

Legal Problems of People Rights in the Traditional Knowledge Protection

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Abstract: The main problem in protecting the traditional knowledge is the societal role as traditional knowledge owner that specifically own legal culture the is open for foreigner, the statute existence problem and how ware its movement and how the government promote and protect. In Indonesia, the problem open great opportunities for the biopiracy, the societal right and dignity removal for the traditional knowledge that has been maintained for centuries. The research method is normative in nature with historical, sociological and statute approaches. The legal material sources in the research are the primary legal material and secondary legal material. The primary legal materials are obtained mainly from statute. The secondary legal material obtained from text / literature that contain about basic principles of Intellectual Property Right, the traditional knowledge, research results, legal writings that contain actual issues about communal ownership for the traditional knowledge, in the form of books, articles and journal. Legal problem about societal relation with the traditional knowledge ownership including: the existence susceptibility of intellectual property right from bio piracy, no embodiment legal protection yet in the normative regulation either national or international, no special actions of government in the form of political policy and etc, and the cultural and legal awareness of the society itself.

Keywords: Legal problem, knowledge protection

Traditional knowledge is traditional (customary) society work that can be in the form of culture, art work, and technology that is from generation to generation be used since their predecessor. Traditional knowledge owned collectively by the customary society that is maintained and preserved, not protected appropriately in the intellectual property law. Many Indonesian traditional knowledge that is patented by foreigner, has opened Indonesian eyes to try to protect it. The problems, can the traditional knowledge be patented or how to make the traditional knowledge protected maximally, especially through paten law. Refer to the existing case, such as tempe making, traditional medicine, technology in medical field, traditional knowledge can be patented if fulfilled the

patentable requirement, by modify the process or product.

Traditional knowledge thieving by foreign country, by changing the process and the product, known as biopiracy, that up to now become severe. As occurred in the Indonesian spices. Cosmetic company of Japang Shiseido Co Ltd has 9 patents for plants that com from Indonesian spices, such as lempyung, beluntas, pulowaras, diluwih, java vhilli, brotowali, kayu manis, kayu rapet wangi, kemukus, and bunga cankok, as spices, medicine and cosmetic. Tempe as Javanese traditional food also has been patented, there are 19 patents about tempe, 13 patent owned by USA, 8 patents owned by Z-L Limited Partnership, 2 patents owned by George about tempe oil, 2 patents owned by Pfaff about incubator and procedure to make food from tempe materials and 1 patent owned Yuch about snack making with tempe mixture. Jepang also has 6 patents, that is 4 patents about tempe making, 1 patent about tempe as antioxidant and 1 patent about cosmetic by using isolated tempe.

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Other patent for Japan called as tempeh, Nishi and Inoue invention that given in 1986, but the tempe made from soybean milk waste that mixed with corn flour, soybean flour, wheat flour, rice flour, dextrin, and albumine and Na-casein. Beside that many losses that make this country embarrassed, as rattan bending technology that has been patented in America, so if our country exporting rattan handicraft that uses the bending technique, then we are obliged to pay royalty to America, whereas the royalty should enter into Indonesian pocket.

WIPO sub Intellectual Property and Genetic Resources. Traditional Knowledge and Folklore stated:

"Traditional knowledge (TK) and how to preserve, protect, and equitably make use of it, has recently be under increasing attention in a range of policy discussion, on matters as diverse as food and agriculture, environment (notably the conservation of biological diversity), health (including traditional medicines), human right and indigenous issues, cultural policy, and aspects of trade and economic development".²

The main problem in protecting the traditional knowledge is the societal role as traditional knowledge owner that specifically own legal culture the is open for foreigner, the statute existence problem and how ware its movement and how the government promote and protect. In Indonesia, the problem open great opportunities for the biopiracy, the societal right and dignity removal for the traditional knowledge that has been maintained for centuries. With full awareness as member of TRIPs, Indonesia has facilitated the investment security and protection for intellectual property right for capitalist state's technology (America, Japan, and etc) with IIRI Act, but the advanced countries do not appreciate the legal, social and cultural rights and economic right of Indonesian societies as the owner and heir of the traditional knowledge so freely use and exploit it without royalty to the owning society. Of course the nation doesn't want to be colonized again, so it needs sufficient legal protection for the people rights of the nation.

