

Effectiveness of Legal Protection of Traditional Cultural Expressions in Indonesia: A Case Study of Pendet Dance



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ABSTRACT: The Traditional Cultural Expression of Pendet Dance from Bali is one of the Communal Intellectual Properties, where the use and exploitation of traditional cultural expressions is often carried out without clear permission, thus leading to unauthorized exploitation and use. The purpose of this study is to analyze the legal protection status of the Pendet Dance as a traditional cultural expression in Indonesia. This legal research is an empirical legal research with a descriptive analytical approach method. The research results show that the effectiveness of legal protection for the traditional cultural expression of the Pendet Dance is influenced by several factors, namely legal factors, law enforcement factors, facilities and infrastructure factors, community factors, and cultural factors that grow in the community. Legal protection for the Pendet Dance can be through preventive protection through inventory and recording carried out by the state through the minister or local government, or through repressive protection.

KEYWORDS: Legal Protection, Effectiveness of Law, Traditional Cultural Expressions

I. INTRODUCTION

Communal intellectual property is intellectual property whose ownership is communal, It's means that ownership of the intellectual property is held jointly so that responsibility and efforts to utilize the intellectual property become a shared orientation. So there is a difference between communal intellectual property and other intellectual property such as Copyright, Trademark Rights, Patent Rights, Industrial Design Rights, Trade Secret Rights, Plant Variety Protection Rights, and Circuit Layout Design Rights, where the nature of the intellectual property is exclusive. (Ayu Taufitra & Gede Agus Kurniawan, 2023).

One type of communal intellectual property is traditional cultural expression, which all forms of cultural expression of creative works, whether in the form of objects or non-objects or a combination of both, show the existence of a traditional culture that is held communally and across generations. Traditional cultural expressions are an integral part of the identity of the Indonesian nation, which is rich in cultural diversity. One of the famous forms of traditional cultural expression is the Pendet Dance from Bali. This dance has high historical, artistic and social value and functions as a cultural symbol of the Balinese people. However, in the era of globalization, traditional cultural expressions face many significant challenges related to their protection and preservation. The common phenomenon is the commercialization and use of traditional cultural expressions without clear permission, which can lead to unauthorized use and misuse. This raises concerns about the loss of cultural rights of indigenous peoples and local communities who create and maintain these traditional cultural expressions. In addition, there is concern that modernization and urbanization will erode the authentic values contained in traditional cultural expressions. Law No. 28 of 2014 concerning Copyright in Indonesia has regulated the protection of Traditional Cultural Expressions, but the implementation of laws and regulations governing Traditional Cultural Expressions is still ineffective, so it is still necessary to study further the factors that influence its ineffectiveness. Traditional cultural expressions include all forms of expression rooted in tradition, such as dance, music, and fine arts. According to WIPO (World Intellectual Property Organization), traditional cultural expressions are "forms of expression that reflect the cultural heritage that has developed from one generation to the next." (WIPO, 2017).

According to Soerjono Soekanto, legal protection for legal subjects is in the form of law enforcement through legal instruments. Effectiveness in law enforcement is influenced by several factors, namely:

The legal factor, namely the applicable written laws or regulations, has provided justice, certainty and benefits.

The law enforcement factor, namely law enforcement officers who are able to implement and enforce the rules so that legal certainty, justice, and legal mandate are created proportionally.

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Factors of facilities or infrastructure that support statehood, namely including skilled human resources, good organization, adequate equipment, so that factors of facilities or infrastructure can assist in law enforcement that is just, provides benefits, and provides legal certainty.

Community factors, which the community are educated and already aware of the law.

Cultural factors, where society cannot be separated from culture which contains values that underlie the prevailing values. (Siregar, 2018).

