

THE PROTECTION OF THE ART OF TRADITIONAL MALAY SONGKET AS AN INTELLECTUAL PROPERTY RIGHT

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ABSTRACT

The harmonization of modern and traditional knowledge is an essential matter in achieving sustainable development. The concept putting forward that the need of development is in tune with the need of development of cultural preservation can take place without harming its surroundings. As a consequence, traditional knowledge has important significance and new issue in the protection of intellectual property right. It is a fact that the people of Indonesia have various legal systems both customary law and Islamic law that remain applied in the middle of the society. There is a tendency in the culture of Malayan society Muslim in majority not to be too concerned about who is entitled to ownership of the art of Traditional Malayan Songket, whereas in fact a protection of intellectual property right will bring about a protection over moral right and economic right which will bring prosperity to the rights holder.

Keywords: Songket, Intellectual Property Rights

Introduction

Human intellectual creation can be present in varied products that have economic values. Such products are intellectual property rights because they are born on the basis of the use of power of thinking and human intellectual creation. Such products might be products of culture that have art values which can generate economic values for local society.

Traditional knowledge and expression of traditional culture which are Indonesia's wealth and identity should be preserved and conserved so these traditional cultures can be placed side by side with both international culture and international works of art and are state assets beyond compare. (Ahmad Zen Purba: 2011)

Songket cloth is a very valuable traditional fabric of Malay society. The making of songket is usually carried out by females. *Malay Songket Cloth* itself is a fabric that is a Malay handicraft made through the process of thread weave that is varied with golden or silver thread weave by using certain various weaving motive. Malay songket cloth has much uniqueness and is rich in values of beauty or aesthetics as a form of combination of cultural aspects that usually symbolizes Malay society's pattern, perspective and thought. Diversification of songket's motives is closely related to the relationship between man and natural realms, both animals and plants. The diversification also reflects mankind's both way and perspective of life.

Songket is an artifact. The definition of artifact is an object or historical objects, namely all objects made or modified by humans which can be moved (KBBI: 2001), such as Batu Bara Malay Songket Cloth aged 180 years exhibited in Jakarta in 2014 in an event of traditional exhibition of cultural art (O.K. Saidin, Pemuka Adat Melayu Batu Bara; 2014). In the culture, songket is Malay self-identity. Clothes usually function to cover the body, in accordance with social norms. There is a time when religion encourages how clothing manners and etiquette go. Besides, values of beauty and supporting societal etiquette are realized in clothes. These clothes are functioned in varied cultural activities, such as in wedding ceremony, circumcision, leader appointment (sultan, religious judge, head of village and so on).

Craftsmen of traditional Malay songket are the craftsmen in the category of Small and Medium Enterprises. Location of this study is in Pahang Village, Talawi District, Batubara County, North Sumatera Province, Indonesia. They are still using traditional tools of weave, like Azhar's group of traditional Malay songket craftsmen.

Learning system from generation to generation is conducted openly, by anyone and from any ethnic. Nowadays, the use of songket is not monopolized by Malay noble families. Even, the Governor of North Sumatera Province has announced the year 2015 as the year of The Shine of Malay Songket. There is a duty, in certain occasions, for wearing songket cloth (Harian Waspada, 12 April 2015). This Regional Government Policy becomes an opportunity for the development of Malay songket to be able to compete in both national and international market. As a result, this can improve the economy of Malay songket craftsmen.

Harmonization of modern knowledge and traditional knowledge is an essential matter in achieving continuous development; the concept putting forward that the need of development is harmonious with the need of development concerning cultural conservation can take place without harming the surrounding environment, and as a result, traditional knowledge (Glossary of Terms WIPO: 2001) has an important meaning and new issues in the protection of Intellectual Property Rights (Afrillyana Purba: 2009). Intellectual Property Rights is the rights emerging from human activity in the sector of industry, science, literature and art (WIPO: Geneva 2001).

Law of a society is a society's special identity while, on other side, transplanted of legal transfer of a legal system from a country to another country has been a common matter for a long time. Basically, legal transplanted which are both comprehensive and partial legal transfer are divided into these three following main parts: *first* legal transplanted due to a migration to a new region whose civilization is different by bringing new law which comes from different civilization, *second* when a race moves and takes along their law to a new place whose civilization is alike, *third* when a race adopts most of other race's legal system (Alan Watson: 1991).

