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LEGAL POLITICS OF PROTECTION OF INDONESIAN TRADITIONAL CULTURAL EXPRESSIONS / FOLKLORE

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This research discusses about the politics of legal protection of traditional cultural expressions/ folklore in Indonesia. It is important to note that the protection of traditional cultural expressions is necessary in order to form national identity. Protecting traditional cultural expressions legally can also be the indication of civilization in order to force the state to conduct its obligation to develop national culture. Method of approach used in this study was non doctrinal or socio-legal approach. From the result of the research, it is found that first, constitutionally, politics of legal protection of traditional cultural expressions has obliged a state to develop its national culture, guarantee the freedom or independence of all components of the people in preserving and developing the culture and enjoy the product of the culture, in this case including in preserving and developing traditional cultural expressions/folklore. It must also guarantee the collective rights of all components of people including communities of people who preserve traditional cultural expressions for the sake of the wellbeing and the progress of the communities, or to a broader sense for the sake of the wellbeing of all Indonesian people. The second, operationally, politics of protection of traditional cultural expressions gives the state the authority to formulate policies, regulate, administrate, manage, promote and supervise the use of traditional cultural expressions. The state must be able to protect and guarantee all people's rights related to traditional cultural expressions/folklore and various national cultural properties that can directly enjoy by the people. In addition, the state must also be able to prevent and handle the use of traditional cultural expressions that cause people to lose their access and rights to the traditional cultural expressions.

1. INTRODUCTION

Indonesia, as a multiethnic nation is an archipelago that is inhabited by more than 500 ethnic groups in which each of them has their own culture. These ethnic groups have diverse properties of cultural expressions originating from cultural heritage, in the form of verbal cultural expressions, music and voice expressions, motion expressions as

well as real¹ expressions passed on from ancestors to generations, and also new creations that still hold or are closely related to the past. Both are very important for Indonesia, not only does it help in the forming of national identity, but also as the indication of nation civilization.²

All local cultures originating from various cultures of different tribes in Indonesia are an integral part of Indonesian cultural heritage. Each ethnic from widespread geographical areas throughout Indonesia islands has different traditional cultural expressions originating from different cultural heritages that have processed and grown for centuries, influenced by other big cultures such as India³, Arabia, China⁴, Europe⁵, and also Malay culture itself.

The forms or expressions of traditional culture/ folklore are traditions that are preserved, maintained and developed hereditarily from one generation to next generation of indigenous people communities or local culture communities all over Indonesia archipelago for the sake of their well being⁶ in the end becoming the identity of national culture. Therefore, Indonesian traditional cultural expressions or folklore can be defined as the entire system that is the expressions of ideas, actions and human creations⁷ as the expression of hereditary tradition in the society.

The forms of Indonesian cultural heritage are reflected in various aspects of the

¹ In the context of world culture protection (*World Cultural Heritage*) categorized as *tangible heritage* and *intangible heritage*.

² *Map of Indonesian Culture* <http://sem2008.blogs.wesleyan.edu/files/2008/10/srihastantopaper.pdf> accessed on 25th May 2010.

³ Indian culture mainly comes from the spread of Hindu and Budha religions in Nusantara far before Indonesia founded. Kingdoms with Hindu and Buddha spirit had ever dominated Nusantara in the 5th century marked by the existence of the oldest kingdom in Nusantara, Kutai, until the end of the 15th century. http://id.wikipedia.org/wiki/Budaya_Indonesia, accessed on 1st June 2010

⁴ Chinese culture entered Indonesia and influenced Indonesian culture because of merchants intensive interaction between Chinese merchants and Nusantara (Sriwijaya) merchants. Besides, there were also a lot of chinese people from South Tiongkok coming to Nusantara to stay. They settled and married local people resulting in the assimilation of Chinese culture and local uniqueness. This type of culture that later became one of the roots of modern local culture in Indonesia such as Java and Betawi culture. Arabian culture entered together with the spread of Islam religion by Arabian merchants that visited Nusantara in the middle of their journey to Tiongkok. http://id.wikipedia.org/wiki/Budaya_Indonesia, accessed on 1 June 2010

⁵ http://id.wikipedia.org/wiki/Budaya_Indonesia, accessed on 1 June 2010 The coming of European explorers since the 16th century to Nusantara, and the colonization taking place later had brought about various forms of western cultures and formed modern Indonesian culture as seen today. Technology, organisational and political system, social system, various elements of cultures such as food, clothes, economics, and so on adopted a lot the western culture that was slowly integrated in Indonesian people's life.

