



## Politics of Law on Protection to Folklore in a Regional Autonomy Perspective: Rights for Indigenous People

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### Abstract

*The study of political law on protection of folklore with the perspective of regional autonomy is expected to be realized ideal protection. The problem in this research is why folklore need to be protected in the perspective of regional autonomy and how the political law of folklore protection in the regional autonomy perspective. This research approach method using normative juridical approach method. The result of this research is folklore needs to be protected because it is part of the wealth of the Republic of Indonesia. Folklore needs to be protected in the perspective of regional autonomy because it is a work that was born and developed and preserved in their respective regions. The politics of law of folklore protection in the perspective of regional autonomy is by making technical implementation policy up to the level of local regulations for the benefit of folklore protection, one of them with the policy of inventory. The conclusions and suggestions in the research are folklore is a human work that must be protected especially in the perspective of regional autonomy and it is advisable to immediately pass a regulation on protection against folklore.*

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## INTRODUCTION

POLITICS of law as the basic policy that determines the legal choice of a country, in other words that politics of law is a grand design of the laws of a country that regulate the legal order of a country so as not to deviate from the purpose of the state. Politics of law is not just talking about or discussing the existing and applicable law (positive law) but will also organize and plan the future law according to the condition of the nation and state.

Article 32 Paragraph (1) of the 1945 Constitution recognize the ownership and utilization of art and culture by a group of people or certain communities. Thus the work of a particular society or group is included in the creation. Creation exists because there is a creative and existent existence and contains a novelty, therefore Law No. 19 of 2002 concerning to Copyright as amended by Law No. 28 of 2014 on Copyright, regulating the protection of creation as well as folklore.

Folklore itself, is a work unknown to its creator, in the Copyrights Law there is a special section discussing it, namely chapter five on the expression of traditional culture and creation that is protected in the first part about the expression of traditional culture and the copyright of a creator whose creator is not known there are two articles, namely Article 38 and Article 39.

Today folklore becomes an attractive commodity to be contested because it has good economic value. Basically folklore in demand because folklore it is a symbol or identity of a particular area.<sup>2</sup> Folklore as an object of custom or community or unknown creation whose rights are owned as a property of the state and whoever uses them shall royalties to certain countries or regions or communities, as well as in Regional Autonomy Era.

Regional Autonomy adopted by Indonesia should be optimized for its function, in guarding law enforcement that is in harmony with the intent and purpose of the state. The principle of decentralization means giving the widest possible authority to the regions with the granting of certain rights and obligations.<sup>3</sup> Should the protection of folklore be easier to implement, naturally the area is the closest organ to the indigenous peoples of the creator so that it will better understand the background, philosophy and benefits of the work there.

The technical role of local government is needed as an arm of the state to provide legal protection from folklore. Regions may make rules such as local regulation (*Perda*), Governor Regulation, Mayor Regulation or other enabling regulations to prevent and overcome violations of folklore and may create technical policies regarding the benefit sharing of a work on which it

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<sup>2</sup> Suwardi Endaswara, *Metodologi Penelitian Folklore Konsep, Teori dan Aplikasi*. Jakarta, Media Pressindo, 2008, p. 3

<sup>3</sup> Siswanto Sunarno, *Hukum Pemerintahan daerah di Indonesia*, Jakarta, Sinar Grafika, 2009, p.4.

applies. Sharing fee or benefit sharing in addition to appreciation of a work on the other hand also generates revenue for the region or country.

This paper, according to the description on the background above, would discuss two main things, *first*, why should folklore be protected in the perspective of regional autonomy, and *second*, what is the legal politics of folklore protection in the regional autonomy perspective? The supporting theories in this research is the theory of the pure of law from Hans Kelsen. The theory developed by Hans Kelsen encompasses two important aspects, namely the static (nomostatics) aspect which sees actions governed by the law and the dynamic (nomodinamic) aspect which sees laws governing certain acts.<sup>4</sup> In this study the theory of the pure of law proposed by Hans Kelsen will be used to analyze the second problem of folklore protection law politics in the regional autonomy perspective.

## THE PROTECTION OF FOKLORE IN REGIONAL AUTONOMY ERA

### The Existence of Regional Foklore

FOLKLORE on The Model Provisions for National Law on Protection of the Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions 1982, grouped into several types. In the Model Provisions are reflected on aspects of community life throughout the region, namely: Verbal expression, Expression of music, Expression of motion, Real Expression. The works in full are accommodated in the Copyrights Law, the formulation of the law already regulates the existence of the culture referred to in that category.