Indonesia's participation in signing the agreement of establishing of World Trade Organization (WTO) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) has a consequence of being ratified through Law No. 7 of 1994 on Ratification of Agreement Establishing The World Trade Organization, and it finally breeds some laws concerning Intellectual Property Rights although in principle Indonesia had recognized the law regulating Intellectual Property Rights before the period of WTO/TRIPs (Agus Sardjono: 2015) and although laws regulating Intellectual Property Rights have not worked as expected up to now; proved by level of Property Rights violation in Indonesia.

Characteristic of the society of Malay very identical with obedience in doing Islamic religiousness particularly in Batubara County is more likely to consider that intellectual creativity attempts in creating the motive of Batubara Malay songket is God's guidance, consequently, design socialization through the same design products among craftsmen is something that is made proud by early designers; even, motive-imitating is a common thing among the craftsmen. This becomes an issue how to apply Intellectual Property Rights rules of law.

The knowledge obtained via community or individuals and passed from generation to generation through traditional ways can be accessed easily so that it gives a chance to the emergence of problem and violation towards Intellectual Property Rights. Traditional Knowledge (will be next mentioned as TK) can also be obtained or developed by people who are not members of the community and is used for either the same or different purpose. For instance, weaving can be learned by anyone; but the knowledge about whether the cloth's motive that has been woven is suitable with the obeyed values for being worn in certain cultural ceremonies is only owned by the community's indigenous people. Truly recognizing whether the TK is owned by an individual or a community has been becoming a problem towards legal protection of a TK (Zainul Daulay: 2011)

Legal protection towards TK in Indonesia is very weak. One of the factors is the restriction of data, written documentation, and information about TK that actually has been being existing since hundreds of years ago (Imas Rosidawati W: 2013). This is very disadvantageous to the indigenous people as the owner of the TK when there are other parties or countries signing up first to get legal protection (Eva Damayanti: 2012).

It is a fact that Indonesia's society has various legal systems, including customary law and Islamic law, applied amid the society. The tendency of culture of Malay society, like in Batubara County which has Islam in the majority, is not in the position to blame or accuse anyone feeling entitled to the Art of Batubara songket. In actual fact, a protection of Intellectual Property Rights will result in protection over moral right and economic right that will bring in welfare to the right-holders.

A. Discussion

1. Theory of Lawrence M. Friedman's legal system

In a legal system, in order the law is effective in protecting a right, according to Lawrence M. Friedman, it must indicate a fulfillment of three important aspects, namely legal structure, legal substance, and the legal culture. (Lawrence, M. Friedman: 1984)

About the structure, Friedman states:

"First many feature of a working legal system can be called structural the moving parts, so speak of-the machine Courts are simple and obvious example; their structures can be described; a panel of such and such a size, sitting at such and such a time, which this or that limitation on jurisdiction. The shape size, and powers of legislature is another element of structure. A written constitution is still another important feature in structural landscape of law. It is, or attempts to be, the expression or blueprint of basic Features of the country's legal process, the organization and frame work of government."

And about the second aspect of legal system, Friedman explains:

"The second type of component can be called substantive. These are the actual products of the legal system-what the judges, for example, actually say and do. Substance includes, naturally, enough, those proportions referred to as legal rules; realistically, it also includes rules which are not written down, i.e. those regulations of behavior that could be reduced to general statement. Every decision, too, is a substantive product of the legal system, as is every doctrine announced in court, or enacted by legislature, or adopted by agency of government."

In this study, I discuss that what Friedman stated above describes that the aspect of *structure* of a legal system includes varied institutions created by such legal system with its various functions in the framework of the operation of such system. One of the institutions is the Government as the holder of Copyright on Cultural Expression (Article 38 Law No. 28 of 2015).

Legal protection of TK in Indonesia is very weak. One of the factors is the inadequacy of data, written documentation, and information concerning TK that actually has been existing since hundreds of years ago (Imas Rosidawati W: 2013). This is very disadvantageous to the indigenous people as the owners of the TK when there are other parties or countries signing up first to get the legal protection (Eva Damayanti: 2012).

