



THE PROTECTION FOR THE PESTA GOTILON AS TRADITIONAL CULTURAL EXPRESSION OF BATAK TRIBE: INTERNATIONAL AND NATIONAL PERSPECTIVE

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Abstract

North Sumatra is a province in Indonesia that has ethnic and cultural diversity. Among them are the Toba Batak tribe. The Toba Batak tribe is known to have many traditional creations and also carry out several traditional ceremonial activities or rituals, one of which is the Pesta Gotilon. Pesta Gotilon in Batak language, which means harvest, is a conventional activity carried out to express the farmers' gratitude to God for the bountiful harvests and hopes that it will be bountiful future again. In tradition, farmers will bring "silua," or offerings that are offered to God. The results showed that the Pesta Gotilon is a traditional ceremony/ritual protected by international law and national law in Indonesia. Protection of Traditional Cultural Expressions (TCEs) is a concern for International Law and the State and even the Central Government.

Keywords: Intellectual Property Rights, Traditional Cultural Expressions, Pesta Gotilon.

A. Introduction

Indonesia is a country with cultural diversity, ethnicities, customs, traditions, arts, and literature.¹ It contributes to the abundance of Indonesia's traditional cultural expressions that originated from indigenous people. Indonesia memiliki 1.128 suku yang tersebar di seluruh wilayah Indonesia dengan lebih dari 300 dialek bahasa daerah, lebih dari 3000 (tiga ribu) tarian asli Indonesia.² It demonstrates a national potential that needs to be safeguarded, preserved, and developed as a solid point to attract domestic and international tourists from Asia. One of the potentials referred to by the researcher is the cultural diversity potentials that the province of North Sumatra has.

North Sumatra is a province in Indonesia that has diverse ethnicities and cultures. There are 8 main ethnic groups in North Sumatra: Batak Toba, Karo, Simalungun, Melayu,

¹ Widiastuti, "ANALISIS SWOT KERAGAMAN BUDAYA INDONESIA", *Jurnal Ilmiah WIDYA* 1, no. 1 (2013): 8-14, 8.

² Bayangsari Wedhatami, Budi Santoso, "UPAYA PERLINDUNGAN EKSPRESI BUDAYA TRADISIONAL DENGAN PEMBENTUKAN PERATURAN DAERAH", *Law Reform* 9, no. 2 (2014): 32-48, 33, DOI: 10.14710/lr.v9i2.1244432-48.

Mandailing, Pakpak, Angkola and Nias.³ Among all ethnic groups, Batak Toba is the majority. There are numerous traditional creations and traditional ceremonies or rituals known to the Batak Toba ethnic group, and one of them is Pesta Gotilon. Pesta Gotilon, which means 'harvest' in the Batak language, refers to a traditional practice followed by farmers to express their gratitude to God for the bountiful harvests and pray for more bountiful harvests the following days. Traditionally, the farmers will carry a "*silua*" or offerings to be made for God. In its development, Pesta Gotilon is conducted in the form of a religious ceremony. This customary ritual is continuously maintained by the Batak Toba people who follow Protestant Christian teachings, particularly those who go to Huria Kristen Batak Protestant (HKBP) church.

Aside from serving as a traditional ritual/ceremony, Pesta Gotilon has been conducted in a tourism event held by the Tourism Office of Samosir District known as Horas Samosir Fiesta (HSF). Pesta Gotilon may undoubtedly be promoted as one of the appealing aspects to attract tourists and help support the tourism economy in some areas of North Sumatra, mainly in the area where the Batak Toba ethnic group resides.⁴ Therefore, the country surely needs to protect Pesta Gotilon as a Traditional Cultural Expressions (TCEs).⁵

The definition of Traditional Cultural Expressions according to the World Intellectual Property Organization (WIPO) is as follows:⁶

"Traditional cultural expressions also called "expressions of folklore" may include music, dance, art, designs, names, signs, symbols, performances, ceremonies, architectural forms, handicrafts, narratives, or any other artistic or cultural expressions."