⁶ Edi Sedyawati 2003, Op Cit 3

⁷ Koentjaraningrat, 1996, *Kebudayaan, Mentalitet dan Pembangunan*, cet. 7 PT.Gramedia, jakarta, page.17

people's life in all regions in Indonesia either in the form of verbal expression such as myth, folktale (*Timun Emas* from Central and East Java, *Semangka Emas* from West Borneo, *Malin Kundang* from West Sumatra, *Lau Tawar* from North Sumatra, *Naga Erau* and *Karang Melenu*), legends (*Sangkuriang* from West Java, *Lau Tawar* from North Sumatra, *Naga Erau* and *Karang Melenu*) poems, riddles and narrations, words (*Pantun* or rhyme from Sumatra, *Parikan* from Java), signs, names, and symbols; music or voice expressions such as songs, rhythm, and instrumental music (*Gambang*, *Gending*, *Tapin* from Kalimantan, *Kolintang* from Palembang), musical instruments (*Angklung*, *Sasando*, *Tanjidor*, *Arumba*, *Gamelan*, *Talempong* from West Sumatra); motion expressions such as dances (*Ngremo*, *Serimpi*, *Gambyong*, *Katwang culture* from Java, *Saman* and *Sedhati* from Aceh, *Serampang dua belas*, *Tari Piring* from Minang, *Kecak*, *Janger*, *Pedhet* from Bali), drama (*Ludruk* from east Java, *Jipeng* from Betawi), ceremonies (baby born traditions, wedding and funeral) sacred rituals (*Jumeneng*, *Grebeg*, *Sedekah bumi/laut*, *Ngaben*), traditional games (*Congklak*, *Bekel*, *Gangsingan*, *Benthik*, *Beteng*) shows (*Ludruk* from Central Java, *Jipeng* from Betawi, *Wayang Golek*, *Wayang Orang*, *Wayang Kulit*, *Debus*); real expressions such as art material expressions like statues, temples, handicraft (wood, metal, fabric, stone, jewelry, embroidery), indigenous house architectures, and holy places (house of worships such as mosque, temple, churches).

The examples of Indonesian traditional cultural expressions that have existed and known worldwide are *Mang Ujo Angklung* music, *Borobudur* Temple, *Batik*, *Tenun*, *Wayang* and *Keris* and also almost all forms of traditional cultural expressions originating from Bali island. *Wayang*, *Keris*, *Batik* from Java, *Saman* dance from Aceh, *Angklung* from Sunda tribe and *Noken* from Papua even have been recorded in the list of Representative Intangible Cultural Heritage (ICH)⁸. It means that those traditional

⁸Representative List of the Intangible Cultural Heritage of Humanity is a program by UNESCO aimed at Safeguarding which means assuring that intangible cultural heritage still becomes an active part of the life of recent generation and can be passed on to the next generation, including identification, documentation, research, preservation, protection, advancement, improvement, spreading particularly through education, either formal or informal, as well as revitalization in various aspects of the cultural heritage. It is not protection or conservation in common sense, that can cause intangible cultural heritage remains still. This protection focuses on the process that involves in the spread of WBTH from generation to generation, not on concrete products from WBTH manifestation, such as dances shows, songs, music instruments or crafts. (Article 2 (3)). This program has begun in 2008, after the enactment of Convention for the Protection of Intangible Cultural Heritage. Previously, a project called Karya Agung or Master piece of verbal and intangible cultural human heritage had been active in recognizing the values of intangible cultures such as tradition, customs, and cultural room, as well as local

cultural expressions have been recognized by the world having belonged to Indonesia. This recognition also brings its own consequences of the chances of foreign intervention if Indonesia does not have serious commitment to conduct conservation and preservation of those traditional cultural expressions that have included in the list.

