

DEVELOPMENT OF LAW ON ACCESS AND BENEFIT SHARING FROM UTILIZATION OF GENETIC RESOURCES OF INDIGENOUS PEOPLE

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**PROCEEDING OF ²THE 1ST INTERNATIONAL
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“TOWARDS A BETTER ASEAN”

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Preface

ASEAN is a dynamic force which maintains its growth despite obstacles and problems. After completing the first period of its vision of an integrated regional community (ASEAN Community 2015), ASEAN is now preparing for the launch of ASEAN Community Vision 2025, supported by ASEAN Connectivity 2025. As a study center focusing primarily and solely on ASEAN, Pusat Studi ASEAN (PSA) Universitas Andalas in collaboration with the Indonesian Ministry of Foreign Affairs believes that this time of transition is the most appropriate moment to evaluate past actions, to discuss present issues and to provide an outlook for the future of ASEAN.

The main objective of the International Conference on ASEAN (IC-ASEAN) was to gather academics and practitioners, from various backgrounds, in order to specifically compile knowledge, theory and scientific suggestions which could contribute to the success of ASEAN's future; thus the theme of this conference "Towards a Better ASEAN". In order to directly connect to ASEAN, the subtheme of IC-ASEAN was aligned with the three ASEAN Community pillars which are ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. Moreover, the subthemes were designed to be general to accommodate the diverse and numerous backgrounds of participants.

The keynote speakers, who were experts in their field; academics and professionals (diplomats), came from ASEAN member countries such as Indonesia, Malaysia, the Philippines and Brunei Darussalam. There were more than 100 papers presented at the conference, originating from more than 30 universities and institutions from all over Indonesia and also Malaysia. We do believe that this conference is an initial step towards collaboration between academics and practitioners from various backgrounds to play a role in the development of ASEAN as a regional organization. It still has a very long way to go, but this initial step is the start of many years of collaboration.

This proceeding is the first of what we hope will be a series of the International Conference on IC-ASEAN proceedings. The papers published in this proceeding are selected articles from IC-ASEAN conference. Our most notable achievement will be the contribution of the knowledge within this proceeding for the advancement of IC-ASEAN, but also the enlightenment that it could bring to anyone who was able to read it.

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DEVELOPMENT OF LAW ON ACCESS AND BENEFIT SHARING FROM UTILIZATION OF GENETIC RESOURCES OF INDIGENOUS PEOPLE

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Abstract

This research of Development of Law on Access and Benefit Sharing from Utilization Genetic Resources of Indigenous People focuses on analysing legal concept to implement the Convention on Biological Diversity (CBD) and Nagoya's Protocol. In Indonesia, there is no legal framework yet in recognizing the status of Indigenous People as provider of genetic resources. On the other hand, CBD and Nagoya Protocol order state to take legislative measures and to ensure that the benefit is shared based on the right of Indigenous People. Through legal research, this study examines: the formulation that is needed to protect the genetic resources of Indigenous People; the way some Asean countries shaped their domestic frameworks and the positive outcomes that can be adopted for Indonesian context. The result shows that recognition of the right of Indigenous People is still in legal concept not as a positive law. While, Thailand has The Plant Varieties Protection Act 1999, The Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999 and Phillippine has Act 8317 known as the Indigenous Peoples' Rights Act of 1997. In the future, Indonesia need to develop of law by enacting the new right of the Indigenous People in their regulation. The increase status of Indigenous People to have right to get benefit from utilization genetic resources is the goal of fair justice for all. It is also hoped that this research can contribute to harmonizing such laws in Asean.

Keywords: Indigenous People, Access and Benefit Sharing, Genetic Resources.

INTRODUCTION

Most of the biodiversity of genetic resources that are useful to sustain life are maintained and located within the territories of Indigenous Peoples [1]. The massive use genetic resources for economic benefit by users have made resistance of them. On the other hand the Convention on Biological Diversity (CBD) and 2011 Nagoya's Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) determine State regulate access and benefits sharing of genetic resources of indigenous peoples and they have right to get benefit from utilization of their genetic resources.