The concept of folklore is closely related to the region as the “owner” of folklore, so that the provincial and district/municipal governments hold important duties and functions in their protection. Implementation of local government as regulated by Law No. 32 of 2004 as amended by Law No. 23 of 2014 on Regional Government (Regional Government Law). As for the matters of the central government is the obligatory government affairs and government affairs of choice, which as provided for in Article 12 paragraph (1) to (3) Regional Government Law. Article 12 Paragraph (2) explicitly discusses the subject of culture. It can be seen that in the Regional Government Law 2014 contributes to cultural protection but does not explicitly mention its relevance to intellectual property rights. With the premise that folklor is an expression related to art culture, knowledge culture and technological (*know-how*), the existence of folklore must also be protected from local government.

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<sup>4</sup> Jimly Asshiddiqie dan M. Ali Safa'at. *Teori Hans Kelsen tentang Hukum*, Jakarta, Konstitusi Press. 2012, p. 8.

The reason is that the absence of a special regulation on the regulation of folklore protection internationally and nationally makes folklore vulnerable to misuse by foreign parties. To overcome this, it is necessary to have an active role of government in doing folklore protection efforts.

This enormous potential is a form of folklore that must still be protected by the state (in this case the government). To date, the government's attention to traditional knowledge and cultural expression is still limited to the process of recording, even though its conservation efforts are still ongoing. In fact, in this era of free trade now required a well-established protection against the potential derived from traditional knowledge. These potentials should be administered (recorded) to clear the ownership of traditional knowledge by each country.

The results of the above cultural work needs to be studied more to do the category of folklor areas that have died, are growing and living. This should be done in order to make inventarisir as well as handling of the kinds of actions necessary to preserve the existence of regional folklore.

Folklor area is something that has value in the life of a community or community of a particular community for it needs an integrated protection to achieve the desired goals. Folklore protection of the real area is the responsibility of all citizens and nation of Indonesia. It's just that the role and level of responsibility of various components of the people's society is not the same. There are responsibilities emerging from the stakeholder community (source) of a traditional cultural asset, there is the responsibility of activists and actors of expression of a cultural asset, there is also a role and responsibility of the government.

### **Presence and Support of Foklore Regional Community**

MOST of the people who develop activities based on this traditional culture are people who are still far from the literate culture, so the inventory can not only rely on the role of community or local community. The disadvantage that needs to be changed is to change the local community from being overly concerned about foreign claims by being a sensitive community through the involvement of support from the cultural community. Therefore, the involvement of the good elements of individuals, communities, communities and governments is crucial in this inventory.

The role of the state becomes important, because today's economic and trade relations have shifted. International trade today involves not only the legal subject of private companies, but also involving governments as its subjects. A country that functions as a regulator should also play an important role as a provider. The state in this case the government must be a counterweight to the various interests of society.

Economic facts of the picture exist because the folklore is a potential commodity to be the mainstay of the region so it can play a role in the regional income. Because of its long-standing and unknown creator make

folklor not terinventarisir well. So that the risk is misused. Community support is indispensable because in the economic aspect, a community that still cares, maintains and conserves in order to benefit from its utilization.

Social facts in folklore have a dominant meaning to the existence of the work, because folklore can be an identity for a certain area (*city branding*). Folklor mostly became one of the mentions in the name of certain areas such as, "Gudeg City"<sup>5</sup> in Yogyakarta. The importance of social facts should make it a boost for legislators to support by making appropriate rules.

Local folklore communities both direct and caring actors have an important role in folklore protection. The existence of such communities can not be excluded in the protection of folklore. As written in the general description of folklore area, folklore areas have been dead, growing and living. Therefore, the existence of folklore should be an urgent matter for protection by regulation of *sui generis* intellectual property rights.

## REGIONAL FOKLORE PROTECTION STRATEGY

### Strategy for Protection of Foklore by Positive Law

ARTICLE 38 Paragraph (1) of Law Number 28 of 2014 on Copyright, states that the copyright on traditional cultural expression is held by the State. Furthermore, Article 38 Paragraph (2) of Copyrights Law describes the obligation of the state as the owner of traditional cultural expression, that is, the state shall inventory, preserve and maintain traditional cultural expression as referred to in paragraph (1). The designation of traditional cultural expression is also discussed in the 38 Paragraph (3) of Copyrights Law, namely the use of traditional cultural expression as referred to in paragraph (1) should pay attention to the living values in the carrier society.

