



UNIVERSITAS INDONESIA

**UPAYA PERLINDUNGAN HUKUM INTERNASIONAL TERHADAP
FOLKLOR SEBAGAI WARISAN BUDAYA**

SKRIPSI

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FAKULTAS HUKUM
PROGRAM SARJANA REGULER
DEPOK
JANUARI 2011



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FOLKLOR SEBAGAI WARISAN BUDAYA**

SKRIPSI

Diajukan sebagai salah satu syarat untuk memperoleh gelar Sarjana Hukum
Pada Fakultas Hukum Universitas Indonesia

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JANUARI 2011

ii

HALAMAN PERNYATAAN ORISINALITAS

Skripsi ini adalah hasil karya saya sendiri dan semua sumber baik yang dikutip maupun dirujuk telah saya nyatakan dengan benar.

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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum, Fakultas Hukum, Universitas Indonesia.

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ABSTRAK

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Perlindungan terhadap warisan budaya pada awalnya bersifat relatif sempit yaitu perlindungan hanya terhadap benda cagar budaya. Namun seiring dengan jalannya waktu, timbul suatu kesadaran yang berpendapat bahwa folklor yang merupakan bagian dari warisan budaya juga layak untuk mendapatkan suatu perlindungan. Hal ini dikarenakan folklor merupakan salah satu kunci dalam memberikan suatu bangsa identitas yang khusus. Oleh karena itu, folklor suatu bangsa harus dilindungi dan dilestarikan oleh bangsa itu sendiri. Namun dalam perwujudannya, perlindungan dan pelestarian juga dapat diberikan oleh organisasi internasional melalui pembentukan berbagai instrumen hukum internasional. Saat ini Indonesia telah mengatur perlindungan folklor di bawah rezim Hak Cipta. Namun pada kenyataannya, perlindungan tersebut jauh dari tujuannya. Karakteristik yang berakar dalam folklor dan Hak Cipta saling bertolak belakang, sehingga diperlukan suatu perlindungan yang lebih efektif terhadap folklor. Upaya-upaya perlindungan yang diberikan melalui berbagai instrumen hukum internasional bertujuan untuk mengurangi tindakan pengklaiman folklor yang tidak sah oleh pihak asing

Kata Kunci:

Warisan budaya, perlindungan hukum internasional, folklor, *intangible cultural heritage*, hak cipta, UNESCO, WIPO.

ABSTRACT

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Title : International Legal Protection Efforts toward Folklor
as Cultural Heritage

The protection against cultural heriage was relatively narrow at first, which only includes the protection of tangible cultural heritage. But along the course of time, arising from a conciousness that believes that folklore is a part of the cultural heritage, then folklore should also be eligible to obtain protection. This is because folklore is one of the key in providing a nation its own specific identity. Therefore, the folklore of a nation must be protected and preserved by the nation itself. However, in realization, protection and preservation can also be provided by international organizations through the establishment of various international legal instruments. Indonesia has set the protection of folklore in the copyright regime. But in reality, the protection is far from its objetive. The chacaracteristics that are rooted in folklore and copyright are conflicting. As a result, there's a necessity for a more effective protection of folklor. The protection efforts that are provided trough various international legal instruments seek to reduce illicit claims of folklore done by a foreign party.

Keywords:

Cultural heritage, international legal protection, folklore, intangible cultural heritage, copyright, UNESCO, WIPO.

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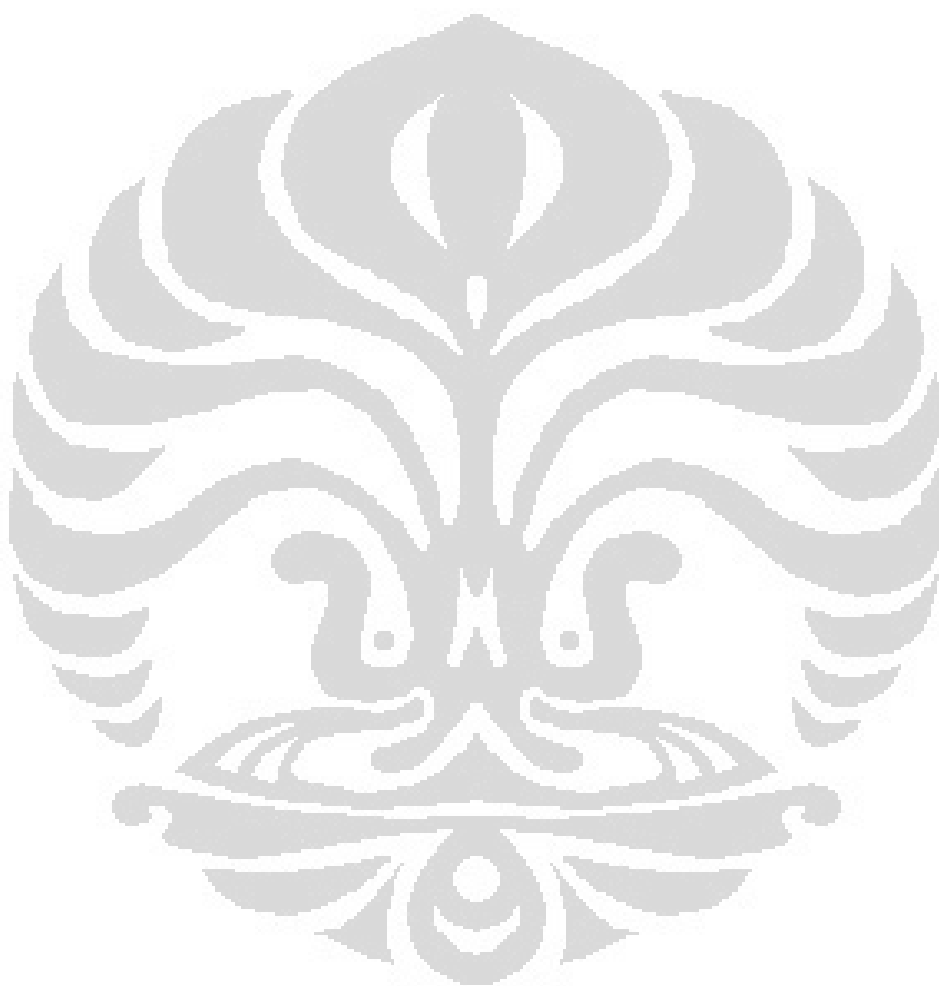
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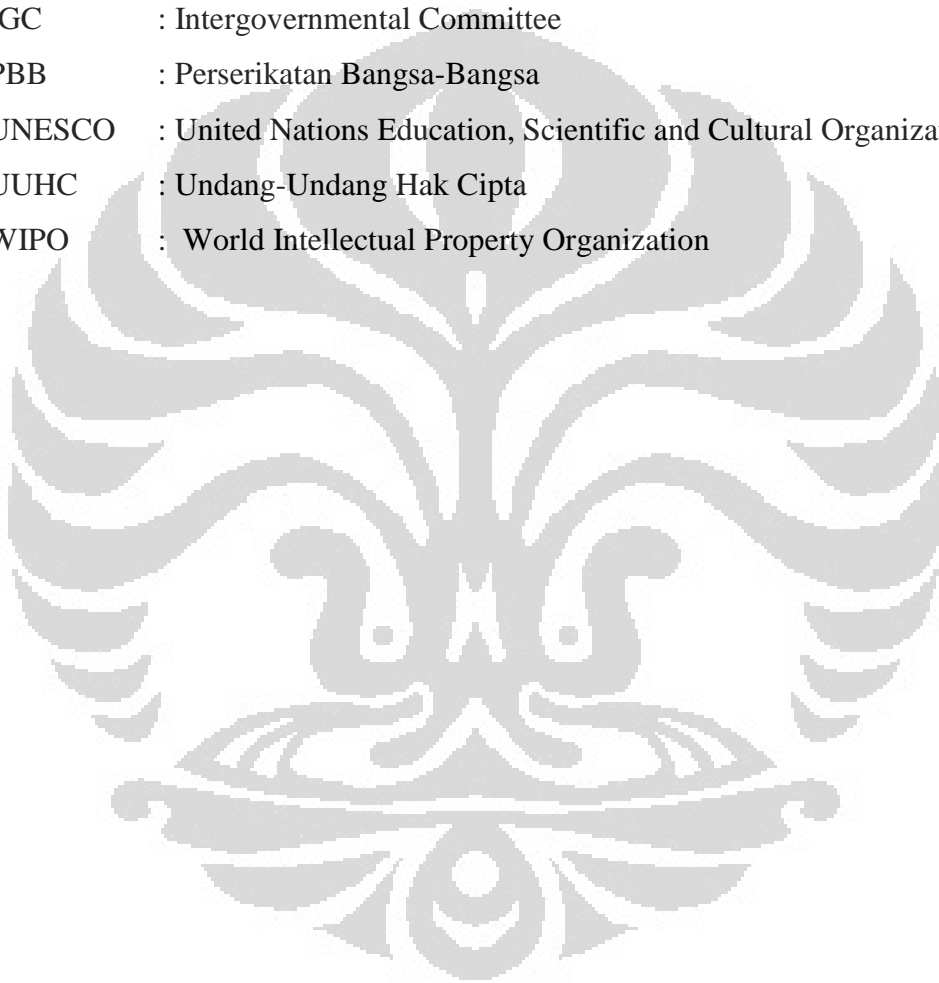
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DAFTAR SINGKATAN

HKI	: Hak Kekayaan Intelektual
ICCROM	: International Centre for the Study of the Preservation and Restoration of Cultural Property
ICOM	: International Council of Museums
ICOMOS	: International Council of Monuments and Sites
IGC	: Intergovernmental Committee
PBB	: Perserikatan Bangsa-Bangsa
UNESCO	: United Nations Education, Scientific and Cultural Organization
UUHC	: Undang-Undang Hak Cipta
WIPO	: World Intellectual Property Organization



BAB I PENDAHULUAN

1.1 Latar Belakang

Ketentuan mengenai perlindungan terhadap warisan budaya mulai diatur dalam hukum internasional melalui konvensi yang telah dibentuk oleh UNESCO (*United Nations Educational, Scientific and Cultural Organization*) pada tahun 1950an.¹ Akan tetapi, konvensi tersebut memberikan perlindungan yang relatif sempit, yaitu perlindungan hanya terhadap benda cagar budaya pada masa perang. Benda cagar budaya yang dimaksud adalah warisan budaya yang bersifat *tangible*², seperti halnya *cultural*³ dan *natural*⁴ heritage. Namun seiring dengan jalannya waktu, telah timbul suatu kesadaran yang berpendapat bahwa folklor⁵ yang merupakan

¹ Janet Blake. "On Defining the Cultural Heritage". *The International and Comparative Law Quarterly*. Vol. 49, No 1 (Jan., 2000).

² Yang dimaksud dengan *tangible* dalam penulisan ini tidak hanya tertuju pada warisan budaya yang termasuk dalam golongan benda cagar budaya, seperti benda alam dan situs, namun juga terhadap benda-benda tradisional seperti alat musik tradisional.

³ UNESCO (a), *Convention Concerning the Protection of the World Cultural and Natural Heritage*. Pasal 1 dari Konvensi ini menyatakan bahwa: "*For the purposes of this Convention, the following shall be considered as "cultural heritage":*
monuments: *architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;*
groups of buildings: *groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*
sites: *works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view*".

⁴ *Ibid.*, Pasal 2 dari Konvensi ini menyatakan bahwa: "*For the purposes of this Convention, the following shall be considered as "natural heritage":*
natural features *consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;*
geological and physiographical formations *and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;*
natural sites *or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty*".

bagian dari warisan budaya juga layak untuk mendapatkan suatu perlindungan.

Menurut WIPO (*World Intellectual Property Organization*), folklor yang dikenal dengan istilah ekspresi budaya tradisional atau ekspresi folklor adalah “...bentuk apapun, baik kasat mata (*tangible*) maupun tak kasat mata (*intangible*) atau gabungan dari keduanya, di mana pengetahuan dan budaya tradisional dapat diekspresikan, ditampilkan atau dimanifestasikan...”.⁶ Sedangkan UNESCO mengartikan folklor dengan menggunakan istilah warisan budaya tak kasat mata sebagai “segala praktik, representasi, ekspresi, pengetahuan, keterampilan – serta alat-alat, benda, artefak dan ruang-ruang budaya terkait dengannya...”.⁷ Sedangkan menurut Agus Sardjono, folklor dapat diartikan sebagai suatu ekspresi dari budaya dan identitas sosial yang pada umumnya disampaikan secara lisan.⁸ Berdasarkan pengertian tersebut, maka dapat dimengerti bahwa folklor tidak hanya melihat ekspresi itu sendiri tetapi juga segala sesuatu yang berkaitan dengannya, seperti nilai-nilai spiritual dan warisan budaya kasat mata, seperti benda atau alat musik tradisional, sehingga unsur kasat mata dan tak kasat mata yang terdapat dalam suatu folklor bersifat saling melengkapi dan tidak terpisahkan.

Keberadaan folklor itu sendiri sangat terkait dengan komunitas adat atau masyarakat tradisional suatu negara karena kehadiran folklor

⁵ Istilah folklor yang dimaksud dalam penulisan ini tidak sama dengan pengetahuan tradisional. Folklor dalam hal ini tidak hanya merupakan suatu praktik, representasi atau ekspresi tetapi juga benda-benda yang berkaitan dengan nilai dan ekspresi dari folklor itu sendiri.

⁶ WIPO, *Revised Draft of The Protection of Traditional Cultural Expressions/Expressions of Folklor*, Pasal 1 menyatakan bahwa: “*Traditional cultural expressions and/or expressions of folklor are any forms [wether] tangible and/or intangible or a combination thereof, in which traditional culture and knowledge are expressed, appear or are manifested, and are passed on from generation to generation...*”.

⁷ UNESCO (b), *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003*. Pasal 2 menyatakan: “*The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.*”

⁸ Agus Sardjono (a), *Pengetahuan Tradisional: Studi Mengenai Perlindungan Hak Kekayaan Intelektual Atas Obat-Obatan*, (Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2004), hal. 29.

memberikan identitas tersendiri bagi masyarakat tradisional sebagai pemiliknyanya. Oleh karena itu, terdapat suatu kewajiban untuk menghormati hak asasi manusia dan warisan budaya sebagai aset nasional yang memiliki nilai sosial, budaya dan ekonomi.

Pada dasarnya, folklor sebagai suatu warisan budaya sudah berasal sejak awal, bahkan sebelum terbentuknya suatu negara; dan di sepanjang sejarah telah berada di tangan masyarakat tradisional atau komunitas budaya tertentu untuk digunakan dalam jangka waktu yang tidak terbatas.⁹ Pada masa dan selama jangka waktu tersebut, perlindungan hukum terhadap folklor sebagai warisan budaya tidak pernah diperlukan bahkan dipertimbangkan.¹⁰ Hal ini dikarenakan adanya anggapan bahwa warisan budaya adalah milik bersama, sehingga setiap pihak diberikan hak untuk ikut serta dalam suatu kebudayaan. Akan tetapi, anggapan tersebut mulai berubah ketika masyarakat tradisional bertemu dengan pihak asing yang menemukan nilai ekonomi dan telah mengidentifikasi peluang bisnis baru dengan menggunakan warisan budaya mereka.¹¹ Pihak asing dalam hal ini cenderung untuk mengkomersilkan warisan budaya masyarakat tradisional tanpa memberikan atribusi apapun kepada mereka sebagai pemilik warisan budaya tersebut.

Selain itu, proses globalisasi dan transformasi sosial juga menyebabkan terjadinya gejala sikap tidak toleran yang dapat menimbulkan ancaman serius yang dapat mengakibatkan kemerosotan, kepunahan dan kehancuran warisan budaya.¹² Hal ini dapat diakibatkan oleh tidak adanya pengakuan kepada para seniman atau masyarakat tradisional terhadap penggunaan folklor

⁹ Reto M Hilty, "Rationales for the Legal Protection of Intangible Goods and Cultural Heritage". *International Review of Intellectual Property and Competition Law*. (2009).

¹⁰ *Ibid.*

¹¹ *Ibid.* Contoh: Penggunaan Angklung dalam sebuah iklan dalam rangka melakukan promosi pariwisata Malaysia.

¹² I Made Purna, "Pelestarian Warisan Budaya Tidak Benda", <http://www.purbakalabali.com/index.php?option=com_content&view=article&id=126:pelestarian-warisan-budaya-tidak-benda&catid=60:artikel&Itemid=82>, diunduh tanggal 1 September 2010.

mereka.¹³ Semakin berkurangnya pengakuan, maka akan semakin berkurang pula niat, perhatian dan antisipasi masyarakat terhadap warisan budaya sebagai kunci utama dalam memberikan suatu negara identitas yang khusus. Dengan demikian diperlukan suatu tindakan untuk melindungi folklor, terutama dalam situasi di mana ekspresi budaya dapat terancam oleh kepunahan ataupun kerusakan.¹⁴ Oleh karena itu, sejak pertengahan tahun 1980an telah terjadi peningkatan apresiasi terhadap folklor sebagai warisan budaya yang sudah lama diabaikan oleh ketentuan hukum internasional.¹⁵ Apresiasi ini kemudian menjadi pedoman bagi negara-negara yang berusaha untuk memberikan perlindungan terhadap warisan budaya yang berada dalam teritori mereka. Dengan demikian folklor diharapkan untuk dapat terus berkembang dari generasi ke generasi.

Berkaitan dengan apresiasi tersebut, sebagai negara maju, *European Community* (EC) berpendapat bahwa pemanfaatan dari folklor sebagai warisan budaya dalam dunia perdagangan oleh orang asing sama sekali tidak memiliki dampak negatif.¹⁶ Pemanfaatan secara komersil justru akan merangsang pertukaran kebudayaan dan mendorong untuk menampilkan ciri atau identitas regional.¹⁷ Sebaliknya, perlindungan terhadap pemanfaatan folklor bagi pihak asing justru akan berdampak kurang baik bagi eksistensi folklor yang bersifat dinamis.¹⁸ Pendapat ini tentunya dikarenakan negara maju lebih memandang folklor sebagai sesuatu yang memiliki komiditas

¹³ Peter Jaszi, *et.al.*, Lihat lebih lanjut “Laporan Penelitian HKI dan Kesenian Tradisional” dalam Agus Sardjono (b), *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*, Edisi Kedua, (Bandung: P.T Alumni, 2010), hal. 414.

¹⁴ UNESCO (c) Pendahuluan *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* menyatakan bahwa: “Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment”.

¹⁵ Janet Blake, *Op. Cit.* Salah satu bentuk apresiasi yang dimaksud dapat dilihat dengan diterimanya UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore*.

¹⁶ Agus Sardjono (c), “Perlindungan Folklor: Apakah Rezim Hak Cipta Memadai?”. *Jurnal Hukum Internasional*. Vol. 1, No. 1 (Oktober 2003)

¹⁷ *Ibid.*

¹⁸ *Ibid.*

ekonomi sehingga apabila dilindungi maka hal tersebut akan mempersulit negara-negara maju dalam mendapatkan sumber untuk diperjual-belikan atau untuk dikomersialisasikan.

Berbeda halnya dengan negara maju, negara berkembang yang tidak menitikberatkan kepentingan mereka terhadap nilai ekonomi justru merasa bahwa tindakan komersialisasi dapat merusak nilai-nilai yang terdapat dalam folklor. Oleh karena itu, ketegangan semakin terasa antara pihak asing dan komunitas budaya ketika perusahaan-perusahaan multinasional dari negara-negara maju mulai mengeksploitasi dan mengkomersilkan warisan budaya dari negara-negara berkembang.¹⁹ Dengan ketegangan ini, tidaklah heran jika beberapa negara berkembang telah menjadi semakin sadar terhadap nilai-nilai dari warisan budaya yang mereka miliki, sehingga mereka menginginkan adanya suatu perlindungan terhadap warisan budaya tersebut.²⁰ Ketegangan ini juga pernah di alami oleh salah satu negara berkembang di dunia, yaitu Indonesia.

Dalam suatu negara terdapat berbagai kelompok manusia yang memiliki budaya majemuk, meskipun demikian mereka tetap merupakan satu kesatuan dari negara yang bersangkutan. Hal ini dapat dilihat di Negara Republik Indonesia yang seringkali disebut sebagai negara yang multietnis. Meskipun berbeda-beda tetap satu adalah slogan dari Negara Republik Indonesia yang dihuni oleh lebih dari 350²¹ kelompok etnis, masing-masing dengan budayanya sendiri – beberapa di antaranya sangat mirip dan beberapa sangat berbeda antara satu sama lainnya. Alam yang indah penuh dengan berbagai suku, bahasa dan adat istiadat telah membaur dan menghasilkan banyak sekali karya seni yang bernilai tinggi bagi Indonesia. Karya-karya yang termasuk dalam bidang folklor telah diturunkan dari generasi ke generasi sehingga berakar menjadi suatu warisan budaya yang membentuk identitas nasional

¹⁹ Reto M Hilty, *Op. Cit.*

²⁰ *Ibid.*

²¹ Sri Hastanto, *Map of Indonesian Culture as Intangible Cultural Heritage Inventory (ICHI) of Indonesia*, <http://sem2008.blogs.wesleyan.edu/files/2008/10/srihastantopaper.pdf>, diunduh 26 Januari 2010.

Indonesia. Indonesia sebagai negara yang berdaulat memiliki hak untuk menjaga, mengembangkan, dan melestarikan kekayaan dan warisan budaya yang merupakan milik Indonesia. Namun sayangnya, perhatian pemerintah terhadap kekayaan bangsa ini cukup memperhatikan, sehingga kedaulatan negara pun dipertaruhkan.

Di Indonesia, perlindungan terhadap warisan budaya, khususnya terhadap folklor telah dicakup dalam Pasal 10 Undang-Undang No. 19 Tahun 2002 tentang Hak Cipta (UUHC). Namun, perlindungan tersebut justru menimbulkan berbagai persoalan. Persoalan yang timbul dari perlindungan tersebut adalah nilai-nilai Hak Kekayaan Intelektual (HKI) yang terdapat dalam Hak Cipta dalam beberapa hal bertentangan dengan nilai-nilai kebersamaan atau kolektivitas yang hidup ditengah masyarakat Indonesia; mengingat bahwa HKI adalah rezim yang sarat dengan nilai-nilai individual.²² Selain itu, sistem perlindungan folklor saat ini belum menggunakan peraturan khusus, tetapi masih memandang folklor sebagai ciptaan yang dapat dilindungi dengan Hak Cipta.²³ Hak Cipta hanya dapat diberikan kepada kreasi yang bersifat asli, sedangkan warisan budaya, khususnya folklor justru merupakan karya reproduksi dimana hasil kreatifitasnya merupakan hasil turun termurun sehingga unsur original dan baru tidak dapat ditemukan.

Pada bagian penjelasan Pasal 10 ayat (2) UUHC dinyatakan bahwa dalam rangka melindungi folklor dan hasil kebudayaan rakyat lain, Pemerintah dapat mencegah adanya monopoli atau komersialisasi serta tindakan yang merusak atau pemanfaatan komersialisasi tanpa seizin negara Republik Indonesia sebagai Pemegang Hak Cipta. Hal ini dimaksudkan untuk menghindari tindakan pihak asing yang dapat merusak nilai kebudayaan tersebut. Oleh karena itu, orang yang bukan warga negara Indonesia harus terlebih dahulu mendapat izin dari instansi yang terkait jika

²² Brian A. Prastyo, "Mencari Format Kebijakan Hukum yang Sesai untuk Perlindungan Folklor di Indonesia". Artikel Online LKHT-FHUI. <http://www.lkht.net/index.php?option=com_content&view=article&id=102:format-perlindungan-hukum-folklor&catid=1:hki-telematika&Itemid=37>, diunduh 28 Januari 2010.

²³ Lihat lebih lanjut, *Ibid.*

ingin memperbanyak folklor dan hasil kebudayaan rakyat yang menjadi milik bersama.²⁴ Namun, berbagai persoalan timbul mengenai bagaimana izin tersebut dapat diberikan kepada pihak asing, mengingat bahwa Peraturan Pemerintah mengenai Hak Cipta atas Folklor belum dibentuk hingga saat ini.

Akibat dari ketidakpastian yang ditimbulkan oleh Hak Cipta adalah terjadinya begitu banyak kasus “klaim” tidak sah berkenaan dengan folklor Indonesia. Pada tahun 2007, misalnya, penggunaan lagu rakyat *Rasa Sayange* untuk promosi wisata Malaysia memicu pertikaian diplomatik antara kedua negara ketika Kementerian Pariwisata Malaysia menyatakan bahwa lagu tersebut digunakan secara luas di seluruh Kepulauan Malaysia, sehingga merupakan warisan budaya Malaysia dan bukan Indonesia.²⁵ Selain lagu *Rasa Sayange*, alat musik tradisional *Angklung* pun pernah di klaim oleh Malaysia sebagai warisan budaya milik Malaysia. Tindakan pengklaiman tersebut tentunya telah menyentil amarah sebagian besar masyarakat Indonesia.

Sebagai contoh untuk memahami folklor adalah ketika membahas mengenai *Angklung* sebagai folklor Indonesia, kita tidak hanya membahas *Angklung* sebagai suatu alat musik tradisional, tetapi juga kesenian daripada *Angklung* itu sendiri. *Angklung* adalah seni musik yang berisi nilai-nilai dasar kerjasama, saling menghormati dan keharmonisan sosial, yang merupakan bagian utama dari identitas budaya masyarakat Indonesia, khususnya masyarakat Jawa Barat dan Banten. Penggunaan *angklung* itu sendiri sudah mulai sejak zaman Kerajaan Padjajaran di mana *Angklung* dimainkan oleh rakyat untuk menanam padi, menyambut kedatangan raja dan berbagai tamu penting.

Sebagaimana disebutkan sebelumnya, folklor merupakan suatu ekspresi, praktik, representasi serta alat-alat dan benda yang dapat menggambarkan identitas sosial suatu budaya atau masyarakat tradisional yang diwariskan dari generasi ke generasi secara lisan. Nilai-nilai yang dapat diekspresikan

²⁴ Indonesia (a), *Undang-Undang Hak Cipta*, UU No. 19 Tahun 2002, LN No. 85 Tahun 2002, TLN No. 4220.

²⁵ *Ibid.*

melalui seni Angklung beserta fungsinya merupakan unsur-unsur yang dapat mengkategorikan Angklung sebagai folklor Indonesia. Selain itu, karena Angklung berhasil untuk tetap hidup dalam budaya masyarakat Indonesia, maka dapat menjadi bukti bahwa Angklung telah diturunkan dari generasi ke generasi secara lisan, sebagaimana folklor dikembangkan, sehingga menjadi warisan budaya milik Indonesia.

Suatu warisan budaya merupakan warisan luhur bagi suatu bangsa. Oleh karena itu, warisan budaya suatu bangsa harus dilindungi dan dilestarikan oleh bangsa itu sendiri. Namun, dalam perwujudannya, perlindungan dan pelestarian budaya tidak hanya harus dilakukan oleh bangsa itu sendiri, sebab juga harus dihormati dan dilindungi oleh bangsa lain. Oleh karena itu, dalam hal ini dibutuhkan peranan organisasi internasional yang dapat melindungi budaya-budaya yang dimiliki setiap bangsa di dunia.

Ketentuan yang diatur oleh organisasi internasional sebagai bentuk perlindungan hukum internasional terhadap folklor sebagai warisan budaya dapat menghindari terjadinya segala bentuk penyalahgunaan terhadap warisan budaya tersebut, sebab negara peserta yang menjadi bagian dari instrumen hukum internasional yang bersangkutan memiliki kewajiban untuk tunduk pada ketentuan yang berlaku di dalamnya. Dengan cara ini, maka akan timbul suatu penghormatan dan perlindungan terhadap warisan budaya yang dimiliki oleh negara-negara peserta lainnya. Selain itu, ketentuan dalam hukum internasional dapat menjadi pedoman bagi negara-negara yang ingin membentuk suatu peraturan untuk melindungi folklor.

Organisasi internasional yang dapat membentuk instrumen hukum internasional seperti yang diinginkan di atas adalah UNESCO dan WIPO. UNESCO yang merupakan badan khusus Perserikatan Bangsa-Bangsa (PBB) mempunyai tujuan untuk mendukung perdamaian dan keamanan dengan mempromosikan kerja sama antar negara melalui pendidikan, ilmu pengetahuan, dan budaya dalam rangka meningkatkan rasa saling menghormati yang berlandaskan kepada keadilan, peraturan hukum, hak asasi manusia (HAM), dan kebebasan hakiki.²⁶ Oleh karena itu, organisasi tersebut

telah bekerja untuk lebih dari 55 tahun dibidang warisan budaya, yang memuncak dengan diadopsinya UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* 2003²⁷ (Konvensi UNESCO 2003).²⁸ Salah satu tujuan utama pembentukan Konvensi UNESCO 2003 antara lain adalah menyediakan media kerjasama dan bantuan internasional untuk mendukung perlindungan warisan budaya.²⁹ Media yang dimaksud adalah dibentuknya *Representative List of the Intangible Cultural Heritage of Humanity* dan *List of Intangible Cultural Heritage in Need of Urgent Safeguarding*, atau dalam bahasa sederhana dapat disebut Daftar Warisan Budaya.

Sedangkan WIPO merupakan badan khusus PBB yang bertanggung jawab dalam mengelola sejumlah kesepakatan internasional di bidang hak kekayaan intelektual. Berhubungan dengan perlindungan terhadap folklor, UNESCO dan WIPO telah menetapkan *Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*. Model Perjanjian tersebut pada prinsipnya mengakui masyarakat tradisional sebagai pemilik folklor yang dapat berbentuk cerita rakyat, musik, lagu dan lainnya yang diciptakan dan diwariskan dalam wilayah masyarakat dari generasi ke generasi. Dan pada akhir 2000, anggota dari WIPO

²⁶ UNESCO (d), Pasal 1 *Constitution of UNESCO* menyatakan bahwa: “*The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations*”

²⁷ Indonesia telah mengesahkan *Convention for the Safeguarding of the Intangible Cultural Heritage* dengan suatu *Declaration* atau Pernyataan terhadap Pasal 26 ayat (2) dari Konvensi tersebut. Pengesahan ini termuat dalam Peraturan Presiden Republik Indonesia No. 78 Tahun 2007 tentang Pengesahan *Convention For The Safeguarding Of The Intangible Cultural Heritage* (Konvensi untuk Perlindungan Warisan Budaya Tak Benda).

²⁸ Instrumen hukum internasional lainnya yang mengatur mengenai warisan budaya tak benda adalah: (1) UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* 1989; (2) *The Proclamation of Masterpieces of Oral and Intangible Heritage of Humanity* tahun 1997.

²⁹ Basuki Antariksa, “Kerjasama Internasional Dalam Perlindungan Warisan Budaya Tidak Benda Dan Kepentingan Indonesia”, (makalah ini disampaikan sebagai analisis terhadap *Background Paper for UNESCO Meeting Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation*. Makalah ini dibahas pada *Regional Consultation Meeting on “Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation”*, di Bangkok tanggal 20-21 Juli 2010), hal. 1.

mendirikan *Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resource, Traditional Knowledge and Folklore* untuk merancang bentuk perlindungan yang tepat untuk sumber daya genetik, pengetahuan tradisional dan folklor.

Berdasarkan penjelasan di atas dan dengan melihat potensi yang dimiliki Indonesia, serta maraknya kasus klaim tidak sah terhadap folklor, maka tidak pelak lagi kebutuhan atas model perlindungan hukum terhadap folklor di Indonesia menjadi suatu hal yang tidak dapat dihindari lagi. Sebagai negara peserta dalam Konvensi UNESCO 2003, Indonesia memiliki kewajiban untuk melindungi folklor sebagai suatu warisan budaya. Oleh karena itu, Indonesia menominasikan Angklung untuk masuk dalam salah satu daftar yang diatur dalam Konvensi UNESCO 2003. Dan hasilnya adalah pada November 2010, Angklung telah dikukuhkan oleh UNESCO sebagai Warisan Budaya dari Indonesia dalam *Representative List of the Intangible Cultural Heritage of Humanity* berdasarkan *Decision 5.COM 6.18*. Keputusan tersebut dikeluarkan karena keberadaan Angklung telah memenuhi ketentuan yang diatur dalam Konvensi UNESCO 2003, yaitu berupa tradisi dan pertunjukan seni, ekspresi lisan, serta kerajinan tradisional yang diwariskan dari generasi ke generasi untuk terus memberikan identitas kepada negara pada umumnya dan masyarakat tradisional.

