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Social Justice for the Economic Rights on Traditional Knowledge in Medicinal Plants of Customary Law Communities

EmildaKuspraningrum¹, ThohirLuth², Yuliat³, RachmadSafa'at⁴

ABSTRACT

Traditional knowledge about medicinal plants and traditional medical treatment has been mastered by Indonesians long before the reign of the Unitary State of the Republic of Indonesia. The technology has been widely preserved by customary law communities. This knowledge has been adopted by medicine industry, both domestic and foreign, so factories can produce traditional medicines in a modern way. However, indigenous people, the inheritor of the knowledge, are not economically improved from the modernization of the traditional medicine. This becomes a problem since Indonesia was founded on the basis of social justice for all of its citizens, in addition to the goal of realizing the state's ideals in compliance with the International Labor Organization Regulation No. 169 concerning Indigenous Peoples and Tribes in Independent Countries of 1989 and the preamble of the Indonesian Constitution. One of the ideals of this law is fair and equitable prosperity for all Indonesians, as explained by Notonegoro's theory of social justice based on Pancasila that "social justice is about rights and obligations in life relationship and fairness relationship with other human and with God, the *causa prima*, or religious justice". Therefore, the state seeks to govern through regulations in all fields, including intellectual property through patent law. Nevertheless, Indonesian patent laws have not answered the questions about the rights on traditional knowledge. Using normative research supported by primary and secondary legal material, future regulations that protect the technology of traditional medicines and medical treatment should be made more comprehensive by giving more attention to the economic rights of indigenous peoples, by referring to the social justice principles of the fifth precept of Pancasila.

Keywords: Social justice, customary law community, economic right.

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¹PhD Student at Faculty of Law, UniversitasBrawijaya.

²Professor at Faculty of Law, UniversitasBrawijaya.

³Associate Professor at Faculty of Law, UniversitasBrawijaya.

⁴Associate Professor at Faculty of Law, UniversitasBrawijaya.

1. Introduction

Traditional knowledge is developed from experiences and adaptations from the surrounding culture and environment. The knowledge develops from time to time to be transferred to people, used to maintain their communities, culture, and genetic resources needed for their existence (Hansen, Stephen, & Justin, 2003, p. 3). It is an inseparable part of people's life since long time ago. People have survived because they are able to adapt with the nature to fulfill their needs. They create culture in forms of knowledge. Besides their needs for food, clothing, and housing, they need to survive from disease. Shortcomings in facilities make them device ways to survive, giving rise to medical culture obtained from experiences and adaptations with natural resources, in this case plants that are used for medicine. They believe that they can overcome such problems and transfer the knowledge to the next generations.

The culture of processing plants into medicine developed by indigenous peoples is an action to maintain the lives of humans who are vulnerable to diseases and extinction. The need to survive is gradually believed to have a high cultural value. The customary law community never thought that the culture of processing plants into medicine for survival, along with scientific development especially in intellectual property theory, was a part of a thought process that produced simple technology, so that it could be included in simple patent.

Ironically, the abundant traditional knowledge possessed by indigenous peoples in Indonesia attracts the interest of capitalist societies, who look for this traditional knowledge to be reprocessed using modern technology in laboratories to produce medicine with high economic value. Moreover, by establishing intellectual property regimes that prioritize thinking, the intellectual work of individuals can be protected through Intellectual Property laws, so that modern medicines are claimed to be intellectual rights of the holders of the intellectual property rights, in this case patents in the field of modern medicine based on traditional medicine and medical treatment (Safa'at, 2018).⁵

The current problem is about the legal standing of economic rights in the legislation. The patent has not touched the justice for customary law communities, who are the original owner of the traditional knowledge of medicine and medical treatment. Indonesian constitution has clearly provided guidelines about safeguarding the rights of indigenous peoples in this republic.

2. Research methods

This article is a normative legal research using statute approach, conceptual approach and analytical approach. Authors used secondary data research material or material supported by library data. Furthermore, this article includes analytical descriptive research that outlines and analyzes issues related to economic rights that should be owned by the customary law community for traditional medicine using medicinal plants.