Theoretical framework

Currently, there is increasing awareness of people about the more accurate research in effort to create

intellectual property right protection system and traditional knowledge that is suitable with the societal needs, especially about the communal ownership of customary society. Indication of the increasing attention and awareness of people reflected from many HKI proposal that proposed to General Directorate of Intellectual Property.

Especially about Patent, since the beginning the patent statute up to end of 2007, the patent registrants from the national citizen only about 3% if compared with patent from abroad. For example, from data of patent registration between 1991–2002 showed that the domestic patents requests for ordinary patents are 959 patents (2.77%), simple patents 979 (2.83%), from all request for the decade of 34.644 patents. Also year 2000 is the greatest patent requests, it is proven by 156 ordinary patents and 213 simple patents have been registered domestically. There is tendency of Patent application during 2001 either from the domestic or foreign registrants, it is possible caused by the economic policy impacts (investment field), politic, and legal policies.

Patent requirements for invention are novelty, non obviousness/inventive step and industrial applicable. The traditional knowledge since beginning even for centuries have been preserved for society and recognized its reliability technologically. Refer to the patentable invention requirements, the novelty requirement fulfillment won't be fulfilled if not made new model based on the traditional knowledge. Indonesia argue the novelty requirement at the traditional knowledge for patent. While for traditional medicine and drugs can through trade secrets and traditional knowledge through folklore should be considered its originality. So principally, WIPO and Japan propose their inventive step and novelty requirement for TK protection through patent, while Indonesia tend to focus to novelty. Today Indonesia is finding special protection (*sui generis*) that will regulate the Indonesian traditional knowledge.

About the possibility of traditional knowledge to be protected through patent law, WIPO stated that:

"In recent years it has been claimed that patents have been granted for traditional knowledge-related inventions which is not fulfill the requirement of art consist of traditional knowledge which could not be identified by patent examiner during the examination of the patent application.

Actually according to WIPO, traditional knowledge do not fulfill the novelty and inventive step requirement, so do not fulfill the patent registration. The Japan Patent Law do not have separate regulation about traditional knowledge and the existing data is not sufficient, in order to obtain patent right under Japanese Patent law, it is necessary to meet the regulation of patent such as novelty and inventive step requirement. As the consequences, the traditional knowledge registration proposal is not accepted if available to public, so no exclusive right for the invention⁴. So far the countries that dominate world patents are America and Japan. Both countries can be reference for developing countries, that very appreciate the patent right in the technological invention. Both countries also have patented their temple making technologies and the temple product that actually come from Indonesia, but have been modified so fulfill the patentable invention.

After investigate many biopiracy that occurred to Indonesian traditional knowledge, the people rights as the owner should be enforced fairly for the legal certainty. Radbruch⁵ stated that in the Idea of Law, the legal certainty is number one because based on positive law that should be enforced. The balance by respecting the parties is possible to embody the justice and legal certainty. Balance does not mean as equal position identically, but based on interest and responsible of the parties, as stated in Kranenburg between people legal awareness and state responsibility to protect the people interest.

Related with technology that contained in the traditional knowledge, technology should be maintain and secured to protect its investment or exploitation. According to Simpson, technology is called as "the clock can be the key to inquiry" that always action from time to time to develop. Technology is understood as constellation of knowledge, process, skill and product whose aim is to control and transform⁶. So, technology take important role in improving economic growth and industrialization. Without ability to get and develop technology to process it, Indonesian natural resources ownership can not be used and comparative advantage will be meaningless. The technological capability and followed with adaptive technology application will encourage the value added increase

in the production process doubly through long production chain so obtain maximum added value.