Meskipun Angklung telah dikukuhkan sebagaimana dimaksud di atas dan telah mendapatkan suatu pengakuan secara internasional, namun masih tetap dibutuhkan suatu mekanisme perlindungan yang lebih efektif terhadap folklor lainnya yang dapat diterapkan di Indonesia. Hal ini untuk menghindari terjadinya segala bentuk penyalahgunaan dan perusakan nilai kebudayaan, melalui tindakan pengklaiman folklor secara tidak sah atau tindakan lainnya, baik oleh warga negara asing maupun warga negara Indonesia, dalam menjaga identitas dan perkembangan harkat serta martabat bangsa.

1.2 Pokok Permasalahan

Pokok permasalahan merupakan salah satu bagian yang penting dalam suatu penelitian. Oleh sebab itu, untuk menghasilkan suatu penelitian yang

baik maka harus terlebih dahulu dimulai dengan merumuskan pokok permasalahannya. Dengan dasar paparan latar belakang di atas, rumusan permasalahan dari penelitian penelitian ini yang diharapkan akan terjawab, adalah:

1. Bagaimanakah konsep perlindungan terhadap folklor sebagai warisan budaya?
2. Apakah rezim Hak Cipta merupakan perlindungan yang terbaik untuk folklor?
3. Bagaimanakah ketentuan perlindungan terhadap folklor sebagai warisan budaya dalam hukum internasional?
4. Bagaimanakah perlindungan terhadap folklor yang lebih efektif untuk diterapkan di Indonesia?

1.3 Tujuan Penelitian

1.3.1 Tujuan Umum

Dengan menelaah latar belakang dan pokok permasalahan di atas, dapat dikemukakan bahwa tujuan umum dari pelaksanaan penelitian ini adalah untuk memberikan pemahaman serta gambaran mengenai folklor sebagai warisan budaya beserta perlindungan yang diberikan kepadanya dalam ranah nasional dan internasional dengan membahas secara rinci instrumen-instrumen hukum yang mengatur baginya.

1.3.2. Tujuan Khusus

Tujuan khusus disusunnya penelitian ini adalah untuk memberikan jawaban mengenai:

1. Konsep perlindungan folklor sebagai warisan budaya.
2. Apakah rezim hak cipta merupakan perlindungan yang terbaik untuk folklor atau tidak.
3. Ketentuan perlindungan terhadap folklor sebagai warisan budaya dalam hukum internasional.
4. Perlindungan terhadap folklor yang lebih efektif untuk diterapkan di Indonesia.

1.4 Kerangka Konsepsional

Suatu kerangka konsepsional merupakan kerangka yang menggambarkan hubungan antara konsep-konsep khusus yang ingin atau akan diteliti.³⁰ Untuk itu konsep-konsep yang dijadikan pedoman operasional di dalam pengumpulan, pengolahan, analisa dan konstruksi data adalah:

1. Perlindungan

Perlindungan adalah upaya pencegahan dan penanggulangan yang dapat menimbulkan kerusakan, kerugian, atau kepunahan kebudayaan berupa gagasan, perilaku, dan karya budaya termasuk harkat dan martabat serta hak budaya yang diakibatkan oleh perbuatan manusia ataupun proses alam.³¹ Perlindungan dalam penelitian ini tidak hanya meliputi perlindungan secara hukum melalui peraturan perundangan, tetapi juga melalui tindakan lainnya, seperti dokumentasi, yang dapat melestarikan folklor sebagai warisan budaya demi kepentingan bersama.

2. Perlindungan Hukum Internasional

Perlindungan hukum internasional yang dimaksud dalam penelitian ini adalah perlindungan yang diatur oleh organisasi internasional melalui instrumen hukum internasional yang mereka bentuk. Dalam hal ini, perlindungan tersebut merupakan ketentuan-ketentuan yang terdapat dalam instrumen hukum internasional yang memberikan amanat dan dapat menjadi pedoman bagi negara-negara untuk melindungi folklor sebagai warisan budaya yang terdapat dalam teritorinya.

3. Warisan Budaya (*Cultural Heritage*)

Istilah warisan budaya tidak selalu berarti hal yang sama. Dalam dekade terakhir ini konsep mengenai warisan budaya – sama halnya seperti

³⁰ Sri Mamudji, et.al., *Metode Penelitian dan Penulisan Hukum*, Cet 1, (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hal. 18.

³¹ Indonesia (b), *Peraturan Bersama Menteri Dalam Negeri Dan Menteri Kebudayaan Dan Pariwisata tentang Pedoman Pelestarian Kebudayaan*, Peraturan Bersama Menteri Dalam Negeri dan Menteri Kebudayaan dan Pariwisata No. 42 Tahun 2009/No. 40 Tahun 2009, Pasal 1 ayat (3).

kebudayaan – telah mengalami berbagai perubahan.³² Ruang lingkup warisan budaya cukup luas, berawal hanya meliputi monumen, bangunan, dan situs,³³ namun sekarang juga mencakup ruang lingkup baru yaitu warisan budaya tak kasat mata.

4. Warisan Budaya Tak Kasat Mata (*Intangible Cultural Heritage*)

Warisan budaya meliputi segala praktik, representasi, ekspresi, pengetahuan, keterampilan – serta alat-alat, benda, artefak dan ruang-ruang budaya terkait dengannya – yang diakui oleh berbagai komunitas budaya, kelompok, dan dalam hal tertentu perseorangan sebagai bagian warisan budaya mereka.³⁴ Dengan demikian, warisan budaya tak kasat adalah segala sesuatu yang dianggap oleh suatu komunitas/masyarakat tradisional sebagai warisan budaya mereka, terlepas dari apakah warisan budaya tersebut kasat mata atau tidak.

5. Folklor atau Ekspresi Budaya Tradisional

Folklor adalah bagian integral budaya dan merupakan identitas sosial masyarakat adat dan lokal. Folklor yang juga dikenal sebagai suatu ekspresi budaya tradisional dapat diwujudkan melalui berbagai bentuk keterampilan dengan nilai-nilai dan keyakinan khusus, serta diwariskan dari generasi ke generasi secara lisan. Pada umumnya, folklor dapat diekspresikan melalui musik, desain, simbol, penampilan, narasi dan berbagai bentuk kerajinan, seperti alat musik tradisional. Dalam

³² Cultural heritage, <http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html>, diunduh tanggal 03 September 2010.

³³ UNESCO (a), *Op.cit.*, Pasal 1.

³⁴ UNESCO (b), Pasal 2 menyatakan: “*The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity*”.

penelitian ini bentuk folklor yang diambil sebagai contoh adalah alat musik tradisional Angklung.

1.5 Metode Penelitian

Bentuk penelitian yang digunakan adalah penelitian hukum yuridis normatif yang menggunakan metode penelitian hukum kepustakaan dengan melakukan studi dokumen untuk memperoleh data.³⁵

Tipe penelitian yang digunakan oleh penulis menurut sifatnya adalah penelitian deskriptif yang bertujuan menggambarkan secara tepat sifat suatu individu, keadaan, gejala atau kelompok tertentu, atau untuk menentukan frekuensi suatu gejala.³⁶ Dari tujuannya, penelitian ini merupakan penelitian *fact finding* dan *problem solution*.

Penelitian hukum ini menggunakan jenis data sekunder berupa bahan pustaka dengan bahan hukum primer, sekunder, dan tersier.

1. Bahan Hukum Primer

Bahan hukum primer yang digunakan berupa instrumen hukum internasional yang terkait. Konvensi yang digunakan adalah konvensi yang dikeluarkan oleh UNESCO. Regulasi dan perjanjian internasional yang digunakan meliputi berbagai peraturan dan perjanjian yang berkaitan dengan folklor sebagai warisan budaya .

2. Bahan Hukum Sekunder

Bahan hukum sekunder yang dipergunakan berupa rancangan perjanjian internasional, buku, artikel, dan jurnal-jurnal hukum, serta bahan dari *internet*. Penggunaan data sekunder ini diharapkan dapat memaksimalkan tujuan dari penelitian ini dengan memanfaatkan fungsi-fungsinya sebagai

³⁵ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: PT Raja Grafindo Persada, 1985), hal. 24.

³⁶ Sri Mamudji, *et. al*, *Metode Penelitian dan Penulisan Hukum*, (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia), hal. 4.

pendukung bahan hukum primer yang memberi informasi tentang bahan hukum primer.³⁷

3. Bahan Hukum Tersier

Bahan hukum tersier yang dipergunakan berupa kamus hukum. Penggunaan bahan hukum tersier ini diharapkan dapat memaksimalkan pemahaman akan suatu istilah hukum yang baru.

Alat pengumpulan data yang digunakan dalam penelitian ini berupa studi dokumen. Cara pengumpulan data yang kedua adalah dengan wawancara. Wawancara adalah bentuk komunikasi langsung antara peneliti dengan responden yang berlangsung dalam bentuk tanya jawab dalam hubungan tatap muka, sehingga gerak dan mimik responden merupakan pola media yang melengkapi kata-kata secara verbal.³⁸ Narasumber dalam wawancara ini dapat memberi suatu pengetahuan kepada penulis mengenai perlindungan folklor sebagai warisan budaya baik dalam konsep nasional maupun internasional.

1.6 **Sistematika Penelitian**

Pemaparan dan pembahasan penelitian ini disajikan dengan sistematika yang terdiri dari lima bab. Adapun pembagian bab dalam skripsi ini sebagai berikut:

BAB 1 Pendahuluan

Dalam bab ini dijelaskan mengenai latar belakang dipilihnya judul penelitian serta pokok permasalahan yang akan dibahas. Dalam bab ini juga diuraikan mengenai kerangka konseptual yang memberikan batasan pemahaman berbagai konsep dan istilah penting yang dipergunakan dalam penelitian ini.

³⁷ *Ibid.* Hal. 30

³⁸ W. Gulo, *Metodologi Penelitian*, (Jakarta: PT Gramedia Widiasarana Indonesia, 2002), hal. 119.

Bab ini juga mencakup penjelasan perihal metode penelitian yang digunakan serta sistematika penelitian dalam penelitian ini.

BAB 2 Konsep Perlindungan Folklor sebagai Warisan Budaya

Dalam bab ini pertama-tama akan dijelaskan mengenai konsep warisan budaya secara umum dan berdasarkan hukum internasional. Kemudian akan dijelaskan mengenai konsep folklor sebagai suatu warisan budaya dengan melihat karakteristik dan bentuk-bentuknya. Bab ini akan ditutup dengan penjelasan mengenai konsep perlindungan folklor sebagai suatu warisan budaya untuk melihat apakah rezim hak cipta merupakan perlindungan yang terbaik untuk folklor.

BAB 3 Perlindungan terhadap Folklor sebagai Warisan Budaya menurut Hukum Internasional

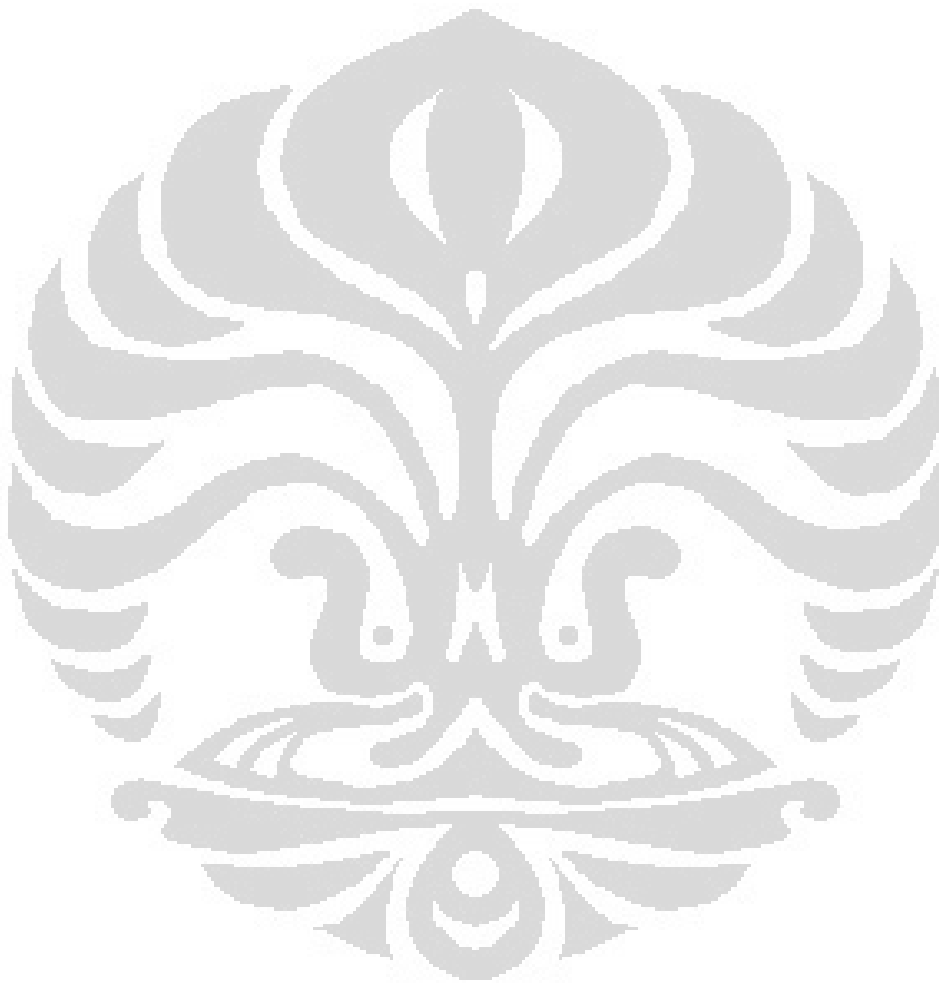
Bab ini akan diawali dengan pembahasan mengenai perkembangan perlindungan folklor dalam hukum internasional. Pembahasan tersebut akan menjelaskan mengenai instrumen hukum internasional yang telah dikembangkan oleh UNESCO dan WIPO. Lalu, akan dijelaskan mengenai perlindungan warisan budaya menurut Konvensi UNESCO 2003. Bab ini akan diakhiri dengan memberikan contoh praktek perlindungan yang dilakukan oleh berbagai negara, seperti Malaysia dan Filipina, terhadap warisan budaya.

BAB 4 Perlindungan terhadap Folklor yang Lebih Efektif di Indonesia

Bab ini akan membahas mengenai perkembangan perlindungan terhadap folklor di Indonesia. Kemudian, akan dibahas mengenai pengklaiman Angklung oleh Malaysia hingga pengukuhan Angklung dalam *Representative List of the Intangible Cultural Heritage of Humanity*. Bab ini akan diakhiri dengan penjelasan mekanisme perlindungan terhadap folklor yang lebih efektif untuk diterapkan di Indonesia, tentunya dengan melihat ketentuan-ketentuan yang diatur dalam hukum internasional.

BAB 5 Penutup

Di dalam bab terakhir ini akan disimpulkan hasil penelitian dan menjawab pokok permasalahan yang telah dirumuskan di dalam bab pertama, serta memberikan saran agar perlindungan terhadap folklor dapat dilaksanakan dengan baik.



BAB II

KONSEP PERLINDUNGAN FOLKLOR SEBAGAI WARISAN BUDAYA

2.1 Konsep Warisan Budaya

Istilah warisan budaya, secara konseptual dapat ditelusuri dan diturunkan dari konsepsi tentang kebudayaan. Menurut Koentjaraningrat, kebudayaan adalah keseluruhan sistem gagasan, tindakan dan hasil karya manusia dalam rangka kehidupan masyarakat yang dijadikan milik diri manusia dengan belajar. Batasan konsep kebudayaan ini secara implisit mengungkapkan adanya tiga wujud kebudayaan yang tercakup di dalamnya, yakni: (1) konsep tentang nilai-nilai, ide atau gagasan atau budaya nonfisik (*intangible*); (2) konsep tentang tingkah laku; (3) konsep tentang hasil karya atau budaya fisik (*tangible*).⁴¹

Akan tetapi, ketika membahas konsep warisan budaya, perlu diingat bahwa definisi dari warisan budaya tidak dapat menyertakan segala sesuatu yang berada di dalam masyarakat. Sebaliknya, pemahaman terhadap istilah tersebut dapat diperoleh dengan memahami hubungan antara warisan budaya dengan budaya itu sendiri. Ini adalah hubungan simbolis dari warisan budaya terhadap budaya dalam arti luas (budaya sebagai masyarakat) yang merupakan inti untuk memahami sifat warisan budaya.⁴²

Pertanyaan yang mendasar dalam mencari konsep yang tepat dari warisan budaya, adalah perluasan dari istilah tersebut. Apakah warisan budaya terbatas hanya kepada elemen-elemen kasat mata seperti monumen atau juga berlaku terhadap unsur-unsur tak kasat mata. Dari definisi kebudayaan yang diberikan oleh Koentjaraningrat, jelas bahwa konsep warisan budaya yang tercakup di dalamnya meliputi unsur *tangible* dan *intangible*, sebab keduanya merupakan bagian yang sangat penting dalam sebuah konsep kebudayaan.

⁴¹Munandar Sulaeman, *Ilmu Budaya Dasar Suatu Pengantar*, (Bandung: Refika Aditama, 1998), hal. 12. Bandingkan dengan Koentjaraningrat, *Persepsi Masyarakat Tentang Kebudayaan*, (Jakarta: Gramedia, 1985), hal. 100 – 101, Joko Tri Prasetya, dkk, *Ilmu Budaya Dasar*, (Jakarta: Rineka Cipta, 1998), hal. 32 – 33.

⁴² Janet Blake, *Op. Cit*

Dengan demikian warisan budaya sesungguhnya adalah bagian integral dari kebudayaan itu sendiri. Namun perlu diperhatikan bahwa dewasa ini, unsur *intangible* tidak hanya dimaksudkan sebagai nilai-nilai dan gagasan melainkan gabungan antara unsur *intangible* dan *tangible* yang saling melengkapi.

Istilah kasat mata dan tak kasat mata dalam penelitian ini adalah pengindonesiaan dari istilah *tangible cultural heritage* dan *intangible cultural heritage*.⁴³ Penulis tidak menggunakan istilah warisan budaya benda atau tak benda sebagaimana banyak digunakan oleh para ahli budaya.⁴⁴ Hal ini dikarenakan dalam dunia hukum, benda menimbulkan adanya suatu hak dan kewajiban. Dengan demikian “tak benda” berarti tidak menimbulkan hak dan kewajiban. Sedangkan suatu negara memiliki hak dan kewajiban untuk melindungi warisan budaya yang bersifat “tak benda” sebagaimana dimaksud oleh para budayawan. Oleh karena itu, penulis cenderung untuk menggunakan istilah kasat mata dan tak kasat mata.⁴⁵

2.1.1 Konsep Warisan Budaya Secara Umum

Warisan budaya menurut Davidson adalah produk atau hasil budaya fisik dari tradisi-tradisi yang berbeda dan prestasi-prestasi spiritual dalam bentuk nilai dari masa lalu yang menjadi elemen pokok dalam jati diri suatu kelompok atau bangsa.⁴⁶ Dengan demikian, warisan budaya dapat dibagi dalam dua konsep, yaitu konsep benda cagar budaya⁴⁷ (*cultural property*) dan konsep warisan budaya⁴⁸

⁴³ Penulis menyimpulkan kepada istilah tersebut sehubungan dengan istilah yang digunakan dalam laporan penelitian yang digunakan oleh Peter Jaszi, *et al.*

⁴⁴ Sebagai contoh, Edi Sedyawati, seorang pakar kebudayaan menggunakan istilah warisan budaya tak benda untuk mengartikan *intangible cultural heritage*. Lihat lebih lanjut, Edi Sedyawati, *Warisan Budaya TakBenda: Masalahnya Kini di Indonesia*, (Depok: Pusat Penelitian Kemasyarakatan dan Budaya, Lembaga Penelitian Universitas Indonesia), 2003.

⁴⁵ Kesimpulan yang penulis ambil setelah mewawancarai Prof. Agus Sardjono, S.H., M.H., pada 21 Desember 2010.

⁴⁶ Graeme Davison dan Chris McConville, *A Heritage Handbook*, (St. Leonard, NSW: Allen & Unwin, 1991), hal. 12.

(*cultural heritage*). Dewasa ini kedua konsep tersebut lebih dikenal sebagai warisan budaya kasat mata (*tangible*) dan warisan budaya tak kasat mata (*intangible*).

Penggunaan konsep benda cagar budaya yang pertama terdapat dalam UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954. Lima belas tahun kemudian konsep ini kembali dipergunakan dalam UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. Sedangkan instrumen hukum internasional yang pertama yang menggunakan konsep warisan budaya adalah *European Convention on the Protection of the Archaeological Heritage* 1969. Kemudian konsep ini juga terdapat dalam UNESCO *Convention Concerning The Protection of the World Cultural and Natural Heritage* 1972 dan *Convention for the Protection of the Architectural Heritage of Europe* 1985.

Dalam beberapa hal, organisasi internasional lebih cenderung untuk menggunakan salah satu dari dua konsep tersebut, meskipun beberapa ahli menganggap bahwa penggunaan keduanya mungkin lebih tepat karena mereka saling melengkapi.⁴⁹ Namun beberapa di antaranya mengatakan bahwa warisan budaya dan benda cagar budaya adalah dua hal yang berbeda. Warisan budaya dianggap sebagai konsep paling umum, sedangkan benda cagar budaya bersifat lebih khusus.⁵⁰ Meskipun terdapat berbagai perbedaan pendapat, perlu diperhatikan

⁴⁷ Manlio Frigo, "Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law", *IRRC.*, Vol. 86 (2004). Konsep kekayaan budaya – yang dianggap sebagai monumen, objek dan barang bergerak – hanya melihat dari bentuk/materi suatu budaya dan tindak meliputi, antara lain, unsur-unsur *intangible* yang baru-baru ini mendapatkan perlindungan hukum di tingkat internasional.

⁴⁸ Penggunaan istilah warisan budaya membuktikan bahwa konsep warisan budaya, jika dibandingkan dengan kekayaan budaya, adalah dalam lingkup yang lebih luas karena menyatakan bahwa sebuah warisan harus disimpan dan diwariskan ke generasi masa depan. *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Lyndell V. Prott dan Patrick J. O'Keefe, "Cultural Property or Cultural Heritage", *International Journal of Cultural Property* (1992), hal. 561.

bahwa warisan budaya dan benda cagar budaya saling berkaitan dalam menentukan kebudayaan suatu bangsa, sebab unsur kasat mata dan tak kasat mata yang terdapat di dalamnya saling berkaitan dan tidak terpisahkan.

2.1.1.1 Warisan Budaya Kasat Mata

Warisan budaya kasat mata adalah kebudayaan yang konkret, yang merupakan hasil karya seni masyarakat tertentu yang berbentuk atau berupa benda seperti halnya bangunan bersejarah, jembatan, monumen, gedung dan lainnya. Kepedulian masyarakat internasional terhadap warisan budaya benda muncul pasca perusakan yang diakibatkan oleh Perang Dunia II.

Dalam memberikan perlindungan yang terbaik, berbagai organisasi internasional bekerja sama dalam menghasilkan bermacam-macam perjanjian internasional yang secara khusus mengatur mengenai perlindungan terhadap warisan budaya kasat mata. Dalam hal ini, UNESCO telah bekerjasama dengan ICOM⁵¹, ICCROM⁵², dan ICOMOS⁵³.⁵⁴ Menurut ICOMOS,

⁵¹ *International Council of Museums (ICOM)* adalah sebuah organisasi internasional yang bergerak di bidang pengorganisasian museum dan pemberian perlindungan warisan budaya dunia baik warisan budaya berwujud atau warisan budaya tidak berwujud. ICOM dibentuk pada tahun 1946 dan bekerjasama dengan UNESCO dan *United Nations' Economic and Social Council (ECOSOC)*, <http://icom.museum/mission.html>, diunduh 26 September 2010.

⁵² *International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)* adalah sebuah organisasi internasional yang bergerak di bidang perlindungan warisan budaya baik benda bergerak atau benda tidak bergerak. ICCROM dibentuk di Roma, Italia pada tahun 1959, http://www.iccrom.org/eng/00about_en/00_00whats_en.shtml, diunduh 26 September 2010.

⁵³ *International Council of Monuments and Sites (ICOMOS)* adalah sebuah organisasi internasional yang bergerak di bidang konservasi dan perlindungan monumen dan situs-situs bersejarah di seluruh dunia. ICOMOS dibentuk di Warsawa, Polandia pada tahun 1965 tepatnya satu tahun setelah ditandatanganinya *International Charter on the Conservation and Restoration of Monument and Sites* atau yang dikenal dengan *Venice Charter*, http://www.icomos-indonesia.org/index.php?option=com_content&task=view&id=12&Itemid=26, diunduh 26 September 2010.

warisan budaya yang dilindungi hukum internasional meliputi kota dan area bersejarah, bangunan bersejarah, taman bersejarah dan situs arkeologi.⁵⁵ Dengan demikian, warisan budaya kasat mata sering dikenal dengan suatu tempat atau lokasi yang merupakan benda tidak bergerak.

2.1.1.2 Warisan Budaya Tak Kasat Mata

Konsep warisan budaya tak kasat mata merupakan konsep yang baru dalam hukum internasional. Sifatnya yang lebih abstrak terkadang sering membingungkan seseorang dalam memahaminya. Suatu warisan budaya tak kasat mata, dapat bersifat berwujud, dapat dilihat ataupun disentuh seperti halnya warisan budaya kasat mata. Namun, yang menjadikannya tak kasat mata adalah adanya unsur-unsur non-materil yang diperhatikan dalam membentuk atau mengekspresikan suatu warisan budaya.⁵⁶ Maka, yang menjadi inti dari warisan budaya tak kasat mata adalah nilai-nilai yang tercermin dalam warisan budaya itu sendiri.⁵⁷

Karakteristik dari warisan budaya tak kasat mata itu sendiri adalah:⁵⁸

- a. Diturunkan dari generasi ke generasi secara lisan;
- b. Diciptakan secara terus menerus oleh masyarakat dan kelompok adat atau tradisional sebagai tanggapan mereka

⁵⁴ Mario Wibowo, "Tanggung Jawab Negara Terhadap Perlindungan Warisan Budaya Dasar Laut", (Skripsi Fakultas Hukum Universitas Indonesia, Depok, 2010), hal. 29.

⁵⁵ "Legal Cultural Protection Charters and Other International Agreements in the Field of Built Heritage Conservation", http://www.international.icomos.org/icomos/e_charte.htm, diunduh 27 Maret 2010.

⁵⁶ Hasil Wawancara dengan Ibu Dewi Indrawati dan Mas Dadam M dari Direktorat Tradisi, Kementerian Kebudayaan dan Pariwisata (19 November 2010).

⁵⁷ *Ibid*

⁵⁸ UNESCO, "What is Intangible Cultural Heritage?", <http://www.unesco.org/culture/ich/index.php?pg=00003>, diunduh 04 Mei 2010

terhadap lingkungan, interaksi mereka dengan alam dan sejarah mereka;

- c. Memberikan rasa identitas dan kontinuitas terhadap masyarakat dan kelompok adat/tradisional;
- d. Warisan budaya tidak hanya merupakan tradisi yang diwarisi dari praktek di masa lalu tetapi juga kontemporer di mana kelompok budaya masa kini telah mengambil bagian di dalamnya;
- e. Suatu ekspresi warisan budaya dapat mirip dengan yang dipraktekan oleh orang lain. Baik dengan mereka yang berasal dari desa tetangga, dari sebuah kota di seberang dunia, atau telah disesuaikan dengan orang yang telah hirjah dan menetap di wilayah yang berbeda; mereka semua adalah warisan budaya yang telah diturunkan dari satu generasi ke generasi lain sehingga memberikan terikatan antara masa lalu, masa kini dan masa depan;
- f. Warisan budaya tidak hanya dinilai sebagai suatu budaya, tetapi juga tumbuh di dalam masyarakat dan diteruskan ke seluruh masyarakat dari generasi ke generasi sehingga menjadi bagian dari identitas masyarakat tersebut;
- g. Warisan budaya baru dapat dianggap sebagai suatu warisan apabila diakui oleh kelompok masyarakat atau individu yang menciptakan, mewariskan, dan memeliharanya.⁵⁹ Tanpa pengakuan mereka, maka tidak ada pihak lain yang dapat memutuskan apakah suatu ekspresi budaya dapat dikategorikan sebagai warisan budaya atau tidak.

⁵⁹ Berdasarkan ketentuan ini, maka hanya masyarakat tradisional atau individu yang menciptakan, mewariskan dan memelihara folklor yang dapat mengakui bahwa folklor yang bersangkutan merupakan bagian dari warisan budaya bangsa.

2.1.2 Konsep Warisan Budaya dalam Hukum Internasional

Pada dasarnya tidak terdapat suatu definisi yang mampu menjelaskan pengertian dari suatu warisan budaya. Hal ini dikarenakan perbedaan konsep antara warisan budaya dan benda cagar budaya membuat hukum internasional sulit untuk memberikan definisi yang tepat karena dalam setiap warisan budaya terkandung unsur hukum internasional dan hukum nasional darimana warisan budaya tersebut berasal.⁶⁰ Oleh karena itu, Lyndel Prott dan Patrick O’Keefe mencatat bahwa karena berbagai alasan masing-masing, instrumen hukum internasional seperti konvensi dan rekomendasi, mempunyai definisi tersendiri yang disusun untuk tujuan instrumen itu sendiri karena tidak dimungkinkan untuk dapat mencapai suatu definisi umum yang cocok untuk digunakan setiap negara dan organisasi internasional.⁶¹ Namun demikian, perlindungan terhadap warisan budaya harus disediakan oleh hukum internasional publik karena nilai-nilai budaya penduduk pribumi hampir tidak dapat dipertahankan berdasarkan hukum perdata.⁶² Hal ini dikarenakan ketentuan HKI yang termasuk dalam ranah perdata tidak dapat memberikan perlindungan yang menyeluruh terhadap suatu budaya yang lebih bersifat publik.

Beberapa konsep warisan budaya menurut beberapa instrumen hukum internasional antara lain adalah:

1. *Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*

“For the purposes of the present Convention, the term cultural property shall cover, irrespective of origin or ownership:

⁶⁰ Frank G. Fechner, “The Fundamental Aims of Cultural Property Law”, *International Journal of Cultural Property* (1996), hal. 377.

⁶¹ Peter K. Yu, “Cultural Relics, Intellectual Property, And Intangible Heritage”, *Temple Law Review*, Vol. 81, (2008), hal. 442.

⁶² Reto M. Hilty, *Op. Cit.*

- (a) *Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;*
- (b) *Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);*
- (c) *Centre's containing a large amount of cultural property as defined in subparagraph (a) and (b), to be known as centre containing monuments.”⁶³*

Konvensi ini hanya memberikan perhatian kepada perlindungan benda cagar budaya pada saat konflik bersenjata/perang. Sedangkan benda cagar budaya seharusnya mendapatkan perhatian dan perlindungan baik dalam konflik maupun dalam keadaan damai. Meskipun demikian, konsep warisan budaya sebagai warisan bersama umat manusia (*cultural heritage of humanity/mankind*) pertama kali muncul dalam konvensi ini. Oleh karena itu, konvensi ini diharapkan mampu menciptakan sistem universal bagi perlindungan warisan budaya karena mengutarakan kewajiban masyarakat internasional dalam melindungi warisan budaya.

2. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972

“For the purpose of this Convention, the following shall be considered as “cultural heritage”:

⁶³ UNESCO (e), *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954, Pasal 1.

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combination of features, which are of outstanding universal value from the point of view of history, art or science;
groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity, or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”.⁶⁴

Pengertian warisan budaya dalam konvensi ini menekankan pada konsep warisan bersama umat manusia (*world heritage of mankind as a whole*) dan warisan seluruh bangsa (*heritage of all the nations of the world*) di mana semua warisan budaya ini unik dan tak tergantikan.⁶⁵ Konvensi ini membagi warisan budaya hanya ke dalam dua bagian yaitu benda warisan budaya (*cultural heritage*) dan warisan kekayaan alam (*natural heritage*).

3. UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003

*“The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity...”*⁶⁶

⁶⁴ UNESCO (a), *Op. Cit.*, Pasal 1.

⁶⁵ *Ibid.*, *Preamble*.