The theory of legal protection of intellectual property can be applied to protect traditional cultural expressions. Copyright theory (Copyright Law) provides protection to creators of artistic or literary works. However, the main challenge in the context of traditional cultural expressions is that these works are often communal and anonymous, and have existed for a long time. (Geismar, 2013). The Communal Intellectual Property Rights theory emphasizes that rights to traditional cultural expressions should be recognized as communal rights belonging to communities or indigenous peoples, not individual rights. This is important to ensure that the economic and social benefits of these cultural expressions return to the communities that own them. (Tobing, 2019). Meanwhile, Cultural Heritage Theory views traditional cultural expressions as part of the cultural heritage that needs to be protected and preserved. Cultural heritage protection includes legal, social and economic aspects, which work together to maintain the integrity of traditional culture. (Blake, 2001). The legal framework for the protection of traditional cultural expressions in Indonesia includes several important regulations. Law Number 28 of 2014 concerning Copyright regulates protection of works of art, including traditional cultural works. However, the implementation of protection of traditional cultural expressions still faces many challenges.

Law Number 5 of 2017 concerning the Advancement of Culture states that traditional cultural expressions must be protected as part of national culture. This law also regulates the inventory, protection and utilization of traditional culture. Several regions in Indonesia have local regulations governing the protection of traditional culture. The case study of Pendet Dance in Bali can provide insight into how local policies play a role in protecting cultural expressions (Bali Provincial Regulation Number 2 of 2012 concerning the Protection and Development of Balinese Culture). Pendet Dance is a traditional Balinese dance that is usually performed as part of religious ceremonies. This dance has deep cultural and spiritual value for the Balinese people. However, challenges in protecting the Pendet Dance include claims of ownership by outside parties, commercialization without permission, and lack of legal awareness among indigenous communities. Various efforts have been made by the government and local communities to protect the Pendet Dance including registration as an intangible cultural heritage and legal awareness campaigns. (Suadnyana, 2018)

Several previous studies found by researchers, namely Legal Protection of Traditional Knowledge and Culture to Improve Community Welfare Reviewed from Law No. 5 of 2017 Concerning Cultural Advancement and Law No. 28 of 2018 Concerning Copyright, which was studied by Abdul Atsar with research results that legal protection for traditional cultural expressions is held by the state, so the state is obliged to conduct an inventory and data collection of traditional culture to maintain and preserve these cultural expressions. (Atsar, 2017).

In addition, other previous research regarding the Certainty of Legal Protection of Traditional Arts as Traditional Cultural Expressions in Supporting Indonesian Tourism. The research was conducted by Liza Marina and Dessy Sunarsi, where the results of the research stated that the regulations governing Traditional Indonesian Cultural Expressions are still regulated in Law No. 28 of 2014 concerning Copyright and still cannot provide legal certainty. There is a difference between individual and communal ownership, and unique communal ownership can be commercialized and has economic value. (Marina & Sunarsi, 2019).

Previous research conducted by Yenny Eta Widyanti with the title Protection of Traditional Indonesian Cultural Expressions in a Sui Generis System, where the results of the study concluded that the regulation of traditional cultural expressions in Law Number 28 of 2018 concerning Copyright still cannot provide legal protection for traditional cultural expressions due to differences in characteristics between copyright and traditional cultural expressions. (Widyanti, 2020).

Several previous studies have shown that even though regulations already exist, legal protection for Traditional Cultural Expressions is still not optimal and has not fully answered the existing challenges. The role of the government and traditional institutions in legal protection of Traditional Cultural Expressions is still very weak, resulting in many cases of copyright infringement of Traditional Cultural Expressions that are not properly resolved. Meanwhile, legal policies in Indonesia still focus more on individual copyright than collective rights, which results in inadequate protection for Traditional Cultural Expressions.

Normatively, Indonesia has created various laws and regulations aimed at protecting traditional cultural expressions, such as Law Number 28 of 2014 concerning Copyright and Law Number 5 of 2017 concerning the Advancement of Culture. This law explicitly recognizes the importance of protecting traditional culture as part of the national cultural heritage. However, in reality, the implementation of this legal protection often does not meet expectations. Indigenous peoples and communities that own traditional cultures such as the Pendet Dance often do not receive adequate protection from exploitation and commercialization

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without permission. For example, the Pendet Dance is used in tourism advertisements by outsiders without permission from the community of origin or is used as a tourist attraction in hotels and restaurants without providing fair compensation to the dancers and indigenous people. Lack of legal knowledge and awareness among indigenous communities, coupled with limited resources to enforce their rights, exacerbates this situation (Suadnyana, 2018).