In past, the utilization of genetic resources of the Indigenous People is freely accessed, based on the world view that these were common heritage of mankind [2]. The food, cosmetic and drug industry products are made by using genetic resources maintained by the Indigenous People that have values and practices in maintaining and preserving [3].

It is estimated that between 25 000 and 75 000 plant species are used for traditional medicine. Only 1% is known by scientists and accepted for commercial purposes. Part of the modern pharmaceutical industry is developed on the basis of plants discovered and use by indigenous peoples and local communities, eventhough the economic benefits are not equitably shared [4].

There are an estimated of 370-500 million indigenous people in the world, spread across 90 countries. They live in all geographical regions and represent 5,000 different cultures [5]. Indonesia is one of the most culturally diverse and biodiversity countries in the world [6].

The transformation of inter-national treaty into national law is needed as the objectives frame work of international treaty that can be realized as part of the state's obligations post ratification. This transformation has also impact on harmonizing the state's law including in Asean countries. All Asean countries have ratified CBD and Nagoya Protocol. State negligence in transforming international treaty goals into national law will harm indigenous peoples.

Based on previous research by Efridani Lubis that the policy of regulating Indonesia's genetic resources is still sectoral and there are no comprehensive and sui generis regulations. In fact, Indonesia is required to accommodate the obligations stipulated by the CBD and the Nagoya Protocol, especially those that contain the Access and Benefit Sharing system in relation to the rights of indigenous and tribal peoples over the distribution of profits [7].

RESEARCH METHOD

The approach in this study consists of a conceptual approach and a statute approach. Furthermore, through both approaches, the principal aim of this research is to find out legal frame work to protect Indigenous People as provider of genetic resources. Therefore, the dogmatic dimension of law is related to the regulation of the concept of Access and Benefit Sharing which refers to international law instruments CBD and Nagoya Protocol.

RESULT AND DISCUSSION

Genetic resources include all species of plants, animals, micro-organisms and ecosystems of which they are a part. Conservation and sustainable use of genetic resources is a decisive interest for sustainable development and to fulfil the needs of food, health and other needs for the world's population that is always developing. Genetic resources provide the foundation of all food production and the key to feeding the prior numbers of people of times of climate and other environmental change [8].

Along with the increased utilization and great economic value, biopiracy often occurs when multinational companies utilize the genetic resources of indigenous without access agreement or benefit sharing. Some cases show that [9]: the case of registration of medicinal plants and spices native to Indonesia for cosmetic purposes submitted by the Shiseido cosmetics company in Japan. Although the last registration concerning *legion*, *kelabet*, *lempuyang*, *remujung* and *brotowali* wood plants was withdrawn by Shiseido, several other Indonesian medicinal plants have been registered in Japan with registration number JP 10316541 with the subject of *rapet* wood (*Palamera laevigata*), *kemukus* (*pipercubeca*), *tempujung* (*sonchus arvensis*), *belantas* (*Pluchea indica* L), *mesoyi* (*Massoia aromatica* Becc), *pules* (*Alstonia scholaris*), *pulowaris* (*Alycia reinrwartii* BI) and *Sintok* (*Cinnamomumsintoc* BI).

The chief prosecutor for the Brazilian State of Amazonas, who opened an inquiry into biopiracy in 1997, estimates that about 20,000 individual plant samples are illegally removed from the country every year. Scientific laboratories generally receive the samples and information from third parties who do not inform their origin. How is the information obtained? 'The scientists congregate in small frontier towns. Then they ask the Indians what they would do if they had a headache, muscle pains or a bad stomach. The local people then take them into the jungle and show them which plant they use to cure those symptoms. The scientists pay the Indians a little money, then take the plant back to their labs. There, they discover the principle by which the plant works and sell their preliminary research to the pharmaceutical companies for development [10].

Indonesia, as a megadiversity country has an interest in developing laws protecting genetic resources. Each region in Indonesia has several unique genetic resources, which are often different from those in other regions. According to Endang Sukara [11], from the results of secondary forest research in Jambi, in an area of 1 hectare alone, it was identified 300 species of plants with a diameter of more than 2 centimeters and mastery of genetic resource data is useful for achieving profit sharing from resource use the genetic power. The mechanism includes an access permit, a material transfer agreement, a commercial utilization permit, and a research and development cooperation agreement [11].