The word "*ceremonies*" provided in the definition of TCE made by WIPO refers to a traditional ceremony or ritual. Hence, WIPO indeed guarantees the safeguarding of TCE itself. The safeguarding of Pesta Gotilon as a TCE is a form of the country's concentration in preventing another country from claiming the TCE as its own. A few North Sumatra's TCE that Malaysia's people have claimed includes the Tortor dance and the Gondang Sembilan musical instrument as the cultural product of some societies in Malaysia. This feud starts from the request of Malaysian people of Mandailing descent to establish the Tortor dance and the Gondang Sembilan as equivalent to other TCEs priorly recorded to belong to Malaysia.⁷

In Indonesia, TCE regulations are specially governed in Article 38 of Law No. 28 the Year 2014 regarding Copyright (Copyright Law). In the Copyright Law formulation, it is stated that TCEs whose creator is unknown belongs to the country. The country serves to inventory, guard, and maintain the existing TCE. However, the law does not specifically regulate the allocation of benefits for caretaker society. In the Copyright Law, the usage of TCE only considers the values upheld by its caretaker society. Based on the background explained previously, the author formulates the following legal research question: how is the protection of Pesta Gotilon as a TCE of Batak Tribe in the perspectives of international and national law? In the discussion of this question, the researcher shall use the Normative Juridical approach. This is the correct research method from one of the existing academic research methods or procedures to determine a research object's veracity based on the legal

³ Erond L. Damanik, "MENOLAK EVASIVE IDENTITY: MEMAHAMI DINAMIKA KELOMPOK ETNIK DI SUMATERA UTARA", *Anthropos: Jurnal Antropologi Sosial dan Budaya* 4, no. 1 (2018): 9-22, 10, DOI: 10.24114/antro.v4i1.9970.

⁴ <https://www.jurnalasia.com/ragam/pesta-gotilon-samosir-sedot-perhatian-turis/> accessed on November 29, 2020.

⁵ EBT is the acronym of Ekspresi Budaya Tradisional, which is the Indonesian translation of Traditional Cultural Expressions.

⁶ Simona Bustani, "URGENSI PENGATURAN EKSPRESI BUDAYA (FOLKLORE) MASYARAKAT ADAT", *Jurnal Hukum Prioris* 2, no. 4 (2010): 246-255, 253.

⁷ <https://www.republika.co.id/berita/nasional/umum/12/06/20/m5wstu-kronologi-klaim-tari-tortor-versi-malaysia> accessed on December 1, 2020.

science logic's normative aspect.⁸ As a normative science, legal science has a *Sui Generis* procedure to help solve society's legal problems. In this method, the research shall approach the formulated research question by examining literature or secondary data.⁹ The aforementioned secondary data refers to data obtained solely from literary references.¹⁰

In this legal research, the researcher shall adopt an interdisciplinary approach. The multidisciplinary approach uses one discipline of Theoretical Framework and Methodology, determined by using other disciplines' research results, both legal and non-legal, to gain a more accurate and in-depth understanding of the legal discipline.¹¹ Such a method is the most suitable choice for this research because it only adopts one discipline: Legal Science. This also considers that the researcher discusses the legal protection for Pesta Gotilon as a Traditional Cultural Expression in international and national laws, which creates a disparity of existing reality (*das sein*) and what is supposed to be (*das sollen*).¹² Therefore, with this research, the researcher hopes to bridge the gap and provide a solution for the emerging problem.

B. Discussion

1. Legal Protection for Traditional Cultural Expressions According to the International Law

Legal protection is a collection of rules to protect one thing from another.¹³ According to Satijipto Raharjo, legal protection protects human rights (HAM) that others have harmed. That protection is given to the community to enjoy all the rights provided by the law.¹⁴ According to Phillipus M. Hadjon, legal protection for the people is a government action in preventive and repressive characteristics.¹⁵ So that in this case, legal protection is divided into two, namely preventive and repressive legal protection. Preventive legal protection is a legal protection that aims to prevent disputes, which directs government actions to decide based on discretion. In contrast, repressive legal protection is a legal protection that seeks to resolve disputes.¹⁶

⁸ Jhonny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Surabaya: Bayu Media Publishing, 2005), 57.

⁹ Soerjono Soekanto dan Sri Mamudi, *Penelitian Hukum Normatif*, Cetakan ke-13 (Jakarta: Rajagrafindo Persada, 2000), 13.

¹⁰ *Ibid.*, 12.