The level of diversification of Indonesian Culture is the highest in the world⁹. Unfortunately, this also make them prone to experience extinction if there is no mechanism that can support the conservation. Not to mention the abundant problems of ownership claims of Indonesian cultural expressions by foreign parties as the consequence of minimal protection on traditional cultural expressions that are parts of cultural elements¹⁰. Indonesia as a multicultural and multi ethnic nation has so many traditional cultural expressions from cultural heritage. An active protection is necessary to prevent those traditional cultural expressions from extension or to gain economical advantage. Many elements of traditional cultural expressions that are endangered because of the impact of globalization¹¹ and the lack of infrastructure, appreciation and understanding that can cause degradation of values, functions and cultural element itself.

Legal politics is a means or an instrument and step that can be used by the government to create national law system in order to achieve national ideal and goal.¹² While law is defined as a means to achieve ideal and goal, legal politics is defined as direction that must be followed in the making and enforcing of law in order to achieve national ideal and goal or in other words, legal politics is an effort to make law the process of achieving ideal and goal.¹³ Therefore, national legal politics must be directed to national ideal and goal that are stated in the preamble of 1945 Constitution of The Republic of Indonesia that is realizing just and prosperous people based on *Pancasila*

figures that preserve the forms of those cultural expressions. The Identification of Masterpiece also involves commitment from countries to promote and protect their own cultural properties while UNESCO funded the conservation plans. Overall, there have been three announcement of Cultural Master piece of verbal and intangible human heritage. The first announcement was in 2001, and it was conducted once in two year until the year of 2005, with the total of 90 forms of intangible cultural heritage from all over the world.

⁹Academic script of Bill of The Protection of State Property on Culture (RUU Perlindungan Kekayaan Negara Atas Budaya), 17th October 2011, www. Budaya Indonesia.org. accessed on 12 December 2013

¹⁰Sejuta Data Budaya , 11 Oktober 201, Perpustakaan Digital Budaya Indonesia, www. Budaya Indonesia.org. accessed on 12 December 2013

¹¹Steger, M. B. 2002. *Globalisme: Bangkitnya Ideologi Pasar* (Globalism: The Rise of Market Ideology). Translated by H. Prasetyo. Yogyakarta: Lafadi Pustaka, page

¹²Sunaryati HartoNo, 1991, OP Cit, page 1

¹³Mahfud MD, *Membangun Politik Dan Menegakkan Konstitusi*, LP3S, Jakarta 2006, page 31

(The Five Principles) by protecting the whole and entire people of Indonesia; advancing general welfare; educate people and contributing to realize the world order based on independence, lasting peace and social justice.

2. Discussion

Politics of legal protection of Indonesian traditional cultural expressions as seen in article 32 and explanation of Constitution of The Republic of Indonesia and Article 28C section (1,2), article 28 I, section (3) of Constitution of The Republic of Indonesia becomes constitutional foundation of the protection of Indonesian traditional cultural expressions. Operational foundation of legal protection politics of traditional cultural expressions is in article 10 of Act of Copyright year of 1982, 1986, and 2002.

2.1. Politics of legal protection of traditional cultural expressions/folklore in 1945 Constitution of the Republic of Indonesia

Politics of legal protection of traditional cultural expressions as stated in Constitution of the Republic of Indonesia is the constitutional foundation of traditional cultural expressions legal protection in Indonesia as national cultural identity as stated in article 32 Constitution of The republic of Indonesia and the explanation saying that:

“Government advances Indonesian national culture. National culture is culture emerging as result of deed of the whole people of Indonesia. The existing old and indigenous cultures as the peaks of cultures in all areas in Indonesia are considered as national culture. Cultural effort must lead to the progression of civilization, culture, unity, without rejecting new materials of foreign culture that can enrich the national culture itself as well as raising the humanity degree of the people of Indonesia.”

Then later, the provision was amended and thus changing to:

“(1).The state advances Indonesian national culture in the midst of global civilization by guaranteeing the people’s freedom in preserving and developing the values of their culture. .

(2). The state respects and preserve local languages as national cultural property.