²³ The World Trade Organization (WTO) is an international body that regulates trade issues between countries, in annexes related to genetic resources, namely Annex 1C, known as the Trade Related Aspect of Intellectual Property Rights (TRIPS Agreement) provisions of Article 27 paragraph (3) letter b determines that: —Members may also exclude from plants and animals other than micro organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui-generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

⁴ Based on the provisions of Article 27 paragraph (3) letter b, plant genetic resources cannot be protected through patents, therefore countries must form their own protection policies either through patents or the sui generis system or a combination of both.

⁶ Meanwhile, based on the United Nations Convention on Biological Diversity (CBD) ratified through Law Number 5 of 1994 concerning Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits of Arising from Their Utilization to the Convention on Biological Diversity ratified with Law Number 11 Year 2013 state in Article 8 (j) that: "Subject to national legislation, respect, protect and retain the knowledge, innovations and practices of indigenous and local communities that reflect traditionally characterized lifestyles, in accordance with the conservation and sustainable use of biodiversity and advancing its application more broadly with the agreement and involvement of such knowledge owners, innovations and practices and encouraging equitable sharing of benefits resulting from the utilization of knowledge, innovations and practices of that kind".

The provisions of Article 15 of the CBD of Indonesia as a post ratification party determine that state are obliged to establish an access mechanism including the benefit sharing in terms of the utilization of Genetic Resources of indigenous peoples. The provisions says that "Each State Party shall prepare legislative, administrative or policy efforts with the aim of sharing the results of research and development as well as the profits resulting from the commercial use of other genetic resources equally with those who provide these resources. This share must be based on mutually agreed terms".

²⁷ Furthermore, the provisions of Article 5 paragraph (1) of the Nagoya Protocol, states that the benefit resulting from the use of genetic resources and their applications and commercialization must be shared fairly and equally with the party providing the resources which is the country of origin of those resources or a party that has obtained genetic resources in accordance with the Convention on Biological Diversity.

Indonesia does not have provisions regarding the protection of the genetic resources of indigenous including the regulation regarding the distribution of benefits from their use. In order to respond to the provisions of Article 27 paragraph (3) b TRIPS, the provisions of the CBD and Nagoya Protocol, Indonesia needs to formulate various legislative, administrative and other policy measures for the protection of genetic resources. Therefore, it is important to study the development of law for the protection of the genetic resources of indigenous. Development of law is interpreted not only as the discovery and formation of law but also the harmonization of law.

International treaty are the main source of international law. An international treaty that has fulfilled the requirements for entry into force in accordance with the principle of pacta sunt servanda of countries that have ratified is obliged to implement the international treaty into its national law. One way to apply international law to countries is to transform international law into national law. This means that international law sourced from international treaties can be applied into national law if it has been transformed or embodied into national law in both its form and substance. The transformation of international law into national law has an important meaning to achieve the goals of international treaty that have been mutually agreed upon.

³⁶ In connection with the aims of international treaty that have been made and ratified by countries, related ³⁷ the rights of indigenous to (Access and Benefit Sharing, hereinafter abbreviated to ABS) for the utilization of genetic resources is the United Nation Convention on Biological Diversity 1992 (hereinafter abbreviated CBD), has three main objectives or three pillars, namely:

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1. The conservation of biological diversity;
2. The sustainable use of its components); and
3. The fair and equitable sharing of the benefits arising of the utilization of genetic resource.

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The third goal of the CBD is the fair and equitable sharing of benefits from the utilization of the genetic resources specifically followed up through the international treaty Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing Arising from Their Utilization of the Convention on Biological Diversity 2011 (hereinafter referred to as the Nagoya Protocol).

The birth of the CBD and the Nagoya Protocol is driven by the condition that genetic resources are under pressure and the world is losing plants, species and habitats at an increasing rate [12], which in turn will disrupt human life. Countries agree to conserve and regulate the distribution of benefits from the use of genetic resources for those who contribute to the preservation of biodiversity.