3. Result and discussion

The theory of social justice, social justice is the concept of justice as set out in the basic philosophy of the Indonesian nation "5th precepts of Pancasila" which reads "Social Justice for All Indonesian People", According to Darmito Social justice is justice that applies in society, in the field of life, both material and spiritual, which is intended for all levels of Indonesian society, wherever they are. This means that the Indonesian people are entitled to receive fair treatment in the fields of Law, Politics, Economy, Social and Culture. Social justice is the goal of the four precepts of its predecessors (First, the Almighty God, Second, Fair and Civilized Humanity, Third, Indonesian Unity, Fourth, Society Led by Wisdom of Wisdom and Representative Consultation) and is the goal of the Indonesian people to create a society that is just and prosperous based on Pancasila (Darmodihardjo, 1979, p. 9-132).

The plurality of the Republic of Indonesia includes plurality of its societies. Some Indonesians enjoyed modernity with the development of their technology, which has increased every time. Indonesian societies consist of people who have not fully followed technological developments; they even persist in traditional patterns and order, for example the customary law community of Tenganan in Karanganyar Regency in Bali. The community lives their lives in the frame of togetherness and

⁵RachmadSafa'at also told his experience while doing research in Kalimantan that he met with researchers who got research funding from PT Bayer for conducting research about traditional medicine.

harmony, not individualism, upholds the greatness of the creator of the universe, reflected in special ceremonies that praise God. They obey and submit themselves to the applicable order and prioritize dialogues, a teaching that has been preserved for generations. Their obedience to life order is seen not only in ceremonies but also in the election and organization of village leadership. They chose leaders who were able to preserve the culture and order that had been developed by their predecessors for hundreds of years (Sadre, 2017). One of the preserved traditions is PerangPandan, a traditional event where men beat each other using whips made of pandanus. The authors saw the potential of improving the welfare of the community from the tradition. Surveys show that domestic and foreign tourists are curious about Boreh, an ointment used to treat wounds caused by the whip. The chief of Tenganan village, Mr. Sadre said that the medicine can heal wounds caused by the thorny pandanus whip quickly and prevent infection. There are still many facts about traditional medicines in various tribes in Indonesia. Another important thing behind the story of PerangPandan is the medication that is able to heal wounds in a short time. Furthermore, there is a legal issue regarding the ointment, where the state should provide protection for the economic rights of indigenous peoples, especially their economic rights.

State is inseparable from social matters, including entrepreneurship, in regards to economic justice. Written constitution is a set of basic rules containing values and norms, principles, and common goals of a nation in its governance, structures of state institutions and the mechanism regulating the relationship between institutional organizations, and mechanisms governing the relationship between state organizations and citizens (Asshiddiqie, 2018, p. 4). The constitution actually regulates matters related to political lives, the dynamics of social lives, and state economy mechanism. The favored state economy is the one that brings prosperity and justice to all Indonesians⁶ in the frame of unity. The state must also have the commitment to protect all of its citizens and improve their welfare fairly and equitably as mentioned in the preamble of Indonesian constitution.⁷

The legal in the fourth paragraph of the opening of the Indonesian Constitution indirectly invites Indonesians to think and answer a big and crucial challenge, namely how to realize a prosperous and equitable Indonesian nation in all aspects, especially equitable welfare for the people of customary law community, which is currently living below the decent living standard (Hadiyati, 2009, p. 197). The customary law community, measured from two indicators, does not get enough attention in the three economic sectors of social responsibility, namely the government, the private sector, and cooperatives, and does not have sufficient capacity to deal with environmental changes, so they are difficult to adapt. The customary law community should be able to overcome their welfare problems by maximizing the potential of traditional knowledge they have in making medicines. The Constitution of the Unitary State of the Republic of Indonesia recognizes and respects customary law community and their traditional rights as long as they are still alive, following the development of the community, and adhering to the unity of the Republic of Indonesia stipulated in Article 18B paragraph 2 and Article 28, which regulates cultural identity and the right of traditional societies to adjust themselves with times and civilizations, and in Article 32 paragraph 1 which reads " The state shall advance Indonesia's national culture among the civilizations of the world by guaranteeing the freedom of the people to maintain and develop cultural values." The three articles are indicators of the potential the protection of the traditional knowledge of indigenous peoples in terms of traditional medicine. This means that Indonesia's natural resource wealth in terms of medicinal plants and traditional knowledge possessed by indigenous peoples is an asset of the Indonesian nation that must be protected, as already stated in the constitution that traditional knowledge of medicinal plants is a manifestation of value.