The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

- (a) oral traditions and expressions, including language as vehicle of the intangible cultural heritage;*
- (b) performing arts;*
- (c) social practices, rituals and festive events;*
- (d) knowledge and practices concerning nature and the universe;*
- (e) traditional craftsmanship.⁶⁷*

Warisan budaya dalam konvensi ini mencakup perwujudan yang lebih luas dari suatu budaya yang bergerak atau tidak bergerak, yang selama ini telah menjadi objek perlindungan hukum internasional. Ruang lingkup warisan budaya dalam konvensi ini tidak hanya meliputi tradisi dan ekspresi lisan, seni pertunjukan, adat-istiadat masyarakat, pengetahuan mengenai alam dan semesta serta kemahiran kerajinan tradisional yang tak kasat mata, tetapi juga meliputi benda-benda yang berkaitan dengannya yang lebih bersifat kasat mata. Di samping itu, konvensi ini meletakkan gagasan bahwa perlindungan warisan budaya tidak hanya merupakan tujuan untuk menjaga kepentingan nasional masing-masing negara berdaulat, tetapi juga melindungi warisan budaya sebagai bukti adanya keragaman budaya.⁶⁸

2.2 Folklor Sebagai Warisan Budaya

Istilah folklor memiliki konsep serta makna yang beragam. Ada yang menyatakan bahwa folklor mencakup pengetahuan tradisional dan ada juga yang menyatakan bahwa folklor mencakup karya-karya budaya seperti sastra, bahasa, musik, tarian, dan lain-lain.⁶⁹ Dengan demikian, diperlukannya suatu

⁶⁶ UNESCO (b), *Op. Cit.*, Pasal 1.

⁶⁷ *Ibid.*, Pasal 2.

⁶⁸ Francesco Fancioni, “Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity”, *Michigan Journal of International Law*, Vol. 25 (2004).

tinjauan mengenai konsep folklor secara keseluruhan untuk dapat memahami bentuk perlindungan yang dapat diberikan terhadapnya.

2.2.1 Pengertian Folklor

Secara terminologi bahasa, istilah folklor masih dianggap terlalu luas artinya atau tidak spesifik oleh para ahli di dunia. Kata folklor adalah pengindonesiaan kata Inggris *folklore* yang terdiri dari kata *folk* dan *lore*. Menurut Alan Dundes, *folk* adalah sekelompok orang (masyarakat) yang memiliki ciri-ciri pengenalan fisik, sosial dan kebudayaan, sehingga dapat dibedakan dari kelompok-kelompok lainnya.⁷⁰ Sedangkan yang dimaksud dengan *lore* adalah tradisi *folk*, yaitu sebagai kebudayaannya, yang diwariskan secara turun-menurun secara lisan atau melalui suatu contoh yang disertai dengan gerak isyarat atau alat pembantu pengingat.⁷¹

Berdasarkan ketentuan di atas, maka definisi folklor secara keseluruhan adalah sebagian kebudayaan suatu masyarakat, yang tersebar dan diwariskan turun-menurun, secara tradisional dalam versi yang berbeda, baik dalam bentuk lisan maupun contoh yang disertai dengan gerak isyarat atau alat pembantu mengingat.⁷² Sedangkan dalam versi hukum Indonesia, khususnya dalam UUHC, dinyatakan bahwa folklor adalah sebuah konsep untuk menggambarkan sekumpulan ciptaan tradisional yang menunjukkan identitas sosial dan budayanya.⁷³ Dalam hal ini, folklor dimaksudkan sebagai sekumpulan ciptaan tradisional, baik yang dibuat oleh kelompok maupun perorangan dalam masyarakat, yang menunjukkan identitas sosial dan

⁶⁹ Agus Sardjono, *Op. Cit.*

⁷⁰ James Danandjaja, *Folklor Indonesia: Ilmu Gosip, Dongeng, Dan Lain-lain* cet. 6, (Jakarta: Pustaka Utama Grafiti, 2002), hal. 1.

⁷¹ *Ibid.*, hal. 2.

⁷² *Ibid.*

⁷³ Agus Sardjono (c), *Op. Cit.*

budayanya berdasarkan standar dan nilai-nilai yang diucapkan atau diikuti secara turun temurun, termasuk:

- a. cerita rakyat, puisi rakyat;
- b. lagu-lagu rakyat dan musik instrumen tradisional;
- c. tari-tarian rakyat, permainan tradisional;
- d. hasil seni antara lain berupa: lukisan, gambar, ukiran-ukiran, pahatan, mosaik, perhiasan, kerajinan tangan, pakaian, instrumen musik dan tenun tradisional.⁷⁴

Sedangkan menurut UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore 1989*, folklor adalah kreasi tradisional berbasis komunitas budaya, yang dinyatakan oleh kelompok atau individu dan diakui sebagai cerminan identitas budaya dan sosial komunitas tersebut. Dalam hal ini, nilai-nilai folklor diwariskan secara imitasi atau dengan cara lain, yang dapat berbentuk bahasa, sastra, musik, tari, permainan, adat-istiadat, kerajinan tangan, arsitektur dan seni lainnya.⁷⁵

Seiring berjalannya waktu terdapat perkembangan terhadap terminologi folklor itu sendiri. WIPO dan UNESCO dalam Model Perjanjian lebih cenderung untuk menggunakan istilah *expression of folklor* atau *traditional cultural expression*. Menurut kedua organisasi internasional ini, yang dimaksud dengan folklor adalah:

“Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others,

⁷⁴ Indonesia (a), Penjelasan Pasal 10 ayat (2).

⁷⁵ UNESCO (f), *Recommendation on the Safeguarding of Traditional Culture and Folklore 1989* menyatakan bahwa: *“For purposes of this Recommendation: Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts”*.

language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

Berdasarkan pengertian di atas, kedua organisasi internasional mengartikan folklor sebagai hasil karya suatu komunitas budaya yang diwariskan dari generasi ke generasi, sehingga karya tersebut memberikan komunitas budaya suatu identitas tersendiri.

2.2.2 Karakteristik Folklor

Ciri-ciri pengenal utama folklor pada umumnya dapat dirumuskan sebagai berikut:⁷⁶

- a. Penyebaran dan pewarisannya biasanya dilakukan secara lisan, yakni disebarakan melalui tutur kata dari mulut ke mulut (atau dengan suatu contoh yang disertai dengan gerak isyarat, dan alat pembantu pengingat) dari satu generasi ke generasi berikutnya;
- b. Folklor bersifat tradisional, yakni disebarakan dalam bentuk relatif tetap atau dalam bentuk standar. Disebarakan di antara masyarakat tertentu dalam waktu yang cukup lama (paling sedikit dua generasi);
- c. Folklor ada atau *exist* dalam versi-versi bahkan varian-varian yang berbeda. Hal ini diakibatkan oleh cara penyebarannya secara lisan, biasanya bukan melalui cetakan atau rekaman, sehingga oleh proses lupa diri manusia atau proses interpolasi⁷⁷, folklor dengan mudah dapat mengalami perubahan;
- d. Folklor bersifat anonim, yaitu nama penciptanya sudah tidak diketahui orang lagi (misalnya lagu daerah, seringkali penciptanya adalah *No Name* karena sudah tidak diketahui lagi siapa pencipta dari lagu tersebut);

⁷⁶ James Danandjaja, *Op. Cit.*, hal 2-4.

⁷⁷ Interpolasi adalah penambahan atau pengisian unsur-unsur baru pada bahan folklor. Umpamanya pada watu memperoleh cerita rakyat yang tidak lengkap, tidak jelas, atau terasa tidak sesuai dengan nilai budaya suku bangsa tertentu, maka biasanya ada kecenderungan bahwa secara tidak sadar terjadi porses tambahan atau penggantian dengan unsur-unsur cerita yang dikenal. (Lihat *Ibid.*, hal. 4).

- e. Folklor biasanya mempunyai bentuk berumus atau berpola. Cerita rakyat misalnya selalu menggunakan kata-kata klise seperti “bulan empat belas hari” untuk menggambarkan kecantikan seorang gadis;
- f. Folklor mempunyai kegunaan atau fungsi dalam kehidupan bersama suatu masyarakat. Cerita rakyat misalnya mempunyai kegunaan sebagai alat pendidik, pelipur lara, protes sosial dan proyeksi keinginan terpendam, sedangkan Angklung sering digunakan dalam proses menanam atau panen padi dan untuk menjamu para raja serta tamu;
- g. Folklor bersifat pralogis, yaitu mempunyai logika sendiri yang tidak sesuai dengan logika umum. Ciri pengenal ini terutama berlaku bagi folklor lisan dan sebagian lisan, seperti mitos;
- h. Folklor menjadi milik bersama dari masyarakat tertentu. Hal ini sudah tentu diakibatkan karena penciptanya yang pertama sudah tidak diketahui lagi sehingga setiap anggota masyarakat yang bersangkutan merasa memilikinya.

Selain ciri-ciri di atas, perlu ditambahkan bahwa suatu folklor tidak berhenti menjadi folklor apabila ia telah diterbitkan dalam bentuk cetakan atau rekaman. Suatu folklor akan tetap memiliki identitas folklornya selama diketahui bahwa ia berasal dari peredaran lisan.⁷⁸

2.2.3 Bentuk-Bentuk Folklor

Jika kebudayaan mempunyai tujuh unsur kebudayaan universal, yakni sistem mata pencaharian hidup, sistem peralatan dan perlengkapan hidup, sistem kemasyarakatan, bahasa, kesenian, sistem pengetahuan dan sistem religi, maka menurut Jan Harold Brunvand, seorang ahli folklor dari Amerika Serikat, folklor dapat digolongkan ke dalam tiga kelompok besar berdasarkan tipenya, yaitu:⁷⁹

⁷⁸ *Ibid.*, hal. 5.

⁷⁹ *Ibid.*, hal 21.

- a. Folklor lisan (*verbal folklore*);
- b. Folklor sebagian lisan (*partly verbal folklore*);
- c. Folklor bukan lisan (*non verbal folklore*).

1. Folklor Lisan⁸⁰

Folklor lisan adalah folklor yang bentuknya memang murni lisan. Bentuk-bentuk folklor yang termasuk dalam kelompok ini antara lain adalah:

- a. Bahasa rakyat, seperti logat;
- b. Ungkapan tradisional, seperti peribahasa dan pepatah;
- c. Pertanyaan tradisional, seperti teka-teki;
- d. Puisi rakyat seperti pantun, gurindam, dan syair;
- e. Cerita prosa rakyat, seperti legenda dan dongeng; serta
- f. Nyanyian rakyat.

2. Folklor Sebagian Lisan⁸¹

Folklor sebagian lisan adalah folklor yang bentuknya merupakan campuran unsur lisan dan unsur bukan lisan. Bentuk-bentuk folklor yang termasuk dalam golongan ini adalah:

- a. Kepercayaan rakyat;
- b. Permainan rakyat;
- c. Teater rakyat;
- d. Tari rakyat;
- e. Adat-istiadat;
- f. Upacara;
- g. Pesta rakyat, dll.

⁸⁰ *Ibid.*, hal 21-22.

⁸¹ *Ibid.*, hal 22.

3. Folklor Bukan Lisan⁸²

Folklor bukan lisan adalah folklor yang bentuknya bukan lisan, walaupun cara pembuatannya diajarkan secara lisan. Kelompok ini dapat dibagi menjadi dua subkelompok, yakni yang material dan yang bukan material. Bentuk folklor yang tergolong material antara lain adalah arsitektur rakyat, seperti bentuk rumah asli daerah dan bentuk lumbung padi; kerajinan tangan rakyat; alat-alat musik tradisional, seperti Angklung; pakaian dan perhiasan tubuh adat; serta obat-obatan tradisional. Sedangkan yang termasuk yang bukan material antara lain adalah gerak isyarat tradisional; bunyi isyarat untuk komunikasi rakyat, seperti kentongan sebagai tanda bahaya di Jawa; dan musik rakyat.

Sedangkan menurut Dundes, yang termasuk dalam daftar folklor adalah: mite, legenda, dongeng, lelucon, peribahasa, teka-teki, dan doa. Di samping itu, ia juga memasukkan pakaian rakyat, tarian rakyat, kesenian rakyat, musik instrumen rakyat dan nyayian rakyat dalam daftar tersebut. Lebih lanjut ia memasukkan puisi rakyat, permainan rakyat dan resep makanan sebagai folklor.⁸³ Dundes dalam hal ini tidak mengkategorikan folklor dalam suatu golongan, melainkan memasukkannya ke dalam suatu daftar yang panjang.

Jika bertumpu pada pendapat Dorson, maka folklor meliputi *oral literature, social folk custom, material culture, dan folk arts*.⁸⁴ Sedangkan Kusnaka Adimiharja membagi folklor dalam tiga golongan, yaitu tradisi lisan, tradisi lisan dan perilaku, dan artefak serta folklor modern yang mencakup lisan, non-lisan, dan sebagian lisan.⁸⁵

⁸² *Ibid.*

⁸³ Suwardi Edraswara, *Metodologi Penelitian Folklor: Konsep, Teori dan Aplikasi*, (Yogyakarta: Media Pressindo, 2009), hal 30-31.

⁸⁴ *Ibid.*, hal 31.

Berdasarkan pendapat dari para ahli folklor, maka terlihat bahwa mereka menggolongkan folklor secara berbeda-beda, namun di antaranya memiliki berbagai persamaan. Pada dasarnya mereka memasukkan apa yang dikenal sebagai suatu ekspresi budaya tradisional ke dalam folklor.

Oleh karena itu, berdasarkan tinjauan umum terhadap konsep folklor di atas, maka dapat dilihat bahwa folklor memenuhi pengertian dari warisan budaya yang termuat dalam Konvensi UNESCO 2003. Sama halnya dengan warisan budaya, folklor pun di wariskan dari generasi ke generasi. Selain itu, dari berbagai bentuk folklor yang telah dijelaskan sebelumnya, folklor merupakan segala praktik, representasi, ekspresi yang diakui oleh berbagai masyarakat tradisional sebagai warisan budaya mereka yang merupakan bagian dari warisan budaya yang dimaksud dalam Pasal 1 dan 2 Konvensi UNESCO 2003. Tanpa adanya pengakuan dari masyarakat tradisional maka apapun itu tidak dapat dianggap sebagai suatu folklor.

Tidak hanya itu, folklor juga merupakan alat-alat, benda dan artefak yang berkaitan dengan praktik dan ekspresi tersebut. Dengan demikian, folklor adalah segala sesuatu yang dianggap oleh suatu masyarakat tradisional sebagai warisan budaya mereka, tanpa melihat apakah folklor tersebut memiliki wujud tersendiri atau tidak. Akan tetapi, perlu dibedakan antara folklor dan warisan budaya kasat mata yang dimaksud di atas. Sebab meskipun folklor, misalnya Angklung, memiliki wujud, ia berbeda dengan monumen atau situs bersejarah yang belum tentu memiliki nilai-nilai spiritual di dalamnya.

⁸⁵ Kusnaka Adimiharja, *Folklor Sebagai Ekspresi Budaya dan Penggolongannya*, (Bandung: INRIK UNPAD, 2004), hal. 12.

Tabel 2.1. Folklor Sebagai Warisan Budaya

Folklor	Warisan Budaya
- Diturunkan dari generasi ke generasi pada umumnya secara lisan	- Diturunkan dari generasi ke generasi secara lisan
- Folklor bersifat tradisional	- Bersifat tradisional, kontemporer dan hidup pada saat yang bersamaan
- Folklor mempunyai kegunaan atau fungsi dalam kehidupan bersama suatu masyarakat	- Warisan budaya merupakan tanggapan masyarakat terhadap lingkungan, interaksi mereka dengan alam dan sejarah mereka.
- Folklor ada atau <i>exist</i> dalam versi-versi bahkan varian-varian yang berbeda karena telah diwariskan secara lisan	- Warisan budaya tumbuh di dalam masyarakat dan diteruskan ke seluruh masyarakat dari generasi ke generasi sehingga menjadi bagian dari identitas masyarakat tersebut

2.2.3.1 Angklung Sebagai Folklor

Dalam penelitian ini, penulis telah memilih Angklung sebagai salah satu warisan budaya yang dapat memberikan pemahaman lebih lanjut mengenai folklor. Angklung sebagai salah satu kekayaan budaya bangsa merupakan suatu kekayaan yang telah lama dimiliki oleh bangsa Indonesia. Keberadaan Angklung di Indonesia telah berkembang sejak abad ke-18. Angklung itu sendiri terbuat dari batang-batang bambu yang dikemas secara sederhana. Asal usul terciptanya alat musik tradisional bambu, seperti Angklung, adalah berdasarkan pandangan hidup masyarakat Sunda yang agraris dengan sumber kehidupan dari padi sebagai makanan pokoknya. Hal ini melahirkan mitos kepercayaan terhadap Nyai Sri Pohaci sebagai lambang Dewi Padi pemberi kehidupan. Perenungan masyarakat Sunda dahulu dalam mengolah pertanian terutama di sawah telah melahirkan penciptaan syair dan lagu dengan

menggunakan Angklung sebagai penghormatan dan persembahan terhadap Nyai Sri Pohaci, serta upaya nyinglar agar cocok tanam mereka tidak mengundang malapetaka, baik gangguan hama maupun bencana alam lainnya.⁸⁶

Dalam perkembangannya, angklung berkembang dan menyebar ke seantero Jawa, lalu ke Kalimantan, Sumatera dan Sulawesi Utara. Pada tahun 1968 melalui Surat Keputusan Bersama Tiga Menteri No. 082/1968, Angklung telah ditetapkan sebagai Alat Musik Pendidikan.

Angklung tradisional menggunakan skala pentatonik, sedangkan Angklung modern menggunakan skala dialtonik. Dalam hal ini, Angklung yang sudah berasal sejak ratusan tahun yang lalu mampu untuk tetap hadir dalam kehidupan kini akibat diturunkannya pengetahuan mengenai Angklung dari generasi ke generasi, sebagaimana folklor seharusnya diteruskan.

Permainan musik Angklung harus dilakukan oleh sekelompok orang. Oleh karena itu, ketika memainkan Angklung, para pemain harus berkolaborasi bersama untuk memainkan melodi. Hal ini mengembangkan nilai kerja sama, saling menghormati, disiplin antara para pemain baik dari komunitas yang sama atau berbeda.

Banyak nilai-nilai filosofis yang terkait dengan bentuk Angklung itu sendiri. Bambu kecil dan besar (tabung) yang membentuk Angklung melambangkan bahwa mereka yang kuat dan kaya harus selalu melindungi mereka yang lemah dan miskin. Setiap Angklung setidaknya memiliki dua tabung, hal ini untuk menunjukkan bahwa manusia merupakan makhluk sosial yang tidak bisa mengisolasi dirinya sendiri. Tabung Angklung yang tersusun dari kecil sampai besar

⁸⁶ Angklung, <<http://lowongankerjamu.com/dir/penjelasan+angklung>>, diunduh pada 16 November 2010.

melambangkan bahwa setiap hari manusia harus berusaha untuk menjadi lebih baik dari kemarin.⁸⁷ Dengan adanya nilai-nilai tersebut, maka kita tidak dapat melihat Angklung hanya sebagai suatu alat musik tradisional, melainkan Angklung sebagai suatu ekspresi kesenian tradisional yang memiliki nilai-nilai khusus yang terdapat di dalamnya. Oleh karena itu, maka dapat disimpulkan bahwa Angklung sebagai folklor merupakan suatu warisan budaya yang mengekspresikan identitas budaya dan sosial.

Konvensi UNESCO 2003 menyatakan bahwa folklor yang merupakan suatu warisan budaya [tak kasat mata] adalah segala praktik-representasi, ekspresi, serta alat-alat atau benda yang terkait dengannya. Berhubungan dengan hal tersebut, maka Angklung dapat disimpulkan sebagai warisan budaya [tak kasat mata] karena:

- a. Angklung sebagai tradisi lisan dan ekspresi dilakukan dan diwariskan oleh sistem lisan/informal;
- b. Angklung sebagai seni pertunjukan dapat dilakukan dalam festival-festival kebudayaan;
- c. Angklung sebagai adat-istiadat, ritual dan perayaan sering digunakan sebagai bagian dari ritual tradisional seperti tanam padi, panen, penyambutan raja dan sebagainya;
- d. Angklung sebagai pengetahuan dan praktek berdasarkan alam menunjukkan begitu banyak nilai-nilai spiritual yang melekat pada bentuk Angklung itu sendiri;
- e. Angklung sebagai kerajinan tradisional memerlukan keterampilan yang cukup baik untuk membentuk dan memainkan Angklung.

Dengan demikian, makna dan nilai-nilai yang begitu besar yang melekat pada Angklung tentunya menjadikan Angklung

⁸⁷ UNESCO, *Nomination File No. 00393 for Inscription of Angklung on the Representative List of the Intangible Cultural Heritage in 2010.*

sebagai bagian dari folklor bangsa Indonesia yang harus dilindungi dan dilestarikan. Oleh karena itu, Indonesia sebagai negara yang berdaulat memiliki kewajiban untuk memberikan perlindungan terhadap warisan budaya.

2.3 Konsep Perlindungan Terhadap Folklor Sebagai Warisan Budaya

Beberapa para ahli berpendapat bahwa tidak ada solusi yang bisa memenuhi seluruh kebutuhan masyarakat tradisional dalam melindungi folklor atau ekspresi budaya tradisional (EBT) secara komprehensif.⁸⁸ Namun sebaliknya, ada yang berpendapat bahwa perlindungan yang efektif dapat diberikan secara berbeda-beda dalam setiap bentuk dan tingkatan.⁸⁹ Karena itu seringkali pengaturan terhadap perlindungan warisan budaya dalam beberapa konvensi internasional juga menyerahkan konsep perlindungan tersebut sepenuhnya kepada kebijakan masing-masing negara.⁹⁰ Banyak negara-negara yang cenderung untuk menggunakan Hak Cipta dalam melindungi folklor dalam teritori mereka. Akan tetapi, terkadang perlindungan melalui Hak Cipta justru menuai begitu banyak persoalan. Dengan demikian, timbullah suatu keraguan mengenai apakah rezim Hak Cipta memberikan perlindungan yang terbaik untuk folklor.

2.3.1 Bentuk Perlindungan Terhadap Folklor Sebagai Warisan Budaya

Pada dasarnya, terdapat dua perlindungan yang dapat diberikan kepada warisan budaya, yaitu:

- a. Perlindungan yang akan melindungi warisan budaya dari kemusnahan dan kehilangan yang dapat merugikan manusia; dan/atau

⁸⁸ Molly Torsen, "Anonymous, Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions". *The American Journal of Comparative Law.*, Vol. 54. No. 1, (2006).

⁸⁹ *Ibid.*

⁹⁰ Anthi Helleni Poulos, "The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis", *International Journal of Legal Information* (Spring 2000), hal. 3.

- b. Perlindungan terhadap penggunaan yang tidak sah dan eksploitasi warisan budaya, khususnya oleh industri negara maju.⁹¹

Perlindungan pertama dapat dilihat dari Rekomendasi UNESCO 1989 tentang Perlindungan Budaya Tradisional dan Folklor. Karena Rekomendasi tersebut memberikan sedikit kemajuan dalam perlindungan yang efektif, maka pada tahun 1994 UNESCO mengadopsi *Guidelines on Living Human Treasures*, yang mengikuti contoh negara Jepang dan Korea, yang ditujukan untuk mengembangkan insentif dan peraturan perundangan yang mendukung kelangsungan hidup keterampilan kerajinan tua.⁹² Pada tahun 1997, UNESCO meluncurkan inisiatif lain yang relevan dengan warisan budaya melalui program berjudul, Proklamasi Karya Agung Warisan Budaya Lisan dan Warisan Budaya Tak Kasat Mata. Program ini secara khusus ditujukan untuk memberikan pengakuan dan menyusun daftar dari bentuk-bentuk warisan budaya yang luar biasa dan tradisional.⁹³ Dalam hal ini, UNESCO lebih cenderung untuk memberikan perlindungan yang dapat terus melestarikan warisan budaya yang hidup.

2.3.1.1 Perlindungan Terhadap Folklor Oleh Rezim Hak Cipta

Perlindungan terhadap penggunaan yang tidak sah dan eksploitasi warisan budaya dapat dilihat melalui sistem hukum di Indonesia yaitu perlindungan terhadap folklor di bawah perlindungan Hak Cipta. Di Indonesia, UUHC tahun 1982 memulai untuk memasukkan peraturan-peraturan terkait dengan kepemilikan negara atas kekayaan budaya termasuk di antaranya folklor. Peraturan ini kemudian diteruskan ke dalam Pasal 10

⁹¹ Reto M. Hilty, *Op. Cit.*

⁹² Francesco Fancioni, *Op. Cit.*

⁹³ *Ibid.*

UUHC tahun 2002. Namun dengan lahirnya pasal tersebut, berbagai macam persoalan kemudian timbul berkaitan dengan ketentuan yang diatur di dalamnya.

Dari aspek perlindungan jangka waktu, dalam beberapa ketentuan rezim Hak Cipta belum terlihat adanya satu kejelasan mengenai jangka waktu perlindungan folklor. Pasal 7 ayat (3) Konvensi Berne menyatakan sebagai berikut “*In the case of anonymous or pseudonymous works, the term of protection granted by this convention shall expire fifty years after the work has been lawfully made available to the public...*”. Rumusan pasal ini menunjukkan bahwa bentuk perlindungan hukum terhadap ciptaan yang tidak diketahui namanya atau yang namanya disamarkan, seperti folklor, memiliki jangka waktu perlindungan hukum selama 50 (lima puluh) tahun dihitung sejak ciptaan tersebut secara hukum dipublikasikan kepada masyarakat atau diketahui umum. Sedangkan Indonesia yang mengacu pada UUHC, menyatakan jangka waktu perlindungan terhadap folklor adalah tanpa batas waktu.

Kemudian, apabila dilihat dalam persyaratan keaslian (*originality*), maka dalam hal ini persyaratan keaslian merupakan akibat langsung dari persyaratan asal ciptaan (*authorship*).⁹⁴ Ketika kita memahami folklor dalam kerangka rezim Hak Cipta, kepemilikan atas folklor yang ada selalu berlangsung secara turun temurun dari satu generasi ke generasi berikutnya. Oleh karena itu, generasi penerus tidak bisa dikatakan sebagai pencipta aslinya, demikian pula terhadap ciptaannya. Ciptaan folklor yang ada pada masa generasi penerus tidak memiliki unsur keaslian dalam sebuah ciptaan,

⁹⁴ Arif Lutviansori, *Op. Cit.*, hal. 85.

namun lebih kepada upaya reproduksi terhadap folklor yang ada dalam rangka pelestarian warisan budaya.⁹⁵

Tabel 2.2 Perbedaan antara Folklor dengan HKI⁹⁶

Folklor	HKI
Folklor merupakan milik bersama dari masyarakatnya sebab mengandung nilai-nilai spiritual yang bersifat religius yang tidak mungkin dapat dilindungi oleh rezim HKI.	Rezim ini melindungi kepentingan ekonomi dari para pencipta maupun penemu, sehingga perlindungan diberikan kepada pencipta dan penemunya.
Merupakan hasil kreatifitas yang turun-temurun sehingga unsur original dan baru tidak dapat ditemukan/dilindungi.	Perlindungan HKI diberikan kepada kreasi-kreasi yang bersifat original dan baru.

Berdasarkan analisis di atas, maka harmonisasi antara konsep Hak Cipta dengan folklor dalam implementasinya mengalami beberapa kendala yang bermula dari karakteristik masing-masing, baik dari Hak Cipta maupun folklor itu sendiri.⁹⁷ Oleh karena itu, apabila dikontekskan dengan konsep umum Hak Cipta, maka folklor tidak dapat dilindungi dengan rezim Hak Cipta, meskipun folklor masuk ke dalam kategori seni, sastra dan ilmu pengetahuan.⁹⁸

Hal tersebut dikarenakan keberadaan folklor yang tidak memenuhi syarat ciptaan yang dilindungi oleh Hak Cipta. Di samping itu, masalah komunalistik juga menjadi satu sebab

⁹⁵ *Ibid.*, hal 107

⁹⁶ Lihat lebih lanjut, Agus Sardjono (a), *Op. Cit.*

⁹⁷ *Ibid.*, 129.

⁹⁸ *Ibid.*

folklor tidak dapat dilindungi dengan rezim Hak Cipta yang lebih mengedepankan aspek individualistik.⁹⁹ Selain itu, banyak pranata yang masih belum lengkap mengenai ketentuan yang diatur dalam UUHC. Misalnya, belum terdapat penjelasan mengenai siapa yang menjadi representasi dari Negara sebagai penguasa Hak Cipta atas folklor. Kemudian tidak adanya pengaturan lebih lanjut mengenai posisi masyarakat tradisional mengenai pendistribusian keuntungan ekonomi. Dan karena Pasal 10 UUHC belum diterapkan melalui peraturan pelaksanaan atau peraturan tambahan, alhasil peraturan ini tidak memiliki pengaruh yang cukup besar terhadap folklor Indonesia.¹⁰⁰

Dengan melihat bahwa rezim Hak Cipta bukanlah perlindungan yang terbaik untuk folklor, maka dibutuhkan suatu mekanisme yang lebih efektif agar perlindungan terhadap folklor dapat berjalan secara lebih optimal. Setelah Indonesia meratifikasi Konvensi UNESCO 2003 dengan Peraturan Presiden Republik Indonesia Nomor 78 Tahun 2007, maka Indonesia, sebagai Negara Peserta, memiliki kewajiban untuk mengikuti ketentuan yang diatur dalam konvensi tersebut, seperti halnya pembuatan peraturan khusus mengenai folklor, melakukan inventarisasi atau dokumentasi folklor, membentuk suatu lembaga yang memiliki kompetensi untuk melindungi warisan budaya, dan lainnya berdasarkan Pasal 11 – Pasal 15 Konvensi UNESCO 2003.

Namun demikian, perlu dipahami bahwa perlindungan yang terlalu sederhana berada dalam risiko gagal sebab tidak dapat memenuhi kebutuhan setiap pihak, terutama para seniman yang pada umumnya merupakan bagian dari masyarakat tradisional

⁹⁹ *Ibid.*, hal 129-130.

¹⁰⁰ Peter Jaszi, *Op. Cit.*, hal. 393.

yang memiliki folklor. Sedangkan perlindungan hukum yang luas juga harus dihindari. Sebab *overprotection* tidak hanya akan bertentangan dengan kepentingan umum, tetapi juga dapat mematikan warisan budaya yang bersangkutan.

2.3.2 Tujuan Perlindungan Terhadap Folklor Sebagai Warisan Budaya

Piagam PBB memang tidak menentukan klausul khusus yang menghubungkan budaya dengan hak asasi manusia. Namun, perkembangan hukum internasional sejak itu memberikan bukti bahwa perlindungan hak asasi manusia, sekarang bagian dari hukum internasional positif, meluas ke budaya dan warisan budaya bangsa.¹⁰¹ Hal tersebut dapat dilihat dari:

1. Pasal 22 DUHAM yang menyatakan bahwa setiap orang ". . . berhak untuk realisasi. . . terhadap. . . hak budayanya yang sangat diperlukan untuk pengembangan martabat". Sedangkan Pasal 27 menyatakan bahwa, ". . . hak untuk berpartisipasi secara bebas dalam kehidupan kebudayaan masyarakat. . . dan. . . untuk menikmati kesenian dan berbagai kemajuan dalam ilmu pengetahuan dan manfaatnya". Ketentuan ini menciptakan kewajiban untuk tidak mengganggu kebebasan budaya, dan untuk mengambil langkah-langkah untuk melindungi masyarakat atau kelompok-kelompok budaya dalam menikmati kebebasan budaya tersebut; dan
2. Munculnya prinsip baru yang menyatakan bahwa warisan budaya adalah *the cultural heritage of mankind*.¹⁰²

Berdasarkan perkembangan di atas, maka dapat disimpulkan bahwa perlindungan terhadap folklor sebagai warisan budaya merupakan bagian dari hak asasi manusia. Dengan demikian, negara diwajibkan

¹⁰¹ Francesco Farancioni, *Op. Cit.*

¹⁰² *Ibid.*

untuk melindunginya karena warisan tersebut memberikan masyarakat internasional dalam setiap negara rasa identitas dan *self-belonging*. Hal ini pun sesuai dengan ketentuan yang tercantum dalam Resolusi PBB No. 57/158 tahun 2002 mengenai *United Nations Year for Cultural Heritage* yang menyatakan bahwa pentingnya melindungi warisan budaya adalah sebagai landasan untuk meningkatkan rasa saling pengertian antar budaya.¹⁰³ Oleh karena itu, dengan memahami pentingnya keberadaan warisan budaya dari masyarakat tradisional yang berbeda dapat mendorong masyarakat di suatu negara untuk menghormati cara hidup masyarakat di negara lain sehingga akan timbul *mutual respect* dan suatu upaya untuk menghindari terjadinya tindakan pengklaiman tidak sah terhadap folklor oleh pihak asing yang bukan pemilik.