In most countries, indigenous are known to have local values and wisdom in protecting and conserving genetic resources. Traditional Indigenous Territories encompass up to 22 percent of the world's land surface and they coincide with areas that hold 80 percent of the planet's biodiversity. Also, the greatest diversity of indigenous groups coincides with the world's largest tropical forest wilderness areas in the Americas (including Amazon), Africa, and Asia [1].

The genetic resources of indigenous associated with traditional knowledge are developed into industrial products, cosmetics, food, medicines, and other needs. However, the economic benefits of utilization are not shared equitably. It is estimated that between 25,000 and 75,000 plant species are used for traditional medicine. Only 1% is known by scientists and accepted for commercial purposes. Part of the modern pharmaceutical industry is developed on the basis of plants discovered and used by indigenous peoples and local communities, even though the economic benefits are not equitably shared [4].

In an effort to accommodate and create a more balanced mechanism, the CBD recognizes the role of indigenous. The CBD consideration emphasized that [13]. Recognize the close dependence and traditional characteristics of indigenous people and communities as reflected in traditional lifestyles on genetic resources, and the desire to share the benefits resulting from the use of genetic resources, knowledge, innovations and traditional practices related to biodiversity conservation and sustainable use of its components fairly.

In the next section, the CBD hands the countries to regulate the policies of protecting the genetic resources of indigenous and tribal peoples and stipulates the sharing of benefits (Access and Benefit Sharing) as stipulated in Article 8 paragraph (1) letter J: "Depending on national legislation, respect, protect and maintain the knowledge, innovations and practices of indigenous and local communities that reflect traditionally characterized lifestyles, comply with the conservation and sustainable use of biodiversity and advance their wider application with agreement and involvement the owner of such knowledge of innovations and practices encourages the equitable sharing of benefits resulting from the utilization of such knowledge, innovations and practices."

These provisions are strengthened in Article 15 paragraph (7) of the CBD that: "Each party is required to prepare legislative, administrative or policy efforts, with the aim of sharing the results of research and development as well as the profits generated from the commercial utilization of other genetic resources equally with those who provide these resources. This distribution must be based on mutually agreed terms."

Meanwhile, the Nagoya Protocol established to realize the objectives or third pillar of the CBD reaffirms the profit sharing provisions in Article 5 paragraph (2): "Each Party shall take legislative, administrative or policy measures in accordance with the aim of ensuring that the benefits generated from the utilization of genetic resources owned by indigenous peoples and local communities are in accordance with domestic law regarding the established rights of the community. Customary law and local communities over genetic resources are shared fairly and equally with the community concerned based on mutual agreement."

Access and Benefit Sharing is an exchange between those who provide access to genetic resources and those who provide compensation or rewards for their use [14]. in considering of all rights to genetic resources, technology and with appropriate funding [15].

At the national level, in Indonesia, the constitutional basis for management of genetic resources the provision of Article 33 paragraph (3) of the Constitution of the Republic of Indonesia that natural resources are controlled by the State and used much as possible for the prosperity of the People. Related to the rights of indigenous peoples Article 18B paragraph (2) confirms that: "The State recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Act."

Several laws and regulations governing genetic resources related to the rights of indigenous and tribal peoples have been established which, in principle, govern the recognition of the rights of indigenous over natural resources. In another part, Law Number 13 Year 2016 regarding Patents, the provisions of Article 26 regulates genetic resources and profit sharing: (1) If the invention relates to and/or originates from genetic resources and/or traditional knowledge, it must be clearly and correctly stated the origin of such genetic resources and/or traditional knowledge in the description. (2) Information on genetic resources and /or traditional knowledge as referred to in paragraph (1) is determined by an official institution recognized by the government. (3) Distribution of results and/or access to the utilization of genetic resources and/or traditional knowledge as referred to in paragraph (1) shall be carried out in accordance with the laws and international agreements in the field of genetic resources and traditional knowledge.