Article 13 paragraph 1 of the Regulation of International Labor Organization No. 169, in applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of

⁶Paragraph 2 of Preamble of Indonesian Constitution states "... has reached the blissful point of leading the Indonesian people safely and well before the monumental gate of an independent Indonesian State which shall be free, united, sovereign, just and prosperous ... "

⁷Paragraph 4 of Preamble of Indonesian Constitution, "... in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice ... "

this relationship.” The specificity inherent in the customary law community and their living environment, especially land, is manifested in the United Nation on Declaration on the Rights of Indigenous Peoples (UNDRIP) (Ikbal, 2011, p. 2), where Article 25 states:

”Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”.

Both regulations reinforce the position of traditional knowledge, a part of the activities of traditional law communities that are traditionally carried out and are entitled to protection from the government (Ndaumanu, 2018).

There are two values inherent in traditional knowledge of medicinal plants of indigenous peoples, they are the reason for the importance of protection. The first is the cultural value in which indigenous and tribal peoples live, use, and pass on traditional knowledge to their next generation and believe that traditional knowledge has sacred values and is a solution for health problems. The development of values and morals prioritizes the transfer (transmission) of values and morals from the culture of the community to the child so that the child will later become a member of the community who understands the values and norms contained in the culture of the community (Yunus, 2013)

Second, economic value, value is a human perception of the meaning of an object (forest resources) for certain individuals at a certain place and time (Nurfatriani, 2006). In the modern era using scientific analysis and methods, traditional knowledge of medicinal plants, in addition to their efficacy in medicine since long time ago, has a high economic value. This is evidenced by the fact that traditional knowledge about medicinal plants is often sought by pharmaceutical researchers and companies. They develop traditional knowledge about medicinal plants to produce modern pharmaceutical products that have better quality, better hygiene, and higher selling power. In fact, the economic value of the cultural value of indigenous peoples in the form of traditional knowledge about medicinal plants is enjoyed more by capital owners and industry owners. The products of the industry that is based on traditional knowledge of medicinal plants belonging to indigenous peoples are enjoyed by the state in the form of taxes, which contribute to Indonesia's life.

The tax obtained from the traditional medicine industry is high. In 2013 Sidomuncul was reported to have contributed the largest tax, 600 billion Rupiah (Nabhani, 2012). This is the fact that traditional knowledge originally owned by customary law communities, through modern processing, is a large industrial asset, which can increase state revenues. Nevertheless, we must honestly admit that the parties who enjoy the economic value of the traditional medicine industry are industrial owners and the state; customary law communities, once again, become merely marginalized spectators. Their well-being cannot be compared to the welfare of industrial and state owners. This fact is exacerbated by injustice, especially in patent law, which does not provide an opportunity for customary law communities to become legal subjects, who have the patent rights from such traditional knowledge.

Indonesian patent right regulations are the copy of the concept developed by western countries, whose individualistic theories lead to the idea that knowledge that develops in the community is regarded as public domain, not an individual, so that it can be claimed by anyone who has successfully registered it using the system. This of course contradicts the concept of common ownership of Indonesian people in general, which is based on social justice contained in the foundation of Indonesia, the fifth precept of Pancasila. This system is found in many indigenous peoples.

The economic rights of indigenous peoples over traditional knowledge of medicinal plants are rights that cannot be separated (Thontowi, 2015) because the economic rights of traditional knowledge of medicinal plants are a part of human rights, as contained in the Universal Declaration of Human Rights and the Covenant on Economic, Social, and Culture Rights. Article 27 of the Universal Declaration of Human Rights and Article 15 of the Covenant on Economic, Social, and Cultural Rights contains ideas about cultural rights including the right to take part in cultural life, the right to enjoy benefits from scientific progress and its applications, rights to get protection for the moral and material interests that arise from every advancement of science, literature, and arts, where the creator is the recipient of the benefits, and the freedom that cannot be separated from scientific research and other creative activities (Kasim&Arus, 2001, p. 26). These cultural rights are correlated with economic rights which are in principle owned by indigenous law communities through the processing of traditional knowledge

about medicinal plants, so that indigenous peoples have the economic rights and freedom to process or develop them, so they obtain economic rights from the development of culture and can have a decent life (Kasim&Arus, 2001, p. 24).⁸