In Saraswati's research entitled "Legal Protection of Traditional Artworks in Indonesia" published in the Journal of Law and Development, the focus is on the protection of traditional art works in general without delving into specific cases such as the Pendet Dance. Saraswati highlighted the legal aspects of protection and suggested improving regulations, but provided few concrete case examples. (Saraswati, 2019). Another study by Nugroho in "Communal Intellectual Property Rights: Protection of Local Culture" published in the Journal of International Law discusses legal protection from the perspective of communal intellectual property rights but does not link it to concrete case studies. Nugroho examines how communal intellectual property rights can be implemented in Indonesia, but this research remains theoretical without practical application (Nugroho, 2018). Rahmawati in "Commercialization of Traditional Culture: Challenges and Solutions" published in the Jurnal Kebudayaan Nusantara highlights aspects of the commercialization of traditional culture and its challenges, but focuses more on general problems and solutions without specific legal-based analysis (Rahmawati, 2020). At the international level, Geismar's article in the "International Journal of Cultural Property" entitled "Copyright in the Museum: Balancing the Rights of Indigenous Communities and Museums" analyzes the conflict between the rights of indigenous communities and cultural institutions in a global context, providing insight into how copyright can be applied in protecting traditional culture but does not provide a specific analysis of the case in Indonesia. (Geismar, 2013). Blake in the "UNESCO Journal of Cultural Heritage" with an article entitled "Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage" provides normative guidance for the protection of intangible cultural heritage, but focuses more on international standards without highlighting implementation in developing countries such as Indonesia. (Blake, 2001).

This research is different from previous research, where the focus of this research is related to the Effectiveness of Legal Protection for Traditional Cultural Expressions in Indonesia: A Case Study of the Pendet Dance. Therefore, it is necessary to conduct research to identify and analyze the effectiveness of legal protection for the Pendet Dance as a representation of traditional cultural expression. In addition, it identifies factors that hinder effective protection, and provides policy recommendations to improve legal protection. This study also aims to examine the status of legal protection for the Pendet Dance as a traditional cultural expression in Indonesia today and what steps should be taken so that legal regulations in Indonesia can provide adequate protection for the Pendet Dance?

Thus, this research is expected to contribute to the development of more inclusive and effective policies in protecting Indonesia's traditional cultural heritage, ensuring that the economic and social benefits of these cultural expressions can be enjoyed by the communities that own them and future generations (WIPO, 2017; Geismar, 2013).

II. RESEARCH METHOD

This legal research is an empirical legal research by researching and identifying the application of laws that are currently in force in society. This study looks at how the laws governing communal intellectual property, especially Traditional Cultural Expressions, are related by looking at the reality in society. (Sulasno et al., 2021). The types of data used are primary data sources through interviews and secondary data sources in the form of laws and regulations, literature studies, both theories and concepts related to Traditional Cultural Expressions. In addition, it is supported by research in the form of journals related to Traditional Cultural Expressions. The approach method used is an analytical descriptive approach, by drawing or describing the research data obtained to then carry out qualitative analysis by examining all available data and writing it down in a systematic manner.

III. RESULT AND DISCUSSION

Efforts to Protect Traditional Cultural Expressions in Indonesia. Protection of traditional cultural expressions, especially from claims or recognition by other nations, has become a focus in Indonesia through efforts to create a Bill on Traditional Knowledge and Traditional Cultural Expressions. The draft law defines traditional cultural expressions as intellectual products of art that include literary expressions with elements of traditional characteristics that are inherited, developed and maintained by indigenous communities. Traditional cultural expressions are not only about art, but also about economic, spiritual and communal values that are part of the cultural life of a society. It represents the identity of indigenous peoples in various regions. Traditional cultural expressions are associated with collective entities such as communities, small groups, or indigenous people. It is not the property of an individual but is an important part of the cultural heritage of a society. The importance of protecting traditional cultural knowledge and expressions to prevent extinction is also linked to intellectual property rights. If not protected, these cultural expressions may fall into the public domain. In Indonesia, the protection of traditional cultural expressions is regulated in

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various regulations, including Law Number 28 of 2014 concerning Copyright, international agreements such as the Berne Convention, and industrial property law regulations.

