

**IUS CONSTITUENDUM: REGULATION OF TRADITIONAL
CULTURAL EXPRESSIONS WITHIN THE FRAMEWORK OF THE
INTELLECTUAL PROPERTY RIGHTS REGIME AS A
STRENGTHENER OF NATIONAL IDENTITY**

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Article Info

Received: 2022-08-12

Revised: 2023-03-21

Accepted: 2024-06-20

Keywords:

*Legal Protection,
Commercial Use,
National Identity,
Intellectual Property
Rights.*

Abstract

Indonesia is rich in diverse traditional cultural expressions that need to be protected from misuse or irresponsible commercialization. Efforts to safeguard these cultural expressions can be undertaken by integrating them into the Intellectual Property Rights (IPR) regime through comprehensive and effective legal regulations. The aim of this research is to formulate an ideal concept for regulating traditional cultural expressions within the IPR regime as a means to strengthen national identity in Indonesia, and to identify challenges and obstacles in integrating the protection of traditional cultural expressions into the IPR regime. This research employs normative legal research methods with legislative and conceptual approaches. The legal materials used include primary, secondary, and tertiary legal sources, with data collection techniques through literature study and qualitative data analysis. The research results indicate that the ideal concept for regulating traditional cultural expressions within the IPR regime to strengthen national identity in Indonesia must include a clear definition of traditional cultural expressions and their criteria, the establishment of a comprehensive data and inventory system, provision of legal protection and management mechanisms involving the community owners, assurance of fair profit-sharing in case of commercial utilization, regulation of government and community roles in preservation, and the reinforcement of national identity by recognizing traditional cultural expressions as protected and promoted national assets. The main challenges and obstacles include the absence of clear definitions and criteria, issues of communal ownership, the diversity of cultural expressions, the need to balance protection and access for utilization, lack of community capacity and awareness, and limitations in resources and supporting infrastructure.

I. Introduction

Indonesia is a country rich in cultural and traditional diversity. Each ethnic group possesses intellectual wealth in the form of unique and diverse traditional cultural expressions, such as dance art, music art, visual art, folklore, traditional knowledge, and so on. These traditional cultural expressions not only hold artistic and aesthetic value but also have philosophical, spiritual, and identity significance that is deeply embedded in the indigenous communities or ethnic groups that own them.(Rai S., 2021) Therefore, traditional cultural expressions need adequate legal protection to prevent misuse or irresponsible commercialization by unauthorized parties. One way to protect traditional cultural expressions is by integrating them into the Intellectual Property Rights (IPR) regime. IPR protection for traditional cultural expressions can provide incentives for communities to continue preserving and developing their cultural heritage. Additionally, IPR protection can prevent others from exploiting or claiming traditional cultural expressions without permission.(Turnip, 2021)

In the context of international law, efforts to protect traditional cultural expressions have been made through various treaties and conventions. One of these is the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which emphasizes the importance of respecting and protecting traditional cultural expressions as part of the world's cultural heritage. Additionally, the World Intellectual Property Organization (WIPO) has initiated discussions on the protection of traditional cultural expressions within the Intellectual Property (IP) regime through the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC GRTKF).(Diana & Tiaraputri, 2020)

In Indonesia, efforts to protect traditional cultural expressions are regulated by several pieces of legislation. Law Number 28 of 2014 on Copyright includes provisions that govern the protection of traditional cultural expressions in the form of artistic, literary, and scientific works. Article 38, paragraph (1) states that "Copyright over traditional cultural expressions is held by the State." Thus, the Government has the authority to regulate and protect traditional cultural expressions from exploitation or improper use.(Putra & Priyantini, 2021)

Law Number 13 of 2016 concerning Patents. In this law, there are provisions regulating the protection of traditional knowledge as part of the expression of traditional culture. Article 26 paragraph (1) states that "Inventions originating from traditional knowledge cannot be granted Patents." This provision is intended to prevent others from claiming ownership or obtaining Patents over traditional knowledge that already exists.(Perangin-angin et al., 2020) Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal Intellectual Property Single Data. This regulation governs the establishment of a communal intellectual property data system, including traditional cultural expressions. The system aims to identify, document, and protect communal intellectual

property owned by indigenous communities or specific groups within society.(Sari & Mawardah, 2021)

Although there are existing legal frameworks regarding the protection of traditional cultural expressions, there are still several weaknesses and challenges in their implementation. One of the main challenges is how to establish clear boundaries and criteria for identifying protected traditional cultural expressions. Additionally, there needs to be an effective mechanism to ensure protection and fair benefit-sharing for the communities owning these expressions. Therefore, an in-depth study is needed on the *ius constituendum* or the law to be formed regarding the regulation of traditional cultural expressions within the framework of intellectual property rights (IPR). This is important to strengthen Indonesia's national and cultural identity, which is rich in cultural diversity. With comprehensive and effective regulation, traditional cultural expressions can be protected from irresponsible exploitation or commercialization and can become valuable cultural assets for indigenous communities or ethnic groups.