Implementation of local government as regulated by Law Number 32 of 2004 as amended by Law Number 23 of 2014 on Regional Government. As for the matters of the central government is the obligatory government affairs and government affairs of choice, which as provided for in Article 12 paragraph (1) to (3) of Regional Government Law. Article 12 (1) of Regional Government Law discusses compulsory governmental affairs concerning basic services including: education, health, public works and spatial arrangement, public housing and settlement areas, peace, public order and the protection of the people; and social.

Article 12 Paragraph (2) of Regional Government Law discusses the obligatory government affairs that are not related to the Basic Service, namely: labor, women's empowerment and protection of children, food, land, environment, population administration and civil registration, community and village empowerment, population control And family planning,

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<sup>5</sup> Gudeg is one of the typical culinary from Yogyakarta, Indonesia, where its existence becomes one of the brand from Yogyakarta.

communications, communication and informatics, cooperatives, small and medium enterprises, investment, youth and sports, statistics, coding, culture, libraries and archives. Article 12 Paragraph (3) of Regional Government Law discusses Preferred Government Affairs, namely: marine and fisheries, tourism, agriculture, forestry, energy and mineral resources, trade, industry and transmigration.

Culture and community empowerment in Article 12 Paragraph (2) of Regional Government Law recognizes the existence of protection and management of folklore at the regional level. With the regulation in the positive law should the steps of folklore protection can be done properly at the level of local government.

### **Regional Folklore Protection Strategy Defensively**

PROTECTING state assets is a mandatory thing to do in order to maintain wholeness. Because the state assets are the wealth of the country. The asset referred to in this study is folklore, as it has been known that folklore has long existed and is contained in legislation.

The state has the right, meaning that all Indonesian people also have the right to the work of copyrighted folklore. However, is it proportional to the portion and its place? Of course not, the people who take the economic benefit of folklore's work is a mistake. The state is only a facilitator to ensure certainty, there should be a special recording of various sources dividing the folklore from each region. Thus created an integrated system.

The creativity of "Indonesians" characterized by ethnic, environmental, topography and religiosity diversity has been known for a long time, even abroad with proven in October 2009 UNESCO has recognized the art of batik as one of traditional knowledge products as a genuine common heritage of Indonesia, after previously UNESCO acknowledged *Keris* and *Wayang* as "belonging to Indonesia". The product of this creativity also includes a sustainable folklor because it is taught from generation to generation until now.

Folklor can almost be related to various aspects of intellectual property rights. Folklor owned Indonesia has the potential to become a material wealth when it has been manifested in the form of products that have a distinctive design. In the perspective of intellectual property law, this potential is a material right that belongs to the nature of Intellectual Property Rights.

## POLITCS *OF* LAW *OF* FOKLORE PROTECTION IN THE PERSPECTIVE *OF* REGIONAL AUTONOMY

### Politics of Law and the Implementation of Foklore Protection in Indonesia

THE URGENCY of folklore protection can be seen from various critical perspectives. As one point of view, in anthropological view, folklore is a work that has magical appeal and has a special order and has a moral message in it. For that three things to consider in building protection against folklore, namely:

- a. their cultural sustainability
- b. the existence of a sustainable system; and
- c. transmit their culture to the next generation

Expressions of Folklore or Traditional Cultural Expressions are actually lively, evolving and form part of the lives of Indigenous communities.<sup>6</sup> The statement states that folklore lives, evolves from certain parts of the community or customary communities. The allegation is entirely correct, for that the need for awareness to prevent theft of folklore work.

In order to prevent the operation of flawed laws, the theory of lawfulness (*rechtsgelding*) which arranged hierarchically, starting from legal enforcement of the law based on philosophical, sociological and juridical validity, is seen as a central principle for legislation on folklore protection at all levels.

It is necessary to make changes to the existing protection because it is considered that the existing regulations are not sufficient to provide protection especially in the implementation or technical level. For that Deconstruction of protection offered in this research is with the legal politics of harmonizing the hierarchy of legislation with the purpose of having a special state with folklore protection. In technical terms the existence of a hierarchy can make it necessary for the rules below to carry out the policy as it is based on the need and awareness of the importance of protection against folklore.

The establishment of laws and regulations, one of which required the legal principle understood as the normative basis. The legal principle requires a juridical form to be a juridical rule. In this case the legal principle serves as a guide of the legislators in the process of forming the law. The guidance takes place by making itself the basis for the positive law that will be made, as well as the impetus for the movement of the mind in formulating the formulation or terms of the chapter in a laws and regulations.