The development of Indonesian culture (with all of its forms of expressions) is the responsibility of the state that, before the amendment, used the word government, meaning that the protection of culture is not only performed by government officials, but

also by all citizens of Indonesia, the government and the people. Koentjaraningrat defined culture as “things that deal with deed and wisdom” because the concept of culture means: “the whole result of deed and the creation”¹⁴. In addition, according to Koentjaraningrat culture is the whole system of ideas, actions and human creation in terms of people life that becomes human self ownership by way of learning. Therefore, Indonesia traditional cultural expressions/folklore is the whole system that is the expression of ideas, notions, actions and human creations as tradition expression hereditary in the indigenous community or local community all over Indonesia.

The forms of culture, according to Koentjaraningrat in traditional cultural expressions/folklore, firstly, is a complexity of ideas, values, norms, regulations and so forth, that is the form of idea that is abstract, in mind set, a customs functioning as manner or code of conduct that regulates, controls, guides human behavior and conduct of the society. In the context of traditional cultural expressions/folklore idea, the values and notions are realized in the form of verbal culture such as story, saga, myth, chronicle and legend. Secondly, the form of culture as a complex activity patterns from human to society. The form is also called social system. It controls manner that patterns from the society itself or so-called social system. This social system consists of human activities that interacts based on customs, and is concrete or called indigenous law. Thirdly, the form of culture is goods as the creations of human. It is the total of physical products, activities, conducts, and creations of all human in a society. It is the most concrete because it can be touched and photographed. In the context of traditional cultural expressions, the form of culture can be in the form of dances, games, paintings, statues, temples, crafts, architectures and other traditional art works.

Indonesia traditional cultural expressions / folklore are so various because Indonesia is a multicultural country¹⁵, thus they are so complex. A group of human live,

¹⁴ Koentjaraningrat, 1996, OP Cit page 17

¹⁵Hidayat Nur Wakhid, *Membangun Masa Depan Bangsa di Atas Pondasi Multikulturalisme (Building Nation Future on Multiculturalism Foundation)*, http://www.setneg.go.id/index.php?option=com_content&task=view&id=2801&Itemid=222 saying that addressing plural society needs a multiculturalism approach. The main guidance for the realisation of multicultural Indonesian people is multiculturalism, that is an ideology acknowledging that differences in equality either individually or culturally. In this multiculturalism model, a society is seen as having a common culture that seems like mosaic. In the mosaic, covered all cultures of people of minority that forms the realization of a larger society that has culture like in that mosaic. This model of culturalism has been used as a guidance by the founding fathers of this Nation in designing what they called as national culture, as stated in the explanation of Article 32 Constitution of The Republic of Indonesia.: “Indonesia’s national culture is the peaks

stay and interact within the group in a quite long period of time so that they create their own communal culture, each of the culture created has their own special characteristics and excellences. Local cultures that are intentionally developed in the era of openness will be dynamic and able to find expressions in accordance to the changing of environment and also contribute to the forming of social life pattern in which Indonesian people who are very plural can live together.

National culture developed from plurality and openness will create dynamic and not monotonous society that keeps growing, and that in turn supports the growth of culture, both material culture such as machines, buildings, inventions and other concrete forms and non-material culture such as art, knowledge, and other abstract forms. Every forms of culture that is accepted and used collectively become national culture. Indonesia culture will not become inferior culture, uniform, stiff, and stagnant. Language is the form of cultural expressions to express thoughts and feelings, to socialize and adapt oneself in the accompaniment of other groups. Through language, knowledge is learned and developed. Every language is also records of culture journey of the language user. Well-preserved local language will support the development of local culture and also as the source of enriching national language, Indonesian language.¹⁶

The state has responsibility for developing the national culture. It must also guarantee the freedom or independence of all components of people to preserve and develop the culture and enjoy the product of the culture, in this case including in term of preserving and developing traditional cultural expressions/folklore.

Furthermore, in the context of the protection of traditional cultural expressions, the state must guarantee all components of people including the community of people who preserve the traditional cultural expressions to fight for their collective rights for the advancement and well being of the related community or to a broader sense, for the wellbeing of all people of Indonesia. This state's obligation is in accordance to what is stated in Article 28 C section (1 and 2) Constitution of the Republic of Indonesia.:

section (1) : Every individual has a right to develop him/herself through the fulfillment of his/her basic needs, having right to receive education and get the benefit of knowledge and technology, art and culture to improve his/her quality of life and for human well being.”

of Indonesia's local cultures”

¹⁶ Diskusi Warga Institut Laimena, “*Kebudayaan Indonesia Menurut Konstitusi: Eksposisi Pasal 32 UUD '45*” CIVIS, Vol. 02, No. 03, Desember 2010, halaman 2

Section (2) : Every individual has a right to improve him/herself in struggling for his/her rights collectively to build the people, nation, and state.”