Perlindungan terhadap folklor tentunya akan berhubungan dengan kedaulatan suatu negara. Negara yang berdaulat memiliki kekuasaan tertinggi terhadap wilayahnya. Dengan demikian, suatu negara memiliki kewajiban dan tanggung jawab untuk melindungi rakyatnya, termasuk folklor yang merupakan bagian dari identitas mereka. Hal ini adalah sesuai dengan ketentuan dalam Resolusi PBB No. 57/249 tentang *Culture and Development* yang menyatakan bahwa negara memiliki kewajiban untuk merumuskan kebijakan yang berkaitan dengan warisan budaya.¹⁰⁴ Dalam hal ini, Indonesia, sebagai negara yang berdaulat, harus tetap bersandar pada tekadnya yang tertuang dalam Piagam Pelestarian Pusaka Indonesia 2003, dalam hal melestarikan pusaka Indonesia secara menyeluruh.

¹⁰³ Salah satu ketentuan dalam Resolusi PBB No. 57/158 tahun 2002 mengenai United Nations Year for Cultural Heritage menyatakan bahwa: “*Mindful of the importance of protecting the world cultural tangible and intangible heritage as a common ground for the promotion of mutual understanding and enrichment among cultures and civilizations*”

¹⁰⁴ Salah satu ketentuan dalam Resolusi PBB No. 57/249 tentang Culture and Development menyatakan bahwa: “*Invites all Member States, intergovernmental bodies, organizations of the United Nations system and relevant non-governmental organizations: to formulate policies pertaining to tangible and intangible cultural heritage, taking into account, in particular, resolution 56/8, by which the Assembly proclaimed 2002 as the United Nations Year for Cultural Heritage*”.

BAB III

PERLINDUNGAN TERHADAP FOLKLOR SEBAGAI WARISAN BUDAYA MENURUT HUKUM INTERNASIONAL

3.1 Perkembangan Perlindungan Folklor dalam Hukum Internasional

Perlindungan terhadap folklor sebagai suatu warisan budaya telah menjadi isu yang penting dengan mengingat bahwa warisan budaya suatu negara tidak hanya tinggi akan nilai sosial dan budaya, tetapi juga ekonomi yang dapat meningkatkan taraf kehidupan masyarakat tradisional. Masalah perlindungan ini tidak hanya merupakan masalah nasional, melainkan juga masalah internasional. Oleh karena itu harus disikapi dengan berbagai tindakan perlindungan nyata yang dapat dilakukan secara global.

Oleh karena itu, pembentukan berbagai macam instrumen hukum internasional yang mengatur mengenai perlindungan terhadap folklor adalah sebagai pedoman atau sandaran yang dapat diadopsi oleh beberapa negara untuk membentuk suatu peraturan yang baik terhadap perlindungan folklor di negaranya. Ketentuan yang terdapat di dalamnya memberikan suatu amanat agar suatu negara membentuk suatu perlindungan yang baik dan lebih efektif terhadap folklor yang berada di dalam teritorinya. Adanya kehendak bersama untuk melindungi warisan budaya telah melahirkan peraturan yang dijelaskan di bawah ini.

3.1.1 UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore 1989*

Apresiasi terhadap folklor sebagai warisan budaya yang sudah lama diabaikan oleh ketentuan hukum internasional mulai meningkat pada tahun 1980an. Hal ini berhubungan dengan dibentuk dan diterimanya *Recommendation on the Safeguarding of Traditional Culture and Folklore* pada tahun 1989. Rekomendasi ini telah menginspirasi sejumlah Negara Anggota¹⁰⁵ untuk mengambil langkah apapun baik legislatif maupun langkah lainnya yang

¹⁰⁵ Yang dimaksud dengan Negara Anggota adalah Negara Anggota UNESCO.

diperlukan sesuai dengan praktik konstitusional setiap Negara Anggota dalam menerapkan prinsip-prinsip dan langkah-langkah yang telah didefinisikan dalam Rekomendasi ini.

Dalam Rekomendasi ini yang dimaksud dengan folklor adalah kreasi tradisional berbasis komunitas budaya, yang dinyatakan oleh kelompok atau individu dan diakui sebagai cerminan identitas budaya dan sosial komunitas tersebut. Dalam hal ini, nilai-nilai folklor diwariskan secara imitasi atau dengan cara lain, yang dapat berbentuk bahasa, sastra, musik, tari, permainan, adat-istiadat, kerajinan tangan, arsitektur dan seni lainnya.¹⁰⁶

Perlindungan yang dimaksud dalam rekomendasi ini terdiri dari beberapa bentuk. Perlindungan yang pertama berhubungan dengan indentifikasi folklor sebagai bentuk ekspresi budaya yang harus dijaga untuk dan oleh kelompok masyarakat yang berhubungan dengan folklor. Untuk tujuan ini, Negara-negara Anggota harus mendorong adanya suatu penelitian yang sesuai pada tingkat nasional, regional dan internasional dengan tujuan untuk:¹⁰⁷

- a. mengembangkan inventarisasi nasional;

¹⁰⁶ UNESCO (f), *Op. Cit.*, *For purposes of this Recommendation: Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.*

¹⁰⁷ *Ibid.*, *Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses. To this end, Member States should encourage appropriate survey research on national, regional and international levels with the aim to:*

- (a) develop a national inventory of institutions concerned with folklore with a view to its inclusion in regional and global registers of folklore, institutions;
- (b) create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist by way of handbooks, collecting guides, model catalogues, etc., in view of the need to co-ordinate the classification systems used by different institutions;
- (c) stimulate the creation of a standard typology of folklore by way of:
 - (i) a general outline of folklore for global use;
 - (ii) a comprehensive register of folklore; and
 - (iii) regional classification of folklore, especially field-work pilot projects.

- b. menciptakan sistem identifikasi dan dokumentasi atau mengembangkan sistem yang sudah ada dengan cara model katalog atau buku panduan; dan
- c. merangsang pembentukan tipologi standar folklor.

Perlindungan yang kedua berhubungan dengan konservasi folklor dengan melaksanakan dokumentasi terhadap tradisi folklor dan objeknya untuk memberikan peneliti suatu akses untuk memahami kondisi dan perubahan pada folklor. Negara-negara Anggota dalam hal ini diharuskan, antara lain, untuk:

- a. membentuk arsip nasional dimana folklor yang dikumpulkan dapat tersimpan dan tersedia dengan baik;
- b. membentuk museum khusus folklor di mana budaya tradisional dan populer dapat diperlihatkan;
- c. menyediakan sarana keamanan dan membuat salinan terhadap semua bahan folklor sehingga komunitas budaya memiliki akses terhadap folklor mereka.¹⁰⁸

Perlindungan yang ketiga berhubungan dengan pemeliharaan atau pelestarian folklor. Pelestarian dalam hal ini harus memperhatikan fakta bahwa setiap orang memiliki hak budaya. Tindakan yang harus

¹⁰⁸ *Conservation is concerned with documentation regarding folk traditions and its object is, in the event of the non-utilization or evolution' of such traditions, to give researchers and tradition-bearers access to data enabling them to understand the process through which tradition changes. While living folklore, owing to its evolving character, cannot always be directly protected, folklore that has been fixed in a tangible form should be effectively protected. To this end, ' Member States should:*

- (a) establish national archives where collected folklore can be properly stored and made available;*
- (b) establish a central national archive function for service purposes (central cataloguing, dissemination of information on folklore materials and standards of folklore work including the aspect of safeguarding);*
- (c) create museums or folklore sections at existing museums where traditional and popular culture can be exhibited;*
- (d) give precedence to ways of presenting traditional and popular cultures that emphasize the living or past aspects of those cultures (showing their surroundings, ways of life and the works, skills and techniques they have produced);*
- (e) harmonize collecting and archiving methods;*
- (f) train collectors, archivists, documentalists and other specialists in the conservation of folklore, from physical conservation to analytic work;*
- (g) provide means for making security and working copies of all folklore materials, and copies for regional institutions, thus securing the cultural community an access to the materials.*

diambil oleh Negara-negara Anggota dalam melestarikan folklor adalah:

- a. memperkenalkan folklor dalam kurikulum sekolah dengan meletakkan penekanan khusus pada penghargaan terhadap folklor dan mempromosikan folklor tidak hanya kepada masyarakat tradisional di “desa” tetapi kepada seluruh masyarakat yang juga berada di perkotaan; dan
- b. menjamin hak akses kepada masyarakat untuk menggunakan folklor mereka.¹⁰⁹

Perlindungan yang keempat berhubungan dengan penyebaran folklor. Setiap orang harus memperhatikan pentingnya folklor sebagai identitas budaya dan negara. Untuk mendorong penyebaran ini, maka Negara-negara Anggota diharuskan untuk:

- a. mendorong diselenggarakannya kegiatan nasional, regional dan internasional seperti pameran, festival, seminar, dan lokakarya;
- b. membentuk suatu lapangan pekerjaan yang dapat menampung para ahli dalam bidang folklor untuk tetap mengedepankan kepentingan dari folklor itu sendiri;

¹⁰⁹ *Preservation is concerned with protection of folk traditions and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities which produce them beyond. To this end, Member States should:*

(a) design and introduce into both formal and out-of-school curricula the teaching and study of folklore in an appropriate manner laying particular emphasis on respect for folklore in the widest sense of the term, taking into account not only village and other rural cultures but also those created in urban areas by diverse social groups, professions, institutions, etc., and thus promoting a better understanding of cultural diversity and different world views, especially those not reflected in dominant cultures;

(b) guarantee the right of access of various cultural communities to their own folklore by supporting their work in the fields of documentation, archiving, research, etc., as well as in the practice of traditions;

(c) set up on an interdisciplinary basis a National Folklore Council or similar co-ordinating body in which various interest groups will be represented;

(d) provide moral and economic support for individuals and institutions studying, making known, cultivating or holding items of folklore;

(e) promote scientific research relevant to the preservation of folklore.

- c. menjamin ketersediaan informasi yang memadai tentang folklor melalui pusat-pusat dokumentasi, perpustakaan dan museum secara berkala; serta
- d. memfasilitasi pertemuan dan pertukaran informasi antara individu, kelompok dan lembaga yang terkait dengan folklor, baik nasional maupun internasional, dengan mempertimbangkan perjanjian budaya bilateral/multilateral yang ada.¹¹⁰

Perlindungan terhadap folklor telah menjadi sangat dibutuhkan sebagai sarana mempromosikan dan memelihara folklor itu sendiri. Berhubungan dengan aspek kekayaan intelektual yang mungkin terdapat dalam folklor, Negara-negara Anggota diamanatkan untuk:

- a. meniadakan pejabat yang berwenang mengenai hasil yang telah dikeluarkan oleh UNESCO dan WIPO berhubungan dengan hak kekayaan intelektual;
- b. atas hak-hak lain yang berhubungan dengan folklor:
 - i. melindungi informan sebagai pewaris tradisi;

¹¹⁰ *The attention of people should be drawn to the importance of folklore as an ingredient of cultural identity. It is essential for the items that make up this cultural heritage to be widely disseminated so that the value of folklore and the need to preserve it can be recognized. However, distortion during dissemination should be avoided so that the integrity of the traditions can be safeguarded. To promote a fair dissemination, Member States should:*

- (a) *encourage the organization of national, regional and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops, training courses, congresses, etc., and support the dissemination and publication of their materials, papers and other results;*
- (b) *encourage a broader coverage of folklore material in national and regional press, publishing television, radio and other media, for instance through grants, by creating jobs for folklorists in these units, by ensuring the proper archiving and dissemination of these folklore materials collected by the mass media, and by the establishment of departments of folklore within those organizations;*
- (c) *encourage regions, municipalities, associations and other groups working in folklore to establish full-time jobs for folklorists to stimulate and co-ordinate folklore activities in the region;*
- (d) *support existing units and the creation of new units for the production of educational materials, as for example video films based on recent fieldwork, and encourage their use in schools, folklore museums, national and international folklore festivals and exhibitions;*
- (e) *ensure the availability of adequate information on folklore through documentation centers, libraries, museums, archives, as well as through special folklore bulletins and periodicals;*
- (f) *facilitate meetings and exchanges between individuals, groups and institutions concerned with folklore, both nationally and internationally, taking into account bilateral cultural agreements;*
- (g) *encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.*

- ii. melindungi kepentingan kolektor dengan memastikan bahwa bahan-bahan yang dikumpulkan akan dilestarikan dalam arsip dengan kondisi yang baik dan layak; dan
- iii. mengadopsi langkah-langkah yang diperlukan untuk menjaga dokumen-dokumen yang telah dikumpulkan dari tindakan penyalahgunaan;¹¹¹

Dengan mengingat bahwa folklor termasuk masalah internasional, maka Rekomendasi ini sudah mengenal adanya suatu *international co-operation* dalam upaya untuk melindungi folklor. *International co-operation* yang dimaksud adalah:

- a. bekerja sama dengan asosiasi internasional dan regional, lembaga serta organisasi yang berkaitan dengan folklor;
- b. bekerja sama dalam bidang pengetahuan, penyebaran dan perlindungan folklor, khususnya melalui:
 - i. pertukaran informasi;
 - ii. pelatihan;
 - iii. promosi proyek bilateral atau multilateral di bidang dokumentasi;
 - iv. melakukan pertemuan antar negara untuk membahas mengenai perlindungan terhadap folklor;

¹¹¹ *In so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, - both within and outside the country, without prejudice to related legitimate interests. Leaving aside the 'intellectual property aspects' of the protection of expressions of folklore, there are various categories of rights which are already protected and should continue to enjoy protection in the future in folklore documentation centers and archives. To this end, Member States should:*

- (a) regarding the 'intellectual property' aspects call the attention of relevant authorities - to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent;*
- (b) regarding the other rights involved:*
 - (i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality);*
 - (ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner;*
 - (iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise;*
 - (iv) recognize the responsibility of archives to monitor the use made of the materials gathered.*

- c. bekerja sama dalam menjamin bahwa Negara Anggota yang dimana wilayahnya digunakan untuk melakukan investigasi dan dokumentasi folklor akan mendapatkan salinan dokumen, rekaman, dan materi lainnya yang berhubungan dengan investigasi dan dokumentasi yang dilakukan diwilayahnya;
- d. bekerja sama untuk menghindari adanya kemungkinan upaya perusakan terhadap folklor atau upaya untuk menghalangi penyebaran folklor.¹¹²

Rekomendasi ini pada dasarnya telah menggambarkan mengenai bagaimana Negara Anggota seharusnya melindungi folklor. Akan tetapi, karena Rekomendasi ini merupakan *soft law* dan tidak mengikat setiap Negara Anggota untuk melaksanakan ketentuan yang terdapat di dalamnya, maka apresiasi terhadap folklor pun menurun pada waktu

¹¹² *In view of the need to intensify cultural co-operation and exchanges, in particular through the pooling of human and material resources, in order to carry out folklore development and revitalization programmes as well as research made by specialists who are the nationals of one Member State on the territory of another Member State, Member States should:*

(a) co-operate with international and regional associations, institutions and organizations concerned with folklore;

(b) co-operate in the field of knowledge, dissemination and protection of folklore, in particular through:

(i) exchanges of information of every kind, exchanges of scientific and technical publications;

(ii) training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment;

(iii) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary folklore;

(iv) the organization of meetings between specialists, of study courses and of working groups on particular subjects, especially on the classifying and cataloguing of folklore data and expressions and on modern methods and techniques in research;

(c) co-operate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighbouring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore;

(d) guarantee Member States on whose territory research has been carried out the right to obtain from the Member States concerned, copies of all' documents, recordings, video-films, films and other material;

(e) refrain from acts likely to damage folklore materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of other States;

(f) take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories, or public disorders of other kinds.

yang bersamaan. Selain itu, karena Rekomendasi ini berfokus terutama pada metode untuk mendokumentasikan folklor berdasarkan teori antropologi yang sudah ketinggalan zaman, Rekomendasi tersebut tidak berhasil untuk memberikan perlindungan yang efektif terhadap folklor.¹¹³ Oleh karena itu, diperlukan suatu instrumen hukum internasional yang mengikat negara peserta untuk mematuhi ketentuan yang terdapat di dalamnya, sehingga perlindungan terhadap folklor dapat dilaksanakan, baik dalam ranah nasional maupun internasional.

3.1.2 UNESCO dan WIPO *Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*

Melihat pentingnya folklor bagi masyarakat tradisional, pada tahun 1992, kelompok kerja untuk masyarakat tradisional dan WIPO menyelenggarakan konferensi teknis mengenai kebutuhan masyarakat tradisional. Hasil konferensi tersebut adalah rekomendasi kepada PBB untuk mengembangkan tolak ukur yang lebih efektif untuk melindungi hak-hak kepemilikan intelektual dari budaya masyarakat tradisional. Oleh karena itu, UNESCO dan WIPO yang merupakan badan-badan khusus PBB yang menangani kebutuhan untuk melindungi warisan budaya tradisional dan kepemilikan intelektual telah bekerja sama untuk menetapkan *Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions* (Model Perjanjian).

Model Perjanjian ini adalah suatu model rancangan hukum yang menetapkan hak-hak dan kewajiban pemilik pengetahuan tradisional dan ekspresi budaya. Selain itu, Model Perjanjian ini memberikan suatu pedoman bagi negara-negara yang ingin memberlakukan suatu peraturan perundangan mengenai perlindungan terhadap folklor atau ekspresi folklor.

¹¹³ Kono Toshiyuki, *The Basic Principles of the Convention for Safeguarding of Intangible Heritage: A Comparative Analysis with the Convention of World Natural and Cultural Heritage and Japanese Law*", (Keynote Speech).

Dalam Model Perjanjian ini, perlindungan yang akan diberikan terhadap ekspresi folklor harus memperhatikan bahwa:

- a. pentingnya perlindungan hukum yang memadai untuk folklor;
- b. perlindungan hukum terhadap folklor harus diterapkan dalam hukum nasional;
- c. bentuk perlindungan yang diberikan harus menghargai dan tidak bertentangan dengan perlindungan yang berkaitan dengan hak kekayaan intelektual;¹¹⁴
- d. model perlindungan harus dibuat secara jelas dan rinci;

Dalam Model Perjanjian ini, yang dimaksud dengan folklor yang akan mendapatkan perlindungan adalah

For the purposes of this Treaty, "expressions of folklore" mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of their community, in particular:

- i. *verbal expressions, such as folk tales, folk poetry and riddles;*
- ii. *musical expressions, such as folk songs and instrumental music;*
- iii. *expressions by action, such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and*
- iv. *tangible expressions, such as:*
 - a) *productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;*
 - b) *musical instruments;*
 - c) *architectural forms.*¹¹⁵

¹¹⁴ UNESCO dan WIPO, *Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, Pasal 11 menyatakan bahwa: "This Treaty shall in no way limit or prejudice any protection applicable to expressions of folklore under national laws or any international treaty protecting copyright, the rights of performers, producers of phonograms and broadcasting organizations, or industrial property, nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore".

¹¹⁵ *Ibid.*, Pasal 2.

Berdasarkan ketentuan di atas, maka perlindungan tersebut tidak hanya diberikan terhadap folklor lisan tetapi juga terhadap folklor yang sebagian lisan dan bukan lisan.

Di bawah Model Perjanjian ini ditentukan bahwa setiap Negara Peserta diharuskan untuk menunjuk satu atau lebih pejabat yang berwenang yang akan mengelola perlindungan yang dimaksud dalam Model Perjanjian ini.¹¹⁶ Bagi pihak-pihak yang akan menggunakan folklor suatu negara dengan maksud untuk mengkomersilkannya, diwajibkan untuk meminta persetujuan dari pejabat yang berwenang.¹¹⁷ Apabila pihak tersebut telah mendapatkan persetujuan dari pejabat yang berwenang, maka dalam rangka mengkomersilkan folklor, ia diwajibkan juga untuk memberikan pengakuan dari mana folklor tersebut berasal.¹¹⁸ Sebab, jika pihak tersebut tidak memenuhi persyaratan untuk mendapatkan persetujuan atau tidak menyebutkan sumber folklor, maka Negara Peserta memiliki hak untuk menghukum dengan sanksi pidana setiap tindakan yang dapat merusak atau melakukan *misappropriation* terhadap folklor dari negara yang bersangkutan.¹¹⁹

¹¹⁶ *Ibid.*, Pasal 3 ayat (1) menyatakan bahwa: “Each Contracting State shall designate one or more competent authorities (hereinafter referred to as “the competent authority”) which shall administer the protection, under this Treaty, of expressions of folklore and to ask for the enforcement of the protection in other Contracting States of such expressions originating in its own territory”.

¹¹⁷ *Ibid.*, Pasal 4 ayat (1) menyatakan bahwa: “The following utilization of the expressions of folklore shall require written authorization by the competent authority of the Contracting State in which the expression of folklore originated, if the utilization is intended to be made for profit in another Contracting State:
(i) the publication, reproduction, distribution or importation, for the purpose of distribution to the public, of reproductions or recordings of recitations or performances of expressions of folklore;
(ii) the public recitation or performance of expressions of folklore, as well as any transmission to the public by wireless means, by wire, or by any other means, of expressions of folklore or of their recitations or performances, whether live or recorded”.

¹¹⁸ *Ibid.*, Pasal 7 ayat (1) menyatakan: “In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place in which it has originated”.

¹¹⁹ *Ibid.*, Pasal 8 menentukan bahwa: “Each Contracting State shall punish by penal sanctions any act of:

Model Perjanjian ini pada prinsipnya mengakui masyarakat adat sebagai pemilik tradisional warisan kesenian budaya yang dapat berbentuk cerita rakyat, musik, tarian yang diciptakan di wilayah masyarakat tradisional dan diturunkan dari generasi ke generasi. Hal tersebut kemudian memicu negara-negara untuk menerapkan perlindungan terhadap folklor. Jika suatu negara ingin memberlakukan Model Perjanjian ini, maka ia bebas untuk mengadopsi dan/atau menyesuaikan ketentuan sesuai dengan kebutuhan negara, keinginan masyarakat tradisional dan pembuat undang-undang.

3.1.3 WIPO IGC *Draft Provisions on The Protection Of Traditional Cultural Expressions/Expressions of Folklore*

Pada akhir tahun 2000, anggota dari WIPO mendirikan *Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resource, Traditional Knowledge and Folklore*. Beberapa hal yang menjadi konsentrasi dari IGC ini antara lain adalah tentang kebijakan umum dan masalah legalitas, termasuk bagaimana membuat kebijakan terhadap *genetic resource, traditional knowledge and folklore* yang berhubungan dengan ketentuan hak kekayaan intelektual yang sudah terdapat dalam aturan beberapa negara. Hal lainnya adalah bagaimana mengembangkan aturan dan mekanisme yang praktis untuk melindungi pemegang hak *genetic resource, traditional knowledge and folklor*.

Pada dasarnya, rancangan ini mencakup mandat untuk menghargai nilai, meningkatkan rasa hormat; memenuhi kebutuhan aktual komunitas; mencegah penyalahgunaan ekspresi budaya

(i) *wilful or negligent non-compliance with the requirement obtaining authorization under Article 4;*

(ii) *wilful or negligent non-compliance with the requirement of acknowledgement of source according to Article 7;*

(iii) *wilful deception of others in respect of the origin of expressions of folklore;*

(iv) *wilful distortion, in any direct or indirect manner, of an expression of folklore in a way prejudicial to the honour, dignity or cultural interests of the community in which it originates.”*

tradisional atau ekspresi folklor; memberdayakan komunitas; mendukung praktik-praktik berdasar kebiasaan adat dan kerja sama komunitas; berkontribusi pada perlindungan bagi budaya tradisional; mendorong inovasi dan kreativitas komunitas; mengembangkan kebebasan artistik dan intelektual, penelitian dan pertukaran budaya dengan cara-cara yang pantas; berkontribusi pada keragaman budaya; memajukan perkembangan komunitas dan kegiatan perdagangan yang sah; menghindari hak-hak atas kekayaan intelektual yang tidak sah; serta mengembangkan kepastian, transparansi dan rasa saling percaya.¹²⁰ Meskipun sudah terdapat mandat yang cukup tegas, hingga saat ini, IGC belum mengadopsi Rancangan Ketentuan mengenai perlindungan terhadap folklor. Akan tetapi, Rancangan ini telah menjadi pedoman di berbagai negara dalam membentuk kebijakan perlindungan terhadap folklor.

Berdasarkan Rancangan Ketentuan ini, yang merupakan subjek dari perlindungan adalah folklor atau ekspresi budaya tradisional. Kedua istilah tersebut sering digunakan secara bergantian dengan maksud yang sama. Berdasarkan *Revised Draft Provision*, yang dimaksud dengan folklor adalah:

“Traditional cultural expressions” and/or “expressions of folklore” are any forms, [whether] tangible and/or intangible or a combination thereof, in which traditional culture and knowledge are expressed, appear or are manifested, and are passed on from generation to generation, including but not limited to the following forms of expressions or combinations thereof:

- a. phonetic or verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
- b. musical or sound expressions, such as songs, rhythms, instrumental music and popular tales;*
- c. expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games and other performances, theater, including, among others, puppet*

¹²⁰ Peter Jaszi, *Op. Cit.*, hal 394.

performance and folk drama, whether or not reduced to a material form; and

- d. *tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, toys, gifts and handicrafts and musical instruments.*

Dan kriteria yang harus dipenuhi oleh folklor atau ekspresi budaya tradisional agar dapat dilindungi adalah:

- a. *“They should be the products of creative intellectual activity, including individual and communal creativity;*
 b. *they should be characteristic of a community’s cultural and social identity and cultural heritage;*
 c. *They should be maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”*

Berdasarkan ketentuan di atas, maka yang dimaksud dengan folklor adalah warisan budaya suatu masyarakat yang dapat diekspresikan terlepas dari apakah warisan budaya tersebut bersifat *tangible* atau *intangible*. Perhatian utama dari Rancangan ini adalah bahwa folklor tersebut bersifat hidup dan memberikan masyarakat tradisional suatu identitas budaya tersendiri, serta diwariskan dari generasi ke generasi. Sedangkan perlindungan dapat diberikan terhadap tindakan-tindakan yang berusaha untuk memperbanyak, mempublikasikan dan menggunakan folklor secara komersil tanpa adanya izin atau pengetahuan dari masyarakat tradisional sebagai pemilik folklor. Selain itu, perlindungan juga ditujukan untuk menghentikan atau mencegah tindakan-tindakan yang berusaha untuk mengakuisisi hak milik folklor, memodifikasi ekspresi budaya tradisional tanpa sepengetahuan masyarakat tradisional sebagai pemilik folklor, dan melakukan pemanfaatan tanpa memberikan sumber

atau pengakuan terhadap masyarakat tradisional.¹²¹ Di samping itu, terdapat ketentuan yang mengatur mengenai *benefit sharing* untuk folklor yang digunakan dengan tujuan komersil. Tujuan dari *benefit sharing* ini adalah untuk meningkatkan ekonomi dari masyarakat tradisional. Dengan demikian, tidak hanya pihak yang melakukan pemanfaat yang mendapatkan keuntungan, tetapi juga masyarakat tradisional. Hal ini adalah untuk menyelaraskan budaya dengan pengembangan ekonomi suatu negara.

3.2 Pengaturan Menurut Konvensi UNESCO 2003 tentang *The Safeguarding of the Intangible Cultural Heritage*

3.2.1 Latar Belakang Dibentuknya Konvensi UNESCO 2003

Pada dasarnya, warisan budaya merupakan elemen utama dalam mendefinisikan dan membentuk identitas masyarakat dan komunitas tradisional. Perlindungan terhadapnya adalah tanggung jawab bersama untuk mencapai solidaritas, kerja sama dan perdamaian.¹²² Sebuah langkah penting dalam melindungi folklor adalah dibentuknya *Recommendation on the Safeguarding of Traditional Culture and Folklore* pada tahun 1989. Namun karena rekomendasi tersebut adalah *soft law* dan tidak memiliki dampak yang luas, pada tahun 1994 UNESCO meluncurkan program *Human Living Treasures* dengan tujuan untuk mendorong terciptanya sistem nasional yang memberikan pengakuan resmi kepada pemilik warisan budaya untuk tetap mengekspresikan budaya mereka dan mewariskannya kepada generasi muda.

Pada tahun 1997-1998, UNESCO menyetujui pembentukan program *Proclamation of Masterpieces of the Oral and Intangible Heritage Of Humanity*. Program ini berusaha untuk memberikan suatu

¹²¹ Lihat lebih lanjut, *Ibid.*, Rancangan Pasal 3.

¹²² Hans D’Orville, “Globalization and Intangible Cultural Heritage: Opportunities, Threats and Challenges” dalam *International Conference: Globalization and Intangible Cultural Heritage*, (Perancis: UNESCO, 2005), hal. 35.

perbedaan secara internasional dalam hal membagi dan melindungi warisan budaya yang terpilih. Program ini pada awalnya telah terinspirasi dari daftar yang dibentuk dari *World Heritage Convention* 1972.

Dengan menimbang kebutuhan untuk membangun kesadaran yang lebih besar, terutama di kalangan generasi muda mengenai pentingnya warisan budaya dan perlindungan terhadapnya sebagai dorongan utama dalam menjamin pembangunan berkelanjutan,¹²³ pada akhir 1990-an, para ahli menyimpulkan bahwa dibutuhkan suatu instrumen hukum yang lebih mengikat untuk melindungi warisan budaya. Selain itu, mereka juga menyimpulkan bahwa Rekomendasi 1989 mungkin telah meletakkan terlalu banyak penekanan pada dokumentasi dan peneliti, dan tidak cukup tentang praktek perlindungan atau perlindungan di kelompok-kelompok atau komunitas yang merupakan sumber tradisi. Oleh karena itu, pembentukan konvensi ini adalah titik puncak dari pencarian panjang UNESCO mengenai fungsi, praktek dan nilai-nilai yang terkandung dalam suatu warisan budaya.

Konvensi ini mulai berlaku pada April 2006. Pada akhir 2007, 78 (tujuh puluh delapan) negara telah meratifikasi, di antara mereka adalah Cina, India, Jepang, Nigeria, Mesir, Indonesia, Perancis, dan Spanyol. Konvensi ini diharapkan untuk menjadi pedoman dalam memberikan perlindungan terhadap warisan budaya karena telah menjadi bagian dari praktik negara dan organisasi internasional.¹²⁴

3.2.2 Tujuan dari Konvensi UNESCO 2003

Berdasarkan Pasal 1 Konvensi ini, tujuan dibentuknya Konvensi UNESCO 2003 adalah:

*“The purposes of this Convention are:
a. to safeguard the intangible cultural heritage;*

¹²³ UNESCO (b), *Op. Cit., Preamble*

¹²⁴ Richard Kurin, “Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention”, *International Journal of Intangible Heritage*, Vol. 02 (2007), hal 10.

- b. to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;*
- c. to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;*
- d. to provide for international cooperation and assistance”*

Dengan demikian, Konvensi ini bertujuan untuk melindungi warisan budaya yang diwariskan dari generasi ke generasi, menjamin terciptanya rasa hormat terhadap warisan budaya milik berbagai kelompok dan perseorangan, meningkatkan kesadaran, baik pada tingkat lokal, nasional maupun internasional akan pentingnya warisan budaya, dan menyediakan kerjasama dan bantuan internasional dalam upaya melindungi warisan budaya.

Selain itu, dengan berbagai pertimbangan, Konvensi ini memiliki tujuan untuk melindungi warisan budaya yang cocok atau selaras dengan perjanjian-perjanjian internasional yang ada mengenai hak-hak asasi manusia, serta segala persyaratan saling menghormati antara berbagai komunitas, kelompok dan dalam hal tertentu perseorangan, serta pembangunan yang berkelanjutan.¹²⁵ Dalam melaksanakan tujuannya, konvensi ini tidak mengubah status atau mengurangi tingkat perlindungan yang termuat dalam Konvensi UNESCO 1972 atau mempengaruhi hak dan kewajiban Negara Peserta yang bersumber dari setiap instrumen hukum internasional yang berkaitan dengan hak kekayaan intelektual atau penggunaan sumber hayati maupun ekologi.¹²⁶ Keberadaan Konvensi ini bukanlah untuk merubah ketentuan-ketentuan yang sudah terdapat dalam konvensi lainnya, tetapi untuk mendukung ketentuan konvensi-konvensi yang telah lahir sebelumnya.

Pemerintah nasional yang meratifikasi konvensi ini berkewajiban untuk merancang dan memberdayakan organisasi untuk

¹²⁵ UNESCO (b), *Op. Cit.*, Pasal 2 ayat (1).

¹²⁶ UNESCO (b), *Op. Cit.*, Pasal 3

mendokumentasikan warisan budaya, dan juga untuk mendorong presentasi, pelestarian, perlindungan serta transmisi warisan budaya dengan bekerja sama dengan masyarakat tradisional yang berkaitan.¹²⁷ Sedangkan pada tingkat internasional, sebuah internasional Komite yang telah dipilih dari Negara Peserta Konvensi akan mengembangkan dua program, yaitu daftar perwakilan warisan budaya yang diusulkan oleh Negara Peserta dan lainnya adalah daftar warisan budaya yang sangat membutuhkan perlindungan dan memenuhi persyaratan untuk dukungan finansial.¹²⁸ Dengan demikian, Konvensi ini tidak hanya mengatur mengenai perlindungan dalam lingkup nasional, tetapi juga dalam lingkup internasional.

