs.²⁴ This incident strengthens the concern of lack of understanding among Indonesian law officials on TKF protection and their confusion between IP protection and TKF protection that could hinder the objective of the Bill to protect Indonesian TKF. The judges in the Denpasar trial court

²² Rule 33 of the Regulations under the Patent Cooperation Treaty states: . . . relevant prior art shall consist of everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) . . .

²³ What distinguishes the *sui generis* protection of TKF from conventional IP protection is that the benefits of the TKF protection accrue to communities and not individuals. Even where an individual has developed a tradition-based innovation, the innovation is regarded from a community perspective as the product of social and communal creative processes. The creation is, therefore, not “owned” by the individual but “controlled” by the community. There is the concept of common heritage and benefit sharing in TKF protection which is not found in the conventional IP protection. Thus, the objective of TKF protection is the preservation of the common heritage.

²⁴ *Supra* note 20. *Traditional Balinese Models of Silver Jewelry Patented by Foreign Company*, BALI NEWS (June 30, 2008)

<http://balinewsonline.com/bali-news/2008/06/30/traditional-balinese-models-of-silver-jewelry-patented-by-foreign-company/>

that tried this case also had limited understanding of TKF protection. Although the judges knew that John Hardy, Ltd. claimed Balinese traditional arts for their jewelry motifs, the judges did not use this fact as the reason to acquit Deni Aryasa. Instead, the judges only used copyright-related fact for their reasoning, namely, Deni Aryasa's jewelry motifs were different from John Hardy's ones, therefore Deni Aryasa did not violate John Hardy's copyright.²⁵

The lack of understanding of TKF protection among Indonesian legal officials can be attributed to the government's lack of socialization of their concept of TKF protection to the people. Although the Bill is listed in the priority national legislation program (*Prolegnas*) 2010-2014, very few people know about the Bill and the government's concept of TKF protection.

Before the Bill is passed by the parliament, the government must present the Bill to the public, law officials, and especially to traditional artists and communities that are the custodians of Indonesian TKF. During the presentation process, the government can take the public and traditional communities' interests, view and customary norms related to TKF protection so that the Bill can appropriately accommodate them. By doing this, the government can avoid the failure in the implementation of the Bill, like what has happened to the IP laws that are difficult to be implemented as the laws do not fit the interest and culture of Indonesian people.²⁶

IV. EXISTENCE AND RIGHTS OF INDIGENOUS COMMUNITIES

While the government pays attention to the protection of Indonesian TKF through its participation in international forums and the Bill, the government does not pay enough attention to the existence and rights of indigenous communities (*masyarakat adat*).

Indonesia has some legislation to recognize the existence of *masyarakat adat*. Even the second amendment of the Indonesian Constitution, Article 18B recognized indigenous communities and their traditional rights as long as it respects the unity of the Republic of Indonesia. The Explanatory of the Forestry Act No. 41/1999 Article 67 paragraph (1) identifies *masyarakat adat* as the community that have characters of: Customary-law community; having customary-law legal authorities; having specific customary-law geographical area; adhering customary legal institutions and courts; still conducting forest harvesting in forest areas. Meanwhile, the Bill of Protection of Indigenous Community provides the

²⁵ *Supra* note 21.

²⁶ *See generally* Afifah Kusumadara, *supra* note 11.

definition of indigenous community (*masyarakat adat*) as follows:

Masyarakat adat are groups of people who for generations live in specific geographical areas based on the ancestral origins, have rights born out of strong relationship with natural resources and have unique custom, value, and cultural identity that establish economic, social, political, and law institutions enforced by traditional organizations.

Despite those legislations, in reality the life of indigenous people or communities is often marginalized by Indonesian economic development. Even the Forestry Act No. 41/1999 Article 5 allows the state to claim indigenous community's forest as the state forest that consequently, will allow the state through concession-holder companies to exploit their forest for economic development. Since the Soeharto military regime, the government tends to disrespect the rights and culture of indigenous communities in Indonesia.²⁷ Based on the policy of unifying the country and modernization, the Soeharto government implemented cultural modification policy by resettling some indigenous communities in ecologically new areas.²⁸ The present government, especially provincial and local level governments, also converts many of indigenous communities' lands to industrial plantation, forestry, and mining run by domestic as well as foreign investors. Indigenous communities in Indonesia quickly lose their communal lands and their traditions in the name of industrialization.²⁹

Although it is true that the custodians of Indonesian TKF could also be local communities and even the state,³⁰ but the indigenous communities play important role in developing Indonesian TKF. They develop local wisdom, ceremonies, arts, foods, medicines, folklore, that are unique to adapt their life to their particular ecosystem.³¹ When the indigenous communities lose their lands and can no longer practice their traditions, Indonesia loses their

²⁷ Gerard A. Persoon, *Being Indigenous in Indonesia and the Philippines*, in *TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION*, 195-206 (Christoph Antons ed., 2009).