The state also acknowledges the existence of indigenous people that have preserved and defended the existence of traditional cultural expressions/folklore. All forms of cultural expressions from indigenous people are parts of human rights that must be respected by anyone including the state. The state’s acknowledgment of indigenous people’s right is as stated in Constitution of The Republic of Indonesia below:

Article 18 B section (2): “The state acknowledges and respects groups of indigenous people along with their traditional rights as long as its existence and in accordance to the development of the people and the principle of The Republic of Indonesia stated in the law.”

Article 28 I, section (3) Constitution of The Republic of Indonesia: “The cultural identity and the right’s of traditional people are respected in harmony with the progress of the era. ”

Traditional/ folklore that is the cultural identity of indigenous people is part of human rights, therefore, in this case the state has an obligation to respect, protect and fulfill its need, as stated in article 6 Act No 39 Year 1999 about Human Right stating that :

“In order to enforcing human rights, differences and needs of indigenous people must be concerned and protected by government and indigenous law. Cultural identity of people of indigenous law, including right of ulayat land is protected, in accordance to the progression of era.

The protection of traditional cultural expressions from human right perspective means that the rights of indigenous people including the right of people ownership over their traditional cultural expressions must get protection, and including also rights emerging from the use of the traditional cultural expressions that they have. However, until now, the policy to implement the provision has been seen. The entire traditional cultural expressions/folklore originating from various tribes in Indonesia from areas in Sabang to Merauke are national culture and become part of the property of national culture.

2.2. Legal Politics of the **Protection of Traditional Cultural Expressions in Copyright Act**

Policy about legal ¹ protection of traditional cultural expressions/folklore in Indonesia begins to be seen implicitly¹⁷ in Act No 6 Year 1982 about copyright stated in article 10, as follow:

- (1) The state holds the copyright of historical, pre-historical, paleo anthropological heritage works and other national cultural goods.
 - a. The products of people's culture that become communal property, such as story, saga, folktale, legend, chronicle, song, handicraft, choreography, dance, calligraphy and other art works are maintained and protected by the state;
 - b. The state holds the copyright of those creation in section (2) a over foreign parties;
 - c. The copyright of a creation, for the sake of national interest, with the knowledge of the holder, can become the state's ownership through Presidential Decree based on the consideration of Copyright Council ;
 - d. To the holders of copyrights, as stated in section (3), are given award stated by the President;
 - e. Further provision about copyright held by the state, as meant in this article, is further regulated with Government Regulation.¹⁸

Furthermore, the provision was revised in the Act No 7 year 1987 by omitting the provision of Article 10 section (3) and section (4) and a change was made for section (1) by omitting the paleo anthropological element. The reason for the omission of paleo anthropological element is because paleoanthropological is clearly not human creation, thus it is reasonable to omit it from the scope of copyright objects. Paleo anthropology in its sense is the relic in the form of fossils that are the result of natural process of a living creature died thousands of years ago or even millions of years ago as the creation of The One and Only God.¹⁹

The last policy is seen in another provision of Copyright Act Year 2002 regulating the protection of traditional cultural expressions on traditional basis, particularly about traditional cultural expressions/folklore regulated in Article 10 stating that:

- 1) The state is the holder of Copyright of prehistoric and historic creation and other national cultural things;
- 2) The state is the holder of Copyright of folklore and of people culture that become

¹⁷ it is implicitly said because in this Article or in its explanation it does not clearly state the term of traditional cultural expressions/ folklore

¹⁸ RI Law No 6 Year 1982 about Copyright

¹⁹ See Explanation No 5 RI law No 7 Year 1982 about the Amendment of Law No 6 Year 1982 about Copyright.

collective ownership such as story, saga, folktale, legend, chronicle, song, handicraft, choreography, dance, calligraphy and other art works;

- 3) To announce or mass produce those creations in section (2), foreigners must first get permission from related institutions;
- 4) Provision about copyright held by the state as meant in this Article is regulated using Government Regulation.