3.2.3 Pengertian dalam Konvensi UNESCO 2003

Di dalam Konvensi ini, yang dimaksud dengan warisan budaya [tak kasat mata] adalah segala praktik, representasi, ekspresi, pengetahuan, keterampilan – serta alat-alat, benda, artefak dan ruang-ruang budaya terkait dengannya – yang diakui oleh berbagai komunitas, kelompok, dan dalam hal tertentu perseorangan sebagai bagian dari warisan budaya mereka.¹²⁹ Warisan budaya ini, yang diwariskan dari generasi ke generasi senantiasa diciptakan kembali oleh berbagai komunitas dan kelompok sebagai tanggapan mereka terhadap lingkungannya, interaksinya dengan alam, serta sejarahnya, dan memberikan mereka rasa jati diri dan keberlanjutan, untuk memajukan penghormatan keanekaragaman budaya dan daya cipta insani.¹³⁰

Warisan budaya sebagaimana dimaksud dalam Konvensi ini meliputi antara lain:¹³¹

¹²⁷ Richard Kurin, *Op. Cit.*

¹²⁸ *Ibid.*

¹²⁹ UNESCO (b), *Op. Cit.*, Pasal 2 ayat (1).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, Pasal 2 ayat (2).

- a. tradisi dan ekspresi lisan, termasuk bahasa sebagai wahana warisan budaya ;
- b. seni pertunjukan;
- c. adat istiadat masyarakat dan perayaan-perayaan;
- d. pengetahuan dan kebiasaan mengenai alam dan semesta;
- e. kemahiran kerajinan tradisional.

Berdasarkan ketentuan di atas, maka dapat dilihat bahwa yang dimaksud dengan *intangible* tidak menitikberatkan pada apakah suatu warisan budaya bersifat kasat mata atau tak kasat mata. Tetapi menekankan perhatiannya terhadap nilai-nilai yang terdapat dalam suatu ekspresi atau benda yang dianggap sebagai warisan budaya masyarakat tradisional.

Sedangkan perlindungan yang dimaksud untuk diberikan terhadap warisan budaya merupakan tindakan yang bertujuan untuk menjamin kelestarian warisan budaya, termasuk identifikasi, dokumentasi, penelitian, perawatan, perlindungan, pemajuan, pemanfaatan, transmisi, khususnya melalui pendidikan – baik formal maupun non formal –, serta revitalisasi berbagai aspek warisan budaya tersebut.¹³² Dengan demikian, dapat dilihat bahwa perlindungan yang dimaksud dalam Konvensi ini tidak hanya merupakan perlindungan secara hukum melalui peraturan perundang-undangan, tetapi juga melalui dokumentasi dan sebagainya.

3.2.4 Perlindungan Warisan Budaya dalam Lingkup Nasional

Di dalam konvensi ini, setiap Negara Peserta memiliki kewajiban untuk mematuhi ketentuan yang termuat di dalamnya. Berhubungan dengan peran Negara Peserta sebagai pihak dalam Konvensi, mereka diwajibkan untuk mengambil langkah-langkah yang dipandang perlu guna melindungi warisan budaya di dalam teritorinya.¹³³ Sama halnya

¹³² *Ibid.*, Pasal 2 ayat (3).

¹³³ *Ibid.*, Pasal 11 (a)

dengan Rekomendasi 1989, Konvensi 2003 ini meletakkan kekuasaan kepada setiap negara untuk masing-masing membuat suatu kebijakan mengenai perlindungan terhadap folklor yang sesuai dengan situasi dan kondisi negara mereka saat ini.

Selain itu, Negara Peserta juga diwajibkan untuk mengidentifikasi dan mendefinisikan berbagai unsur budaya yang ada di dalam teritorinya, dengan mengikutsertakan berbagai komunitas, kelompok maupun organisasi non-pemerintah terkait.¹³⁴ Tujuan dari kewajiban ini adalah untuk mengetahui ekspresi budaya tradisional yang mana yang dianggap sebagai warisan budaya oleh masyarakat tradisional. Sebab hanya merekalah yang dapat menentukan mana di antara ekspresi budaya tradisional yang ada yang merupakan warisan budaya.

Di samping itu, Negara Peserta diwajibkan untuk menyusun satu atau lebih daftar inventaris warisan budaya yang ada di teritorinya, dengan cara yang disesuaikan dengan situasi di Negara masing-masing. Daftar inventaris ini akan dimutakhirkan secara berkala. Sebagai contoh, saat ini Indonesia memiliki buku panduan mengenai tata cara melakukan inventarisasi. Di dalam buku tersebut, penyusunan inventarisasi terdiri dari proses inventarisasi melalui cara manual dan cara *online*.¹³⁵ Inventarisasi ini berguna untuk mengetahui warisan budaya manakah yang harus dilindungi.

Guna menjamin perlindungan, pengembangan dan promosi warisan budaya yang ada di teritorinya, setiap Negara Peserta harus:

- a. menerima kebijakan umum yang bertujuan memajukan fungsi warisan budaya dalam masyarakat, dan mengintegrasikan warisan tersebut dalam program-program perencanaan;

¹³⁴ *Ibid.*, Pasal 11 (b).

¹³⁵ Lihat lebih lanjut, Departemen Kebudayaan dan Pariwisata bekerjasama dengan Kantor UNESCO Jakarta, "Buku Panduan Praktis Pencatatan Warisan Budaya Tak Benda Indonesia", (Jakarta: Departemen Kebudayaan dan Pariwisata Republik Indonesia, 2009).

- b. menunjuk atau membentuk satu lembaga atau lebih yang memiliki kompetensi untuk melindungi warisan budaya yang ada di dalam teritorinya;
- c. mendorong studi ilmiah, teknik dan seni serta metodologi penelitian, dengan tujuan perlindungan efektif terhadap warisan budaya, khususnya warisan budaya yang terancam;
- d. menetapkan tindakan-tindakan hukum, teknik, administratif maupun keuangan yang tepat yang bertujuan untuk:
 - i. mendorong penciptaan atau penguatan lembaga-lembaga untuk pelatihan manajemen warisan budaya serta transmisi warisan tersebut melalui forum dan ruang yang dimaksudkan untuk pergelaran atau ekspresinya;
 - ii. menjamin akses pada warisan budaya sambil menghormati adat istiadat yang mengatur akses pada bagian-bagian khusus warisan tersebut;
 - iii. mendirikan lembaga-lembaga pendokumentasian warisan budaya dan memfasilitasi akses pada lembaga-lembaga tersebut.¹³⁶

Di samping itu, perlindungan yang dapat diberikan dalam ranah nasional dapat diberikan melalui pendidikan, baik secara formal maupun non formal. Dalam hal ini, setiap Negara Peserta diwajibkan untuk:

- a. menjamin pengakuan, penghargaan dan pendayagunaan warisan budaya dalam masyarakat khususnya melalui:
 - i. program-program pendidikan, peningkatan kesadaran dan informasi, yang ditujukan kepada masyarakat umum, khususnya generasi muda;
 - ii. program-program pendidikan dan pelatihan khusus di kalangan komunitas dan kelompok tradisional;

¹³⁶ *Op. Cit*, Pasal 13.

- iii. kegiatan yang bertujuan membangun kapasitas untuk perlindungan terhadap warisan budaya, khususnya dalam hal manajemen dan penelitian ilmiah; dan
 - iv. sarana transmisi pengetahuan yang bersifat non-formal;
- b. menjaga agar masyarakat umum selalu mendapatkan informasi tentang bahaya yang mengancam warisan budaya dan kegiatan yang dilaksanakan berkaitan dengan Konvensi;
- c. memajukan pendidikan untuk perlindungan ruang-ruang alami dan tempat-tempat yang terkait dengan ingatan kolektif yang keberadaannya dibutuhkan untuk mengekspresikan warisan budaya.¹³⁷

Selain hal di atas, dalam rangka menjamin perlindungan yang baik terhadap warisan budaya, Konvensi ini menitikberatkan fokusnya pada keikutsertaan berbagai komunitas, kelompok maupun perseorangan dalam melindungi warisan tersebut. Oleh karena itu, dalam kerangka kegiatan perlindungan warisan budaya, setiap Negara Peserta harus berusaha untuk menjamin keikutsertaan berbagai komunitas, kelompok dan, apabila tepat, perseorangan yang menciptakan, memelihara dan mentransmisikan warisan budaya tersebut, dan melibatkan mereka secara aktif dalam manajemen warisan budaya.¹³⁸ Dengan hal ini, maka masing-masing negara dapat mensosialisasikan makna serta tujuan perlindungan terhadap warisan budaya sebagai suatu upaya untuk menjaga identitas dan kedaulatan negara.

3.2.5 Perlindungan Warisan Budaya dalam Lingkup Internasional

Untuk menjamin agar warisan budaya lebih dikenal dan agar orang lebih menyadari keberadaannya, serta untuk merangsang dialog yang menghormati keanekaragaman budaya, Komite¹³⁹, setelah

¹³⁷ *Ibid.*, Pasal 14.

¹³⁸ *Ibid.*, Pasal 15

menerima proposal dari Negara Peserta, akan membuat, memelihara dan menerbitkan Daftar Representatif Warisan Budaya Tak Kasat Mata Manusia¹⁴⁰ dan Daftar Warisan Budaya yang Memerlukan Perlindungan Mendesak.¹⁴¹ Komite ini akan merancang kriteria untuk pembuatan, pemeliharaan dan publikasi Daftar Representatif tersebut, dan mengajukannya kepada Majelis Umum untuk mendapatkan persetujuannya.

Perlindungan terhadap warisan budaya merupakan kepentingan bersama manusia, dan untuk itu, diperlukan kerja sama baik pada tingkat bilateral, subregional, regional, maupun internasional. Kerja sama internasional yang dapat dilaksanakan berdasarkan Konvensi ini meliputi, antara lain, pertukaran informasi dan pengalaman, usaha-usaha kerja sama, dan pembuatan mekanisme bantuan kepada Negara Peserta lainnya dan usaha-usahanya untuk perlindungan warisan budaya.¹⁴² Pertukaran informasi yang dimaksud dapat dilakukan dalam bentuk FGD (*focus group discussion*).

Tujuan dari perlindungan dalam lingkup internasional ini adalah untuk meminimalisir upaya pengklaiman tidak sah terhadap folklor oleh pihak asing yang bukan merupakan pemilik folklor yang bersangkutan. Dengan adanya pengakuan secara internasional melalui Daftar Representatif dan kerjasama internasional, maka negara-negara akan mengetahui folklor-folklor yang dimiliki oleh negara lain, sehingga setiap negara diwajibkan untuk mencegah kemungkinan adanya tindakan *misappropriation* terhadap folklor.

¹³⁹ Komite ini merupakan Komite Antar-Pemerintah untuk Perlindungan Warisan Budaya Tak Benda. Komite ini terdiri dari 18 Negara Peserta yang dipilih oleh Negara Peserta lainnya dalam sidang Majelis Umum, yang dibentuk berdasarkan Konvensi UNESCO 2003.

¹⁴⁰ Hingga saat ini, warisan budaya tak benda milik Indonesia yang termasuk dalam Daftar ini adalah Wayang, Keris, Batik dan Angklung.

¹⁴¹ UNESCO (d), *Op. Cit.*, Pasal 16 dan 17.

¹⁴² *Ibid.*, Pasal 19.

3.3 Praktek Perlindungan Negara terhadap Warisan Budaya

Perlindungan yang dapat diberikan oleh suatu negara terhadap warisan budaya harus dilakukan secara sistematis. Perlindungan tersebut tidak dapat diberikan apabila tidak adanya suatu pengakuan dan/atau pengklaiman. Pengakuan dan/atau pengklaiman dalam hal ini merupakan tindakan yang menyatakan bahwa suatu warisan budaya adalah memang milik negara yang bersangkutan. Pengakuan dan/atau pengklaiman tersebut tentunya baru bisa diberikan ketika sudah diketahui apa saja yang merupakan atau dianggap sebagai suatu warisan budaya suatu negara.

Untuk mengetahui hal tersebut, maka proses awal dalam memberikan perlindungan adalah dengan dokumentasi. Dokumentasi ini dapat berfungsi sebagai mekanisme untuk menanggulangi penyalahgunaan rezim HKI terhadap folklor suatu negara di negara lain. Dokumentasi ini kemudian dapat digunakan sebagai dasar bahwa suatu warisan budaya yang didaftarkan atau dimanfaatkan secara komersil di luar negeri adalah tidak original sebagaimana dipersyaratkan dalam hukum hak cipta.¹⁴³ Dengan adanya dokumentasi tersebut, maka akan ada suatu bukti yang menentukan bahwa suatu negara memiliki begitu banyak warisan budaya yang beragam.

Ketika suatu negara sudah jelas mengetahui apa saja yang merupakan warisan budaya mereka melalui proses dokumentasi, maka negara tersebut dapat memberi suatu pengakuan dan/atau pengklaiman terhadap warisan budaya yang bersangkutan. Pengakuan tersebut tentunya adalah untuk menunjukkan bahwa suatu warisan budaya memiliki suatu ciri tertentu yang dapat memberikan identitas terhadap suatu bangsa yang tidak dapat dimiliki oleh bangsa lain. Karena adanya pengakuan dan/atau pengklaiman yang khusus tersebut, maka negara kemudian dapat melindungi warisan budaya mereka, baik melalui perlindungan hukum maupun perlindungan lainnya.

Bentuk perlindungan yang diterapkan terhadap warisan budaya di setiap negara berbeda-beda. Hal ini dapat dilihat dari perlindungan yang diberikan oleh Malaysia dan Filipina terhadap warisan budaya masing-masing negara.

¹⁴³ Arif Lutviansori, *Op. Cit.*, hal. 149.

3.3.1 Malaysia

Sebagai negara yang juga multi-budaya dan multi-etnis, warisan budaya di Malaysia tidak hanya beragam tetapi rumit. Sampai saat ini, tidak ada sistem inventarisasi di Malaysia, melainkan sistem dokumentasi terhadap warisan budaya.¹⁴⁴ Dokumentasi warisan budaya dilakukan oleh yang dulu dikenal sebagai Departemen Kebudayaan, Seni dan Pariwisata, Departemen Museum dan Purbakala dan *Malaysia Handicrafts Development Corporation*. Selain itu, berbagai universitas juga ikut serta dalam melakukan pendokumentasian warisan budaya, seperti Universiti Sains Malaysia di Penang. Berbagai organisasi non-pemerintah seperti *Heritage of Malaysia Trust* dan *Penang Heritage Trust* juga menyelenggarakan berbagai lokakarya dan perundingan untuk tujuan pendokumentasian warisan budaya.¹⁴⁵

Setelah pembentukan Kementerian Kebudayaan, Kesenian dan Warisan Budaya yang baru, komitmen terhadap warisan budaya pun telah ditingkatkan.¹⁴⁶ Sekarang, Kementerian mengumpulkan bahan studi mengenai warisan budaya dari berbagai sumber termasuk universitas, perpustakaan dan lembaga untuk mendirikan sebuah *database* yang komprehensif dan untuk pembentukan pusat penelitian warisan budaya.

Selain mengoptimalkan bantuan dari masyarakat tradisional, universitas dan lembaga yang ada dalam memberikan perlindungan terhadap warisan budaya, Malaysia juga telah memasukkan ketentuan mengenai warisan budaya di dalam *National Heritage Act 2005*¹⁴⁷.

¹⁴⁴ Mohd Sukarno Abd. Wahab. "Community Mechanism for Safeguarding Intangible Cultrual heritage (ICH) – with Reference to the Policies and Strategies for the Promotion of Arts Education at the National Level, *paper* yang dipresentasikan dalam *Sub-Regional Experts Meeting in Asia on Intangible Cultural heritage: Safeguarding and Inventory-Making Methodologies*, (di Bangkok, Thailand, 13-16 Desember 2005).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *The National Heritage Act 2005 is an Act to provide for the conservation and preservation of National Heritage, natural heritage, tangible and intangible cultural heritage, underwater cultural heritage, treasure trove and for related matters. It received Royal Assent on 30 December*

Berdasarkan peraturan perundangan ini, yang dimaksud dengan warisan budaya [tak kasat mata] adalah:

“intangible cultural heritage” includes any form of expressions, languages, lingual utterances, sayings, musically produced tunes, notes, audible lyrics, songs, folksongs, oral traditions, poetry, music, dances as produced by the performing arts, theatrical plays, audible compositions of sounds and music, martial arts, that may have existed or exist in relation to the heritage of Malaysia or any part of Malaysia or in relation to the heritage of a Malaysian community”.¹⁴⁸

Perlindungan yang diberikan terhadap warisan budaya ini dapat dilakukan melalui pendaftaran hak cipta.¹⁴⁹ Pihak yang berkewajiban untuk melakukan pendaftaran, pelaksanaan dan pewarisan warisan budaya adalah pemilik warisan tersebut.¹⁵⁰ Pemilik dalam hal ini dimaksudkan sebagai komunitas masyarakat tradisional atau perorangan. Selain itu, setiap orang dapat mendaftarkan warisan budaya kepada Kementerian Kebudayaan, Kesenian dan Warisan Budaya untuk dijadikan Warisan Budaya Nasional.¹⁵¹

Dengan demikian, perlindungan yang dipraktikkan di Malaysia berupa perlindungan melalui pelestarian dan rezim hak cipta.

2005 and was published in the Gazette on 31 December 2005. The National Heritage Act 2005 came into effect on 1 March 2006.

¹⁴⁸Malaysia, *Natural Heritage Act*, Pasal 2 ayat (1).

¹⁴⁹*Ibid.*, Pasal 51 ayat (3) menyatakan bahwa: “Where the application involves intangible cultural heritage in which copyright subsists, the consent of the copyright owner shall be obtained before the application is approved.”

¹⁵⁰ *Ibid.*, Pasal 60 ayat (1) menyatakan bahwa: “The owner or custodian of a heritage object in the form of an intangible cultural heritage shall take all necessary steps to develop, identify, transmit, cause to be performed and facilitate the research on the intangible cultural heritage according to the guidelines and procedures as may be prescribed”.

¹⁵¹ *Ibid.*, Pasal 68 jo. Pasal 67 ayat (2) menyatakan bahwa: “Any person may nominate to the Minister in the prescribed form any natural heritage, tangible or intangible cultural heritage, living person or underwater cultural heritage to be declared as a National Heritage. But Where the declaration under involves an intangible cultural heritage and copyright still subsists in such works, the consent of the copyright owner shall be obtained before any declaration is made”.

Pelestarian tersebut dilakukan melalui pelaksanaan dokumentasi warisan budaya dengan mengikutsertakan setiap pihak yang berkepentingan dalam melakukannya. Sedangkan peraturan yang secara khusus mengatur mengenai warisan budaya termuat dalam *National Heritage Act 2005*. Dalam peraturan ini ditemukan bahwa warisan budaya dapat didaftarkan melalui rezim hak cipta dan dapat dijadikan Warisan Budaya Nasional.

3.3.2 Filipina

Konstitusi Filipina Pasal XVI ayat (14) sampai dengan (18)¹⁵², meletakkan peran kepada Negara, dalam hal ini pemerintah, untuk melindungi dan melestarikan warisan budaya Filipina. Negara dalam hal ini juga harus mengakui, menghormati, dan melindungi hak masyarakat tradisional untuk terus melestarikan dan mengembangkan budaya mereka. Dalam hal ini, Negara tidak menutup kemungkinan untuk meminta bantuan kepada peneliti untuk membantu masyarakat dan pemerintah dalam melindungi warisan budaya Filipina.

Berdasarkan ketentuan di mana warisan budaya berada di bawah perlindungan negara, maka pada tahun 1997, Filipina telah membentuk *Indigenous People Rights Act* yang memberikan hak penuh kepada penduduk asli untuk memiliki, mengendalikan dan melindungi

¹⁵² Filipina (a), *Constitution 1987*, Pasal 16 ayat (14) sampai dengan (18) menyatakan bahwa:
Section 14: The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression;
Section 15: Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations;
Section 16: All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition;
Section 17: The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.
Section 18: (1) The State shall ensure equal access to cultural opportunities through the educational system, public or private cultural entities, scholarships, grants and other incentives, and community cultural centers, and other public venues; (2) The State shall encourage and support researches and studies on the arts and culture”.

kekayaan intelektual di bidang pengetahuan tradisional dan folklor.¹⁵³ *Indigenous People Rights Act* juga menetapkan bahwa setiap pihak yang hendak memanfaatkan pengetahuan tradisional atau folklor penduduk asli harus memperoleh persetujuan terlebih dahulu dari mereka dengan syarat bahwa persetujuan tersebut diberikan tanpa adanya unsur paksaan. Persetujuan ini didefinisikan sebagai “konsensus dari seluruh anggota penduduk asli yang dimaksud dan sesuai dengan hukum adat dan praktek yang berlaku”.¹⁵⁴ Dalam hal ini, dapat dilihat bahwa hukum adat merupakan faktor yang dominan dalam rangka pengelolaan dan perlindungan pengetahuan tradisional dan folklor.

Indigenous People Rights Act dalam ketentuannya juga memberikan hak kepada penduduk asli untuk:

- a. mengatur masuknya peneliti dan lembaga penelitian ke dalam wilayah mereka;
- b. memberikan persetujuan tertulis berkaitan dengan tujuan, desain dan hasil yang diharapkan dari suatu penelitian;
- c. meminta pengakuan bila informasi yang berkaitan dengan pengetahuan tradisional dan folklor mereka akan dipublikasikan;
- d. meminta salinan dari hasil penelitian; dan
- e. memperoleh bagi hasil dari keuntungan (*benefit sharing*) yang dihasilkan dari penelitian tersebut.

Perkembangan terakhir mengenai perlindungan warisan budaya di Filipina adalah berhasilnya pembentukan suatu peraturan yang mengatur tentang perlindungan dan pelestarian warisan budaya Filipina. Peraturan tersebut dikenal sebagai *National Cultural Heritage Act of*

¹⁵³ Filipina (b), *Indigenous Peoples Rights Act, Section 34*.

¹⁵⁴ *Ibid.*, Chapter 11 Section 3(g) menyatakan bahwa: “Free and Prior Informed Consent - as used in this Act shall mean the consensus of all members of the ICCs/IPs to; be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language an process understandable to the community”.

2009. Berdasarkan peraturan tersebut, yang dimaksud dengan warisan budaya [tak kasat mata] adalah:

“Intangible Cultural Heritage” shall refers to the practices, representations, expressions, knowledge, skills – as well as the instruments, objects and artifacts associated therewith, that communities, groups and individuals recognize as part of their cultural heritage, such as: (1) oral traditions, languages, and expressions; (2) performing arts; (3) social practices, rituals, and festive events; (4) knowledge and practices concerning nature and the universe; and (5) traditional craftsmanship.¹⁵⁵

Dalam peraturan 2009 ini, perlindungan yang pertama yang diberikan terhadap warisan budaya adalah melalui inventarisasi. Selain itu, lembaga yang berwenang yang dibentuk oleh Pemerintah memiliki kekuasaan untuk melindungi warisan budaya berdasarkan Konvensi UNESCO 2003.¹⁵⁶

Berdasarkan praktek perlindungan dari kedua negara di atas, beda halnya dengan Malaysia, Filipina tidak memasukkan perlindungan warisan budaya dalam rezim hak cipta. Filipina juga menitikberatkan perlindungan tersebut kepada ketentuan yang termuat dalam Konvensi UNESCO 2003 dan kepada hukum adat yang berlaku.

¹⁵⁵ Filipina (c), *National Cultural Heritage Act of 2009*, Pasal II – Section 3 (x)

¹⁵⁶ *Ibid*, Pasal V – Section 19.

BAB IV

PERLINDUNGAN FOLKLOR YANG LEBIH EFEKTIF DI INDONESIA

4.1 Perkembangan Perlindungan Terhadap Folklor Menurut Sistem Hukum Indonesia

Sebagai negara yang merdeka dan berdaulat, Indonesia memiliki Undang-Undang Dasar (UUD) 1945 yang menjadi dasar dalam menyelenggarakan pemerintahan. Dalam ketentuan UUD 1945 telah diatur mengenai masalah perlindungan kebudayaan, dimana folklor menjadi bagian dari kebudayaan tersebut. Dalam UUD 1945 yang sudah di amandemen, ketentuan mengenai kebudayaan diatur dalam Pasal 28 C ayat (1). Pasal tersebut menyatakan bahwa: “Setiap orang berhak mengembangkan diri melalui pemenuhan kebutuhan dasarnya, berhak mendapatkan pendidikan, memperoleh manfaat dari ilmu pengetahuan, seni dan budaya, demi peningkatan kualitas hidupnya demi kesejahteraan umat manusia”.

Berdasarkan ketentuan Pasal 28 C ayat (1), setiap warga negara Indonesia memiliki hak yang harus dipelihara yang merupakan kewajiban negara dalam melindungi segenap rakyatnya. Dalam hal ini pemerintah diwajibkan untuk melindungi setiap warga negara Indonesia dalam mendapatkan manfaat dari kebudayaannya. Hal tersebut dapat dilakukan dengan melestarikan atau memberikan perlindungan secara hukum terhadap kebudayaan yang ada.

Sedangkan Pasal 28 I ayat (3) menyatakan bahwa: “Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban”. Ketentuan ini merupakan penegasan bahwa budaya merupakan suatu identitas dari masyarakat tradisional yang harus dilindungi oleh negara. Dan dalam Pasal 32 ayat (1) dinyatakan bahwa: “Negara memajukan kebudayaan nasional Indonesia di tengah peradaban dunia dengan menjamin kebebasan masyarakat dalam memelihara dan mengembangkan nilai-nilai budaya”. Berdasarkan pasal tersebut, dengan masuknya arus globalisasi di Indonesia, maka negara memiliki kewajiban untuk tetap melestarikan dan melindungi kebudayaan nasional Indonesia.

Perlindungan tersebut tentunya tidak boleh menghilangkan nilai-nilai yang melekat dalam kehidupan masyarakat tradisional. Perlindungan tersebut juga tidak hanya berfokus pada peran pemerintah saja, tetapi juga peran seluruh warga negara Indonesia, sebagai pemilik kebudayaan.

Karena ketentuan yang diatur dalam UUD 1945, masih merupakan ketentuan yang bersifat umum, maka diperlukan suatu kebijakan yang dapat mengatur perlindungan terhadap folklor secara lebih rinci.

4.1.1. Undang-Undang Hak Cipta terhadap Folklor

Masalah perlindungan terhadap folklor dalam Undang-Undang Hak Cipta sudah dimulai sejak tahun 1982 melalui UUHC No. 6 Tahun 1982. Undang-undang yang dilahirkan akibat ketentuan dalam TRIPS, memuat masalah perlindungan folklor dalam ketentuan Pasal 10. Rumusan dari pasal tersebut sebagai berikut:

- “(1) Negara memegang hak cipta atas karya peninggalan sejarah, pra sejarah, paleo antropologi dan benda-benda budaya nasional lainnya;*
- (2) a. Hasil kebudayaan rakyat yang menjadi milik bersama, seperti cerita, hikayat, dongeng, legenda, babad, lagu, kerajinan tangan, koreografi, tarian, kaligrafi dan karya seni lainnya dipelihara dan dilindungi oleh negara;*
b. Negara memegang hak cipta atas ciptaan tersebut pada ayat (2) a terhadap luar negeri;
- (3) Hak cipta atas suatu karya demi kepentingan nasional dengan sepengetahuan pemegangnya dapat dijadikan milik negara dengan keputusan presiden atas dasar pertimbangan Dewan Hak Cipta*
- (4) Kepada Pemegang hak cipta sebagaimana dimaksud dalam ayat (3) diberi imbalan penghargaan yang ditetapkan oleh presiden;*
- (5) Ketentuan lebih lanjut mengenai hak cipta yang dipegang oleh negara sebagaimana dimaksud dalam pasal ini, diatur lebih lanjut dalam peraturan pemerintah.”*

Dalam rumusan pasal di atas, penggunaan negara sebagai pemegang Hak Cipta atas karya yang disebut di atas khususnya terhadap pihak

asing merupakan amanat untuk mewajibkan negara melindungi kebudayaan bangsa, terutama warisan budaya yang masih hidup.

Saat ini, ketentuan yang mengatur mengenai perlindungan terhadap folklor melalui hak cipta adalah UUHC No. 19 Tahun 2002. Dalam undang-undang tersebut, masalah folklor diatur dalam Pasal 10, yang menyatakan bahwa:

- (1) *Negara memegang Hak Cipta atas karya peninggalan prasejarah, sejarah dan benda budaya nasional lainnya;*
- (2) *Negara memegang Hak Cipta atas Folklor dan hasil kebudayaan rakyat yang menjadi milik bersama, seperti cerita, hikayat, dongeng, legenda, babad, lagu, kerajinan tangan, koreografi, tarian, kaligrafi dan karya seni lainnya;*
- (3) *Untuk mengumumkan atau memperbanyak ciptaan tersebut pada ayat (2), orang yang bukan warga negara Indonesia harus terlebih dahulu mendapat izin dari instansi yang terkait dalam masalah tersebut;*
- (4) *Ketentuan lebih lanjut mengenai Hak Cipta yang dipegang oleh negara sebagaimana dimaksud dalam Pasal ini, diatur dengan Peraturan Pemerintah.*

Rumusan dari Pasal 10 ini telah menuaikan begitu banyak persoalan sebagaimana telah dijelaskan dalam bab sebelumnya. Hingga saat ini, masih belum tercipta suatu instansi sebagaimana dimaksud dalam Pasal 10 ayat (3). Dengan demikian, masih terdapat persoalan ketika pihak asing ingin mengumumkan atau memperbanyak folklor Indonesia. Selain itu, hingga saat ini, Peraturan Pemerintah yang dimaksud dalam Pasal 10 ayat (4) masih dalam bentuk rancangan. Di samping itu, UUHC menganggap bahwa hanya warga negara asing yang dapat merusak nilai kebudayaan Indonesia dan tidak memandang bahwa warga negara Indonesia juga dapat merusak nilai-nilai kebudayaan Indonesia. Peraturan yang hanya dapat diterapkan terhadap pihak asing akan menghadapi kritik dari dunia internasional. Hal ini dikarenakan terdapatnya prinsip *national treatment* yang diakui sebagai norma umum dalam perjanjian internasional yang mengatur tentang hak kekayaan intelektual. Oleh karena itu, dapat disimpulkan

bahwa ketentuan yang diatur dalam UUHC mengenai folklor tidak dapat diterapkan sebagai bentuk perlindungan yang terbaik terhadap folklor. Hal ini dikarenakan ketika kita membahas mengenai warisan budaya, kita tidak membahas mengenai HKI atau bentuk dari warisan budaya tersebut, melainkan sesuatu yang dikenal sebagai kebudayaan yang memberikan suatu identitas kepada masyarakat tradisional.¹⁵⁷

4.1.2 Rancangan Peraturan Pemerintah Tentang Hak Cipta Yang Dipegang Oleh Negara

Dalam rancangan peraturan pemerintah yang dimaksud untuk mendukung Pasal 10 ayat (4) UUHC, folklor yang dikenal dengan istilah ekspresi budaya tradisional diartikan sebagai karya intelektual dalam bidang seni yang mengandung unsur karakteristik warisan tradisional yang dihasilkan, dikembangkan dan dipelihara oleh komunitas atau masyarakat secara luas. Berdasarkan ketentuan ini, maka dapat disimpulkan bahwa yang termasuk folklor adalah suatu warisan budaya yang hidup (*living heritage*).

Rancangan ini menyatakan bahwa pemilik atau kustodian dari folklor adalah komunitas atau masyarakat tradisional yang memelihara dan mengembangkan folklor tersebut. Meskipun demikian, rancangan ini tetap menunjuk Negara sebagai pihak yang memegang hak eksklusif (Hak Cipta) terhadap folklor. Hal ini dikarenakan tidak semua masyarakat Indonesia memahami secara mendalam ketentuan mengenai Hak Cipta.