This study will discuss the concept of traditional cultural expressions, the importance of their protection in the context of international and national law, and an analysis of the existing regulations in Indonesia related to the protection of traditional cultural expressions. Furthermore, it will also address the challenges and opportunities in regulating traditional cultural expressions within the framework of IPR regimes, as well as policy recommendations to strengthen their protection and management as part of efforts to reinforce Indonesia's national and cultural identity.

In other words, this research aims to examine and provide policy recommendations regarding the regulation of traditional cultural expressions within the IPR regime in Indonesia, thus providing a strong legal foundation for protecting Indonesia's traditional cultural heritage and strengthening its national and cultural identity. The formulation of the problem in this research is as follows:

1. How is the concept of regulating traditional cultural expressions within the Intellectual Property Rights (IPR) regime ideally structured to strengthen the national and state identity in Indonesia?
2. What are the challenges and obstacles in integrating the protection of traditional cultural expressions into the IPR regime?

II. Research Method

This research utilizes the normative legal research method. This method is chosen because the research aims to examine and analyze the concept of regulating traditional cultural expressions in the Intellectual Property Rights (IPR) regime from the perspective of positive law and relevant legal theories. The approaches used in this research are statutory approach and conceptual approach. The statutory approach is used to analyze the legal provisions related to the protection of traditional cultural expressions in the IPR regime

applicable in Indonesia. Meanwhile, the conceptual approach is used to understand the concepts and legal theories related to the protection of traditional cultural expressions in the IPR regime.(Marzuki, 2021)

The legal sources used in this research consist of primary, secondary, and tertiary legal materials. Primary legal materials include legislative regulations related to the protection of traditional cultural expressions, such as Copyright Law, Patent Law, and their implementing regulations. Secondary legal materials include books, scientific journals, articles, research results, and other literature discussing the research topic. Tertiary legal materials include legal dictionaries, encyclopedias, and other sources providing explanations of legal terms used in the research. The data collection technique in this research is conducted through library research. Library research is conducted by collecting, studying, and analyzing relevant primary, secondary, and tertiary legal materials related to the research topic. The data obtained from library research are then organized, classified, and analyzed systematically.

The data analysis technique used in this research is qualitative analysis. Qualitative analysis is conducted by interpreting and constructing the legal materials collected to discover concepts, principles, and legal theories relevant to the research topic. This analysis aims to deepen understanding of the regulation of traditional cultural expressions in the IPR regime in Indonesia, as well as to identify existing deficiencies and challenges, so that an ideal regulatory concept can be formulated to strengthen national identity and statehood.

III. Results and Discussion

The Concept of Regulating Traditional Cultural Expressions Within an Ideal Intellectual Property Rights (IPR) Regime as an Effort to Strengthen National Identity and Statehood in Indonesia

The concept of regulating traditional cultural expressions within the Intellectual Property Rights (IPR) regime, ideally aimed at strengthening national and state identity in Indonesia, must encompass several important aspects. Firstly, such regulation should be able to provide adequate legal protection against the exploitation or improper use of traditional cultural expressions by others.(Sutrisno et al., 2022) The second, this arrangement must ensure the sustainability and development of traditional cultural expressions by the communities that own them.(Alsusanto & Murni, 2023) The third, this regulation must create a mechanism for fair profit sharing for the community owning traditional cultural expressions when utilized commercially.(Ayu Citra Santyaningtyas, 2020) Fourthly, this arrangement should strengthen the national identity by making traditional cultural expressions a protected and preserved national asset.(Kusuma & Roisah, 2022)

In Law Number 28 of 2014 concerning Copyright, the Copyright Law regulates the protection of traditional cultural expressions in the form of arts, literature, and sciences. Article 38 paragraph (1) states that "Copyright over traditional cultural expressions is held

by the State." However, this provision still does not provide a clear definition of what is meant by traditional cultural expressions and how the criteria are to determine whether a cultural expression can be categorized as traditional cultural expression. (Ramadhan et al., 2023)

Law Number 13 of 2016 concerning Patents regulates the protection of traditional knowledge as part of traditional cultural expressions. Article 26 paragraph (1) states that "Inventions originating from traditional knowledge cannot be granted a Patent." This provision aims to prevent others from claiming ownership or obtaining Patents over traditional knowledge that already exists. However, this law also does not provide a clear definition of traditional knowledge and criteria for determining whether certain knowledge can be categorized as traditional knowledge. (Sukardi et al., 2024)

Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Single Data of Communal Intellectual Property regulates the establishment of a communal intellectual property data system, including traditional cultural expressions. This system aims to identify, document, and protect communal intellectual property owned by indigenous communities or specific community groups. However, this regulation does not specifically regulate how intellectual property rights protection applies to traditional cultural expressions that have been documented in the system. (Wirata, 2022)

Therefore, a more comprehensive and integrated regulation in the intellectual property rights regime is needed to protect traditional cultural expressions. The following are ideal regulatory concepts:

1. Definition and Criteria of Traditional Cultural Expression

This regulation should provide a clear definition of what is meant by traditional cultural expression, as well as the criteria that must be met for a cultural expression to be protected. This definition should encompass various forms of traditional cultural expression, such as performing arts, handicrafts, folklore, traditional knowledge, and others. Criteria that may be considered include the age of the cultural expression, its connection to indigenous communities or specific community groups, and the cultural values contained within it. (Widyanti, 2020)

2. Data Collection and Inventory System

This regulation should mandate a comprehensive data collection and inventory system for traditional cultural expressions throughout the Indonesian territory. The system aims to identify, document, and protect traditional cultural expressions held by indigenous communities or specific social groups. Data collection can be conducted by involving the community owners of traditional cultural expressions, customary institutions, local governments, and other relevant institutions. (Herzani, 2021)

3. Legal Protection and Management Mechanisms

This regulation must provide strong legal protection against the exploitation or inappropriate use of traditional cultural expressions by third parties. This protection can be realized in the form of granting exclusive rights or economic rights to the community owning

the traditional cultural expressions. Additionally, there needs to be a management mechanism involving the community owning the traditional cultural expressions in decision-making regarding the utilization and preservation of such cultural expressions.(Perangin-angin et al., 2020)

4. Fair Profit Sharing

In the event of commercial exploitation of traditional cultural expressions, this regulation must ensure fair profit sharing for the community owning those cultural expressions. The mechanism for profit sharing can be proportionally arranged based on the level of utilization and the profits obtained. This profit sharing is not only in material form but can also include support for the preservation and development of traditional cultural expressions.(Ayu Citra Santyaningtyas, 2020)

5. The Role of Government and Society

This regulation should govern the roles of government and society in protecting and preserving traditional cultural expressions. The government bears the responsibility of providing the necessary resources, infrastructure, and policy support. Meanwhile, the community owning traditional cultural expressions should play an active role in preserving, transmitting, and developing these cultural expressions to the next generation.(Herzani, 2021)

6. Strengthening National and State Identity

This regulation should make traditional cultural expressions a protected national asset and preserve them as part of efforts to strengthen national and state identity. This can be achieved by incorporating the content of education and introducing traditional cultural expressions into the national education curriculum, as well as promoting and developing traditional cultural expressions as part of Indonesia's cultural heritage at the national and international levels.(Febriyana & Sugiantari, 2022)

With the ideal regulatory concept like this, it is hoped that the expression of traditional culture in Indonesia can be legally protected, sustainable, and develop in accordance with the cultural values of its owners. Moreover, these efforts will also strengthen the national identity by making traditional cultural richness an asset valued and cherished by the entire Indonesian society.

The Challenge And Obstacles In Integrating The Protection Of Traditional Cultural Expressions Into The Intellectual Property Rights Regime.

In integrating the protection of traditional cultural expressions into the Intellectual Property Rights (IPR) regime, there are several challenges and obstacles that need to be overcome. These challenges include legal, social, cultural, and practical aspects that can hinder effective protection efforts.

1. Undefined definitions and criteria

One of the main challenges in integrating the protection of traditional cultural expressions into the intellectual property rights regime is the lack of clear definitions and

criteria for what constitutes traditional cultural expression. In Law Number 28 of 2014 concerning Copyright, Article 38 paragraph (1) states that "Copyright in traditional cultural expressions is held by the State." However, this law does not provide further explanation on the definition and scope of traditional cultural expressions.(Yuswar et al., 2022) The ambiguity of these definitions and criteria can lead to difficulties in identifying and determining which traditional cultural expressions can be protected under the intellectual property regime. This can also create legal uncertainty and varying interpretations in its implementation.