In the explanation of Article 10 section (2) Act No 19 Year 2002 about Copyright, it is said that in order to protect folklore and other products of people culture, the government can prevent the tendency of monopoly or commercialization and also other harmful actions or commercial use without permission of the authorized state parties of The Republic of Indonesia as the holder of the Copyright. It is also stated that what is meant as folklore is a collection of traditional creation, either created by collectively or individually in the society, that shows its social and cultural identity based on the standards and values said or followed hereditarily, including: (a) folktales, folk poems; (b) folk songs and traditional instrumental music; (c) folk dances, traditional games; and (c) art products in the form of: paintings, pictures, statues, carvings, mosaic, jewelry, handicraft, clothes, musical instruments and traditional instruments.

The last regulation about traditional cultural expressions is in Article 28 of Act of Copyright No 28 Year 2014, stating that: Copyright of traditional cultural expressions is held by the state. (2) The state obliges to inventory, preserve, and administer those traditional cultural expressions as meant in section (1). (3) The use of traditional cultural expressions as meant in section (1) must take into account living values in the people having them. (4) Further provision about Copyright held by the state over traditional cultural expressions as meant in section (1) is regulated using Government Regulation.

The definition of traditional cultural expressions is elaborated further in the explanation of the Act, that “ traditional cultural expressions” cover one of or the combination of the form of expressions as follow : (a). Textual verbal, either verbal or written, that is in the form of prose or poem, in any various themes contents of the message, that can be in the form of literature works or informative narration and; (b). music, covering namely vocal, instrumental, or the combination of both; (c). movement, covering namely dances; (d). theater, covering namely *wayang* or puppet shows and folk

plays; (e). fine arts, either in the form of two dimensions or three dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile, and so forth or the combination of all; and (f). Traditional ceremonies.

Comparing the aforementioned government's policies, it can be seen that the policy of legal ¹ protection of traditional cultural expressions/ folklore in Copyright Act 1982 shows that the state acknowledge people's communal rights over traditional cultural expressions/ folklore or in the context of policy, it states that the ownerships or copyright holders of traditional cultural expressions/ folklore are people communities where the traditional cultural expressions/folklore originate, are preserved and developed. People's communal rights, including communal rights of traditional/local people over traditional cultural expressions/folklore are parts of national identity that the state supposedly has obligation to preserve, develop, and protect.

Legal politics indeed observed in the policies is based on the spirit to balance the development of technology by introducing the concept of traditional cultural expressions protection in protecting the interest of the individual (the creator), however, it still tries to protect the character of national identity that tends to be communal (including people's right over traditional cultural expressions/folklore). In this case, the government, besides trying to balance two visions of protections of copyright, in one side the protection is directed to the creator and or the holder of the copyright (individual protection) and in the other side the protection is directed to people's right to enjoy the creation (public protection), nevertheless, it must also protect people's interest by putting the ownership of traditional cultural expressions in communality so that the access to the products of traditional cultural expressions is still opened and besides that, this policy also prevents monopoly over traditional cultural expressions/ folklore.

Legal politics of this policy is in line with Sunaryati Hartono's statement saying that protection over intellectual properties is contained in individual right and public right. Individual right is reflected as exclusive right of ownership of the intellectual property right and public right is to get and access those intellectual properties. Therefore, a principle that aims at balancing between the individual interest of the holder of the right and public interest is necessary. Moreover, it is said that any rights admitted by law, given individually, in alliance or in a unity is not merely for their own interest, but for the interest of the whole people. Therefore, human in relation to other human are

bound in one social bond thus any rights given by law that is given to an individual or an alliance or other groups are also for the fulfillment of interest of the whole people.²⁰

Furthermore, in the regulation of The Act of copyright 2002 and 2014 aforementioned, there is formulation about state's ownership of traditional cultural expressions/ folklore stating that the holder of folklore copyright is the state, therefore in this case, it is appropriate to say that the state as the exclusive holder of the right²¹ of the copyright of traditional cultural expressions or folklore. Some theories of state's authority below will explain how far state has authority over traditional cultural expressions/folklore:

- (1) According to Van Volehlehoven, state as the highest organization of the nation is given authority to regulate everything, and the state based on its position has the authority over traditional cultural expressions for legal regulation. In this case, state authority is always connected to sovereignty or *souverenitet*.
- (2) Meanwhile, according to J.J. Rousseau, state's authority as a body or organization sources from the result of social contract whose essence is a form of unity defending and protecting communal authority, personal authority, and ownership of each individual.²² In this case, in its essence, authority is not sovereignty, but state's authority is also not limitless because there are some legal provisions that bind themselves like nature's law and God's Law and also law that is common in all nations called *leges imperii*.

In accordance to those two theories, theoretically state's authority over the potential of national culture that is in the form of traditional cultural expressions/ folklore sources from people. It is known as nation's right. The state, in this case, is seen as the party that has a character of a public institution. Therefore, the authority or power to

²⁰ Sunaryati HartoNo, 1982, OP Cit, page 24.

²¹ Intellectual Property Right is exclusive and absolute, meaning that the right can be defended over anyone and the holder of the right can sue the violation of his right by anyone. The holder of Intellectual Property Right also has the right to monopoly, that is the right that can be used to ban anybody without his permission making his / her creation and or use it.(Mr.N.E.Algra,et.al, *Mula Hukum*, Cetakan Pertama, Jakarta, Bina Cipta, 1983, page 210)

²²R. Wiratno, dkk, *Ahli-Ahli Pemikir Besar tentang Negara dan Hukum* ,PT Pembangunan, 1958), Jakarta halaman 176.

regulate, manage, and preserve (guard) the use of the whole potential of the national culture existing in its territory intensively is given to the state.

In addition, the state as the holder of copyright over folklore/traditional cultural expressions does not mean that the state has (having right of ownership) or control (having right to control) the products of traditional cultural expressions/ folklore. The state in this case only has authority to formulate policies, regulate, manage, administer, promote and safeguard the use of traditional cultural expressions.²³ State's authority in this case, if associated with welfare country, functions to realize as much as wellbeing and prosperity for the people. The obligations of the state are elaborated below:

- 1) Any forms of use and utilization of the products of traditional cultural expressions/folklore as well as the product of national culture that are obtained must significantly be able to boost the wellbeing and prosperity of the people;
- 2) Protecting and guaranteeing all people's rights dealing with traditional cultural expressions and various properties of national culture gained directly or enjoyed directly by the people.
- 3) Preventing and handling any forms of actions from any parties that will cause the people to lose their chance or rights to enjoy the products of traditional cultural expressions and the properties of their country.

3. Policies of Indonesia Traditional Cultural expressions Protection in the Future

Legal protection that has not been comprehensively accommodated over the products of traditional cultural expressions in the Act of Copyright and some legal rules of Indonesia intellectual properties and also other rules has impacted on the emergence of cases and claims of ownership and commercial use of copyright or discovery of traditional cultural expressions by parties outside the communities of indigenous

²³ This explanation is an analogy of the verdict of Constitutional Supreme Court in legal consideration of Water Resource Act interpreted about "the right to control the state" does not mean the state possess, but it means that the state is only formulate policies (*beleid*), regulate (*regelendaad*), manage (*bestuursdaad*), administrate (*beheersdaad*), and supervise (*toezichhoudendaad*). See verdict of Constitutional Supreme Court No 058-059-060-063/PUU-II/2004 and No 008/PUU-III/2005 about the trial of Water Resource Act.

people or by foreign parties that are getting more and more and are not completely resolved. Being aware of all those issues, the government needs to prepare legal policies about the protection of traditional cultural expressions through *sui-generis*²⁵ intellectual properties legal regulations. It means that the protection approach must introduce the concept of novel right over the ownership of traditional cultural expressions that so far has been considered as public domain by following the principles of intellectual properties legal system separately. There are some reasons why *sui generis* protection approach is necessary in giving protection to Indonesian traditional cultural expressions. Those reasons are:

First, so far, the protection of traditional cultural expressions based on the principles of intellectual properties law that substantively exists in Indonesia (copyright, patent, brand, industry design, trade secret and plant variants) is not completely able to protect the traditional cultural expressions of Indonesia. The different characters between HKI or Intellectual Property Rights and traditional cultural expressions have caused the difficulty in the fulfillment of substantive requirement to get protection through the provision of intellectual properties law. The grant of protection using *sui generis* legal approach of intellectual properties is expected to be more suitable to the characteristics of traditional cultural expressions so that it can be more able to give protection to traditional cultural expressions entirely.