Perlindungan yang diberikan dalam rancangan peraturan pemerintah ini adalah melalui izin akses pemanfaatan dan perjanjian pemanfaatan. Oleh karena itu, untuk dapat memperbanyak atau menggunakan folklor Indonesia, warga negara asing atau badan hukum asing diwajibkan untuk mendapatkan izin akses pemanfaatan dari menteri yang berwenang dan perjanjian pemanfaatan dari masyarakat tradisional sebagai pemilik folklor. Sedangkan warga negara Indonesia

¹⁵⁷ Hasil wawancara dengan Prof. Agus Sardjono, S.H., M.H. pada 21 Desember 2010.

atau badan hukum Indonesia yang ingin melakukan pemanfaatan untuk tujuan komersil, tidak memerlukan izin akses pemanfaatan, tetapi harus melakukan perjanjian pemanfaatan dengan pemilik atau kustodian folklor. Dengan demikian, dapat dilihat bahwa rancangan ini tidak hanya melihat pihak asing sebagai satu-satunya pihak yang dapat memanfaatkan atau merusak folklor Indonesia sebagai warisan budaya.

Berkaitan dengan izin akses dan perjanjian pemanfaatan, izin dan perjanjian tersebut tidak diperlukan untuk pemanfaatan di bidang pendidikan, penelitian atau pengembangan ilmu; peliputan atau pelaporan untuk tujuan informasi semata; dan kegiatan amal. Namun perlu diperhatikan bahwa pemanfaatan yang dimaksud adalah tidak bertujuan komersil, tidak merugikan kepentingan yang wajar dari pemilik folklor; mencantumkan sumbernya; dan tidak menyimpang dan menimbulkan kesan tidak benar terhadap masyarakat terkait.

Sebagai penutup rancangan ini telah diatur ketentuan mengenai pelanggaran ketentuan izin. Dalam rancangan ini ditentukan bahwa setiap orang atau badan hukum yang melakukan pemanfaatan tanpa izin akses pemanfaatan akan dikenakan sanksi sesuai dengan ketentuan pidana yang berlaku.

4.2 Penerapan Ketentuan Hukum Internasional Mengenai Perlindungan Terhadap Folklor di Indonesia

Penerapan ketentuan hukum internasional ke dalam hukum nasional dapat diawali dengan melakukan penyesuaian pengertian dari subjek yang akan diatur dalam hukum nasional. Hal ini dapat dilihat dari pengertian folklor yang dianut oleh UUHC yang mencerminkan pengertian yang dimaksud oleh WIPO dan UNESCO.

Tabel 4.1 Pengertian Folklor Menurut WIPO, UNESCO dan UUHC

WIPO	UNESCO	UUHC
<p><i>Traditional cultural expressions (or, "expressions of folklore") include music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives. TCEs are integral to the cultural and social identities of indigenous and local communities, they embody know-how and skills, and they transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.</i>¹⁵⁸</p> <p>Dengan demikian, yang dimaksud dengan folklor adalah bentuk apapun, baik kasat mata maupun tak kasat mata, dimana budaya tradisional dapat diekspresikan dan ditampilkan atau dimanifestikan, sehingga folklor tersebut menjadi bagian daripada identitas suatu masyarakat tradisional.</p>	<p>Konvensi UNESCO 2003 mengartikan folklor yang lebih dikenal dengan istilah <i>intangible cultural heritage</i> sebagai: “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”</p> <p>Berdasarkan definisi tersebut UNESCO unsur kasat mata dan tak kasat mata yang terdapat dalam folklor tidak dapat dipisahkan karena mereka saling melengkapi.</p>	<p>Penjelasan Pasal 10 ayat (2) UUHC mengartikan folklor sebagai: “sekumpulan ciptaan tradisional, baik yang dibuat oleh kelompok maupun perorangan dalam masyarakat, yang menunjukkan identitas sosial dan budayanya berdasarkan standar dan nilai-nilai yang diucapkan atau diikuti secara turun temurun, termasuk:</p> <ol style="list-style-type: none"> cerita rakyat, puisi rakyat; lagu-lagu rakyat dan musik instrumen tradisional; tari-tarian rakyat, permainan tradisional; hasil seni antara lain berupa: lukisan, gambar, ukiran-ukiran, pahatan, mosaik, perhiasan, kerajinan tangan, pakaian, instrumen musik dan tenun tradisional”.

¹⁵⁸ WIPO, “Traditional Cultural Expressions (Folklore)”, <<http://www.wipo.int/tk/en/folklore/>>, diunduh 24 November 2010.

Walaupun definisi yang diberikan oleh UUHC tidaklah sama dari segi penerapan kata-kata, namun apabila diinterpretasikan dengan baik, inti dari ketentuan yang dimaksud dalam UUHC mencerminkan maksud yang diartikan oleh WIPO dan UNESCO. Secara keseluruhan ketiga pengertian di atas mengartikan folklor sebagai suatu warisan budaya yang dapat diekspresikan atau dipraktekkan sehingga memberikan identitas yang khusus terhadap masyarakat tradisional yang memilikinya.

Meskipun pengertian dalam UUHC telah mencerminkan ketentuan dalam hukum internasional, namun perlindungan terhadap folklor yang diatur dalam rezim hak cipta tidak dapat memberikan perlindungan yang maksimal. Selain karena rezim hak cipta bertolak belakang dengan kepentingan masyarakat tradisional, peraturan pemerintah yang dimaksud untuk dapat melaksanakan ketentuan yang diatur dalam Pasal 10 UUHC masih dalam bentuk rancangan. Dengan demikian, dapat disimpulkan bahwa meskipun rezim hak cipta telah membawa negara Indonesia ke dalam suatu proses untuk melindungi warisan budaya, perlindungan tersebut masih jauh dari tujuannya.

Oleh karena itu, dengan adanya berbagai ketentuan hukum internasional yang mengatur mengenai perlindungan terhadap folklor, Indonesia sebagai negara yang berdaulat memiliki hak untuk mengadopsi ketentuan yang berlaku yang sesuai dengan kondisi masyarakatnya saat ini. Dari ketentuan yang diatur dalam UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore*, UNESCO dan WIPO *Model Treaty on the Protection of Expressions of Folklor against Illicit Exploitation and Other Prejudicial Actions*, WIPO *IGC Draft Provisions on the Protection of Traditional Cultural Expressions/Expressions of Folklore* dan UNESCO *Convention fo the Safeguarding of the Intangible Cultural Heritage*, Indonesia baru meratifikasi ketentuan yang diatur dalam Konvensi UNESCO 2003 melalui Peraturan Presiden Republik Indonesia No. 78 Tahun 2007 tentang Pengesahan *Convention For The Safeguarding Of The Intangible Cultural Heritage*.

Berdasarkan Peraturan Presiden No. 78 Tahun 2007, Indonesia memiliki kewajiban untuk mengikuti ketentuan yang tercantum dalam Konvensi UNESCO 2003, khususnya yang tercantum dalam Pasal 11 sampai dengan Pasal 15. Dalam melindungi warisan budaya di seluruh wilayah Indonesia, pemerintah harus mengambil langkah-langkah yang dipandang perlu untuk memberikan perlindungan yang diinginkan. Hingga saat ini tahap yang baru diambil oleh pemerintah Indonesia dalam memberikan perlindungan adalah dengan mengikutsertakan berbagai masyarakat tradisional dalam mengidentifikasi dan mendokumentasikan warisan budaya Indonesia. Dokumentasi dan daftar inventaris ini berguna sebagai bukti kepada negara lain yang berusaha untuk mengklaim warisan budaya Indonesia, bahwa warisan budaya yang ingin mereka klaim adalah sebenarnya milik Indonesia.

Dalam melaksanakan dokumentasi dan pembuatan daftar inventaris sebagai suatu bentuk awal perlindungan, kita tidak hanya sekedar mendaftarkan nama serta deskripsi umum dari folklor yang bersangkutan. Tetapi harus disertai dengan informasi dari berbagai aspek sehingga meyakinkan setiap pihak bahwa warisan budaya yang bersangkutan pantas untuk dilindungi. Hingga saat ini Indonesia telah mendokumentasikan warisan budaya melalui kerjasama antara Kementerian Kebudayaan dan Pariwisata dengan pemerintah daerah, masyarakat tradisional, tokoh-tokoh adat, dan LSM.¹⁵⁹

Selain dokumentasi, pemerintah Indonesia juga telah mengadakan berbagai *focus group discussion* sebagai upaya terlaksananya pertukaran informasi mengenai perlindungan warisan budaya dari negara peserta Konvensi lainnya.¹⁶⁰ Disamping itu, Indonesia juga sering mengikuti dan mengadakan berbagai macam festival kebudayaan baik di Indonesia maupun diluar negeri. Festival ini mempunyai tujuan untuk menunjukkan kepada

¹⁵⁹ Hasil wawancara dengan Hasil Wawancara dengan Ibu Dewi Indrawati dan Mas Dadam M dari Direktorat Tradisi, Kementerian Kebudayaan dan Pariwisata (19 November 2010).

¹⁶⁰ *Ibid.*

dunia bahwa folklor yang bersangkutan merupakan warisan budaya milik Indonesia.

Sebagai bentuk implementasi terhadap Konvensi UNESCO 2003, Indonesia melalui Menteri Dalam Negeri dan Menteri Kebudayaan dan Pariwisata telah mengeluarkan Peraturan Bersama Menteri No. 42 Tahun 2009/No. 40 Tahun 2009 tentang Pedoman Pelestarian Kebudayaan. Peraturan Bersama ini ditujukan sebagai suatu sandaran yang dapat diterapkan di Indonesia dalam melindungi warisan budaya yang membentuk jatidiri bangsa.

Perlindungan yang dimaksud dalam Peraturan Bersama Menteri ini adalah upaya pencegahan dan penanggulangan yang dapat menimbulkan kerusakan, kerugian atau kepunahan kebudayaan yang diakibatkan oleh perbuatan manusia ataupun proses alam.¹⁶¹ Kegiatan perlindungan tersebut dapat dilakukan, antara lain melalui inventarisasi, pendokumentasian, registrasi, hak atas kekayaan intelektual dan penegakan peraturan perundang-undangan.¹⁶² Berdasarkan ketentuan tersebut, maka dapat dilihat bahwa perlindungan baru dapat diberikan ketika dokumentasi telah dilaksanakan. Akan tetapi ketentuan yang termuat dalam Peraturan Bersama ini tetap menunjuk pada HKI sebagai suatu sistem perlindungan yang dapat diterapkan kepada folklor Indonesia, sedangkan dalam pembahasan sebelumnya telah dijelaskan bahwa rezim HKI terutama Hak Cipta memiliki karakteristik yang bertolak belakang dengan kehidupan masyarakat tradisional Indonesia.

Meskipun Indonesia telah meratifikasi Konvensi UNESCO 2003, masih perlu disayangi bahwa perlindungan terhadap folklor yang diberikan masih bersifat lemah. Hal ini dikarenakan Indonesia belum memenuhi ketentuan yang diatur dalam Konvensi UNESCO 2003 secara keseluruhan. Misalnya, Indonesia belum membentuk suatu lembaga yang memiliki kompetensi untuk melindungi warisan budaya yang ada diteritorinya. Selain itu, belum terdapat

¹⁶¹ Indonesia (b), *Op. Cit.*, Pasal 1 butir (3).

¹⁶² *Ibid.*, Lihat lebih lanjut Pasal 8 dan Pasal 9.

peraturan khusus yang dapat memberikan perlindungan terhadap folklor. Peraturan khusus ini dimaksudkan untuk memiliki tujuan yang berbeda dari perlindungan yang terdapat di bawah rezim Hak Cipta. Seharusnya Indonesia dapat menerapkan ketentuan hukum internasional lainnya untuk dapat memberikan perlindungan yang tepat kepada folklor. Indonesia dapat mencontoh Malaysia dan Filipina yang telah berhasil untuk membuat suatu undang-undang yang secara khusus mengatur mengenai warisan budaya.

Ketentuan yang diatur dalam Model Perjanjian dan Rancangan IGC juga dapat diadopsi oleh Indonesia. Ketentuan yang dapat dipetik oleh Indonesia adalah ketentuan mengenai pengakuan dan pendaftaran. Pengakuan tersebut adalah untuk memastikan bahwa meskipun ada pemanfaatan, masyarakat tradisional Indonesia diuntungkan dengan mendapatkan atribusi atau pengakuan dari pemanfaatan itu, sehingga hak mereka terhadap folklor Indonesia tidak hilang. Sedangkan yang dimaksud dengan pendaftaran tidak harus dengan pendaftaran melalui rezim HKI. Pendaftaran tersebut dapat berupa pendaftaran sebagai warisan budaya nasional atau pendaftaran dalam inventarisasi atau *database*.

4.3 Pengklaiman Folklor Milik Indonesia Oleh Malaysia

Sebagai negara berkembang, Indonesia kaya akan kebudayaan. Hal ini dapat dilihat dengan begitu banyak suku yang melahirkan keragaman budaya. Budaya tersebut kemudian melahirkan suatu warisan budaya yang kaya akan nilai historis dan nilai ekonomi. Akan tetapi, kekayaan tersebut sangat jauh dari suatu perlindungan. Oleh karena itu, seringkali pihak asing berusaha untuk mengklaim folklor Indonesia sebagai warisan budaya mereka.

Seperti yang dijelaskan pada bab sebelumnya, dalam penelitian ini penulis mengangkat Angklung sebagai salah satu contoh folklor yang dimiliki oleh Indonesia. Dengan demikian, penulis akan membahas mengenai pengklaiman Angklung yang pernah dilakukan oleh Malaysia.

4.3.1 Pengklaiman Angklung

Pada awalnya, pengakuan/klaim dari Malaysia terhadap Angklung tidak secara eksplisit dicetuskan oleh para pejabat, budayawan, seniman maupun masyarakat Malaysia sebagai milik mereka, melainkan secara implisit melalui penampilan permainan Angklung dalam salah satu segmen iklan promosi pariwisata Malaysia. Akan tetapi, tindakan ini justru mengakibatkan timbulnya berbagai klaim secara eksplisit.

Dalam situs www.musicmall.asia.com disebutkan bahwa angklung berasal dari Malaysia tepatnya berada di kota Johor. Dalam situs ini, dinyatakan bahwa musik angklung merupakan pengiring kesenian kuda kepang. Selain itu, klaim angklung sebagai budaya Malaysia juga dituangkan dalam situs www.malaysiana.pnm.my dimana disebutkan bahwa angklung adalah salah satu warisan budaya Malaysia.¹⁶³

Tindakan pengklaiman ini menimbulkan amarah masyarakat Indonesia terhadap Malaysia. Amarah tersebut timbul akibat adanya usaha untuk merebut identitas serta harkat martabat Indonesia sebagai suatu negara yang berdaulat. Banyak pihak yang mengatakan bahwa Angklung harus dipatenkan atau di daftarkan melalui hak cipta. Akan tetapi keinginan merkapun tidak dapat direalisasikan secara mudah.

Ketika kita membahas *cultural heritage* yang penuh dengan nilai-nilai, maka kita membahas mengenai kebudayaan. Dalam hal ini kita tidak membahas mengenai persoalan HKI tetapi adanya sesuatu yang terdapat dibelakang budaya yang bersangkutan, yaitu ekspresi kesenian.¹⁶⁴ Perlu diperhatikan bahwa yang dapat diklaim bukanlah Angklung sebagai suatu alat musik tradisional, tetapi pembuatan dan nilai-nilai yang terdapat dalam Angklung yang dapat diklaim oleh pemiliknya, yaitu masyarakat Jawa Barat pada khususnya. Dalam hal

¹⁶³ Melissa Tuanakotta, "Fakta Angklung Budaya Indonesia Diungkap", <http://nasional.vivanews.com/news/read/135822-fakta_angklung_budaya_indonesia_diungkap>, diunduh pada 01 Desember 2010.

¹⁶⁴ Hasil wawancara dengan Prof. Agus Sardjono, S.H., M.H. pada tanggal 21 Desember 2010.

ini, nilai-nilai dan warisan budaya tidak dapat dilindungi oleh rezim hak kekayaan intelektual.¹⁶⁵ Dengan demikian, Angklung tidak dapat didaftarkan melalui rezim paten ataupun hak cipta. Hal ini dikarenakan pembuatan Angklung bukanlah sesuatu yang original dan inovatif sebagaimana dimaksud dalam kedua rezim tersebut.

4.3.2 Pengukuhan Angklung dalam *Representative List of the Intangible Cultural Heritage of Humanity*

Ketika perlindungan terhadap folklor tidak dapat dipenuhi secara maksimal melalui perlindungan Hak Cipta, suatu negara diwajibkan untuk mencari perlindungan yang lain untuk melindungi kekayaan budayanya. Oleh karena rezim Hak Cipta tidak dapat mencapai tujuan yang diinginkan oleh Indonesia untuk melindungi folklor sebagai warisan budaya, Indonesia beralih kepada ketentuan yang diatur dalam hukum internasional, khususnya Konvensi UNESCO 2003.

Konvensi UNESCO 2003 memberikan hak dan kewajiban kepada Negara Peserta untuk menominasikan warisan budaya mereka yang dianggap penting dan memberikan ciri khas tertentu kepada suatu negara dalam *Representative List* yang dikeluarkan oleh UNESCO. Dengan demikian, Indonesia telah menominasikan Angklung sebagai suatu warisan budaya yang perlu diakui baik secara nasional maupun internasional. Nominasi tersebut bertujuan untuk memberikan suatu pengakuan terhadap keberadaan kesenian Angklung pada umumnya dan pengakuan terhadap masyarakat tradisional sebagai pemilik dari nilai-nilai Angklung pada khususnya. Dengan diakuinya Angklung sebagai milik Indonesia, maka hal tersebut dapat mencegah upaya negara lain dalam mengklaim Angklung sebagai miliknya.

Berdasarkan *Decision 5.COM 6.18*, Komite sebagaimana dimaksud dalam Konvensi UNESCO 2003, menyatakan bahwa nilai-nilai dan ciri khas yang diberikan oleh Angklung pantas untuk dimasukkan dalam *Representative List*. Hal ini dikarenakan:

¹⁶⁵ *Ibid.*

- *Indonesian Angklung and its music are central to the cultural identity of communities in West Java and Banten, where playing the Angklung promotes the values of teamwork, mutual respect and social harmony;*
- *Inscription of Indonesian Angklung on the Representative List could contribute to greater awareness of the importance of intangible cultural heritage and promote the values of cooperation, discipline and mutual respect that are at its core;*
- *Safeguarding measures are proposed that include cooperation between performers and authorities at various levels to stimulate transmission in formal and non-formal settings, to organize performances, and to encourage the craftsmanship of making Angklungs and sustainable cultivation of the bamboo needed for its manufacture;*
- *The nomination clearly demonstrates the broad participation of the communities both in safeguarding efforts and, through formal consultations, in the process of elaborating the nomination;*
- *Indonesian Angklung is included in a national inventory maintained by the Centre for Research and Development of Culture of the Ministry of Culture and Tourism, and in several specialized inventories maintained by universities and Angklung associations.*¹⁶⁶

Berdasarkan ketentuan di atas, Angklung yang merupakan folklor Indonesia layak untuk diakui sebagai warisan budaya karena kesenian Angklung memberikan identitas budaya kepada masyarakat Indonesia, khususnya di Jawa Barat dan Banten, di mana kesenian Angklung tersebut mempromosikan nilai-nilai kerja sama dan saling menghormati. Selain itu, dengan memasukkan Angklung dalam *Representative List* dapat memberikan kontribusi yang lebih besar terhadap kesadaran akan pentingnya warisan budaya sebagai kekayaan yang dimiliki oleh suatu bangsa dalam hal mempertahankan identitas, harkat dan martabat, serta kedaulatan negara.

Meskipun Angklung telah diakui sebagai warisan budaya dari Indonesia, hal ini tentunya tidak dapat mencegah pihak-pihak yang ingin memanfaatkan Angklung dan folklor Indonesia lainnya untuk

¹⁶⁶ UNESCO, “Indonesian Angklung”, <<http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&RL=00393>>, diunduh pada 02 Desember 2010.

tujuan komersil. Oleh karena itu, masih tetap diperlukan suatu mekanisme perlindungan terhadap folklor yang lebih efektif untuk diterapkan di Indonesia. Bagaimanapun juga, ketentuan hukum internasional tidak dapat mengatur segala hal yang termasuk dalam yurisdiksi nasional. Oleh karena itu, Indonesia perlu untuk membentuk suatu perlindungan yang lebih efektif yang dapat diterapkan secara nasional dan diakui dalam dunia internasional.

4.4 Perlindungan Terhadap Folklor Yang Lebih Efektif Di Indonesia

Apabila perlindungan terhadap folklor diberikan dalam rezim hak kekayaan intelektual, maka siapapun juga – baik pihak asing maupun bukan – yang pernah mempelajari atau meniru kebudayaan Indonesia dapat menyatakan bahwa folklor tersebut adalah miliknya.¹⁶⁷ Hal ini dikarenakan hak kekayaan intelektual mengenal adanya hak individualistik. Hal inilah yang tidak boleh terjadi.

Kita tidak dapat memberlakukan suatu rezim HKI yang hanya berlaku dalam teritori suatu negara yang bersangkutan. Oleh karena itu diperlukan suatu perlindungan yang khusus yang dapat mengatur perlindungan terhadap nilai-nilai dan seni yang terdapat dalam suatu folklor yang bersifat kasat mata dan tak kasat mata.¹⁶⁸

4.4.1 Melakukan Inventarisasi dan Dokumentasi Folklor

Inventarisasi merupakan salah satu langkah dalam perlindungan defensif. Perlindungan defensif adalah perlindungan yang dimaksudkan untuk tidak melindungi folklor melalui rezim HKI.¹⁶⁹ Upaya defensif ini bertujuan untuk mencegah penggunaan folklor secara tidak sah dengan melakukan kegiatan pencatatan keseluruhan unsur kebudayaan yang terdapat dalam suatu wilayah, yang bersifat kasat mata maupun

¹⁶⁷ Hasil wawancara dengan Prof. Agus Sardjono, S.H., M.H. pada 21 Desember 2010.

¹⁶⁸ *Ibid.*

¹⁶⁹ Arif Lutviansori, *Op. Cit.*, hal. 146.

tak kasat mata. Perlu diperhatikan bahwa kegiatan inventarisasi tidak dapat dibebankan secara keseluruhan kepada pemerintah, sebab hanya masyarakat tradisional yang merupakan pemilik folklor yang mengetahui segala sesuatu yang berkaitan dengan folklor tersebut yang dapat menentukan apa saja yang merupakan warisan budaya mereka.

Agar inventarisasi yang dilakukan oleh berbagai pihak dapat dilaksanakan dengan baik, maka perlu adanya panduan yang berisi tentang cara-cara praktis untuk melakukan inventarisasi. Oleh karena itu, Departemen Kebudayaan dan Pariwisata bekerjasama dengan Kantor UNESCO Jakarta dalam menyusun “Buku Panduan Praktis Pencatatan Warisan Budaya Tak Benda Indonesia” yang diharapkan dapat digunakan sebagai pedoman dalam melakukan kegiatan inventarisasi.¹⁷⁰ Dengan adanya panduan inventarisasi yang sederhana dan mudah dipahami, maka diharapkan untuk meningkatkan peran aktif masyarakat dalam melestarikan budaya bangsa.

Berdasarkan buku panduan tersebut, inventarisasi warisan budaya dapat dilakukan secara manual atau *online*.¹⁷¹ Perbedaan cara pencatatan disebabkan masih adanya masyarakat Indonesia yang belum mengenal teknologi informasi modern, serta belum dapat membaca, menulis, dan berbicara dalam bahasa Indonesia. Pada tahap pencatatan ini, maka pihak yang berwenang akan secara langsung mendatangi masyarakat yang bersangkutan untuk mendapatkan persetujuan untuk mencatat folklor yang mereka miliki. Hal ini dikarenakan hanya masyarakat yang bersangkutan yang dapat menentukan apa saja yang merupakan warisan budaya mereka. Pencatatan ini tentunya dapat melibatkan tokoh adat setempat. Sedangkan inventarisasi secara *online* dilakukan secara interaktif melalui web 2.0.

Selain melalui pencatatan secara manual dan *online*, masih terdapat langkah-langkah yang dapat diterapkan untuk melakukan

¹⁷⁰ Departemen Kebudayaan dan Pariwisata bekerjasama dengan Kantor UNESCO Jakarta, *Op. Cit*, hal 7.

¹⁷¹ *Ibid.*, hal 9.

inventarisasi secara baik. Langkah pertama adalah untuk memberikan pemahaman kepada masyarakat dan seniman tradisional mengenai pentingnya perlindungan terhadap folklor. Kedua adalah dengan memanfaatkan kesenian tradisional secara optimal. Salah satu faktor rendahnya kesadaran hukum masyarakat akan pentingnya perlindungan terhadap folklor dikarenakan kurangnya perhatian dan minat masyarakat Indonesia terhadap kesenian budaya itu sendiri. Ketiga adalah melakukan dokumentasi yang komprehensif. Pendokumentasian dalam hal ini adalah upaya menghimpun, mengolah, dan menata informasi kebudayaan dalam bentuk rekaman berupa tulisan, gambar, foto, film, suara atau gabungan unsur-unsur ini (*multimedia*).¹⁷²

Sebagaimana dijelaskan sebelumnya, perlindungan baru dapat diberikan oleh suatu negara terhadap folklor ketika sudah adanya suatu pengakuan dan/atau pengklaiman yang didukung oleh dokumentasi. Dengan demikian, tahap inventarisasi dan dokumentasi bertujuan untuk memberikan suatu bukti kepada pihak yang berkepentingan bahwa warisan budaya yang dimiliki oleh Indonesia merupakan folklor yang layak untuk dilindungi.

Menyadari pentingnya dokumentasi, dibutuhkan suatu pendekatan dalam membangun *database* warisan budaya Indonesia, yang bisa diluncurkan dengan segera dan dengan biaya yang relatif murah, sehingga dapat terus berkembang untuk menjadi dukungan bagi peraturan *sui generis*. Pendekatan yang dimaksud pernah diusulkan oleh suatu tim peneliti untuk menggunakan teknologi *wiki* yang terdapat di *internet*.¹⁷³

Melalui sistem *wiki*, siapapun dapat memberi sumbangan informasi atau pengetahuan mengenai unsur-unsur folklor yang sedang didokumentasikan. Hal ini sama seperti menyunting suatu hal dalam *wikipedia*. Namun, karena pendokumentasian merupakan hal yang

¹⁷² Indonesia (b), *Op. Cit.*, Psal 1 angka (12).

¹⁷³ Peter Jaszi, *Op. Cit.*, hal 559.

penting, diperlukan suatu peraturan dalam menggunakan *wiki* sehingga dapat mencegah pihak-pihak yang berusaha untuk merubah atau melakukan vandalisme terhadap nilai-nilai dan unsur-unsur yang terdapat dalam suatu folklor.¹⁷⁴

4.4.2 Pembentukan Peraturan Khusus

Karena rezim Hak Cipta tidak dapat menyentuh warisan budaya, terutama yang tak kasat mata, maka pembentukan peraturan khusus memiliki tujuan untuk mencakup segala sesuatu yang tidak dapat diterapkan melalui Hak Cipta. Dengan demikian pemerintah diwajibkan untuk membentuk suatu peraturan yang secara khusus dapat melindungi folklor sebagai warisan budaya. Pembentukan peraturan ini dimaksudkan untuk menjadi sumber untuk merumuskan hak-hak masyarakat tradisional terhadap folklor yang mereka miliki.

Folklor sebagai warisan budaya sangat berkaitan dengan masyarakat tradisional yang memeliharanya. Oleh karena itu, dalam membentuk suatu peraturan khusus, pemerintah harus memperhatikan hal-hal yang berkaitan dengan masyarakat tradisional itu sendiri. Sebab dalam hal ini, perlindungan yang akan diberikan tidak hanya bertujuan untuk melindungi warisan budaya tetapi juga untuk melindungi masyarakat tradisional sebagai pemilik dari warisan budaya tersebut.

Beberapa hal yang harus diperhatikan adalah pertama mengadopsi nilai-nilai dan kebijakan adat dan tradisional. Sebisa mungkin pengaturan khusus ini harus dapat mengakomodasi prinsip-prinsip yang dikenal dalam hukum adat. Oleh karena itu, peraturan khusus harus bersifat sederhana; hendaknya tetap berlandaskan kepada sistem kemasyarakatan yang sangat menghargai nilai komunal dan kebersamaan; dan harus mampu untuk menjamin bahwa perlindungan terhadap folklor juga bertujuan untuk memberikan kesejahteraan kepada masyarakat pada umumnya.¹⁷⁵

¹⁷⁴ *Ibid.*, Lihat lebih lanjut hal. 559-561

Ketentuan yang diatur dalam peraturan khusus ini harus mampu mengerti keinginan dari masyarakat tradisional itu sendiri, yang di antaranya adalah keinginan masyarakat tradisional untuk mendapatkan pengakuan terhadap folklor yang mereka miliki. Keinginan tersebut timbul karena masyarakat tradisional merupakan pemegang hak-hak dari warisan budaya yang mereka pelihara hingga saat ini. Selain itu, peraturan khusus dapat mengatur mengenai izin atau perjanjian pemanfaatan. Selain itu, peraturan khusus ini dapat mengatur mengenai ketentuan *benefit sharing* (pembagian manfaat) sebagaimana dimaksud dalam Rancangan IGC WIPO sebagai bagian dari perjanjian pemanfaatan.

Tidak dapat dielakkan lagi bahwa dengan masuknya arus globalisasi di Indonesia terdapat pihak-pihak yang ingin menggunakan folklor Indonesia untuk tujuan komersil. Oleh karena itu diperlukan suatu ketentuan yang mengatur mengenai pembagian keuntungan yang diperoleh dari pemanfaat folklor untuk tujuan komersil. Peraturan ini kemudian dapat mengatur mengenai pihak yang berhak untuk mewakili masyarakat tradisional dalam memberikan persetujuan penggunaan dan untuk menerima hasil keuntungan.¹⁷⁶

4.4.3 Membentuk Suatu Lembaga Khusus

Mekanisme ketiga yang dapat diterapkan di Indonesia dalam hal melindungi folklor sebagai warisan budaya adalah dengan membentuk suatu lembaga khusus yang memiliki kompetensi untuk melindungi warisan budaya yang terdapat dalam teritorinya dan untuk memajukan kesenian tradisional dalam mengembangkan folklor pada masa kini dan masa depan. Komisi yang pernah diusulkan oleh suatu tim peneliti adalah dibentuknya suatu Dewan atau Komisi Kesenian Tradisional.¹⁷⁷

¹⁷⁵ Arif Lutviansori, *Op. Cit.*, hal. 141.

¹⁷⁶ Lihat lebih lanjut, Peter Jaszi, *Op. Cit.*, hal 547-552.

¹⁷⁷ *Ibid.*, hal 553.

Sebagai suatu lembaga yang diharapkan untuk dapat melindungi dan mengembangkan folklor sebagai warisan budaya, Komisi yang dimaksud memiliki peran sebagai berikut:

- a. Mendidik para seniman tentang hak-hak mereka;
- b. Memiliki keterlibatan dengan pengakuan yang harus diberikan kepada masyarakat tradisional;
- c. Mengawasi perjanjian pemanfaatan;
- d. Memonitor penyalahgunaan terhadap folklor Indonesia;
- e. Memimpin masyarakat Indonesia dalam pembelaan dari klaim-klaim kekayaan intelektual yang dilakukan oleh pihak asing.¹⁷⁸

Dalam mendidik masyarakat tradisional tentang hak-hak mereka sebagai pemilik folklor, tugas utama Komisi adalah untuk mengkoordinir penyebarluasan informasi tentang sumber-sumber hukum yang ada di dunia sehubungan dengan praktik-praktik budaya.¹⁷⁹ Penyebarluasan informasi ini dapat diterapkan melalui lokakarya ataupun pendidikan formal dan informal.

Suatu pengakuan merupakan hal yang terpenting yang diinginkan oleh masyarakat tradisional sebagai hasil dari pemanfaatan folklor mereka oleh pihak manapun. Oleh karena itu Komisi ini ditugaskan untuk mengatur mengenai ketentuan pemberian syarat pengakuan yang diinginkan oleh masyarakat tradisional yang bersangkutan.¹⁸⁰

Sebagaimana dikatakan sebelumnya, peraturan khusus dapat mengatur ketentuan mengenai pemberian izin dan/atau perjanjian pemanfaatan. Sehubungan dengan hal ini, Komisi memiliki tugas untuk memberikan panduan bagi calon pengguna folklor untuk dapat mengidentifikasi wakil komunitas dengan tepat ketika mereka membutuhkannya untuk mendapatkan izin penggunaan. Selain itu,

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, hal 554.

¹⁸⁰ *Ibid.*, hal 555.