²⁸ For example, in the case of *Mentawai* indigenous people in West Sumatera.

²⁹ For example, in the cases of the indigenous communities of *Talang Mamak*, *Karo*, *Pandumaan* in Sumatera, *Dayak* in Kalimantan, *Papua*, *Amungme*, *Komoro* in Papua.

³⁰ Article 1 point 5 of the Bill of Protection and Utilization of IP of TK and TCE stipulates that: Custodians of Traditional Knowledge and Traditional Cultural Expression are *local communities* or *indigenous communities* who preserve and sustain Traditional Knowledge and Traditional Cultural Expression traditionally and communally (Emphasize from the author). Article 10 of the Copyright Act No.19/2002 stipulates that the state holds copyright for Indonesian cultural heritage that includes historical works, artifacts and folklore.

³¹ According to an Indonesian NGO, *Aliansi Masyarakat Adat Nusantara*, as of 2010 in Indonesia there are 1,163 indigenous communities with the population of between 50 and 70 million people and there are 5 million hectares of indigenous community's forest. See *Membagi Sumber Daya Alam secara Adil* [To Share Natural Resources Fairly], KOMPAS, Feb. 25, 2010, at 38.

intellectual heritages and the framework for their unique understandings of life. As the late Darrell Posey described it:

With the extinction of each indigenous group, the world loses millennia of accumulated knowledge about life in and adaptation to tropical ecosystems. This priceless information is forfeited with hardly a blink of the eye.³²

While the misappropriation of Indonesian TKF is serious matter demanding attention from the government, the disappearance of indigenous communities and their TKF in Indonesia equally requires attention from the government. The passing of the Bill of Protection and Utilization of the IP of TK and TCE is not enough to preserve Indonesian TKF if it is not supported by the *sui generis* law that protects the existence and rights of indigenous communities in Indonesia. By empowering the indigenous communities with rights to control their land and traditions, they can have a better chance of preventing misappropriation of their TKF and negotiating fair and favorable benefit sharing arrangement of their TKF. Therefore, the Bill of Protection of Indigenous Communities that now has reached the parliament should be passed together with the Bill of Protection and Utilization of the IP of TK and TCE to strengthen the TKF protection in Indonesia.

The Bill of Protection and Utilization of the IP of TK and TCE has not empowered indigenous communities (*masyarakat adat*) to control the utilization of their TKF by others. The Bill still maintains the government centralistic approach that gives power to the central government (the Minister) to decide the utilization of Indonesian TKF. Article 6 of the Bill on Terms and Procedures to Apply for Permit of Utilization Access states:

The application for the permit of utilization access is submitted in writing in the Indonesian language to the Minister.

(6) The Minister will give the decision to accept or refuse the application by considering the recommendation of the Team of Experts on Traditional Knowledge and/or Traditional Cultural Expression at the latest 14 days from the receipt of the recommendation.

These provisions that authorize the central government to issue the permit of TKF utilization access do not respect the rights and existence of indigenous communities. These provisions might be justified in cases where the owner of TKF could not be identified. However, in most cases, we can

³² Darrel A. Posey, *Indigenous Knowledge and Development: An Ideological Bridge To the Future*, in KAYAPÓ ETHNOECOLOGY AND CULTURE, 59 (Kristina Plenderleith ed., 2002), as cited in GRAHAM DUTFIELD, PROTECTING TRADITIONAL KNOWLEDGE AND FOLKLORE, A REVIEW OF PROGRESS IN DIPLOMACY AND POLICY FORMULATION 25 (2003), available at <http://www.iprsonline.org/resources/docs/Dutfield%20%20Protecting%20TK%20and%20Folklore%20-%20Blue%201.pdf>

identify the custodians of Indonesian TKF, even the TKF has been placed in public domain. The custodianship responsibilities do not necessarily cease to exist just because the TKF has become public domain. Custodians of Indonesian TKF can be local communities, who still preserve and practice the TKF although they live in urbanized societies,³³ or indigenous communities, who consist of tribal people and culturally-distinct rural communities that still embody traditional lifestyles. The government cannot issue the permit of TKF utilization access, without asking prior informed consent (PIC) of the relevant local communities and indigenous communities. In fact, the Bill of Protection and Utilization of IP of TK and TCE does not have provisions of PIC that is commonly adopted in the legislations of other countries pertaining TKF protection. Without PIC provisions, the Bill will potentially create conflict between the government and indigenous communities as well as local communities that refuse to give TKF access to the permit holders.