The prevail of Act No 18 of 2002 about Research National System, Development, and Implementation of Science and Technology (P3IPTEK) encourage central government and local government to motivate, stimulate and facilitate and create conducive climate for *Sisnas P3 Iptek* development in Indonesia. To implement the function, government has role to develop policy instrument that is the supporting factors to support the growth and synergy between institution, resources, and science and technology network. The policy instrument that can be developed: (1) human resources support and intellectual property law (2) fund support (3) incentive giving in the form of tax incentive, risk coping, rewarding and recognizing or other incentive that able to encourage the research and development activities funding, engineering, innovation and technological diffusion from foreign business entities that conduct business activities in Indonesia (4) science and technology program to get national and local potentials (5) establishing the institution that is not yet or unable to be developed by society but needed to support *Sisnas P3 Iptek*.

According to Blakeney, western patent system grew out of a particular model of innovation of a particular time in history⁷ that give individual right based on time period, while collective ownership as in the traditional people do not fulfill requirement, because the invention considered as "vague" and its origin are lost in the mist of time.

Blakeney stated:

"New models will probably needed to protect the traditional knowledge, and these will not easy to create. To some, such initiative smack of political correctness, others see them as fair reward. Their introduction would help to return the rising tide against TRIPs by showing even the poorest developing countries that intellectual property right can be opportunity, not just a threat."⁸

Essentially, so far the society as the owner and heir of traditional knowledge have maintained and preserved conventionally, although viewed from cultural viewpoint that is friendly and open will open the occurrence of information of technology spread to foreigner. Culture and legal awareness for the protection toward traditional knowledge still lack, so

old society even be proud if their creation used by foreigner. Today, society open their legal insight and understand how loss to them if there is biopiracy

METHOD

The research method is normative in nature with historical, sociological and statute approaches. The legal material sources in the research are the primary legal material and secondary legal material. The primary legal materials are obtained mainly from statute. The secondary legal material obtained from text/literature that contain about basic principles of Intellectual Property Right, the traditional knowledge, research results, legal writings that contain actual issues about communal ownership for the traditional knowledge, in the form of books, articles and journal. Number data in field and interview results that are used as supporting materials that are used. The legal materials that is collected, identified, classified, and made systematic either from substance or relevance of the substance. Then done analysis of the legal materials with the systematic reasoning and by giving legal arguments.

RESULT AND DISCUSION

People rights and traditional knowledge

In the societal social group, there are binding cooperation, solidarity, and awareness. The awareness is awareness for the collective work completeness, awareness for collective feeling in group, and awareness for collective thinking as the foundation of goal achievement⁹. Society is the origin of the nation, and the societal basic nature will become the existence philosophy of the nation. The "kekeluargaan" concept that is embodied in the unity, interdependency in society, collective desire, love motherland and togetherness, tolerant, social solidarity, social justice and appreciate the dignity as the God creature¹⁰.

Society is the performer, the basic capital and also the goal direction of knowledge and technology developed. The protection to the traditional knowledge and the people right, it is aimed to give legal understanding to society about the management of intellectual property as owner and its exploitation. HKI law aimed at eroding the societal culture that full of democratic nuance, mutual cooperation, help each

other, but exactly want to protect society (as the inventor and the owner) even society legally own, not only as the audience or witness of the biopiracy.

The HKI law is modern legal culture that flow along with the globalization and investment current, and initially along with technology transfer. The related aspects of intellectual property right (TRIP/WTO) that based on the Paris Convention. Society also should given law that in the TRIP and Paris Convention, there are regulation for priority right, so able to propose legal effort to avoid loss if the invention registration (similar) from abroad with priority right. Society should be opened their knowledge insight about Intellectual Property Right law so the intellectual property sourced in Indonesia not used up absorbed by foreign technology either technologically or the legal ownership.