¹¹ Agus Brotosusilo, *Paparan pada Diskusi Penelitian Rumpun Sosial-Humaniora Universitas Indonesia: Metodologi Inter-Trans dan Multi Disiplin untuk Penelitian Disiplin Hukum* (Depok: Universitas Indonesia, 2017), 21.

¹² Agus Brotosusilo, Et. Al., *Penulisan Hukum: Buku Pegangan Dosen* (Jakarta: Asia Foundation-Konsorsium Ilmu Hukum Departemen PDK, 1994), 6.

¹³ Muammar Alay Idrus, "KEABSAHAN, KEPASTIAN HUKUM DAN PERLINDUNGAN HUKUM ATAS PERWAKAFAN YANG TIDAK TERCATAT (STUDI KASUS PRAKTEK PERWAKAFAN TANAH DIKECAMATAN SUKAMULIA)", *Jurnal Ius* 5, no. 1 (2017): 32-48, 36, DOI: 10.29303/ius.v5i1.342.

¹⁴ Annisa Justisia Tirtakoesoemah, Muhammad Rusli Arafat, "PENERAPAN TEORI PERLINDUNGAN HUKUM TERHADAP HAK CIPTA ATAS PENYIARAN", *Pena Justisia: Media Komunikasi dan Kajian Hukum* 18, no.1 (2019): 1-14, 4, DOI: 10.31941/pj.v18i1.1084.

¹⁵ Dyah Permata Budi Asri, "PERLINDUNGAN HUKUM PREVENTIF TERHADAP EKSPRESI BUDAYA TRADISIONAL DIDAERAH ISTIMEWA YOGYAKARTA BERDASARKAN UNDANG-UNDANG NOMOR 28 TAHUN 2014 TENTANG HAK CIPTA", *Journal of Intellectual Property* 1, no. 1 (2018): 13-23, 16.

¹⁶ Luthvi Febryka Nola, "UPAYA PELINDUNGAN HUKUM SECARA TERPADU BAGITENAGA KERJA INDONESIA (TKI)", *Negara Hukum* 7, no. 1 (2016): 35-52, 40, DOI: 10.22212/jnh.v7i1.949.

International Laws are enacted from an agreement between Countries that feel bound to comply with the agreement.¹⁷ A few forms of International Laws include Agreements, International Treaties, Conventions, and others. TCE regulation as Intellectual Property certainly is a form of the countries' awareness to protect their society's interests.¹⁸ Such awareness creates a plethora of agreements or conventions or treaties and others that specifically discuss Intellectual Property rights, mainly regarding TCE.

a. 1948 Universal Declaration of Human Rights

The most fundamental form of TCE Safeguarding starts from the 1948 Universal Declaration of Human Rights. This treaty is deemed a reflection of all Countries' concern for fulfilling their society's fundamental rights regarding intellectual property rights based on cultural rights. Paragraph (4) and Paragraph (5) of Article 27 of the 1948 Universal Declaration of Human Rights state that:¹⁹

- 1) Everyone has the right to freely participate in the community's cultural life, enjoy the arts, and share in scientific advancement and its benefits.
- 2) Everyone has the right to protect the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.

Such two paragraphs serve as the vital basis for the world to focus on TCE's scope. Through the Universal Declaration of Human Rights, various international communities may use the general values of Human Rights as a guide to face issues related to access to knowledge. Therefore, through this agreement, the Government of each country has the opportunity to regulate the wealth of the country in ways that may fulfill the fundamental rights and values of its citizens.²⁰

b. Model Provisions for National Laws on the Protection for Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action 1982

This International Law Instrument is the result of UNESCO's and WIPO's formulation. This instrument is a form of awareness that the copyright law does not provide adequate protection for TCE. In copyright law, a new creation shall only be protected if the idea of the creation has been fixed. Additionally, the copyright law also includes a protection period, which is highly difficult to be applied to TCE as it is a generational heritage. Part 2 of this Instrument states as follows:

“For this (law), 'expressions of folklore' means productions consisting of characteristic elements of the traditional arsc heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional arsc expectations of such a community, in particular: ... (iii) expressions by action, such as folk dances, plays, and arsc forms or rituals, ...”