Although in general, Indonesian indigenous and local communities are more concerned about value of sharing than possessing their TKF in proprietary ways, but for certain reasons they may not want to share their TKF with third party, for example because the TKF has sacred ritual or religious significance among them. To respect indigenous communities' rights and traditions, the Bill must have PIC provisions to allow them to decide whether they agree or disagree to give access to third parties on their TKF. The PIC given by indigenous and local communities will give legal certainty to third parties who want to utilize the communities' TKF and will avoid conflict between the government and the communities. The PIC must be obtained by the third parties from the custodians of the relevant TKF, before they apply for the permit of TKF utilization access to the Minister.

V. REVIVAL OF INDONESIAN CUSTOMARY LAW

The Bill of Protection and Utilization of IP of TK and TCE also must accommodate Indonesian customary law (*adat* law) in settling the disputes between different communities. The disputes might arise because particular TKF is practiced similarly in several different communities, each of which claims custodianship of the TKF. Jaszi reports that *adat* institutions and regulations command profound respect from local and indigenous communities across Indonesia.³⁴ *Adat* principles govern aspects of daily life and are also in a position to mediate effectively between disputing parties

³³ For example, Balinese and Javanese communities.

³⁴ PETER A. JASZI, *supra* note 4, at 31.

inside community and between different communities.³⁵ Traditional communities also believe that they have little connection to the national legal system. They regard national legal system difficult to be accessed, expensive and time-consuming. Moreover, they do not rely on IP enforcement agencies such as, government bodies and courts with no special cultural expertise to tell them what they can and cannot do with their TKF. For traditional communities, *adat* principles have shown considerable resourcefulness in managing the utilization of their TKF. For example, *adat* controls the secrecy of certain TKF to prevent the disrespectful and degrading use of TKF by third parties. *Adat* also governs the transmission and practice of TKF within traditional communities.

Given the important role of *adat* law in the life of Indonesians, there should be provisions in the Bill of Protection of IP of TK and TCE that recognize *adat* law and its institutions as medium to settle disputes relating to the utilization of TKF, permit of TKF utilization, and so forth. The Bill so far only relies on the national legal system and national court to settle disputes relating to Indonesian TKF (see Articles 22, 23, 24)³⁶, although it is allowed to use the *adat* law for criminal penalties related to TKF misappropriation (Article 25).

VI. BENEFIT SHARING REQUIREMENT FOR ALL TKF USERS

There is a notion among the drafters of the Bill of Protection and Utilization of IP of TK and TCE that Indonesian TKF shall be protected from foreign misappropriation only. The Bill requires only foreign individuals, foreign legal entities and Indonesian legal entities owned by foreign investors to obtain the permit of TKF utilization access from the government. After obtaining the permit, they are required to make Benefit Sharing Agreement with custodians of Indonesian TKF.

Article 12 of the Bill states:

After obtaining the permit of TKF utilization access referred to in Article 6

³⁵ *Adat* law and institutions are often implemented to settle conflicts between different communities. For example, *Pela* Agreements are established among communities in Maluku Islands to maintain peace between them; Some *adat* agreements were made between *Dayak* communities and immigrant *Madura* communities in the island of Borneo to settle their conflicts; The *Malino* Agreement was based on *adat* principles to settle conflicts among communities in Poso, Central Sulawesi.

³⁶ Article 22 stipulates that any party who objects to and is injured by the issuance of permit of TKF utilization access must bring his or her lawsuit to a trial court. Article 23 stipulates that the lawsuit against misappropriation of TKF must be brought by its custodian to a trial court. Article 24 stipulates that the lawsuit or dispute relating to misappropriation of TKF may also be brought to an arbitration or alternative dispute resolution.

paragraph (10), the Applicant shall enter into Benefit Sharing Agreement with the Custodian of Traditional Knowledge and/or Traditional Cultural Expressions within a maximum period of 1 (one) year from the grant of the permit.

The “Applicant” is defined by Article 1 point 7 of the Bill as foreign individuals, foreign legal entities and Indonesian legal entities owned by foreign investors.

These provisions that exempt Indonesian users of TKF from benefit sharing requirement ignore the fact that most of Indonesian TKF is actually utilized by fellow Indonesians,³⁷ most often by Indonesian industries, such as, textile, entertainment, cosmetic, and herbal industries. Without requiring Indonesians to perform benefit sharing of TKF utilization with its custodians, the government has disrespected the local and indigenous communities that preserve and sustain Indonesian TKF.

Therefore, to sustain Indonesian TKF and to respect local and indigenous communities, the Bill must not only require foreigners, but also Indonesians to perform benefit sharing of TKF utilization with custodians of TKF. Benefit sharing is an important ethic for and valued most by traditional communities, regardless of who utilizes their TKF. The survival of Indonesian TKF depends on the sharing ethic. Benefit sharing of TKF utilization could help produce better and more meaningful Indonesian TKF for future generations.