Law No. 28 of 2014 regulates the protection of traditional cultural expressions by firmly stipulating that copyright for traditional cultural expressions is held by the state, while in the use of cultural expressions, attention must be paid to the values that exist in the community that develops them. The protection of traditional cultural expressions also involves aspects of neighbouring rights, where international agreements such as the WPPT (WIPO Performances and Phonograms Treaty) provide protection for performances or shows that are part of traditional cultural expressions. In addition, industrial property laws, such as the Paris Convention, also provide avenues of protection for traditional cultural expressions through trademarks, geographical indications, patents and industrial designs.

The legal protection status of the Pendet Dance as a traditional cultural expression in Indonesia is currently based on the principle of intellectual property rights, especially in the context of Traditional Cultural Expressions, the Pendet Dance, as one of Bali's intangible cultural heritages which has deep cultural and spiritual value for the Balinese indigenous people, so it must be carefully protected so that it is not misused or claimed by outside parties.

Law Number 28 of 2014 concerning Copyright is the main legal basis that regulates the protection of works of art, including traditional cultural works such as the Pendet Dance. Article 38 paragraph (1) of the Copyright Law emphasizes that copyright for traditional cultural expressions is held by the state, which is then further regulated by Government Regulation Number 56 of 2022 concerning Communal Intellectual Property as the implementing regulation of the Copyright Law. The implementation of these laws and regulations still faces challenges in practice, especially regarding understanding and legal awareness among indigenous communities.

According to Philipus Hadjon, legal protection is divided into two, namely preventive legal protection, the nature of which is to prevent disputes from occurring, and repressive legal protection, the nature of which is to resolve problems or disputes that have already arisen. (Prayoga et al., 2023). If it is associated with legal protection for traditional cultural expressions, the form of preventive legal protection efforts is by conducting an inventory, maintaining, and preserving traditional cultural expressions which are mandatory for the state, as regulated in Article 38 of Law No. 28 of 2014 concerning Copyright. This is done with the aim of preventing disputes that may arise in the future. In addition, in the use of cultural expressions, it must be in accordance with the values of life in the community of the bearer, while legal protection of a repressive nature is through dispute resolution carried out through alternative dispute resolution, arbitration or courts as regulated in Article 95 of Copyright Law Number 28 of 2014.

Although in this case the State is the holder of the rights to communal intellectual property, the implementation of the obligation to inventory, maintain and preserve communal intellectual property can be carried out by the Minister, Head of a non-Ministerial Government Institution and/or Regional Government, Community of Origin as part of a country, as regulated in Government Regulation Number 56 of 2022 concerning Communal Intellectual Property.

Every intellectual property right has moral rights and economic rights that deserve legal protection. However, communal intellectual property rights are inclusive and are held by the community of origin without time limits.

In addition, the form of legal protection efforts that can be carried out is by safeguarding communal intellectual property through preventing exploitation of communal intellectual property that is not in accordance with the values, meaning, and identity of Communal Intellectual Property or social institutions that apply in the community of origin, mediation or legal issues related to Communal Intellectual Property, and diplomacy with other countries. Meanwhile, maintenance activities or Communal Intellectual Property can be carried out through education, literacy, socialization and promotion, utilization of Communal Intellectual Property that provides benefits to the Community of Origin.

Any use of Communal Intellectual Property must include information on the Community of Origin of the Communal Intellectual Property, as well as permission from the Community of Origin, especially for Communal Intellectual Property which has a sacred, confidential nature and is firmly held in the use of Communal Intellectual Property. In addition, the utilization of Communal Intellectual Property for commercial interests is carried out by paying attention to the sharing of benefits agreed upon in the provisions of the legislation, as regulated in the implementing regulations.