The word “*rituals*” is included in the formulation of the article mentioned above. Thus traditional ceremonies are also part of TCE that needs to be safeguarded.

¹⁷ Mahendra Putra Kurnia, “HUKUM INTERNASIONAL (KAJIAN ONTOLOGIS)”, *Risalah Hukum* 2, no. 2 (2008): 77-85, 80.

¹⁸ Zulkifli, “Perlindungan Hukum Atas Ekspresi Budaya Tradisional”, *Dissertation*, Universitas Hasanuddin Makassar, (2018), 171.

¹⁹ FY Hakim, “DEKLARASI UNIVERSAL HAK ASASI MANUSIA”, *Indonesian Journal of International Law* 4, no. 1 (2006): 133-168, 139.

²⁰ Zulkifli, *Op.Cit.*, 173.

c. The Matatua Declaration on Cultural and Intellectual Property Rights of Indigenous People 1993

This declaration is made to discuss the values of traditional knowledge, biodiversity and biotechnology, environment management customs, arts, music, languages, and various physical and cultural forms. Moreover, indigenous people also have community rights over intellectual and cultural properties compared to previously when the only known right was the right to choose one's path. In *Pesta Gotilon*, there are, for a fact, spiritual values between society and God as the giver of blessings for harvests. Clearly, through this declaration, the Batak Toba indigenous people's spiritual values are protected and guaranteed by the law.

d. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (WBTB²¹ Convention) means various practices, representations, expressions, knowledge, and skills acknowledged by various communities, groups, and in some cases, individuals as a part of their cultural heritage. Countries that ratified this WBTB Convention shall commit to safeguard and conserve their heritage by exercising efforts such as safeguarding, promotion, and dissemination through formal and non-formal education, research and revitalization, and efforts to increase reverence and awareness. The country must realize such commitment by identifying and determining a cultural product categorized as intangible in an inventory.²²

e. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression 2005

This Convention regulates not only preservation but also the safeguarding and promotion of cultural expression diversity. The safeguarding referred to in this Convention includes, to mention a few examples, that member countries are provided with the opportunity to decide on the necessary actions to prevent the extinction of a TCE. As for promotion, this Convention mandates member countries to create, produce, and distribute the TCE of its people. Several International Law Instruments mentioned previously are a form of concern of the world for the safeguarding of TCE. The communal uniqueness of TCE is what makes TCE one of the Intellectual Properties that is specially regulated as it does not have any similarities to copyright.

2. Legal Protection for Traditional Cultural Expressions According to the National Law

Regulations of TCE in the scope of National Law are specifically governed in the Copyright Law. The 2014 Copyright Law serves as a stepping stone for TCE to receive legal protection. This is because previously, TCE did not receive any legal attention or protection, although the 2002 Copyright Law did not govern TCE. The regulations of TCE are explicitly governed in Article 38 and Article 39 of the Copyright Law.²³ In the Copyright Law, the copyright on a TCE belongs to the country. The role of a Country in the Copyright Law is to inventory, safeguard and maintain TCE. The explanation of Copyright Law also states what constitutes traditional cultural expressions, such as²⁴:

²¹ WBTB is the acronym of Warisan Budaya Tak Benda, the Indonesian translation of Intangible Cultural Heritage.

²² Departemen Kebudayaan dan Pariwisata, *Buku Panduan Praktis Pencatatan Warisan Budaya Tak Benda Indonesia* (Jakarta: Departemen Kebudayaan dan Pariwisata dan UNESCO, 2009) p. 5.

²³ Samiran Jerry Fransiskus, "PERALIHAN HAK CIPTA DENGAN CARAPEWARISAN MENURUT UNDANG-UNDANGNOMOR 19 TAHUN 2002 JUNCTO UNDANG-UNDANG NOMOR 28 TAHUN 2014 TENTANG HAK CIPTA", *Lex Privatum* 4, no. 2 (2016): 5-12, 10.

²⁴ See Article 38 Law Number 28 the Year 2014 regarding Copyrights.

- a. Verbal textual, verbal or written, in the form of prose or poem, maybe a literary work or informative narration in various themes and messages.
- b. Music, which includes vocal, instrumental, or a combination of the two;
- c. Motions, which include dance;
- d. Theatres, which include shadow puppet shows and folk plays;
- e. Fine arts, both two-dimensional and three-dimensional that are made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile, and others or a combination of any of the previously mentioned elements; and
- f. Traditional ceremonies.