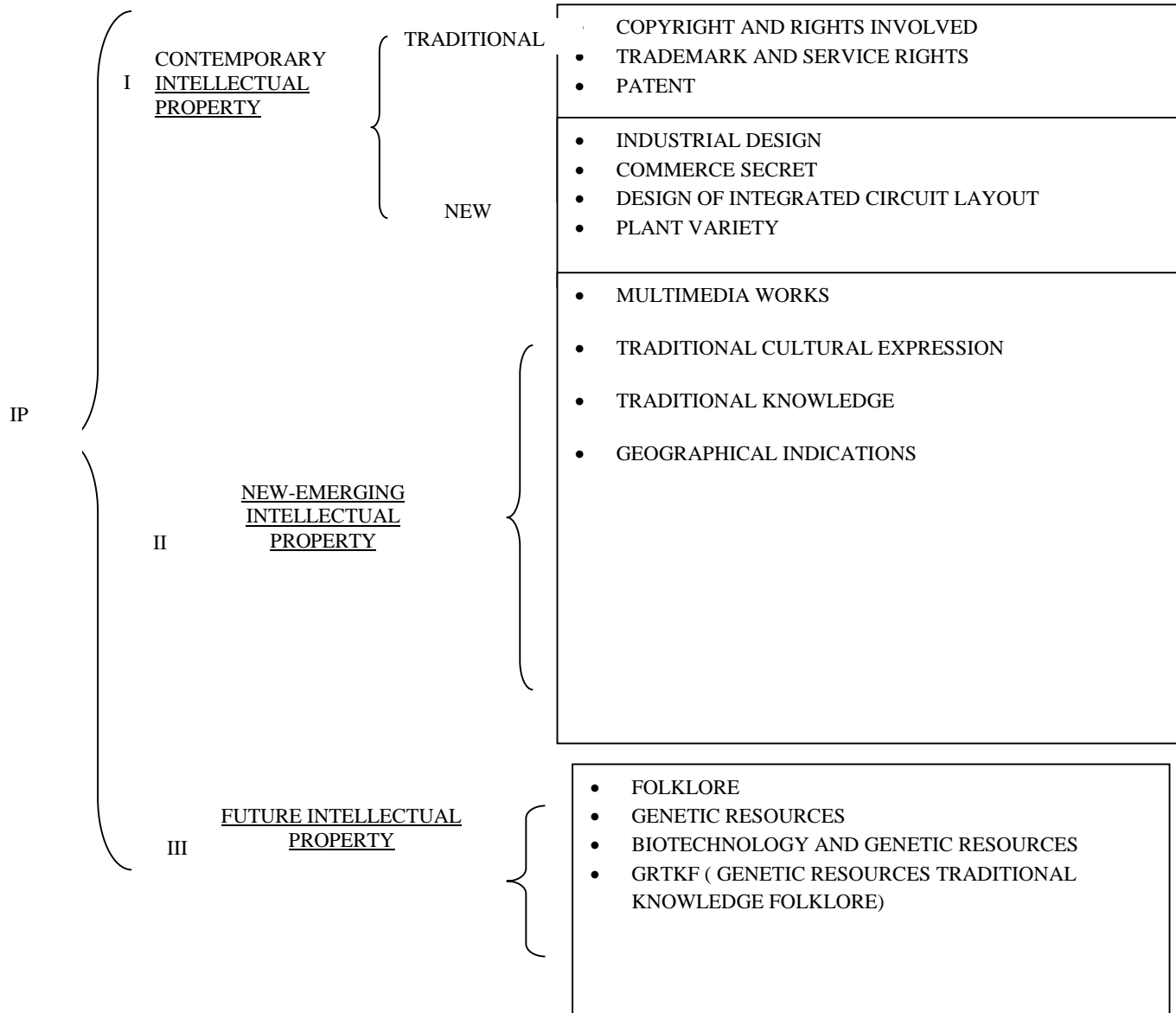
The protection of TK is in Law of Copyright No. 28 of 2014, Chapter V on Expression of Traditional Culture and The Protected Creation, Article 38 Section (1): Copyright on expression of traditional culture is held by the State. Then, in Article 40 of the Law is stated: the protected creation includes creation in the sector of science, art and literature, also the art of Batik or other arts of motive.

The component of *substance* concerns everything that is the result of *structure*. This covers legal norms in the form of rules, decrees, and doctrines. Substantively, the definition of Intellectual Property Rights can be described as “the rights over the richness that is born because of human intellectual capability”. Basically, the explanation above gives a vividness that Intellectual Property Rights indeed turns the works coming up from human intellectual capability into the core and objects of their organization. (Suyud Margono: 2003).

Intellectual Property Rights covers a sector of law administering juridical rights and works or creations which are results of human contemplation attached to economic and moral interests (Eddy Damian: 2004).

Schematically, the classification of intellectual property by Eddy Damian (Eddy Damian: 2012) in three ranges of time is as follows.

Figure 1: INTELLECTUAL PROPERTY (IP) “CONTEMPORARY – NEW-EMERGING – FUTURE”



From the chart above, it is understood that TK in its development both today and in the future is an intellectual property and needs to get protection.