Many traditional knowledge in the technology and natural wealth even the traditional knowledge of Indonesia that be patented by foreigner, has opened Indonesian eyes to protect it. The problem, whether the ordinary people or those science and legal literate know the important of Intellectual property right or how to make the invention can be protected maximally, especially through intellectual property right. Refer to existing case, such as technology to make medicines, traditional medicines, traditional knowledge can be patented as long as fulfill the patentable requirement. Today it is tried to make legal protection by sui generic

First international conference about cultural and intellectual right of indigenous people in New Zealand in 1993, produced Maataatum Declaration, that basically stated:

- Right to protect traditional knowledge is part of right to determine the destiny
- Indigenous people should determine for themselves what is their intellectual property and their cultural property
- The protection equipment that is insufficient
- Ethical code should be developed to be obeyed by foreign user if note the traditional and customary knowledge
- An institution should be formed to preserve and monitor the commercialization of the work and knowledge, to give proposal to the indigenous people about how the able to protect their cul-

ture and to negotiate with government about statute that impact to the traditional right

- An additional system about cultural right and intellectual property right should be formed that recognize (1) collective ownership and retroactive, (2) protection against debasement of culturally significant item (3) cooperative rather than competitive framework (4) first beneficiaries to be direct descendants of the traditional guardians of the knowledge. Then also has been conducted indigenous people conference at Bolivia of 1994 and Fiji 1995, while WIPO key up the efforts to make report about facts finding from traditional knowledge.

To investigate the Intellectual Property Right controversy for people traditional knowledge is heavy task, while many foreigner steal the science of or predecessor. Today society disappointed because many foreigner enjoy the economic benefit for their traditional knowledge without they aware. Such as about plant nature, traditional medicine, and other that considered as general knowledge of traditional society, have been patented in abroad by the foreigner by fulfilling the patent requirement. As the consequences of intellectual property right especially trademark and patent that is brought from west society, then if we import the patent medicine the price is not affordable.

Currently there is awareness improvement of society about the restudy more accurately in effort to create intellectual property right system that is suitable with the societal needs, especially about the ownership of customary or communal society.

The usage of genetic resources for various interest (such as the medicine materials, food, beverage, preservative, and as seeds) that become improve with the support of science in biotechnology, that draw attention of big companies in the developed/developing countries. Unfortunately, the fair profit sharing, and real technology transfer from the big companies to the genetic resource supplier/producers that generally come from the developing countries so far considered as insufficient. While the pretext that is disputed that stated by developed companies that the available genetic resource abundantly that is the legacy of predecessor can be used by anyone and any time (common heritage of mankind)¹¹

Cultural value system is a behavior that is abstract. The behavior should be given in detail into more real form that is norm such as courteousness, custom and etc (Koentjaraningrat, in Sujarwo). The problem is, they come from various tribes that have potential to produce conflict among them¹².

The legal development should be aimed at make society welfare, with other word the development should has positive connotation toward societal cultural development¹³. For that public participation and legal awareness necessary absolutely. The legal cultural aspect is a component of legal system that the concept is introduced since 50s by considering that the human action including their legal actions not only contain biological content, but also socio cultural content. To order and build legal awareness, it need sustainable moral development, that of course should synergy with the welfare development. The behavior and legal awareness building also can not be seen as separated, without realize, that there is requirement that should be fulfilled as economic welfare. Targeting the legal awareness and behavior building in the people economic difficulty can be grouped as program that difficult to achieve. Building legal awareness is part of moral life development of nation that comprehensively unable to wait until the life welfare increase substantially. At that time we are probably too late.¹⁴

Actually to find any appropriate form or system of statute should be planted the legal awareness and participation from various parties either society or government. Traditional knowledge sometimes oral and communal in nature also often spiritual in nature, and as object for exploitation. The traditional knowledge and folklore can be protected maximally, and if possible the action to promote or protect should be keyed up. The intellectual property law, contract law and regulation law that is design specially to protect traditional knowledge and folklore, should emphasize the societal interest of indigenous people.¹⁵

With the increase of modernization and globalization, change process from communal awareness become more individualized will be occurred. The intellectual property right concept whose individualism has open the societal eye including the traditional culture heirs. Opportunities to promote the traditional knowledge and traditional cultural expression and also protect it become important thing to huddle up the

folklore position and traditional knowledge and the traditional society interest who own it.