Komisi dapat memberikan panduan bagi masyarakat tradisional mengenai berbagai teknik untuk mencapai pembagian manfaat (*benefit sharing*) secara adil dan benar. Dengan melakukan *benefit sharing*, maka hal ini dapat meningkatkan kesejahteraan masyarakat tradisional sebagai pemilik folklor. Komisi juga dapat menjadi penyimpanan informasi tentang perjanjian serta menjadi badan penyelesaian perselisihan.¹⁸¹

Meskipun suatu negara telah membentuk suatu peraturan yang baik beserta lembaga yang berkompeten untuk mendukungnya, tindakan penyalahgunaan terhadap folklor sangat sulit untuk dicegah secara penuh. Hal ini dikarenakan tingginya nilai ekonomi yang terdapat dalam folklor dan masih rendahnya kesadaran masyarakat tradisional terhadap hak-hak mereka. Oleh karena itu, salah satu tujuan dibentuknya Komisi atau lembaga yang kompeten adalah untuk memonitor penyalahgunaan folklor Indonesia, seperti klaim-klaim yang diajukan oleh pihak-pihak asing. Dengan demikian, Komisi tersebut juga memiliki tugas untuk mewakili masyarakat tradisional dalam menyelesaikan penyalahgunaan tersebut. Dalam hal ini Komisi dapat mengajukan suatu keberatan terhadap klaim di negara-negara dimana folklor didaftarkan dengan memperlihatkan dokumentasi yang telah dilakukan untuk menunjukkan bahwa klaim yang ingin didaftarkan tidak bersifat original, namun merupakan representasi dari aspek tradisi Indonesia yang telah berjalan lama dan terdokumentasi.¹⁸²

Pembentukan lembaga ini lebih baik berada di bawah pengawasan pemerintah. Hal ini untuk mencegah *invested interest* yang cenderung untuk mengkomersilkan folklor untuk mendapatkan keuntungan yang besar. Dengan berada di bawah pengawasan pemerintah, maka lembaga ini memiliki kewajiban untuk terus melindungi kepentingan nasional, khususnya masyarakat tradisional sebagai pemilik folklor.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*, hal. 556.

BAB V

PENUTUP

5.1 Kesimpulan

Setelah melakukan penelitian dan analisa, maka secara singkat dapat disimpulkan bahwa perlindungan terhadap folklor dalam ranah nasional tidak akan lepas dari ketentuan yang diatur dalam hukum internasional. Sebagaimana telah dijelaskan sebelumnya, perlindungan terhadap warisan budaya mulai diatur dalam hukum internasional melalui Konvensi UNESCO yang mengatur mengenai perlindungan terhadap benda cagar budaya pada masa perang. Namun, seiring dengan berkembangnya zaman, terdapat pendapat yang menganggap bahwa folklor sebagai warisan budaya juga membutuhkan perlindungan. Oleh karena itu, ketentuan hukum internasional dimaksudkan untuk menjadi sumber hukum kepada negara-negara dalam melindungi kekayaan budaya mereka.

Dalam melakukan penelitian ini, penulis mencoba untuk menjelaskan mengenai ketentuan perlindungan yang dapat diberikan terhadap folklor baik dalam hukum internasional maupun hukum nasional dengan menjawab empat pokok permasalahan berdasarkan pemaparan yang telah disampaikan pada bab-bab sebelumnya. Maka untuk memberikan kesimpulan dalam penelitian ini, penulis mencoba untuk menjawab pokok permasalahan tersebut.

- 1) Untuk dapat mengetahui konsep perlindungan terhadap folklor, maka diperlukan suatu pemahaman terhadap folklor itu sendiri sebagai warisan budaya. Istilah folklor didefinisikan secara berbeda-beda oleh pakar budaya dan organisasi internasional. Meskipun berbeda-beda, definisi tersebut memiliki berbagai kesamaan. Dengan demikian, folklor dapat diartikan sebagai suatu ekspresi yang merepresentasikan identitas budaya suatu masyarakat tradisional, baik dalam bentuk lisan, sebagian lisan, maupun tidak lisan, yang diwariskan dari generasi ke generasi secara lisan sehingga seringkali tidak diketahui penciptanya. Pandangan seseorang terhadap folklor seharusnya tidak hanya kepada bentuk atau

pertunjukan yang dihasilkan oleh suatu folklor, melainkan juga kepada nilai-nilai yang terdapat di dalamnya yang sangat berkaitan dengan budaya dan identitas suatu masyarakat tradisional tertentu. Dengan demikian, folklor itu sendiri tidak hanya merupakan ekspresi, praktek atau representasi dari suatu budaya, tetapi juga benda-benda dan artefak yang berkaitan dengannya. Oleh karena itu, dapat disimpulkan bahwa sifat budaya yang bersifat kasat mata dan tak kasat mata saling berhubungan, dan jarang sekali dapat dipisahkan.

Salah satu bentuk folklor Indonesia adalah Angklung. Angklung memang memiliki suatu wujud, tetapi nilai-nilai yang terkandung di dalamnya menjadikannya sebagai folklor yang memiliki unsur kasat mata dan tak kasat mata yang layak untuk dilindungi karena memiliki ciri khas yang memberikan masyarakat Jawa Barat dan Banten suatu identitas yang khusus.

Ketika sudah memahami pengertian dari folklor sebagai suatu warisan budaya dan melihat bahwa folklor memiliki nilai-nilai sejarah, filosofis dan ekonomi, maka dibutuhkan suatu perlindungan untuk mencegah adanya suatu pemanfaatan terhadapnya yang dilakukan secara tidak sah, seperti klaim-klaim yang telah dilakukan oleh Malaysia. Bentuk perlindungan terhadap folklor terdiri dari perlindungan terhadap kehilangan dan kerusakan folklor, serta perlindungan terhadap penyalahgunaan folklor. Saat ini, perlindungan yang diterapkan di Indonesia adalah melalui perlindungan rezim Hak Cipta.

- 2) Perlindungan di bawah Hak Cipta dimaksudkan untuk dapat melindungi folklor karena pihak yang akan memegang hak eksklusif tersebut adalah Negara, sebagaimana dimaksud dalam Pasal 10 ayat (2) UUHC tahun 2002. Akan tetapi maksud dari undang-undang tersebut justru menimbulkan berbagai persoalan. Nilai-nilai HKI yang terdapat dalam Hak Cipta dalam beberapa hal bertentangan dengan nilai-nilai kebersamaan yang hidup ditengah masyarakat Indonesia, mengingat bahwa HKI adalah rezim yang sarat dengan nilai-nilai individualistik.

Selain itu, belum terbentuknya suatu peraturan pemerintah sebagai peraturan pelaksana terhadap Pasal 10 UUHC mengakibatkan rezim Hak Cipta tidak memiliki pengaruh yang cukup besar bagi folklor Indonesia sebagai suatu warisan budaya.

Persoalan lain yang ditimbulkan oleh peraturan yang diatur dalam rezim hak cipta adalah tidak adanya ketentuan yang pasti mengenai pemberian izin yang dapat diberikan kepada pihak asing ketika mereka ingin memperbanyak folklor. Berhubungan dengan hal ini, perlindungan yang diberikan dalam UUHC menitikberatkan kepada perlindungan terhadap pemanfaatan yang hanya dilakukan oleh pihak asing. Hal ini sangat bertentangan dengan prinsip *national treatment* yang diakui dalam dunia internasional.

Apabila dilihat dalam persyaratan keaslian/original yang diharuskan untuk hadir dalam setiap ciptaan yang layak untuk dilindungi melalui rezim hak cipta, kepemilikan atas folklor berlangsung secara turun temurun dari generasi ke generasi. Dengan demikian, generasi penerus tidak bisa dikatakan sebagai pencipta aslinya, demikian pula terhadap folklor yang telah kehilangan unsur original.

Belum terdapat penjelasan mengenai siapa yang menjadi representasi dari Negara sebagai penguasa Hak Cipta atas folklor dan tidak adanya pengaturan lebih lanjut mengenai posisi masyarakat tradisional mengenai pendistribusian keuntungan dari pemanfaatan folklor untuk tujuan komersil menambah persoalan yang timbul akibat perlindungan yang diatur dalam UUHC.

Berdasarkan analisis sebelumnya, maka harmonisasi antara konsep Hak Cipta dengan folklor dalam implementasinya mengalami beberapa kendala karena adanya perbedaan dari karakteristik masing-masing. Dengan demikian, apabila dikontekskan dengan konsep umum Hak Cipta, maka folklor tidak dapat dilindungi dengan rezim Hak Cipta, meskipun folklor masuk ke dalam kategori seni dan sastra. Dengan kata lain, rezim hak cipta bukan merupakan perlindungan yang terbaik/efektif untuk folklor.

- 3) Ketentuan hukum internasional terbentuk akibat adanya kehendak bersama untuk melindungi folklor sebagai suatu warisan budaya yang memberikan negara suatu identitas tersendiri. Kehendak bersama ini adalah untuk meningkatkan rasa saling pengertian antar budaya yang dapat menimbulkan *mutual respect* antara satu negara dengan negara lainnya.

Oleh karena itu, organisasi internasional yang memiliki peranan penting dalam membentuk suatu ketentuan hukum internasional untuk melindungi folklor adalah UNESCO dan WIPO. UNESCO mengawali proses perlingkungannya dengan mengeluarkan suatu rekomendasi terhadap perlindungan folklor pada tahun 1989. Akan tetapi, karena rekomendasi tersebut bersifat *softlaw*, maka ketentuan untuk melakukan dokumentasi tidak diterapkan dalam hukum nasional Negara-negara Anggota.

Perkembangan perlindungan terhadap folklor dalam hukum internasional dapat dilihat dengan dibentuknya Model Perjanjian mengenai Perlindungan Terhadap Ekspresi Folklor oleh UNESCO dan WIPO. Model Perjanjian ini menitikberatkan pada ketentuan bahwa pihak-pihak yang ingin menggunakan folklor dengan tujuan komersil diwajibkan untuk meminta persetujuan dari pejabat yang berwenang. Selain itu pihak yang bersangkutan harus memberikan pengakuan dari mana folklor itu berasal ketika melakukan pemanfaatan. Dengan demikian, perlindungan tersebut diterapkan melalui izin pemanfaatan dan pengakuan.

Pada tahun 2000, WIPO membentuk suatu IGC untuk membentuk suatu peraturan yang tepat terhadap ekspresi budaya tradisional atau folklor. IGC ini kemudian membentuk suatu rancangan peraturan untuk melindungi folklor. Dalam rancangan peraturan tersebut, perlindungan dapat diberikan melalui pendaftaran folklor berdasarkan ketentuan rezim HKI. Perlindungan dalam rancangan peraturan ini mempunyai tujuan untuk menghentikan atau mencegah tindakan-tindakan yang berusaha untuk mengakuisisi hak milik folklor, memodifikasi ekspresi budaya

tradisional tanpa sepengetahuan masyarakat tradisional sebagai pemilik folklor, dan melakukan pemanfaatan tanpa memberikan sumber atau pengakuan terhadap masyarakat tradisional.

Berbeda halnya dengan WIPO, UNESCO tidak menaruh perlindungan terhadap folklor dibawah rezim hak kekayaan intelektual. UNESCO justru menganggap bahwa suatu perlindungan dapat dilakukan melalui proses pendokumentasian dan pengakuan yang dapat diterapkan dalam ranah nasional. Sedangkan dalam hukum internasional, UNESCO membentuk *Representative List* dimana folklor suatu negara yang dianggap layak untuk dilindungi dapat dinominasikan, untuk kemudian dapat diakui secara internasional sebagai warisan budaya yang dimiliki oleh negara yang menominasikannya. Ketentuan yang diatur dalam Konvensi UNESCO 2003 tidak menitikberatkan perlindungan seluruhnya kepada peran pemerintah. Dalam Konvensi ini, partisipasi masyarakat tradisional, LSM dan masyarakat lainnya sangat diharapkan untuk menjamin kelangsungan hidup warisan budaya.

Ketentuan hukum internasional memberikan kebijakan kepada setiap negara untuk mengadopsi ketentuan yang diatur di dalamnya. Sebagai contoh, Malaysia lebih menerapkan perlindungan terhadap warisan budaya dengan mendaftarkannya melalui hak cipta berdasarkan *Natural Heritage Act 2005*. Sedangkan Filipina menerapkan perlindungan yang diatur dalam hukum adat dan ketentuan Konvensi UNESCO 2003 melalui dua peraturan, yaitu *Indigenous Peoples Right Act 1997* dan *National Cultural Heritage Act 2009*.

Dengan demikian, dapat dilihat bahwa ketentuan yang diatur dalam hukum internasional merupakan upaya untuk melindungi warisan budaya yang dimiliki oleh setiap negara di dunia. Hal ini bertujuan untuk meminimalisir tindakan pengklaiman folklor secara tidak sah oleh pihak asing.

- 4) Ketika perlindungan terhadap folklor di Indonesia tidak sepenuhnya dapat dilakukan melalui rezim hak cipta, maka dibutuhkan suatu

mekanisme yang lebih efektif yang dapat diterapkan di Indonesia. Sebagaimana dijelaskan sebelumnya, dengan dimasukkannya folklor dalam ketentuan hak cipta, hal ini telah menimbulkan berbagai persoalan. Meskipun saat ini telah dirancang suatu peraturan pemerintah untuk mendukung ketentuan yang diatur dalam Pasal 10 UUHC, peraturan pemerintah tersebut masih tetap dalam bentuk rancangan dan masih jauh untuk mencapai tahap pengesahan. Dengan demikian, baik ketentuan yang diatur dalam Pasal 10 UUHC ataupun yang diatur dalam rancangan peraturan pemerintah tidak memiliki pengaruh yang cukup besar bagi folklor Indonesia.

Meskipun suatu folklor, seperti halnya Angklung, telah diakui sebagai warisan budaya milik Indonesia secara internasional, masih diperlukan suatu perlindungan dalam hukum nasional untuk mencegah tindakan-tindakan yang tetap berusaha untuk memanfaatkan Angklung secara tidak sah. Oleh karena itu dibutuhkan suatu mekanisme perlindungan yang lebih efektif yang dapat diterapkan di Indonesia terhadap folklor sebagai warisan budaya.

Mekanisme perlindungan tersebut dapat diawali dengan pembentukan inventarisasi dan dokumentasi. Hal ini adalah untuk memberikan bukti kepada pihak yang berkepentingan mengenai apa saja yang termasuk dalam folklor Indonesia. Langkah inventarisasi dan dokumentasi folklor ini berguna untuk melahirkan suatu pengakuan terhadap folklor Indonesia yang layak untuk dilindungi.

Suatu perlindungan tentunya tidak akan lengkap apabila tidak diterapkan dalam suatu peraturan. Untuk melindungi folklor, maka peraturan yang tepat untuk diberlakukan adalah peraturan yang khusus mengenai folklor. Peraturan tersebut memiliki tujuan untuk melindungi nilai-nilai dari suatu folklor yang bersifat kasat mata dan tak kasat mata yang tidak dapat dijangkau oleh hak cipta. Dengan mengingat bahwa ketentuan dalam Pasal 10 tidak memiliki pengaruh yang besar, maka diperlukan suatu upaya untuk kembali menyesuaikan pengertian folklor yang dianut oleh WIPO dan UNESCO. Dan karena Indonesia telah

meratifikasi Konvensi UNESCO 2003, maka konvensi tersebut merupakan salah satu sumber hukum yang dapat dijadikan pedoman dalam melaksanakan penyesuaian pengertian.

Selain itu, untuk mendukung mekanisme inventarisasi, dokumentasi dan pembentukan peraturan khusus dalam melindungi folklor Indonesia, maka harus dibentuk suatu lembaga yang kompeten yang dapat melindungi dan mengembangkan folklor Indonesia. Lembaga ini akan memiliki peran untuk memberikan pedoman-pedoman yang dibutuhkan terkait dengan pemanfaatan folklor oleh pihak manapun, dan untuk mewakili masyarakat tradisional dalam menyelesaikan *misappropriation* yang dilakukan di negara lain. Lembaga ini akan berdiri di bawah pengawasan pemerintah.

5.2 Saran

Dalam rangka meningkatkan perlindungan terhadap folklor sebagai warisan budaya, maka Indonesia harus melakukan berbagai macam perubahan. Adapun saran yang penulis ajukan antara lain adalah:

- 1) Mengadopsi berbagai ketentuan yang diatur dalam instrumen hukum internasional untuk membentuk suatu peraturan khusus yang mengatur mengenai ketentuan perlindungan yang tidak dapat dicapai oleh hak cipta;
- 2) Rekonstruksi pemahaman mengenai folklor sebagai warisan budaya dengan melakukan penyesuaian pengertian dengan yang dianut dalam instrumen hukum internasional, khususnya Konvensi UNESCO 2003;
- 3) Melanjutkan pelaksanaan dokumentasi sebagai bukti bahwa keragaman budaya yang dimiliki oleh Indonesia tidak dapat dimiliki oleh negara lain;
- 4) Membentuk suatu lembaga yang kompeten di bawah pengawasan pemerintah untuk membantu pemerintah dalam melindungi folklor, sebagaimana diamanatkan dalam Konvensi UNESCO 2003;

- 5) Membentuk suatu peraturan mengenai izin pemanfaatan dan perjanjian pemanfaatan sebagaimana diterapkan di Filipina dan di dalam Model Perjanjian;
- 6) Melaksanakan *benefit sharing* terhadap pemanfaatan folklor untuk memajukan kesejahteraan masyarakat tradisional. *Benefit sharing* sebagaimana diatur dalam Rancangan Peraturan WIPO ini dapat diatur dalam peraturan khusus;
- 7) Meningkatkan partisipasi masyarakat Indonesia dan masyarakat tradisional pada khususnya, serta LSM dalam melindungi folklor Indonesia;
- 8) Mengembangkan perlindungan terhadap folklor melalui sistem pendidikan formal dan informal, agar seluruh masyarakat Indonesia dapat mengetahui perkembangan dan kondisi folklor Indonesia.

DAFTAR PUSTAKA

BUKU

- Adimiharja, Kusnaka. *Folklor Sebagai Ekspresi Budaya dan Penggolongannya*. Bandung: INRIK UNPAD, 2004.
- Danandjaja, James. *Folklor Indonesia: Ilmu Gosip, Dongeng, Dan Lain-lain, cet. 6*. Jakarta: Pustaka Utama Grafiti, 2002.
- Davison, Graeme dan Chris McConville. *A Heritage Handbook*. St. Leonard, NSW: Allen & Unwin, 1991.
- Deacon, Harriet, *et.al.* *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage*. Capetown: HSRC Publishers, 2004.
- Departemen Kebudayaan dan Pariwisata bekerjasama dengan Kantor UNESCO Jakarta. *Buku Panduan Praktis Pencatatan Warisan Budaya Indonesia*. Jakarta: Departemen Kebudayaan dan Pariwisata Republik Indonesia, 2009.
- Edraswara, Suwardi. *Metodologi Penelitian Folklor: Konsep, Teori dan Aplikasi*. Yogyakarta: Media Pressindo, 2009.
- Finger, J. M. dan Philip Schuler, *ed.* *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*. Washington DC: The International Bank for Reconstruction and Development, 2004.
- Graber, Christoph Beat dan Mira Burri-Nenova, *ed.* *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*. United Kingdom: Edward Elgar Publishing Limited, 2008.
- Hoffman, Barbara T, *ed.* *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, 2006.
- Kurin, Richard. "Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention". *International Journal of Intangible Heritage*, Vol. 02 (2007).
- Lutviansori, Arif. *Hak Cipta dan Perlindungan Folklor di Indonesia*. Yogyakarta: Graha Ilmu, 2010.
- Riswandi, Budi Agus dan M. Syamsudin. *Hak kekayaan Intelektual dan Budaya Hukum*, ed. 1, cet. 1. Jakarta: PT RajaGrafindo Persada, 2004.
- Ruggles, D. Fairchild dan Helaine Silverman, *ed.* *Intangible Heritage Embodied*. New York: Springer Science dan Business Media, LLC, 2009.

Sardjono, Agus. *Pengetahuan Tradisional: Studi Mengenai Perlindungan Hak Kekayaan Intelektual Atas Obat-Obatan*, cet.1 Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2004.

_____. *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*, Edisi Kedua. Bandung: P.T Alumni, 2010.

Smith, Laurajane dan Natsuko Akagawa. *Intangible Heritage*. Oxon: Routledge, 2009.

JURNAL

Antons, Christoph. "What is "Traditional Cultural Expressions"? International Definitions and Their Application in Developing Asia", *WIPO Journal* (2009).

Blake, Janet "On Defining the Cultural Heritage". *The International and Comparative Law Quarterly*. Vol. 49, No. 1 (Jan., 2000).

Bratspies, Rebecca M. "The New Discovery Doctrine: Some Thoughts on Property Rights and Traditional Knowledge". *American Indian Law Review*. Vol. 31, No. 2 (2006/2007).

Cameron, Christina. "From Warsaw to Mosta: The World Heritage Committee and Authenticity". *APT Bulletin*. Vol. 39, No. 2/3 (2008).

Dwivedi, Anurag dan Monika Saraho. "Copyright Laws as a Means of Extending Protection to Expressions of Folklore. *Journal of Intellectual Property Rights*, Vol. 10 (July 2005).

Fechner, Frank G. "The Fundamental Aims of Cultural Property Law". *International Journal of Cultural Property*, (1996).

Francioni, Francesco. "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity". *Michigan Journal of International Law*, Vol. 25 (2004).

Frigo, Manlio. "Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law". *IRRC*. Vol. 86 (2004).

Hilty, Reto M. "Rationales for the Legal Protection of Intangible Goods and Cultural Heritage". *International Review of Intellectual Property and Competition Law* (2009).

Keitumetse, Susan. "UNESCO 2003 Convention on Intangible Heritage: Practical Implications for Heritage Management Approaches in Africa". *The South African Archaeological Bulletin*. Vol. 61, No. 184 (2006).

- Kirshenblatt-Gimblett, Barbara. "Theorizing Heritage". *Ethnomusicology*. Vo. 39, No. 3 (1995).
- Kurin, Richard. "Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention". *International Journal of Intangible Heritage*. Vol. 02 (2007).
- Mendoza, Zoila S. "Defining Folklore: Mestizo and Indigenous Identities on the Move". *Bulletin of Latin American Research*. Vol. 17, No. 2 (May, 1998).
- Nafziger, James A. R. Dan Mark w. Janis, "The Development of International Cultural Law". *American Society of International Law*. Vol. 100 (2006).
- Prott, Lyndell V dan Patrick J. O'Keefe. "Cultural Property or Cultural Heritage". *International Journal of Cultural Property*. (1992).
- Poulos, Anthi Helleni. "The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis". *International Journal of Legal Information* (Spring 2000).
- Torsen, Molly. "Anonymous, Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions". *The American Journal of Comparative Law*. Vol. 54. No. 1 (2006).
- Sardjono, Agus. "Perlindungan Folklor: Apakah Rezim Hak Cipta Memadai". *Jurnal Hukum Internasional*. Vol. 1, No. 1 (Oktober 2003).
- Yu, Peter K. "Cultural Relics, Intellectual Property, And Intangible Heritage". *Temple Law Review*, Vol. 81, (2008).

MAKALAH/REPORT/SKRIPSI

- Antariksa, Basuki. "Kerjasama Internasional Dalam Perlindungan Warisan Budaya Tidak Benda Dan Kepentingan Indonesia", (Bangkok tanggal 20-21 Juli 2010).
- D'Orville, Hans. "Globalization and Intangible Cultural Heritage: Opportunities, Threats and Challenges" dalam International Conference: Globalization and Intangible Cultural Heritage, (Perancis: UNESCO, 2005).
- Indrawati, Dewi. "*Mechanism for Safeguarding of Intangible Cultural Heritae in Indonesia*", Departement Kebudayaan dan Pariwisata Republik Indonesia, 2008.
- Jaszi, Peter, *et.al.* "Laporan Penelitian HKI dan Kesenian Tradisional".

Wahab Mohd Sukarno Abd, “Community Mechanism for Safeguarding Intangible Cultrual heritage (ICH) – with Reference to the Policies and Strategies for the Promotion of Arts Education at the National Level”, (Bangkok, Thailand, 13-16 Desember 2005.

Wibowo, Mario. “Tanggung Jawab Negara Terhadap Perlindungan Warisan Budaya Dasar Laut”. Depok: Fakultas Hukum Universitas Indonesia, 2010.

PERATURAN PERUNDANGAN

Filipina. *Indigenous Peoples Right Act*

_____. *National Cultural Heritage Act of 2009.*

Indonesia. *Undang-Undang Hak Cipta*, UU No. 19 Tahun 2002, LN No. 85 Tahun 2002, TLN No. 4220.

_____. Peraturan Bersama Menteri Dalam Negeri Dan Menteri Kebudayaan Dan Pariwisata tentang Pedoman Pelestarian Kebudayaan. Peraturan Bersama Menteri Dalam Negeri dan Menteri Kebudayaan dan Pariwisata No. 42 Tahun 2009/No. 40 Tahun 2009.

_____. Peraturan Presiden Republik Indonesia No. 78 Tahun 2007 tentang Pengesahan *Convention For The Safeguarding Of The Intangible Cultural Heritage* (Konvensi untuk Perlindungan Warisan Budaya).

Malaysia. *National Heritage Act 2005.*

INSTRUMEN HUKUM INTERNASIONAL

United Nation Resolution No. 57/158 on *Year for Cultural Heritage 2002.*

United Nation Resolution No. 57/249 on *Culture and Development.*

UNESCO *Constitution.*

UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.*

UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage 1972.*

UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage 2003.*

UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore.*

UNESCO dan WIPO *Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation.*

WIPO *Intergovernmental Committee Revised Draft Provisions on The Protection Of Traditional Cultural Expressions/Expressions of Folklore.*

INTERNET

Hastanto, Sri. "Map of Indonesian Culture as Intangible Cultural Heritage Inventory (ICHI) of Indonesia".
<<http://sem2008.blogs.wesleyan.edu/files/2008/10/srihastantopaper.pdf>>.

Prastyo, Brian A. "Mencari Format Kebijakan Hukum yang Sesai untuk Perlindungan Folklor di Indonesia". Artikel Online LKHT-FHUI.
<http://www.lkht.net/index.php?option=com_content&view=article&id=102:format-perlindungan-hukum-folklor&catid=1:hki-telematika&Itemid=37>.

Purna, I Made. "Pelestarian Warisan Budaya Tidak Benda".
<http://www.purbakalabali.com/index.php?option=com_content&view=article&id=126:pelestarian-warisan-budaya-tidak-benda&catid=60:artikel&Itemid=82>.

UNESCO. "Cultural Heritage". <http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

_____. "What is Intangible Cultural Heritage?".
<<http://www.unesco.org/culture/ich/index.php?pg=00003>>.

_____. "Indonesian Angklung".
<<http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&RL=00393>>

WIPO. "Traditional Cultural Expressions (Folklore)".
<<http://www.wipo.int/tk/en/folklore/>>.

Republic of the Philippines
CONGRESS OF THE PHILIPPINES
Metro Manila
Fourteenth Congress
Third Regular Session

Begun and held in Metro Manila, on Monday, the twenty-seventh day of July, two thousand nine.

REPUBLIC ACT NO. 10066

AN ACT

PROVIDING FOR THE PROTECTION AND CONSERVATION OF THE NATIONAL CULTURAL HERITAGE, STRENGTHENING THE NATIONAL COMMISSION FOR CULTURE AND THE ARTS (NCCA) AND ITS AFFILIATED CULTURAL AGENCIES, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. Short Title. - This Act shall be known as the “National Cultural Heritage Act of 2009.”

ARTICLE I
POLICIES AND PRINCIPLES

SECTION 2. Declaration of Principles and Policies. – Sections 14, 15, 16, and 17, Article XIV of the 1987 Constitution declare that the State shall foster the preservation, enrichment, and dynamic evolution of a Filipino culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression. The Constitution likewise mandates the State to conserve, develop, promote and popularize the nation’s historical and cultural heritage and resources, as well as artistic creations. It further provides that, all the country’s artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State, which may regulate its disposition.

In the pursuit of cultural preservation as a strategy for maintaining Filipino identity, this Act shall pursue the following objectives:

- (a) Protect, preserve, conserve and promote the nation’s cultural heritage, its property and histories, and the ethnicity of local communities;
- (b) Establish and strengthen cultural institutions; and,
- (c) Protect cultural workers and ensure their professional development and well-being.

The State shall likewise endeavor to create a balanced atmosphere where the historic past co-exists in harmony with modern society. It shall approach the problem of conservation in an integrated and holistic manner, cutting across all relevant disciplines and technologies. The State shall further administer the heritage resources in a spirit of stewardship for the inspiration and benefit of the present and future generations.

ARTICLE II
DEFINITION OF TERMS

SECTION 3. Definition of Terms. – For purposes of this Act, the following terms shall be defined as follows:

- (a) **“Adaptive Re-use”** shall refers to the utilization of buildings, other built-structures, and sites of value for purposes other than that for which they were intended originally, in order to conserve the site, their engineering integrity and authenticity of design;
- (b) **“Anthropological Area”** shall refers to any place where studies of specific ethno-linguistic groups are undertaken, the properties of which are of value to our cultural heritage;
- (c) **“Antique”** refers to a cultural property found locally which is one hundred (100) years in age, more or less, the production of which has ceased;
- (d) **“Archaeological Area”** shall refers to any place, whether above or under ground, underwater or at sea level, containing fossils, artifacts, and other cultural, geological, botanical, zoological materials which depict and document culturally relevant paleontological, prehistoric and/or historic events;
- (e) **“Archives”** shall refer to public and private records in any format which have been selected for permanent preservation because of their evidential, historical informational value; otherwise known as archival materials collections or archival holdings; the place (building/room/storage area) where archival materials are kept and preserved; and an organization or agency or part thereof whose main responsibility is to appraise, arrange, describe, conserve, promote and make archival materials available for reference and research, also known as archival agency;
- (f) **“Built Heritage”** shall refers to architectural and engineering structures, such as but not limited to bridges, government buildings, houses of ancestry, traditional dwellings, quartels, train stations, lighthouses, small ports, educational technological and industrial complexes, and their settings, and landscapes with notable historical and cultural significance;
- (g) **“Collector”** shall refers to any person who or institution that acquires cultural property for purposes other than sale;
- (h) **“Commission”** shall refer to the National Commission for Culture and the Arts (NCCA);

- (i) **“Conservation”** shall refer to all the processes and measures of maintaining the cultural significance of a cultural property, including but not limited to, preservation, restoration, reconstruction, protection, adaptation or any combination thereof;
- (j) **“Cultural agencies”** shall refer to the following national government agencies with their specific areas of responsibility: National Museum (cultural property); the National Library (books); National Historical Institute (Philippine history); National Archives (documents); Cultural Center of the Philippines (culture and the arts); and Komisyon sa Wikang Filipino (language).
- (k) **“Cultural Education”** shall refer to the teaching and learning of cultural concepts and processes;
- (l) **“Cultural Heritage”** shall refer to the totality of cultural property preserved and developed through time and passed on to posterity;
- (m) **“Cultural Heritage Worker”** shall refer to an individual undertaking cultural heritage work;
- (n) **“Cultural Institution”** shall refer to entities engaged primarily in cultural work;
- (o) **“Cultural Property”** shall refer to all products of human creativity by which a people and a nation reveal their identity, including churches, mosques and other places of religious worship, schools and natural history specimens and sites, whether public or privately-owned, movable or immovable, and tangible or intangible;
- (p) **“Dealers”** shall refer to natural or juridical persons who acquire cultural property for the purpose of engaging in the acquisition and disposition of the same;
- (q) **“Heritage Zone”** shall refer to historical, anthropological, archaeological, artistic geographical areas and settings that are culturally significant to the country, as declared by the National Museum and/or the National Historical Institute.
- (r) **“History”** shall refer to a written record of past events relating to Philippine history;
- (s) **“Historical Landmarks”** shall refer to sites or structures that are associated with events or achievements significant to Philippine history as declared by the National Historical Institute;
- (t) **“Historical Monuments”** shall refer to structures that honor illustrious persons or commemorate events of historical value as declared by the National Historical Institute;
- (u) **“Historical Shrines”** shall refer to historical sites or structures hallowed and revered for their history or association as declared by the National Historical Institute;
- (v) **“Historical Street Name”** shall refer to a street name which has been in existence for at least fifty (50) years and over time has been considered historic;
- (w) **“Important Cultural Property (ICP)”** shall refer to a cultural property having exceptional cultural, artistic, and historical significance to the Philippines, as shall be determined by the National Museum and/or National Historical Institute.
- (x) **“Intangible Cultural Heritage”** shall refer to the practices, representations, expressions, knowledge, skills - as well as the instruments, objects and artifacts associated therewith, that communities, groups and individuals recognize as part of their cultural heritage, such as : (1) oral traditions, languages, and expressions; (2) performing arts; (3) social practices, rituals, and festive events; (4) knowledge and practices concerning nature and the universe; and (5) traditional craftsmanship;
- (y) **“Intangible cultural property”** shall refer to the peoples’ learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create and the resources, spaces and other aspects of social and natural context necessary for their sustainability.
- (z) **“Library”** shall refer to an institution where the collection of books, manuscripts, computerized information, and other materials are organized to provide physical, bibliographic, and/or intellectual access to the public, with a librarian that is trained to provide services and programs related to the information needs of its clientele;
- (aa) **“Museum”** shall refer to a permanent institution that researches, acquires, conserves, communicates, and exhibits the material evidence of humans and their environment for purposes of education or leisure;
- (bb) **“National Cultural Treasure”** shall refer to a unique cultural property found locally, possessing outstanding historical, cultural, artistic and/or scientific value which is highly significant and important to the country and nation, and officially declared as such by pertinent cultural agency;
- (cc) **“Nationally significant”** shall refer to historical, aesthetic, scientific, technical, social and/or spiritual values that unify the nation by a deep sense of pride in their various yet common identities, cultural heritage and national patrimony.
- (dd) **“Natural Property of Cultural Significance”** shall refer to areas possessing outstanding ecosystem with flora and fauna of national scientific importance under the National Integrated Protected Areas System ;
- (ee) **“NCCA Portal Cultural Databank”** refers to the specific domain in the Commission’s intranet for cultural information that is accessed only internally with control and confidentiality. It includes the registry of national cultural property.
- (ff) **“Pre-history”** shall refer to the period of human history before the introduction of the forms of writing;
- (gg) **“Registry”** shall refer to the Philippine Registry of Cultural Property which is the registry of all cultural property of the country deemed of significant importance to our cultural heritage;
- (hh) **“Restoration”** shall refer to the action taken or the technical intervention to correct deterioration and alterations.
- (ii) **“Tangible cultural property”** shall refer to a cultural property with historical, archival, anthropological, archaeological, artistic and architectural value, and with exceptional or traditional production, whether of Philippine origin or not, including antiques and natural history specimens with significant value.