The second, the protection of traditional cultural expressions/folklore based on the principle of Intellectual Property Rights protection adopts individualism and **monolistic/monopolism**. These ideologies accept that an individual has a strong personal value. In an absolute sense, someone or an individual is believed to have intrinsic/inherent moral values. Based on that belief, individualism encourages an individual's authority in thinking and taking action. Consequently, individual privacy has got its position and is considered important. Someone is completely autonomous because he/she is released from specific relationship with other people. The goal that is intended centers on the development of oneself.²⁴ Its exclusive ownership can have consequence that the owner of HKI or Intellectual Property Rights has monopoly right and right to exploit maximally the economical advantages of the creation or the finding without

²⁴Hamilton V. Lee & Sanders, Yoseph, *Everyday Justice, Responsibility and The Individual in Japan and United State*, New Haven, Yale University Press, 1992 in Sathipto Rahardjo, Ibid page 60

interruption of other parties during protection period and the only restriction is that as long as it does not go against other people's rights and does not bring loss to other people.

Individualism and **monolistics/ monopolism** are clearly different from the cosmology of Indonesian people who tend to be communal. People's life attitude that is full of togetherness makes them see their citizens not as an individual, but as a unity that cannot be separated from the whole society. Thus, creating or inventing something is the result of an individual motion and effort, and the result, in the form of copyright or invention can be enjoyed collectively (sharing) by all members of societies where the individual is. The creators and inventors create those creations or inventions not to be privately owned as property, but merely intending to fulfill the need of people community where he/she is a part of it.

The third, giving protection to traditional cultural expression through the provision of *sui generis* regulation of intellectual properties is expected to provide freedom not to necessarily be associated with norm standard and also the principles of Intellectual Property Rights protection based on the agreement of TRIPs that have a "hard law" character. The regulation of *sui generis* can evade the threat of lawsuit through DSB or unilateral actions from other countries particularly from developed countries that become export destinations.

Conclusion

Constitutionally, legal politics of traditional cultural expressions protection as a part of national cultural identity has obliged the state to develop national culture, guarantee freedom or independence to all components of people to preserve and develop the culture and enjoy the products of the culture, in this case including the preservation and developing of traditional cultural expressions/ folklore. It also must be able to guarantee the collective rights of all components of people including communities of people who preserve traditional cultural expressions/ folklore for the sake of the progress and well being of the public communities or to a broader extent for the wellbeing of all Indonesian people.

Operationally, politics of traditional cultural expressions protection provides

authority for the state to formulate policies, conduct regulation, management, maintenance, promotion and supervision of the use and utilization of traditional cultural expressions for the wellbeing and prosperity of communities in particular and society in general. State must be able to protect and guarantee all its people's rights associated with traditional cultural expressions/folklore and various national cultural properties that can be enjoyed directly by the people. Besides that, the state must also be able to prevent and handle the use and utilization of traditional cultural expressions that cause people to lose their access and rights to them.

Policies that are "*sui generis*" over the protection of folklore or traditional cultural expressions are expected to be more able to protect comprehensively Indonesian folklore. There are some reasons why those policies must be taken. First, the grant of protection by *sui generis* legal approach of intellectual properties is expected to be more suitable to the characteristics of traditional cultural expressions so that it will be more able to give protection over the traditional cultural expressions thoroughly. The second, the policies of the protection of traditional cultural expressions are not merely based on legal principles of intellectual properties, but they are also based on values or foundation that live and root in the communities creating intellectual creativities of Indonesia. The third, giving protection to traditional cultural expressions through the provisions of *sui generis* intellectual properties law is expected to provide freedom not necessarily to be restricted to the norm standard or principles of Intellectual Property Rights protection based on TRIPs agreement as well as to avoid potential lawsuits through DSB or unilateral actions from other countries particularly from export destination developed countries.

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