In this law the role of indigenous is not regulated in relation to profit sharing but is implicitly limited to being recognized through the mention of the origin of genetic resources and traditional knowledge. In accordance with Article 26 paragraph (3) the distribution of the results of the utilization of genetic resources is carried out in accordance with laws and international treaties. However, profit sharing arrangements in accordance with laws and international treaties have not been followed up.

Indonesia has a wealth of abundant genetic resources which are mostly located in the territories of indigenous. Access and Benefit Sharing policy, after the Constitutional Court Decision No. 35 / PUU-X / 2012 on May 16, 2013 which stipulates that customary forests are not part of state forests. It is important because there is legal certainty regarding the status of customary community forest areas where genetic resources are located.

On The Asean Framework Agreement on Access to Biological and Genetic Resources state that The Member States shall recognize, respect, preserve and maintain the knowledge, innovations and practices of indigenous peoples and local communities embodying traditional lifestyles to their natural resources, including genetic resources. In the Article 11: "All resource providers, particularly indigenous peoples and local communities embodying traditional lifestyles, shall be actively included in the negotiation of benefits on the basis of a full disclosure of potential benefits and risks arising from the use of the resource. Any benefit sharing arrangements that may be entered into shall not negatively interfere with traditional knowledge systems and practices of indigenous peoples and local communities." The Member States shall ensure fair and equitable sharing of benefits arising from the utilization of biological and genetic resources at the community, national and regional levels.

After ratified CBD and add Nagoya Protocol Thailand has regulation to protect genetic resources' Indigenous People by The Plant Varieties Protection Act 1999 and The Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999. Republic of The Philippines Act 8317, known as the Indigenous Peoples' Rights Act of 1997 protect the rights of indigenous peoples over their traditional knowledge. If a country ratifies the Nagoya Protocol, it is absolutely obliged to implement it [16].

In Indonesian law, the position of Indigenous People as legal subjects having rights and obligations must be recognized and confirmed in a Regional Regulation. Several Regional Regulations have been formed to recognize the existence of Indigenous Peoples, namely:

1. Lebak Regency Regulation No. 32/2001 concerning Protection of the Indigenous Peoples' Rights of the Badui;
2. Malinau District Regulation Number 10 of 2012 concerning Recognition and Protection of the Rights of Indigenous Peoples in Malinau Regency;
3. Regional Regulation of Ciamis Regency Number 15 Year 2016 concerning Recognition and Protection of the Customary Law Community of Kuta Village;
4. Regional Regulation Number 8 of 2016 concerning Recognition and Protection of the Serampas Marga Customary Law Community;
5. A total of 538 indigenous and tribal peoples have been established through regional legal products following the issuance of Constitutional Court Decree Number 35 / PUU-X / 2012 on May 16, 2013 which stipulates that customary forests are not part of state forests. This stipulation was carried out through 7 Regent Decrees and 6 Regional Regulations at the district level; and
6. Regional Regulation of Lebak Regency Number 8 Year 2015, as many as 519 Kasepuhan consisting of core Kasepuhan, Kokolot overtime and gurunulan rendangan.

Indonesia has ratified the CBD through Law Number 5 of 1994 concerning Ratification of the Convention on Biological Diversity and established a policy of legislation related to genetic resources. International treaty to realize the third goal or pillar of the CBD and have also been ratified by Indonesia through Law Number 11 of 2013 concerning Ratification Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, so the mandate of the CBD and the Nagoya Protocol on ABS need a legal formation policy based on the claims of Indigenous Peoples who have interests to achieve the goal as owner of the genetic resources can be option in national regulation.

CONCLUSION

The Goal of International Treaty Convention on Biological Diversity (CBD) and Nagoya Protocol: Access and Benefit Sharing (ABS) is to order states to regulate the rights of indigenous people on access and benefit sharing from utilization their genetic resource.

The development of law for the protection and recognition of the genetic resources of indigenous peoples needs to be done based on rights. Through the conception of genetic resources as a source of life and it will be related to the right to life. Access and benefit sharing arrangements for the utilization of genetic resources are constructed as the development of the right to life so that the basis are relevant.

Benefit sharing can based on proportional contribution of the parties. The general measure is to make sense in the context of the system. For Asean, it will make law harmonization in the region particularly to implement Asean Frame Work.

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