2. Ownership and control of traditional cultural expressions

Another challenge faced is the issue of ownership and control of traditional cultural expressions. Many traditional cultural expressions are communally owned by indigenous communities or specific groups within society. However, under the existing intellectual property regime, intellectual property rights are generally granted to individuals or specific legal entities.(Sutrisno et al., 2022) Therefore, a special mechanism is needed to accommodate communal ownership of traditional cultural expressions. Minister of Law and Human Rights Regulation Number 13 of 2017 regarding Communal Intellectual Property Single Data attempts to regulate this by establishing a system for recording communal intellectual property. However, this regulation does not specifically address the protection of intellectual property rights for traditional cultural expressions documented within the system.

3. Diversity of traditional cultural expressions

Indonesia possesses a highly diverse cultural landscape, with thousands of ethnic groups and varied traditional cultural expressions. This diversity poses its own challenges in efforts to identify, document, and protect traditional cultural expressions comprehensively.(Rasyidi, 2022) In addition, many traditional cultural expressions are dynamic and evolve over time. This can make it difficult to determine the original or authentic form of the traditional cultural expression to be protected.

4. Access and utilization of traditional cultural expressions

In integrating the protection of traditional cultural expressions into the intellectual property regime, it is necessary to maintain a balance between protection and access to such traditional cultural expressions. Excessive protection can hinder access to and utilization of traditional cultural expressions for educational, research, or cultural development purposes.(Widyanti, 2020) On the other hand, overly open access without adequate protection can lead to the exploitation and commercialization of traditional cultural expressions by others without permission and fair benefit-sharing for indigenous communities or the groups that own them.

5. Capacity and public awareness

Another challenge faced is related to the capacity and public awareness regarding the importance of protecting traditional cultural expressions through intellectual property rights

regimes. Many indigenous communities or groups owning traditional cultural expressions have yet to grasp the concept of intellectual property rights and its benefits in safeguarding their cultural heritage.(Xia, 2023) Therefore, intensive socialization and education efforts are needed among the community to enhance their awareness and capacity in utilizing the intellectual property rights regime to protect traditional cultural expressions.

6. Resources and Infrastructure

Another equally important challenge is the availability of adequate resources and infrastructure to support the protection of traditional cultural expressions within the intellectual property rights regime. This includes the availability of trained human resources, such as IP examiners who understand the cultural context and traditional cultural expressions, as well as supporting infrastructure such as integrated data and documentation systems.(Yuswar et al., 2022)

To overcome these challenges, comprehensive and integrated efforts from various parties are required, including the government, related institutions, academics, as well as indigenous communities or groups of people who own traditional cultural expressions. Some solutions that can be offered include:(Suaib, 2023)

1. Formulating clear definitions and criteria regarding traditional cultural expressions through in-depth studies and the involvement of indigenous communities or groups owning traditional cultural expressions.
2. Developing an integrated and systematic data collection and inventory system for traditional cultural expressions, involving indigenous communities or groups owning traditional cultural expressions in the data collection process.
3. Establishing a special legal regime or sui generis rights to protect traditional cultural expressions communally owned by indigenous communities or specific community groups.
4. Regulating fair and transparent profit-sharing mechanisms when traditional cultural expressions are commercially exploited by others.
5. Establishing balanced exceptions and limitations in the protection of traditional cultural expressions to ensure sufficient access for public interests such as education, research, and cultural development.
6. Enhancing community capacity and awareness through socialization programs, education, and training on the importance of protecting traditional cultural expressions and utilizing intellectual property rights regimes for this purpose.
7. Strengthening resources and supporting infrastructure, such as training for intellectual property examiners, establishing specialized institutions dealing with the protection of traditional cultural expressions, and developing integrated data collection and documentation systems.

By overcoming these challenges and obstacles, it is hoped that the integration of traditional cultural expression protection into the intellectual property rights regime can

proceed effectively and provide optimal benefits for indigenous communities or groups owning traditional cultural expressions, as well as strengthen the national and state identity of Indonesia.

4. Conclusion

The concept of regulating traditional cultural expressions within the Intellectual Property Rights (IPR) regime, ideally aimed at strengthening the national identity in Indonesia, should encompass clear definitions of traditional cultural expressions and their criteria, the establishment of a comprehensive system of documentation and inventorying, providing legal protection and management mechanisms involving the community of owners, ensuring fair profit-sharing in case of commercial exploitation, regulating the roles of the government and the community in preservation, and reinforcing national identity by making traditional cultural expressions national assets that are protected and promoted.

The main challenges and obstacles in integrating the protection of traditional cultural expressions into the Intellectual Property Rights (IPR) regime include the lack of clear definitions and criteria for traditional cultural expressions, issues of ownership and control of communal traditional cultural expressions, the diverse nature of traditional cultural expressions in Indonesia, the need to balance protection and access to utilization, lack of capacity and awareness among the community about the importance of protection, and limitations in resources and supporting infrastructure such as integrated documentation and data systems.

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