In addition to the Copyright Law, Law Number 5 of 2017 concerning the Advancement of Culture also has an important role in protecting traditional cultural expressions. Article 19 of the Cultural Advancement Law emphasizes that traditional cultural expressions must be protected as part of national culture. This law also regulates the inventory, protection and utilization of traditional culture, which can be an important instrument in maintaining the authenticity and integrity of the Pendet Dance. At the local level, Bali Provincial Regulation Number 2 of 2012 concerning the Protection and Development of Balinese Culture provides a more specific legal basis regarding the protection of the Pendet Dance. This regulation establishes concrete steps in protecting and developing Balinese culture, including the Pendet Dance as an integral part of Balinese cultural heritage.

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In the international context, Indonesia has become a member of various agreements and conventions relevant to the protection of traditional cultural expressions. For example, the UNESCO Convention on the Protection and Promotion of the Diversity of Traditional and Contemporary Cultural Expressions recognizes the importance of protecting and promoting cultural diversity throughout the world. However, even though there is a legal framework that regulates the protection of Traditional Cultural Expressions, one of which is the Pendet Dance.

In practice, commercialization without permission still occurs frequently. One concrete case is where the Pendet Dance is used for commercial purposes without permission from the Community of Origin or the Institution that holds the Communal Intellectual Property rights. Thus, this violates the rights of the Balinese community as holders of Communal Intellectual Property rights over their traditional cultural expressions.

In addition, there are claims to property rights made by parties outside the Balinese community. Where the party claims ownership rights or commercializes the Pendet Dance without permission or knowledge of the community of origin, this is a form of violation of communal intellectual property rights.

The use of Pendet Dance is often used in contexts that are inappropriate or not in accordance with the cultural and spiritual values attached to it. So that it can reduce the integrity and value of traditional cultural expression. Beside that, Pendet Dance is also vulnerable to piracy and illegal use, both in the form of video recordings and live performances without permission. This is detrimental to indigenous communities and reduces the economic potential and social impact that can be derived from these traditional cultural expressions.

Disputes arising in matters of traditional cultural expression or communal intellectual property are due to the lack of legal effectiveness in dealing with problems that exist in society. The effectiveness of the law is influenced by:

- 1) Legal factors,
- 2) Law enforcement factors,
- 3) Facilities or means that support enforcement,
- 4) Community factors,
- 5) Cultural factors, where the community cannot be separated from the culture that contains values that underlie the applicable values. (Siregar, 2018)

If it is related to disputes over traditional cultural expressions, the legal factor is that the Copyright Law still cannot provide legal protection because every violation that occurs can only be processed if there is a lawsuit or complaint (complaint offense) from the injured party so that without legal standing, law enforcement officers cannot carry out the law enforcement process.

In addition, the lack of public understanding of communal Intellectual Property Rights is a fundamental problem, especially among Balinese indigenous communities. So that it can lead to exploitation or unauthorized use of the Pendet Dance. Therefore, there needs to be extra effort from all sectors, not only relying on the law, but also on mechanistic cooperation in order to improve these weaknesses.

Efforts that can be taken include through legal education and awareness for indigenous communities about their rights, as well as providing adequate legal assistance and law enforcement mechanisms to support the protection of their traditional cultural expressions, stricter legal protection arrangements at the local level, as well as through legal awareness campaigns for indigenous communities and tourism industry players, establishing a legal approach that recognizes communal rights to traditional cultural expressions, and through legal measures to counter unfounded claims, developing a legal approach that regulates the use and presentation of the Pendet Dance, and through educational and awareness campaigns for the general public about the importance of respecting and preserving cultural heritage and most crucially taking stricter law enforcement measures against copyright infringement, and through cooperation between governments, legal institutions, and indigenous communities to protect and strengthen their rights. Designing legal regulations in Indonesia to provide adequate protection for the Pendet Dance.