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<sup>6</sup> Kuek Chee Ying. "Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?", *Journal of Malaysian and Comparative Law*, Volume 2, 2005, retrieved online from <http://www.commonlii.org/my/journals/JMCL/2005/2.html> (12 November 2014).

The legal principles embodied in laws and regulations can be seen as a form of legal politics carried out in the process of formulating legislation. The political meaning and function for legal protection against folklore is as follows:

1. Political law must achieve the goal of law and the goal of the state.
2. Political law as a benchmark and signs, if a legal rule established can not be accountable to justice.

Politics of law in the protection of folklore in its implementation process requires the legal principle to establish a law. The legal principle is derived from legal or legal objectives, the need for new states and conscious weaknesses. For that reason the existence of legal principle is seen as a form of substance of a rule because the position of legal principle as an impulse to formulate legislation. The legal principle for protection against traditional folklore is as follows:<sup>7</sup>

- a. Principle of Protection
- b. The Principle of Social Justice
- c. Utilization Principle
- d. The Godhead
- e. The principle of Equal Rights

The South African country for the protection of the folklore done by interpreting widely the customary law of their country. So it can create a *sui generis* protection. In addition, in India the protection of folklore resides in communities of various tribes. Although in India has established modern institutions but the life and traditions of tribal communities remain intact and nourished.

Some folklores from India that we know emerge and make a profit. As in the movie, the tradition of certain ceremonies, celebratory ceremonies, dances, songs and other things that show their culture in some films. The provisions of folklore protection in India are also contained in the Constitution and on its intellectual property rights law.<sup>8</sup> In terms of its protection, India uses classification methods to inventory works of copyright and folklore and is recognized by other countries.

### **Politics of Law to the Folklore Protection by Local Government**

POLITICS of law is operationally defined as academic concepts and approaches in understanding legal issues, how goals are achieved through review of legal substance and effective functioning of its institutions. On the other hand, the effectiveness of the law can be seen about how far the work of law is in accordance with its objectives. There are many different perceptions

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<sup>7</sup> Ahmad Ubbe *et.al*, *Pengkajian Hukum tentang Perlindungan Hukum Kebudayaan Daerah*, Badan Pembinaan Hukum Nasional Kementrian Hukum dan Hak Asasi Manusia Republik Indonesia, 2011, pp. 21-26.

<sup>8</sup> Kholis Roisah. *Op Cit*. p. 407.

about the definition of legal politics by experts. Below are some of the opinions of experts on legal politics.

The Republic of Indonesia is a legal state (*droit constitutionnel*), then any establishment of a state institution must have a legal basis so that the state institution can carry out its duties and authorities in accordance with the laws governing it. Therefore when a state institution will be established it is obligatory to form its legal basis first so that the established state institutions have clear authority limits. Of course this is to limit or avoid overlapping power between state institutions.

Regional autonomy is also intended to provide a direct and targeted policy with the principle of separation of power. The state or in this case the central government also do not loose their hands on the existence of local government precisely the coordination of stability is done in order to achieve ideal government.

Intellectual Property Rights is classified as an intangible assets object. Object is defined as everything that can be made object of property rights. As an object, the properties of material rights are also attached to intellectual property rights. One of them is transferable to another party. Some basic theories of intellectual property rights protection proposed by Robert C. Sherwood, there are five basic theories of intellectual property rights protection, namely:<sup>9</sup> Reward Theory, Recovery Theory, Incentive Theory, Risk Theory, Economic Growth Stimulus Theory.

Folklore is closely related to indigenous peoples because the creation of literary and artistic works such as legends, dances, traditional ceremonies and so forth is a legacy between generations of a community of indigenous peoples. The recognition of those rights is governed by the United Nations Declaration on the Rights of Indigenous Peoples which says that indigenous peoples have the right to renew, use, develop and inherit the future generations of history, language, oral tradition, philosophy, Literature, and to signify and use their own names for communities, places and people.

Not only in the 1945 Constitution there is a regulation on the folklore, but also in Article 23 Paragraph (2) of Law Number 18 of 2002 on National System, Research, Development and Application of Science and Technology. The article states the following: "*The Government guarantees the protection of local knowledge and wisdom, the indigenous cultural values of the community, as well as the biological and nonhuman biodiversity of Indonesia*".