Some experts argue that intellectual property protection cannot be applied to traditional knowledge because of individual ownership requirements and requirements for the need for novelty on patents (Suparta, 2017, p. 227). This is quite unfortunate since the Intellectual Property Right regime did not realize that ownership in communal systems was different from individual ownership originating from western thinking (Roisah, 2015). In addition, novelty, which is used as a real requirement, has been represented by the phenomenon of "seeking" traditional knowledge about medicinal plants, which later will be used as basic knowledge of the production of modern medicine. Another impact that needs to be considered is that economic rights that have been inherent in the Patent Intellectual Property Rights regime, especially in Law No. 14 of 2016 concerning patents, tend to favor inventors who have inventions based on empirical research. Thus, traditional knowledge is not taken into account because indigenous people do not have the ability to stand on par with researchers because of limitations in science and infrastructure such as laboratories. However, this weakness certainly cannot just be accommodated as it is given the fact that indigenous peoples have been able to survive for thousands of years with traditional medicine. This is an undeniable proof.

The fact above is a reflection of social justice that is not in line with what is contained in the second paragraph of the opening of the Constitution of the Unitary State of the Republic of Indonesia, which describes social justice, as John Rawls (1999, p. 3) in his theory says "Justice is the first virtue of social institutions", especially if it is associated with the fifth precept of Pancasila, social justice, the first thing coveted by social life, which means that all levels of society expect justice. Social justice in welfare distribution, in this case, is to give the legal community an equal position with industry players (Asshiddiqie, 2018, p. 17). Creating a just dimension requires considerable effort so that justice is truly entrenched, entrenched in the behavior of Indonesian people's lives. Justice does not start from the value offered in the constitution material but in the form of implementation of law (Asshiddiqie, 2018, p. 18). Law is a system where other sub-systems within it that support the establishment of a legal system itself cannot be released. Enforcement of the mechanism of the legal system needs to be supported by sub-economics, sub-politics, and culture that test whether a legal system can work well. Apart from the tension between the interests of the sub-systems, legal system must remain independent and at the same time depend on other sub-systems. Carefulness in enforcing the law as a system is indispensable because the sub-systems, such as the economic and political sub-systems, have enormous influence. Incorrect placement will make the legal system that has the content of ethical values and morals will be easily "bought" and do not have self-esteem in the process (Akhmaddhian, 2016).

The transformation of welfare for indigenous peoples can actually be pursued through two ways. First is through the potential to develop traditional knowledge in the field of processing medicinal plants. Medicinal plants in Indonesia have been traditionally processed by customary law communities since technology has not touched their lives. Economic aspects provide opportunities for indigenous and tribal peoples to develop their traditions into ownership of productive activities, so that people have income and achieve financial autonomy so that they are not dependent on other parties. The productive activities that can be done by indigenous peoples are to develop traditional knowledge that they have been making as a livelihood. Second is through the readiness of the state to provide protection not only in the form of fair legislation. The legislation produced does not only look at the formal side but also emphasizes its form and existence and ignores other elements so that everyone has the same opportunity, ability, and well-being. If this is not done, the weak will be vulnerable to discrimination (Warassih, 2014, p. 434). Legislation that emphasizes ideal law with ethical and moral values can embrace the concept of business that can be owned by society, so that just and equitable welfare can be achieved. When modern medicine is considered capable of replacing traditional medicines, when certified medical personnel are considered more capable of overcoming health

⁸Economic right has a double function. On the one hand, the rights are the basis that guarantee a decent living standard and, on the other hand, the basis for freedom.

problems, there is no harm in traditional knowledge in the manufacture of medicines and treatment of these diseases managed, turned on, and certified, so that potential this local can exist.

4. Conclusion and suggestion

The Constitution of the Unitary State of the Republic of Indonesia has determined that social justice is one of the ideal laws of the Indonesian nation; one of the goals is to realize just and equitable welfare for all citizens. This country has potential in terms of traditional knowledge about medicinal plants, but its existence so far is still limited in the environment of customary law communities. The irony is that traditional knowledge about medicinal plants is actually more in demand by industry players, targeted by the pharmaceutical industry to produce new innovations, and patented blindly. The government has not provided sufficient protection, proven by the fact that there are no more detailed arrangements in patents. If studied more deeply, traditional knowledge also has an indication of patents in general and economic rights in them.

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