In other words, to measure whether a law is running effectively or not, it can be influenced by five factors, namely the legal factor, the law enforcement factor, the means or facilities that support law enforcement, the community factor, and the cultural factor, where the community is located. Failure to fulfill one of these factors is one of the causes of the ineffectiveness of the law enforcement process (cumulative in nature).

Recommended Steps for Regulation to Provide Legal Protection for Pendet Dance.

Legal regulations in Indonesia must be designed in such a way as to provide adequate protection for the Pendet Dance, as a representation of a valuable traditional cultural expression rich in cultural and spiritual values for the Balinese people. To create effective protection, the legal framework must cover several important aspects covered in the theoretical framework mentioned earlier.

First of all, legal regulations must recognize the Pendet Dance as an integral part of traditional Balinese cultural expression. This is in line with the concept of traditional cultural expression which reflects the cultural heritage that develops from one

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generation to the next (WIPO, 2017). This recognition will provide a strong legal basis to protect and preserve this dance as an inseparable part of Indonesian national culture.

Second, legal regulations must take into account communal rights over the Pendet Dance, in accordance with the concept of Communal Intellectual Property Rights. In the context of the Pendet Dance, these rights should be recognized as the common property of the Balinese community or indigenous society, not individual rights (Tobing, 2019). It is important to ensure that the economic and social benefits of the Pendet Dance return to the communities that own it.

Third, legal regulations must also adopt a Cultural Heritage *Theory* in the protection and preservation of the Pendet Dance. Cultural heritage protection includes legal, social and economic aspects, which work together to maintain the integrity of traditional culture. (Blake, 2001). Thus, legal regulations must provide a comprehensive framework to maintain the authenticity, integrity and cultural values of the Pendet Dance.

Fourth, in the implementation of legal regulations, it is important to pay attention to the concrete challenges faced in protecting the Pendet Dance, such as claims of ownership by external parties, commercialization without permission, and lack of legal awareness among indigenous communities (Suadnyana, 2018). Therefore, legal regulations must include clear provisions and effective enforcement mechanisms to address these issues.

Fifth, legal regulations must take into account the existence of local regulations governing the protection of traditional culture, as occurred in the case study of the Pendet Dance in Bali with the existence of Bali Provincial Regulation Number 2 of 2012 concerning the Protection and Development of Balinese Culture. This shows the important role of local policies in providing more concrete and relevant protection for traditional cultural expressions at the regional level.

Within the overall legal regulatory framework, it is important to ensure that the communal rights, cultural values, and interests of the Balinese indigenous people in maintaining the sustainability and authenticity of the Pendet Dance are recognized and prioritized. Thus, legal regulations must be designed by taking into account a theoretical framework that includes aspects of communal intellectual property rights, cultural heritage, and local arrangements, to provide comprehensive and sustainable protection for the Pendet Dance as a traditional cultural expression of high value to the Balinese people.

IV. CONCLUSION

Legal protection for the Pendet dance as a traditional cultural expression originating from Bali is still not effective. Although there is a legal framework that regulates the protection of traditional cultural expressions, such as copyright laws and their implementing regulations, as well as laws on the advancement of culture, their implementation still faces obstacles, especially related to unauthorized commercialization, claims of ownership by external parties, and a lack of understanding of intellectual property rights among Balinese indigenous communities. So it is necessary to have extra efforts from various sectors, not only relying on legal regulations alone, but also on cross-sectoral mechanical cooperation. So it is hoped that protection of the Pendet dance can be strengthened and maintained sustainably.

In order to provide adequate protection for the Pendet dance as a traditional cultural expression of high value for Balinese society, legal regulations in Indonesia need to be drafted by considering several important aspects. First of all, the recognition of the Pendet dance as an integral part of traditional Balinese cultural expression provides a legal basis for protecting cultural heritage. Second, recognition of communal rights over the Pendet dance. Furthermore, the adoption of a cultural heritage approach in protecting the Pendet dance will ensure a comprehensive framework to maintain the authenticity, integrity and cultural values of the dance, and finally the implementation of legal regulations by taking into account the concrete challenges faced in protecting the Pendet dance.

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