Then in the General Assembly in December 2000, it was agreed to form Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC GTRKF) will study fact finding mission results and prepare input for further follow up. In the first meeting of IGC GTRKF in Geneva on April 30 to May 3 of 2001, based on report for fact finding mission (ffm), it was agreed to study further accurately about the problem. Following up the matter, various forum in several countries basically has study about the implemented problem. One of study forum that implemented in Yogyakarta, Indonesia, on October 17-19 2001 is WIPO Asia Pacific Regional Symposium on Intellectual Property Rights, Traditional Knowledge, and Related Issues. In the symposium, it can be prepared input that used by Asian Group in WIPO to arrange opinion/position of Pacific Asian about the problem handling.

One of input that produced from the symposium is to make each country, especially developing countries, can do consultation/coordination at national level about the genetic resources handling, folklore traditional knowledge, and document all information about the matter.

Viewing the important of genetic resources problem handling, the traditional knowledge and folklore and following up the WIP Asia Pacific Regional Symposium on Intellectual Property Right, Traditional Knowledge, and Related Issues (Yogyakarta, October 17 to 19 2001), General Directorate of Intellectual Property Right has initiative to conduct coordination meeting with some related institutions, that is specially discuss about the problem. As one of meeting results is to make working group in the genetic resource field, traditional knowledge, and folklore expression.

The working group of genetic resources, traditional knowledge and folklore expression is planned will be determined by Judicial And Human Right Minister decree. While the scope of working group function is (1) inventorying various documents about the genetic resources and their usage, the traditional knowledge and folklore expression that become public domain (2) striving for the spreading and information exchange electronically that can be used by public in

general about the genetic resources and their usage, traditional knowledge and folklore that become public domain so can not be patented (3) preparing the input for bill about mechanism to get genetic resources and their relation with intellectual property right, and the profit sharing for the usage, and (4) support the problem solution activities that related with the intellectual property right about genetic resource usage and the profit sharing for the usage fairly.

Some investigations also have been done in various forum, either in WIPO environment (such as: Standing Committee on Information Technology, Standing Committee on Patent, Committee of Experts of the Union of International Patent Classification) or other international organization (such as that done by World Health Organization, Convention on Biological Diversity, United Convention to Combat Desertification, United Nations Educational, Scientific and Cultural Organization, United Nations Conference on Trade and Development, World Trade Organization, and World Bank).

So far has succeeded in identifying some matters that should be handled further and expected able to accelerate realization of wide society expectation (that is to make the benefit/usage of genetic resource, traditional knowledge, and folklore expression can be done optimally). The things were agenda that discussed in the second meeting of IGC GTRKF that is done in Geneva December 10-14-2001

Basically, the local/traditional/indigenous people rights for traditional knowledge still discussed and investigated continuously, either internationally or nationally. The right is social cultural and economic rights that still become legal problem that not solved yet, either in the statute formula between developed countries and the owning (developing) countries for the exploitation and the needs of regulation. The societal rights for the traditional knowledge suitable with section 15 and 25 of International Covenant, such as

- right to take share in the cultural life
- right to enjoy scientific benefit and its advance
- right to get profit and moral and material protection
- right to determine self destiny for their traditional knowledge political, economically and socially

- right to be free from fear from the international agreement and give emphasis to mutual benefit principle

So finally, the people right for the traditional knowledge return to the traditional owner interest, that is the government where the society present to regulate protection, and promotion, and exploitation its economy. The social, cultural, and economic rights should get legal certainty guarantee for its protection, so government and society actively participate as soon as possible to form legislation regulation that suitable and demanded by the society

Legal protection toward Indonesian traditional knowledge

Various problems about traditional knowledge that are patented, basically because there are still polemics because the patent right and its protection is legal construction that is adopted from liberal country to protect their individual right of work. The main goal to guarantee monopoly of their usage. With liberal concept then the individual ownership given emphasis (absolute), contrary with the collectivism concept of Indonesian customary law. At the customary law, wealth has social function and public owned, even traditional society will be proud if their work be awed and used by other customary society. And also the customary law follow the intangible and cash wealth, so patent right is strange for the traditional society. Indonesia disputes about the novelty requirement at the Traditional Knowledge registration through patent¹⁶. While for herb and medicine can be done through trade secret and traditional knowledge through folklore should be considered its "originality". So principally, WIPO and Japan propose inventive step requirement and novelty for TK protection through patent, while Indonesia more focus to novelty.