According to the Copyright Law, copyright on TCE belonging to a country is not limited to a certain period. Thus a Country shall implement the mandate granted by the law to provide safeguarding of a TCE. This safeguarding also includes Pesta Gotilon, which is qualified as a traditional ceremony TCE. In addition to the Copyright Law, in 2017, Law Number 5 the Year 2017 regarding Cultural Advancement (Cultural Advancement Law) was passed.²⁵ In this law, the culture means everything related to the conception, sense, intention, and results of a society's cultural creation, including TCE in Copyright Law. Through this Cultural Advancement Law, Article 38 of Copyright Law's mandate regarding the country's obligation to hold TCE is realized.

The Cultural Advancement Law explicitly governs the methods to safeguard a cultural advancement object. The country is provided with the authority to inventory, which consists of these steps: recording and documentation, data establishment, and upgrade. Furthermore, the Cultural Advancement Law also governs the safekeeping, maintenance, rescue, publication, development, and utilization. This Cultural Advancement is mandated by the Central Government and the Regional Government to fulfil its objective. The country must refer to the Main Idea, Cultural Strategy, and Cultural Advancement Master Plan.²⁶ Therefore, Pesta Gotilon, which has become a traditional ceremony with an attractive tourism point and has helped support its indigenous people's economy, needs special attention from the Regional Government, especially in North Sumatra.

For instance, the Government of West Java issued a Regional Regulation of the Province of West Java Number 5 the Year 2012 regarding the Safeguarding of Intellectual Properties, which governs Conventional IPR and Communal IPR such as TCE.²⁷ Such Regional Regulation is created as an effect of witnessing various results of the people's cultural conception, intention, and creation, which must be developed. Although this Regional Regulation was issued before the Cultural Advancement Law, this remains a significant step of the Regional Government's participation in supporting the cultural conception and creation of its people, mainly the indigenous people.

Such examples should serve as a good model for the Regional Government of North Sumatra as the province of North Sumatra has diverse ethnic groups. This ethnic diversity leads to distinct uniqueness in the community's TCE. Moreover, some ethnic groups in North Sumatra express a deep interest in the arts. This can be seen in Pesta Gotilon, which includes the Tortor dance's procession and the Gondang.

²⁵ Retnani Amurwaningsih, "PERLINDUNGAN BUDAYA TRADISIONAL INDONESIA MELALUI PENCATATAN DALAM SISTEM PENDATAAN KEBUDAYAAN TERPADU", *Jurist-Diction* 1, no. 1 (2018): 303-323, 303, DOI: 10.20473/jd.v1i1.9747.

²⁶ See Article 8 Law Number 5 the Year 2017 regarding Cultural Advancement.

²⁷ Laina Rafian, Qolliqina Zolla Sabrina, "PERLINDUNGAN BAGI 'KUSTODIAN' EKSPRESI BUDAYA TRADISIONAL NADRAN MENURUT HUKUM INTERNASIONAL DAN IMPLEMENTASINYA DALAM HUKUM HAK KEKAYAAN INTELEKTUAL DI INDONESIA", *Padjadjaran Jurnal Ilmu Hukum* 1, no. 3 (2014): 498-521, 498, DOI: 10.22304/pjih.v1n3.a5.

C. Conclusions

The protection for Pesta Gotilon as a TCE that has been inherited generationally and has a communal characteristic is protected by international law. However, the technical protection of TCE has not been governed explicitly in international law. Nonetheless, Pesta Gotilon may be safeguarded with preservation through the International Convention formed by UNESCO. Notwithstanding, the economic rights have not been governed explicitly in International Law. As a country with cultural diversity, Indonesia has passed some laws to protect a TCE. Pesta Gotilon itself is also a part of the protected TCE as mandated by the Copyright Law. In addition to the Copyright Law, the protection for TCE ritual may also be achieved through the Cultural Advancement Law. This helps the indigenous Batak people safeguard Pesta Gotilon better, considering that Pesta Gotilon also receives several benefits from ceremonies.

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