The benefit sharing arrangement could involve cash compensation, such as lump-sum payment or ongoing royalty, or it could also involve non-cash compensation. For Indonesian traditional communities who rarely value their TKF from economic or commercial aspects, let alone from IP rights, non-cash compensation is more preferred to cash compensation. Therefore the most appropriate benefit sharing arrangement for them is the one that has been practiced for centuries in Indonesia and has enriched Indonesian TKF, namely, the products or works derived from the use of TKF material should be returned and made available to the communities that preserve the TKF.

VII. SANCTION FOR RELIGIOUS RADICALS THAT ATTACK TKF

The government must not tolerate and must quash any attempt by religious radicals that prohibits local and indigenous communities from practicing their TKF in the name of a particular religious belief. Since the fall of Soeharto military government in 1998 there have been several attacks and threats launched by Moslem radicals against some TKF products, such

³⁷ PETER A. JASZI, *supra* note 4, at 98.

as, traditional statues and against communities that are practicing their traditions deemed in contrary to Islamic norms. The present government which is politically weaker than the Soeharto military government often does not take legal action against the Moslem radicals who attack and threat the tradition-practicing communities, fearing political backlash from some Islamic organizations in Indonesia. Most of the time, it is the people, not law enforcement agencies, that shield and protect the tradition-practicing communities from attacks by Moslem radicals.

For example, there have been some incidents that Moslem radicals in Solo, Central Java Province, attack and stop the shows of “*wayang* puppet theatre” held by villagers in Solo, as the radicals consider *wayang* un-Islamic.³⁸ *Wayang* is one of the most famous Indonesian TKF that has received the UNESCO recognition as Intangible Cultural Heritage of Humanity in 2008. The local communities and *wayang* artists must negotiate with the radicals to continue the show. There is no news that law enforcement agencies take any legal actions against the radicals who attack the *wayang* puppet theatre. Local communities and traditional artists must defend the rights to practice their TKF by themselves without protection of the government or law enforcement agencies from threats posed by radicals.

This is the irony of the Bill, in which the government intends to protect Indonesian TKF, but in the same time is ignorant to the fact that increasing radicalism in Indonesia is threatening the existence of Indonesian TKF and its relevant communities. By letting the radicals attack the communities that practice their TKF, the government somehow allows them to destroy Indonesian cultural heritage and cultural diversity that gives Indonesia its intangible wealth.

The government effort to protect Indonesian TKF should not only be drafting a law, but also protecting the right of local and traditional communities to practice their TKF, so that Indonesian TKF will not be destroyed by radicalism.

CONCLUSION

The protection of Indonesian TKF has been seen in different perspectives by the government and Indonesian communities. The Indonesian government’s perspective on the TKF protection is to protect the IP and commercial values of Indonesian TKF. While the Indonesian local and traditional communities’ perspective on the TKF protection is to

³⁸ *Menembus Brunei, Gamang di Negeri Sendiri* [Accepted in Brunei, Not Sure in Its Home Country], KOMPAS, Oct. 22, 2010, at 43.

preserve and sustain Indonesian TKF that underlies Indonesian cultural heritage. The communities rarely see their TKF from its IP and commercialization aspects, but rather they see it from its spiritual value, way of life, cultural identity, and social tie that unites the country.

Therefore, the government effort to protect Indonesian TKF through the Bill of Protection and Utilization of IP of TK and TCE will fail to preserve and sustain Indonesian TKF because the Bill only focuses its protection on the IP and commercial values of the TKF. Besides that, the Bill will be difficult to be implemented and accepted by local and traditional communities who still hold to *Adat* norm that values the ethic of sharing and does not recognize property rights and monopoly in intellectual works, including TKF.

This paper asserts that the Bill is not sufficient to protect and sustain Indonesian TKF. TKF protection must draw a comprehensive range of measures, not only IP and legal measures, but also non-IP, non-proprietary, and non-legal measures. This paper proposes some measures need to be taken by the government to protect Indonesian TKF, namely: (1) documenting and making data-base of Indonesian TKF as soon as possible; (2) educating Indonesian law officials and judges not to confuse TKF protection with IP protection; (3) passing the Bill of Protection of Indigenous Communities to protect the existence and rights of indigenous communities (*masyarakat adat*) who are the custodians of Indonesian TKF; (4) reviving and accommodating Indonesian customary law (*adat* law) into the Bill of Protection and Utilization of IP of TK and TCE; (5) benefit sharing requirement not only for foreign users, but also for Indonesian users of TKF; (6) controlling and sanctioning religious radicals that attack TKF and communities practicing their TKF.