Section 2 sub section (1) and (2) act no 14 of 2001 about patent then (called by UUP) stated that:

- paten given to new invention and contain inventive steps and can be implemented in industry.
- an invention contain inventive step if the invention for someone that have certain skill in technical field that can not be expected previously.

Then the section 3 of UUP sub section (1) stated that an invention considered as new if at the receipt

date, the invention different with previous revealed technology.

Observing the traditional knowledge of customary society, the requirement about applicable to industry can be fulfilled because traditional knowledge for years even centuries has been developed by our predecessor. For example traditional medicine that able to treat human and animal, the invention of way to accelerate or multiply the plant yield, make plant immune to insect and diseases and other, is reliable knowledge.

Traditional knowledge has been produced for centuries, has become public domain of traditional society, so individually can not be found the inventor. Beside that, requirement of contain inventive step if invention for someone that has certain skill in technical field that previously unexpected, is difficult to fulfill. Inventive step in the traditional knowledge showed inventive step that has become public domain, found and used collectively by society, collectively maintained, and not be closed, for centuries. So the inventive step and novelty requirement inhibit the patent registration for the traditional knowledge.

This opportunities may be used by foreigner to take the core of the knowledge then be modified or specify and mix it become new innovation so the traditional knowledge that initially owned collectively also can be registered individually. For that matter it can be planted the innovative spirit of society to found new invention of economic in nature so foreigner unable to beat. About the novelty requirement, there is controversy (in case of Neem tree in India), that novelty exist by only considering whether an invention has been registered before in which country (either has been used) or novelty by considering that the invention just be found and other people don't used it and register it yet.

To analyze the novelty problems, section 2 of UUP stated that novelty contain meaning that the invention different with previous revealed technology. In the explanation, the equivalent of technology term that previously revealed is state of the art or prior art that include either patent literature or non patent literature. The term of different meant not only different but also be researched the similarity or difference of the technical function (features) of the invention with the previous invention. The technology

that revealed before mean including proposal document that is proposed in Indonesia and published at or after the receipt date or priority date of the proposal that is examined its substantive. So basically, invention can not be patented if the invention do not be registered before used in field commercially.

The traditional knowledge still do not protected through statute in Indonesia yet, because it has been looked for appropriate protection that suitable with the societal interest and able to protect the traditional knowledge from foreigner threat. Actually there is other problems that inhibit the ordinary society to get reward and protection of intellectual property right, that is the complicated and expensive registration procedure where society does not have the skill for that. According to Governmental Regulation No 26 of 1999, the paten registration of Rp 575.000, substantive examination of ordinary patent of Rp 2000.000, the patent right transfer Rp 150.000, license agreement registration cost Rp 1000.000 and yearly cost of Rp 700.000 for first year and increase up to 5000.000 for year 20th

Legal problems about societal relation with traditional knowledge ownership including: the susceptibility of Indonesian Intellectual property right toward bio piracy, no embodiment legal protection yet in the normative regulation either national or international, no special actions of government in the form of political policy and etc, and the cultural and legal awareness of the society itself.

So principally, Indonesian do not have special regulation about traditional knowledge, because up to know the academic manuscripts do not follow up yet to positive law. The data recording about traditional knowledge and folklore has been conducted. For that, it needs proactive cooperation among various related parties, especially the inheriting society and government

CONCLUSION

From explanation above, it can be concluded as follow:

Societal rights for traditional knowledge such as social, cultural, and economic rights, right to get scientific benefit, economic and moral right and the right to determine self destiny, right to be free from fear toward the international agreement results.

Indonesian government and societies have rights to regulate protection, promotion, and its economic exploitation

The social, cultural and economic rights appropriate to get legal certainty for its protection, so government and society together actively and as soon as possible to form statute that is suitable and desired by the society

Legal problem about societal relation with the traditional knowledge ownership including: the existence susceptibility of intellectual property right from bio piracy, no embodiment legal protection yet in the normative regulation either national or international, no special actions of government in the form of political policy and etc, and the cultural and legal awareness of the society itself.

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