In the stipulation of such Law Article 40 Section (1) letter j, signified as “batik work of art” is the motive of contemporary batik that is innovative, up-to-date, and not traditional. The work is protected because it has values of art in its relation to the drawing, motive, and color composition. Signified as “wok of art of another motive” is the motive which is the richness of Indonesia that can be found in various regions, such as the art of songket motive, motive of ikat weave, motive of tapis, motive of ulos, and other art of motives which are contemporary, innovative and can be well developed. In accordance with the stipulation of such Law, songket art is included to the work of art of motive of contemporary songket protected by copyright. Furthermore, Friedman states that if contemplated, many will admit that aspects of legal system do not just consist of *structure* and *substance*. There is still an importance of the third aspect, even the most necessary for a legal system’s success, namely *legal culture*.

Legal culture concerns people’s attitude or values that they obey determining the operation of the legal system involved. These attitudes and values will contribute both positive and negative influence to behaviors relating to law; as a result, legal culture is an actualization of people and a thought of people and social power determining how the law is used, avoided or condemned. Legal culture as a societal actualization and thought towards law will change in accordance with change of behavior, perspective and values perceived by members of society. Therefore, understanding of a society’s legal culture must comprehensively consider societal aspects and the involved society and changing process and also the development happening inside it. (Steward Maccaulay: 1995).

Can punishment achieve the purpose to keep orderliness? Theoretically, this does not depend on certainty, distinctness and sufferings and punishment, but depends on perception and potentiality of the doer concerning their acts.

Many humans believe that society needs network of rules and structures of rules in the purpose to protect freedom of choice (Lawrance M. Friedman: 1990). A craftsman of traditional Malay songket who has low-economy level does not ask or doubt the need of protection for his or her work of intellectual creativity. He or she respects moral right just when and where he or she wants it, but the right is nearly useless when his or her work is not sold in the market.

The concept of legal culture in legal system is very important for understanding legal development. By legal culture, it means that ideas, attitudes, values, and beliefs in society show that people understand about legal system. Not because a certain country has a culture, single law unites. There are usually many cultures in a country because of the complexity of people, and consisting of various groups, classes and levels so it should be distinguished between internal (legal culture of lawyers and judges) and external legal culture (general legal culture population).

If someone asks how social change leads to legal change, the answer will be by legal culture. This would mean that social change causes society’s change of values and attitude, and this is a chain of demands (or drawing) which in time will push law and government in some certain course.

Hence, the essence of legal culture is a society’s attitude and behaviors towards law and legal system in the perception believed by the very society. Accordingly, legal culture is a dynamic of social perspective determining how such law is used, avoided, or violated (Ansori Sinungan: 2013).

Presently, improvement in government’s scope and power has responded demands and the society itself. The state conducts what people want to conduct (“people” here means whoever has influence or power) so modern state is created, namely Welfare State, can also be called Insurance State meaning that a state that knows how to lessen risk of mistake. (Steward Maccaulay: 1994) Constitutionally, Indonesia has had hierarchy of legislation with various laws which have been codified partially. This is a proof that Indonesia is a follower of *civil law*. However, in its implementation, the state laws lose their existence when it is faced with the people’s strong desire to apply their own laws, such as customary law and Islamic law, over societal problems they face. Indonesians’ pride in their creation like Malay songket being worn by other people is a reality that proves that Indonesia professes communal ownership more than private ownership. The belief that intellectual capability in creating a work is based on the thought that it is a God’s guidance becomes a reason why the imitation of art creativity of traditional Malay songket is not questioned.

In fact, that kind of legal behavior is a characteristic of the implementation of *common law* system. Such fact shows that Indonesia follows not only one legal system but also more likely to be a mixed system. (Ahmad Ali: 2010)

2. Legal Theory of Development Method by Mochtar Kusumaatmadja.

This theory is suitable with this study because this theory has proximity to the context of the condition of being Indonesian; the Indonesia which remains trying to build its country after being attacked by various economic problems and problems of law enforcement that is not yet fulfilled. (Soetandyo Wignjosebroto: 1994)

Legal theory brought up by Mochtar Kusumaatmadja a lot discusses law as a method of people renewal where the law functions in the development namely to assure the performance of development process based on legal certainty, or known more as “Law as The Method of Development”.