The law does claim to protect the culture but is not explained about the definition and limitations of what is termed as culture and get proper protection.

Cultural heritage mentioned above is also the object of the tourism industry in Indonesia which in Law No. 09 of 1990 on Tourism scope of museums, ancient relics, historical relics, cultural arts, agro-tourism, tourist

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<sup>9</sup> *Mengapa HKI perlu dilindungi?* Access from <https://www.academia.edu> 21 October 2014, 08:54.

*tirta* (water) tourism, *buru* (hunting) tourism, natural adventure tourism, recreational parks, and entertainment venues that are only a tourism sector and it has also been able to provide multiplier effects (*multiplier effect*) on improving the welfare of the community, either directly or indirectly.

The existence of folklore is identical with the condition of a particular area and becomes a city branding of the area so as to bring economic benefits for the region that exist folklore. Maintaining the preservation of folklore can also have an effect on the economic, social and political aspects. It cannot be separated from professional and proportional law enforcement. The effectiveness or absence of a rule of law depends on how law enforcement is promoted.

As said B.M. Traverne who states “*give me a judge, prosecutor, police and good advocate, then I will fight crime though without a law*”. Traverne’s statement is not ridiculous, if more complex analysis is done. The state of Indonesia has many regulations, both containing elements of punishment or administrative sanction is nothing more than paper. As in the Copyrights Act, since birth was mandated by forming the implementing rules, but not formed then there have been many disputes against folklore many are questioning because of the legal basis that does not exist (*rechtsvacuum*).

The Draft Law on Protection and Utilization Intellectual Property of Traditional Knowledge and Cultural Expression Tradition is regarded as the ideal product with its regulation of protection with GRTKF. For countries that use the copyright regime as a folklore protection framework it should follow the concept of rules that exist in the copyright regime whereas some countries that are more suited to the *Sui Generis* regime are more likely to believe that under certain circumstances, the copyright regime cannot be used as a concept Protection of a particular creation, such as the principle of communality that is not much explored in the copyright regime.

Hans Kelsen introduced *the pure theory of law*, which, in reaction to the assertion that law has been contaminated by political ideology and morality on the one hand, has been reduced by science and modernization / industrialization on the other.<sup>10</sup> Kelsen found that these two reducers have weakened the law. Therefore, Kelsen proposes a pure form of legal theory that seeks to alienate the forms of reduction of the law that distances the law from political and morality, at which time law has become a political tool.

The perspective of regional autonomy arises in some written legal arrangements in Indonesia, which should be implemented and in the dynamic aspect should the actions in the framework of protection against folklore be governed by law (written rules). The lack of folklore protection lies in the dynamic legal aspects of providing regulation that technically to protect folklore. The need for protection arrangements is not only the rule of conduct but also the legal political direction of the policy being made to be adjusted.

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<sup>10</sup> *Ibid*, pp. 15-18.

Protection against folklore is an ideal way of doing sprightful and targeted protection.

The area where the folklore is born and grows and is sustainable, so that the area better understand the existence of folklore. Once the existence is known from the region can be an organization or body formed by local government or involve from the community in the area to make an inventory on the existence of folklore is then included in the list of folklore protection nationally. It is certainly not difficult to understand the obligations of the constitutional order.

## CONCLUSIONS

The results of research and then conducted the discussion by analyzing using the relevant concepts and theories can be obtained conclusion as, folklore needs to be protected in the perspective of regional autonomy, because folklore is one of the property owned by the state, therefore it can be referred to as an asset of the Republic of Indonesia, an of course the obligation to maintain assets is the obligation of the state sebegaimana keep the unity of the Unitary State of the Republic of Indonesia.

Folklore exists because there are behaviors that are an integral part of the life of the ancient people who have special values possessed by the people of a particular region. The area is where the folklore is born and grows and is sustainable, so that the area better understands the existence of folklore.

Political protection of folklore in the perspective of regional autonomy, are: *first*, legal politics to align the hierarchy of legislation with the purpose of having a special state with folklore protection, *second* implement the provision of Article 38 Paragraph (2) of Law Number 28 of 2014 regarding Copyright, which is to inventory, maintain and maintain folklor which is adjusted with the perspective of regional autonomy, *third*, making guidelines on the implementation of folklore protection, and the last, the folklore protection strategy can be positive and defensive. What is meant by positive is to make regulations related to folklore and defensive protection is to conduct an inventory, support community or community who care and maintain folklore.

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