According to Mochtar Kusumaatmadja, law is not only about norms or principles, but also related to sociocultural symptom where law is a pattern of values in society *acknowledged* communally. Law itself can be used to change society. Law is required

for the process of change including a fast process of change that is usually expected by developing society when the change is to be conducted in arranged and orderly way. (Mochtar Kusumaatmadja: 2002).

A good law is a law suitable with the values obeyed by a society. Development takes reformation of mindset, attitude of life, and values obeyed by a society. As stated by Mochtar Kusumaatmadja, it also takes the principles contained in The Constitution of 1945 and the Preamble of the Constitution of 1945 to do a reformation of national law. One matter that needs to be remembered is a mandate contained in the purpose of struggling for independence namely to build a society free from poverty, backwardness and stupidity. It is reminded here that unlimited liberal capitalism is obviously not suitable with this principle which states that social justice is an essential purpose in having a society and country in this republic.

National economic development must be based on The Constitution of 1945 and Pancasila acts as the morality of nation's life. By basing on Article 33 The Constitution of 1945 stating that economic matters are organized based on the principle of kinship, it is expected that a balance can be formed in the activity of big, medium, and small business partnership. In such economic system based on togetherness and kinship, it is expected that all parties can compete in family way, develop each other so that can advance together in developing efficient national economic. (Djuhaedah Hasan: 2011).

Besides the organization of basic right equality of citizens, it is also implied that the State requires protecting its economically weak citizens. This is intended that in the process of economy, gradually, the people can compete normally with other businessmen or states that are more firstly competent based on the principle of economic democracy. (Sri Edi Swasono: 1985) To be able to actualize such economic development, it takes legal protection for individual economic right (Article 27 the Constitution of NKRI of 1945), for instance, protection for intellectual property rights of craftsmen of traditional Malay songket. Mochtar Kusumaatmadja states that law is a social reformation method. This matter is based on an assumption that the existence of regularity or orderliness is something wanted, even needed. In addition to it, another assumption contained in legal conception as a method of social renewal is that law in the sense of axiom or legal rule can function as a tool (controller) or as a method of development in the sense of the organizer of human activity to the direction desired by the development or reformation. (Mochtar Kusumaatmadja: 1976).

According to Mochtar Kusumaatmadja, law is the whole rules and principles regulating human life in society including institution and process in actualizing the law into reality.

The art of songket (Songket is a type of traditional cloth from Malay and Minangkabau, Palembang and other regions in Indonesia. The origin of songket cloth is associated with people's handicraft and the area of living place and Malay culture introduced by Chinese merchants that contributed silk thread while Indian merchants contributed gold and silver thread so that songket can be created) is really associated with TK. In accordance with stipulation of Convention on Biological Diversity (CBD: June 5, 1992), Traditional Knowledge is knowledge, innovation and practices of indigenous people or local society (Durning A.T: 2001) that realize traditional way of life and local and original technology (Afrillyana Purba: 2014).

According to *World Intellectual Property Organization* (WIPO), the term of TK refers to literature on the basis of tradition, artistic or scientific work, performance, invention, scientific invention, design, brand, name and symbol, unstated information, and all other innovation and creation on basis of tradition produced by intellectual activities in the sector of industry, science, literature or artistic. Ideas based on tradition show that system of knowledge, creation, innovation and cultural expression that are generally considered having relation to certain society or area have been developed as a response to a changing environment.

Conclusion

The protection for TK in Law of Copyright No. 28 of 2014, Chapter V on Expression of Traditional Culture and The Protected Creation, Article 38 Section (1): Copyright on expression of traditional culture is held by the State. Then, in Article 40 of the Law is stated: the protected creation includes creation in the sector of science, art and literature, also the art of Batik or other arts of motive.

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In the era of globalization and free trade today, quality of human resources and technology is one of the factors becoming the main determinant of a country's success. Moreover, other factors that the modern theory also regards to be influential towards economic growth are availability and condition of infrastructure, law and order, political stability, government's policy (such as reflected by large extent of government's expense), bureaucracy, and terms of trade.

Legal awareness of the community of the craftsmen of traditional Malay songket in Batubara County, about the importance of legal protection towards copyright, needs to be socialized by the Government so that they do not imitate each other in order to boost more economically valuable products.

It is not doubted that high economic development, especially in long term, is very essential for declining poverty. Basic framework of its theoretical thinking is that economic development creates or improves working opportunity that would reduce unemployment and raise income of the poor. With an assumption that the right mechanism that is needed to facilitate profit and economic development towards groups of poor craftsmen of Malay songket is running well, economic development can be an effective tool, though not the only one, to the reduction or eradication of poverty.

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