ARTICLE III CULTURAL PROPERTY

SECTION 4. Categories. - The Cultural Property of the country shall be categorized as follows:

- (a) National Cultural Treasures;
- (b) Important Cultural Property;
- (c) World Heritage Sites;
- (d) National historical shrine;

- (e) National Historical Monument; and,
- (f) National Historical Landmark;

SECTION 5. Cultural Property Considered Important Cultural Property. -For purposes of protecting a cultural property against exportation, modification or demolition, the following works shall be considered Important Cultural Property, unless declared otherwise by the pertinent cultural agency:

Unless declared by the Commission,

- (a) Works by a *Manlilikha ng Bayan*;
- (b) Works by a National Artist;

Unless declared by the National Museum,

- (c) Archaeological and traditional ethnographic materials;

Unless declared by the National Historical Institute,

- (d) Works of national heroes;
- (e) Marked structure;
- (f) Structures dating at least fifty (50) years old; and

Unless declared by the National Archives,

- (g) Archival material/document dating at least fifty (50) years old.

The property owner may petition the appropriate cultural agency to remove the presumption of important cultural property which shall not be unreasonably withheld.

SECTION 6. World Heritage Sites (WHS). - The appropriate cultural agency shall closely collaborate with United Nations Educational Scientific and Cultural organization (UNESCO) National Commission of the Philippines in ensuring the conservation and management of world heritage sites of cultural and mixed sites category, in the Philippines.

SECTION 7. Privileges for Cultural Property. - All cultural properties declared as National Cultural Treasures and national historical landmarks shall be entitled to the following privileges:

- (a) Priority government funding for protection, conservation and restoration;
- (b) Incentive for private support of conservation and restoration through the Commission's Conservation Incentive Program for National Cultural treasures;
- (c) An official Heritage Marker placed by the cultural agency concerned indicating that the immovable cultural property has been identified as national cultural treasures; and/or national historical landmarks, sites or monuments; and,
- (d) In times of armed conflict, natural disasters, and other exceptional events that endanger the cultural heritage of the country, all National Cultural Treasures or national historical landmarks, sites or monuments shall be given priority protection by the Government.

All cultural properties declared as Important Cultural Property may also receive government funding for its protection, conservation, and restoration. An official Heritage Marker shall likewise be placed on an immovable cultural property to identify the same as important cultural property.

SECTION 8. Procedure for Declaration, or De-Listing of National Cultural Treasures or Important Cultural Property. - The procedure in declaring as well as in delisting a National Cultural Property or an Important Cultural Property shall be as follows:

- (a) A declaration or a delisting of a cultural property as a National Cultural Treasure or an Important Cultural Property shall commence upon the filing of a petition by the owner, stakeholder or any interested person, with the Commission, which shall refer the matter to the appropriate cultural agency;
- (b) Upon verification of the suitability of the property as a national cultural treasure or an important cultural property, the cultural agency concerned shall send notice of hearing to the owner and stakeholders. Stakeholders, including but not limited to local government units, local culture and arts council, local tourism councils, non-government conservation organizations, and schools, may be allowed to file their support or opposition to the petition;
- (c) The owner and/or other stakeholders shall file their position paper within fifteen (15) days from receipt of the notice of hearing, furnishing all the parties, including the appropriate cultural agency, with such position paper. Extensions may be allowed, but in no case shall it exceed more than thirty (30) days; and
- (d) The petitioner/stakeholder shall give their answer within fifteen (15) days upon receipt of any position paper. Thereafter, no further submissions shall be allowed.
- (e) The appropriate cultural agency shall have a maximum of ninety (90) days from the deadline of the submission of all the answers within which to submit its resolutions and render its decision on the application.

SECTION 9. Right of First Refusal on the Sale of National Cultural Treasures (NCT). -

The appropriate cultural agency shall be given the right of first refusal in the purchase of cultural properties declared as national cultural treasures. Prior to the finality of the sale, the appropriate cultural agency may likewise match any offer made for the purchase of national cultural property.

SECTION 10. Licensing of Dealers of Cultural Property. - All dealers of cultural property shall secure a license to operate as such from the appropriate cultural agency concerned. They shall submit a quarterly inventory of items carried, which shall include a

history of each item. Failure to submit two (2) consecutive inventories shall be a ground for cancellation of the license. All dealers of Cultural Property shall be subject to inspection of the concerned cultural agencies.

The cultural agencies may charge and collect fees for registration as well as for licenses, inspections, certifications, authorizations and permits that they issue and undertake in connection with the implementation of this Act. Funds generated from these collections by cultural agencies shall be retained by the cultural agency concerned for its operations.

SECTION 11. *Dealings of Cultural Property.* - No cultural property shall be sold, resold, or taken out of the country without first securing a clearance from the cultural agency concerned. In case the property shall be taken out of the country, it shall solely be for the purpose of scientific scrutiny or exhibit.

ARTICLE IV HERITAGE ZONES

SECTION 12. *Designation of Heritage Zones.* - The National Historical Institute and the National Museum in consultation with the Commission and, the Housing and Land Use Regulatory Board or other concerned agencies, shall designate Heritage Zones to protect the historical and cultural integrity of a geographical area.

SECTION 13. *Maintenance of Heritage Zones.* - A Heritage Zone shall be maintained by the local government unit concerned, in accordance with the following guidelines:

- (a) Implementation of adaptive re-use of cultural property;
- (b) Appearance of streets, parks, monuments, buildings, and natural bodies of water, canals, paths and Barangays within a locality shall be maintained as close to their appearance at the time the area was of most importance to Philippine History as determined by the National Historical Institute; and,
- (c) Local government units shall document and sustain all socio-cultural practices such as but not limited to traditional celebrations, historical battles, recreation of customs, and the re-enactment of battles and other local customs that are unique to a locality.

ARTICLE V REGISTRATION AND CONSERVATION OF CULTURAL PROPERTY

SECTION 14. *Establishment of a Philippine Registry of Cultural Property (PRECUP).* - All cultural property of the country deemed important to cultural heritage shall be registered in the Philippine Registry of Cultural Property.

The Commission, through the appropriate cultural agencies and local government units, shall establish and maintain this Registry within three (3) years from the effectivity of this Act. The guidelines in the registration of cultural property are as follows:

- (a) All cultural agencies concerned shall individually maintain an inventory, evaluation and documentation of all cultural properties it has declared according to their category and shall submit the same to the Commission. For cultural property declared as Immovable Cultural Property, the appropriate cultural agency shall, after registration, give due notice to the Registry of Deeds having jurisdiction for annotation on the land titles pertaining to the same;
- (b) Local government units, through their cultural offices, shall likewise maintain an inventory of cultural property under its jurisdiction and shall furnish the Commission a copy of the same;
- (c) Both cultural agencies concerned and local government units shall continuously coordinate in making entries and in monitoring the various cultural properties in their respective inventory;
- (d) All government agencies and instrumentalities, government-owned and/or controlled corporations and their subsidiaries, including public and private educational institutions, shall report their ownership and/or possession of such items to the pertinent cultural agency and shall register such properties within three (3) years from the effectivity of this Act;
- (e) Private collectors and owners of cultural property shall register such properties, within three (3) years from the effectivity of this Act. The private collectors and owners of cultural property shall not be divested of their possession and ownership thereof even after registration of said property as herein required.

Information on registered cultural properties owned by private individuals shall remain confidential and may be given only upon prior consent of the private owner. The Commission shall operate the Registry in the NCCA portal cultural databank.

SECTION 15. *Conservation of Cultural Property.* - All intervention works and measures on conservation of National Cultural Treasures, Important Cultural Property, as well as national historical landmarks, sites or monuments, and structures previously marked by the National Museum and/or National Historical Institute before the implementation of this Act shall be undertaken only upon prior approval of the Commission through the appropriate cultural agency which shall supervise the same.

The Commission shall approve only those methods and materials that strictly adhere to the accepted international standards of conservation.

SECTION 16. *Documentation and Preservation of Traditional and Contemporary Arts.* - Local government units shall document traditional and contemporary arts and crafts, including their processes and makers, and sustain the sources of their raw materials. The local government units shall encourage and sustain traditional arts and crafts as active and viable sources of income for the community.

The Commission, the Department of Trade and Industry, the Department of Tourism and other government agencies involved

directly or indirectly in the production of goods shall assist the local government units in protecting their traditional and contemporary arts and crafts making them viable for current and future markets, with a view to encouraging and promoting the unique heritage and identities of the said communities.

The local government unit concerned shall submit an annual inventory of these documentations to the Commission, which will be included in the Philippine Registry of Cultural Property, as established in Section 14 of this Act.

SECTION 17. *Systematic Research in Natural History.* - The National Museum shall have the authority to collect, maintain and develop the national reference collections of Philippine flora and fauna, rocks and minerals through research and field collection of specimens including Important Cultural Property within the territorial jurisdiction of the Philippines. It shall be exempt from any and all permit systems regulating the same.

The National Museum shall inform the Department of Environment and Natural Resources and the Department of Agriculture of such collection. All type of specimens collected in the Philippine territory shall be deposited in the National Museum.

SECTION 18. *Heritage Agreements.* - The Commission, upon advice of the concerned cultural agency, may enter into agreements with private owners of cultural properties with regard to the preservation of said properties.

Such agreement shall be in the form of a contract, and may include such terms and conditions including, but not limited to:

- (a) Public access to the property;
- (b) Value of the encumbrance;
- (c) Duration of the servitude of the property;
- (d) Restriction of the right of the owner or occupant to perform acts on or near the place;
- (e) Maintenance and management of the property;
- (f) Provision of financial assistance for the conservation of the property;
- (g) Procedure for the resolution of any dispute arising out of the agreement.

Such agreement should be annotated in the land title to bind future owners and/or occupants of the immovable cultural property.

SECTION 19. *National Inventory of Intangible Cultural Heritage.* - The appropriate cultural agency shall closely collaborate with the UNESCO National Commission of the Philippines in safeguarding intangible cultural heritage in the Philippines. The Philippine Intangible Cultural Heritage Committee established by the UNESCO National Commission of the Philippines shall continue to take lead role in implementing the provisions of the UNESCO Convention for the Safeguarding of the Intangible Cultural heritage with particular attention to Article 11 to 15 of the said Convention.

SECTION 20. *Immovable National Cultural Treasures.* - Immovable National Cultural Treasures shall not be relocated, rebuilt, defaced or otherwise changed in a manner, which would destroy the property's dignity and authenticity, except to save such property from destruction due to natural causes.

The site referred to in this provision may only be moved after securing a permit from the Commission or the appropriate cultural agency.

SECTION 21. *Indigenous properties.* - The appropriate cultural agency in consultation with the National Commission on Indigenous Peoples shall establish a program and promulgate regulations to assist indigenous people in preserving their particular cultural and historical properties.

SECTION 22. *Renaming of Historical Streets, Buildings Designated as Cultural Treasure or Important Cultural Property.* - The names of historical streets, parks, buildings, shrines, landmarks, monuments and sites designated as National Cultural Treasures or Important Cultural Property shall not be allowed to be re-named by a local or national legislation, unless approved by the National Historical Institute, and only after due hearing on the matter. Furthermore, for changes of names done to historical streets, parks, buildings, shrines, landmarks, monuments, and sites prior to the effectivity of this act, the National Historical Institute may direct the local government units to restore their original names, also after due hearing.

ARTICLE VI REGULATING THE EXPORT, TRANSIT, IMPORT AND REPATRIATION OF CULTURAL PROPERTY

SECTION 23. *Export of Cultural Property.* - Whoever desires to export cultural property registered in the Philippine Registry of Cultural Property shall adhere to the following requirements:

- (a) Authorization from the Commission through the appropriate cultural agencies;
- (b) Application for export permit shall be submitted thirty (30) days before the intended export from the Philippines; and
- (c) Application for export permit must include the following: (1) the purpose of the temporary export; (2) the export date of the cultural property; (3) the repatriation date of the cultural property; (4) a description of the cultural property; and, (5) the inventory of the cultural property in the Philippine Registry of Cultural Property.

The grant of export permit shall be based on the following conditions: (i) the cultural property is exported on a temporary basis; and (ii) export of cultural property is necessary for scientific scrutiny or exhibit.

SECTION 24. *Repatriation Claims and Agreements.* – Should the cultural property registered in the Philippine Registry of Cultural Property be illicitly exported from the country, the Department of Foreign Affairs shall, upon the recommendation of the appropriate cultural agency, claim the right of repatriation *vis-à-vis* all other contracting States. Any compensation and costs shall be carried by the Philippine government.

For the protection of cultural and foreign affairs interests and to secure cultural heritage, the Philippines may conclude international treaties with contracting States on the import and repatriation of cultural property subject to the following conditions:

- (a) The scope of the agreement must be cultural property of significant importance to the cultural heritage of the contracting States;
- (b) The cultural property must be subject to the existing export policies for the purpose of protecting cultural heritage; and,
- (c) The contracting States shall grant reciprocal rights.

ARTICLE VII POWERS OF THE COMMISSION/CULTURAL AGENCIES

SECTION 25. *Power to Issue a Cease and Desist Order.* - When the physical integrity of the national cultural treasures or important cultural properties are found to be in danger of destruction or significant alteration from its original state, the appropriate cultural agency, shall immediately issue a Cease and Desist Order suspending all activities that will affect the cultural property. The local government unit which has the jurisdiction over the site where the immovable cultural property is located shall report the same to the appropriate cultural agency immediately upon discovery and shall promptly adopt measures to secure the integrity of such immovable cultural property. Thereafter, the appropriate cultural agency shall give notice to the owner or occupant of the cultural property and conduct hearing on the propriety of the issuance of the Cease and Desist Order. The suspension of the activities shall be lifted only upon the written authority of the appropriate cultural agency after due notice and hearing involving interested parties and stakeholders.

SECTION 26. *Power to Issue Compulsory Repair Order.* - When a privately-owned heritage site cannot be maintained by the owner or has fallen into disrepair thru neglect to such an extent that it will lose its potential for conservation, the Commission, through the appropriate cultural agency, may serve on the owner or occupant of such property, an order to repair or maintain such site. If the owner fails to comply with said order within thirty (30) to forty-five (45) days, repairs may be undertaken by the appropriate cultural agency for the account of the owner.

SECTION 27. *Visitorial Powers.* - The cultural agencies concerned, through the Commission, are hereby given the power to inspect National Cultural Treasures and Important Cultural Properties, and national historical landmarks, sites or monuments at any time to ensure the protection and integrity of such. They may also inspect public or private collections or objects that may be categorized as cultural property; Provided, That in the case of private collections or objects, the prior written consent of the owner shall be obtained.

SECTION 28. *Power to Deputize Other Government Agencies.* – The cultural agencies concerned, as well as the Commission, shall have the power to deputize the Philippine National Police, the National Bureau of Investigation, the Armed Forces of the Philippines, the Philippine Coast Guard, and other local or national law enforcement agencies, including the Bureau of Fisheries' agents, the Department of the Environment and Natural Resources' rangers, the Bureau of Customs and Immigrations agents, members of the Office of the Special Envoy on Transnational Crimes and other such agencies and their successors in interest, to enforce the provisions of this Act and its implementing rules and regulations. The said agencies shall immediately detail their respective personnel to protect the cultural items under the National Registry. Failure to follow deputization order of the concerned cultural agency as well as the Commission shall be penalized in accordance with Section 49 herein.

SECTION 29. *Power to Recover Cultural Properties.* – The Commission is empowered to recover or retrieve cultural properties which are under the custody of foreign nationals or entities and to bring these properties back to Philippine custody.

SECTION 30. *Anthropological Research and Archaeological Exploration/Excavation.* –

- (a) The National Museum with respect to cultural/ archaeological/ anthropological matters, and the National Historical Institute, with respect to historical anthropological matters, shall regulate and control all anthropological research conducted by foreigners; and all archaeological excavation or exploration. Pursuant to the foregoing, the National Museums or the National Historical Institute shall deputize other agencies to protect archaeological and anthropological sites. It shall be guided by the following rules:
 - (1) All cultural property found in terrestrial and / or underwater archaeological sites belong to the State.
 - (2) No terrestrial and/or underwater archaeological explorations and excavations for the purposes of obtaining materials and data of cultural value shall be undertaken without written authority and direct site supervision by archaeologists and/or representatives of the National Museum;
 - (3) All anthropological researches, for the purpose of obtaining materials and data of cultural value and where the principal proponent is a foreign national shall be undertaken only with the authority, and under the supervision of the National Museum or the National Historical Institute. Anthropological research by Philippine nationals, especially members of the indigenous communities shall be encouraged;

- (4) Archaeological or anthropological materials presumed as important cultural property shall be allowed to leave the country only upon proper evaluation and written permission of the National Museum or the National Historical Institute;
 - (5) All explorations and excavations undertaken wherein the caves, rock shelters and their vicinities may have been used in the prehistoric past by man either for habitation, religious and/or sacred and burial purposes all over the country, shall be under the direct jurisdiction and supervision of archaeologists and/or other experts of the National Museum;
 - (6) All mining activities inside caves, rock shelters and any such other areas shall require a written permit and clearance from the National Museum. An appropriate prior inspection by representatives of the National Museum, funded by the company applying for a mining right, shall be required to ensure that no archaeological materials are present and, possibly, destroyed;
 - (7) Excavations in caves, rock shelters and other areas by laymen are prohibited by this Act. All earth-moving activities in these areas must have the proper permit and clearance from the National Museum and monitored by their representatives;
 - (8) All treasure hunting permits and licenses shall be issued by the National Museum, which shall formulate the rules and regulations to adequately control, regulate and monitor all applicants for such undertakings; and
 - (9) The provisions of this Act on explorations and excavations of terrestrial and underwater archaeological sites shall supersede all local, municipal, regional and autonomous regional governments' resolutions and ordinances.
- (b) When the presence of any cultural or historical property is discovered, the National Museum or the National Historical Institute shall immediately suspend all activities that will affect the site and shall immediately notify the local government unit having jurisdiction of the place where the discovery was made. The local government shall promptly adopt measures to protect and safeguard the integrity of the cultural property so discovered and within five (5) days from the discovery shall report the same to the appropriate agency. The suspension of these activities shall be lifted only upon the written authority of the National Museum or the National Historical Institute and only after the systematic recovery of the archaeological materials.
 - (c) The Commission, upon the recommendation of the appropriate cultural agency, shall provide incentives for persons who discover and report heretofore unknown archaeological sites, in accordance with its rules and regulations implementing the provisions of this Act.
 - (d) Any government or non-government infrastructure project or architectural site development shall include anthropological, archaeological, and historical and heritage site conservation concerns in their Environmental Impact Assessment System.

ARTICLE VIII ROLE OF CULTURAL AGENCIES

SECTION 31. Responsibilities of Cultural Agencies for Designation of Cultural Property. - The cultural agencies, in conformity with their respective charters, shall define and delineate their respective areas of responsibility with respect to cultural property and assessment of National Cultural Treasures and national historical landmarks, sites or monuments. These areas shall be subject to periodic re-assessment whenever necessary.

For purposes of this Act, the following shall be the responsibilities of cultural agencies in the categorization of cultural property:

- (a) The **Cultural Center of the Philippines** shall be responsible for significant cultural property pertaining to the performing arts;
- (b) The **National Archives of the Philippines** shall be responsible for significant archival materials;
- (c) The **National Library** shall be responsible for rare and significant contemporary books, manuscripts such as, but not limited to, presidential papers, periodicals, newspapers, singly or in collection, and libraries and electronic records;
- (d) The **National Historical Institute** shall be responsible for significant movable and immovable cultural property that pertains to Philippine History; heroes and the conservation of historical artifacts
- (e) The **National Museum** shall be responsible for significant movable and immovable cultural and natural property pertaining to collections of Fine Arts, Archaeology, Anthropology, Botany, Geology, Zoology and Astronomy, including its conservation aspect; and
- (f) The **Komisyon sa Wikang Filipino (KWF)** shall be responsible for the dissemination, development, and the promotion of the Filipino national language and the conservation of ethnic languages;

SECTION 32. Institutional Linkages of the National Cultural Agencies. - The cultural agencies and other national government agencies, as listed below, shall consult, coordinate and work closely with the Commission in the implementation of their respective programs/projects in the context of this Act. Furthermore, the Commission may link up with other agencies and institutions, as it may deem appropriate, as a way of dealing with conservation on a holistic manner.

- (a) The **Department of Tourism**, and its attached agencies, which shall be responsible for cultural education among tourism services, and protection of cultural property supplemental to the jurisdiction of the cultural agencies as defined in this Act. The implementation and creation of a tourism master plan shall be consistent with this Act;
- (b) The **Intramuros Administration** which shall be responsible for the restoration and administration of the development in Intramuros;
- (c) The **National Parks Development Committee** as an attached agency of the Department of Tourism, which shall be responsible in supervising the development (beautification, preservation and maintenance) of Quezon Memorial, Fort Santiago, Luneta, Paco Park, Pook ni Maria Makiling and other national parks and satellite projects;
- (d) The **Department of Education** which shall be responsible in instituting the governance of basic education act, and the conservation and restoration of its built heritage such as the significant Gabaldon School buildings as determined by the National Historical Institute;—

- (e) The **Department of Public Works and Highways** which shall be responsible in undertaking major infrastructure projects specifically in the planning, design, construction, and maintenance of national roads and bridges as they impact on heritage structures or aspects of heritage conservation;
- (f) The **National Commission on Indigenous Peoples** in behalf of the country's indigenous cultural communities, which shall coordinate with the national agencies on matters pertaining to Cultural Property under its jurisdiction;
- (g) The **Department of Environment and Natural Resources** which shall be responsible for the establishment and management of the National Integrated Protected Areas System and the conservation of wildlife resources, including cave and cave resources and which shall coordinate with the National Commission on Indigenous peoples, the conservation of natural resources that are cultural sanctuaries of indigenous peoples;
- (h) The **Department of the Interior and Local Government** which shall coordinate with the national cultural agencies on matters pertaining to Cultural Properties under its jurisdiction, and ensure that the provisions of this Act is properly executed by the local government unit;
- (i) The **Office of the Muslim Affairs** which shall coordinate with the national cultural agencies on matters pertaining to Cultural Property under its jurisdiction;
- (j) The **UNESCO National Commission of the Philippines** which shall be responsible for providing the liaison between the cultural agencies of the Philippines and UNESCO as well as assist the national cultural agencies in implementing the agreements and conventions adopted by the UNESCO of which the Philippines has ratified or is in the process of ratification;
- (k) The **Housing and Land Use Regulatory Board** which shall coordinate with the local government units and the Commission on matters pertaining to the establishment and maintenance of Heritage Zones;
- (l) The **Autonomous Regional Government in Muslim Mindanao** and the **Cordillera Administrative Region** which shall coordinate with the national cultural Agencies on matters pertaining to Cultural Property under their respective jurisdictions; and,
- (m) The **Office of the Special Envoy on Transnational Crimes** which shall have the oversight and operational capacity to go after illicitly trafficked and stolen cultural treasures.

SECTION 33. *Incorporation of Cultural Property Programs in Local Government Units Budgets.* - The local government units are encourage to incorporate programs and budgets for the conservation and preservation of Cultural Property in their environmental, educational and cultural activities.

SECTION 34. *Training Programs.* - The Commission, in coordination with the appropriate cultural agencies shall provide general training programs on conservation to the local government units which have established cultural heritage programs and projects in their localities.

ARTICLE IX CULTURAL PROPERTY INCENTIVES PROGRAM

SECTION 35. *Tax Exemption on Donations.* - All donations in any form to the Commission and its affiliated cultural agencies shall be exempt from the donor's tax and the same shall be considered as allowable deduction form the gross income in the computation of the income tax of the donor, in accordance with the provisions of the National Internal Revenue Code of 1997, as amended.

SECTION 36. *National Heritage Resource Assistance Program.* - The Commission may provide financial assistance in the form of a grant to historic, archaeological, architectural, artistic organizations for conservation or research on cultural property. No grant made pursuant to this Act shall be treated as taxable income.

SECTION 37. *Awards and Citations.* - To encourage preservation of the national heritage, the Commission shall establish an annual conservation recognition program under which monetary prizes, awards and citations will be given by the President of the Philippines, upon the recommendation of the Commission, for special achievements and important contributions and services in the area of heritage preservation and conservation efforts.

ARTICLE X CULTURAL EDUCATION

SECTION 38. *Incorporation of National Cultural Treasures and Important Cultural Property in the Basic Education System.* - Within one (1) year from the effectivity of this Act, the Department of Education in coordination with the Commission's Philippine Cultural Education Program shall formulate the cultural heritage education programs both for local and overseas Filipinos to be incorporated into the formal, alternative and informal education, with emphasis on the protection, conservation and preservation of cultural heritage property.

The Philippine Registry of Cultural Property shall likewise be incorporated into the formal, alternative, and informal education by the provincial and local governments.

SECTION 39. *Cultural Heritage Education Program.* - Within one (1) year from the effectivity of this Act, the Department of Education, the Technical Education and Skills Development Authority and the Commission on higher Education in consultation with the Commission shall set forth in its teaching programs nationwide the following cultural heritage education programs with emphasis at the provincial, city and municipal levels:

- (a) Protection, conservation and preservation of cultural heritage properties;
- (b) Instructional materials in prints, film and broadcast media on the cultural and historical significance of cultural properties; and

- (c) Visitation, public accessibility and information dissemination on designated local cultural properties.

SECTION 40. Public Accessibility. - Access to national historical landmarks, monuments and sites, whether designated as National Cultural Treasure, Important Cultural Property by the general public for visitation and information, and by government representatives for inspection, shall not be hindered except on reasonable cause. Fees, as prescribed by the cultural agency concerned, may in appropriate cases be charged to defray cost of conservation, inclusive of general maintenance and upkeep. In the case of privately owned monuments and sites, the National Historical Institute or the National Museum shall arrange with the owners the schedules of visits and regular inspection.

ARTICLE XI CULTURAL HERITAGE WORKERS' INCENTIVES PROGRAM

SECTION 41. Cultural Heritage Workers' Incentives. - The national cultural agencies, in coordination with the Commission on Higher Education shall initiate scholarships, educational training programs, and other measures to protect the well being of curators, conservators, authenticators and valuers/appraisers of cultural property. Such cultural workers shall be given grants, incentives and scholarships upon the endorsement by the head of the appropriate cultural agency.

- (a) **Program for Cultural Heritage Workers.** Within ninety (90) days from the effectivity of this Act, the Commission through the cultural agencies concerned shall come up with the following:
- 1) An active Roster of Authenticators and Valuers/Appraisers;
 - 2) An education and training plan for conservators, authenticators, valuers/appraisers, and other conservation related workers; and
 - 3) A general training plan on conservation for local government units.
- (b) **Application of Scientific Career Merit System.** Cultural heritage workers in the Civil Service with a Doctorate, Master of Science, or Master of Arts Degree in fields related to cultural heritage promotion and conservation, shall be given the rank and benefits of Scientists, subject to qualifying standards equivalent to those prescribed in the scientific career merit system of the government.

A cultural heritage worker involved in science and technology in the government agencies shall be eligible for the benefits under Republic Act 8439 or the Magna Carta for Scientists, Engineers, Researchers and other S&T Personnel in Government. The Commission shall likewise establish a merit award system for non-civil service cultural heritage workers.

ARTICLE XII SENTRO RIZAL

SECTION 42. Creation of Sentro Rizal. - There is hereby created and established a *Sentro Rizal* whose main purpose is the promotion of Philippine arts, culture and language throughout the world.

SECTION 43. Overseas Branches or Offices of Sentro Rizal. -*Sentro Rizal* shall have branches or offices in countries where there are children of overseas Filipino workers who need to be educated about their roots, as well as developed countries where there are large Filipino communities.

The office or branch shall be repository, *inter alia*, of the following materials on Philippine art, culture and language: books, digital video discs, compact discs, films, magazines, artworks, tourism promotion materials, information materials, etc. all these shall be made available to the public both Filipino and foreign.

SECTION 44. Coordination and Supervision with Philippine Schools. - The *Sentro Rizal* shall coordinate and supervise the Philippine Schools for Filipino children overseas.

SECTION 45. Services Offered. -The *Sentro Rizal* shall offer Filipino language courses for children and adults, as well as exhibits, small concerts, poetry reading, Philippine cuisine lessons in all *Sentro Rizal* branches.

SECTION 46. Provision of Tourism, Trade and Investment Materials to the Sentro Rizal. - The Department of Tourism, as well as the Department of Education, National Commission for Culture and the Arts, Commission on Higher Education, National Historical Institute, National Archives, National Library, and the Cultural Center of the Philippines, shall provide tourism promotion materials to the *Sentro Rizal* overseas branches. In the same manner, the Department of Trade and Industry will also provide trade and investments materials.

SECTION 47. Appropriation. - The amount of One hundred million pesos (P100,000,000.00) necessary to carry out the provisions of this article shall be appropriated immediately to be generated from whatever source that are available in the National Treasury.

ARTICLE XIII PENAL PROVISIONS

SECTION 48. Prohibited Acts. - To the extent that the offense is not punishable by a higher punishment under another provision of law, violations of this Act may be made by whoever intentionally:

- (a) Destroys, demolishes, mutilates or damages any world heritage site national cultural treasures important cultural property, and archaeological and anthropological sites;
- (b) Modifies, alters, or destroys the original features of or undertakes construction or real state development in any national shrine, monument, landmark and other historic edifices and structures, declared, classified, and marked by the National Historical Institute as such, without the prior written permission from the Commission. This includes the designated security or buffer zone, extending five (5) meters from the visible perimeter of the monument or site;
- (c) Explores, excavates or undertakes diggings for the purpose of obtaining materials of cultural historical value without prior written authority from the National Museum. No excavation or diggings shall be permitted without the supervision of a certified archaeologist;
- (d) Appropriates excavation finds contrary to the provisions of the New Civil Code and other pertinent laws;
- (e) Imports, sells, distributes, procures, acquires, or exports cultural property stolen, or otherwise lost against the will of the lawful owner;
- (f) Illicitly exports cultural property listed in the Philippine Registry of Cultural Property or those that may be categorized as such upon visitation or incorrectly declares the same during transit; and,
- (g) Deals in cultural property without proper registration and license issued by the cultural agency concerned.

SECTION 49. Penal Provisions. - Upon conviction, the offender shall be subject to a fine of not less than Two Hundred Thousand Pesos (P200,000.00) or imprisonment for a term of not less than ten (10) years, or both upon the discretion of the Court: *Provided*, That any cultural property attempted to be concealed from registration or those intended to be encumbered or excavated in violation of this Act shall be summarily confiscated and forfeited in favor of the Commission: *Provided further*, That if the violation is committed by a juridical person, the president, manager, representative, director, agent or employee of said juridical person responsible for the act shall also be liable for the penalties provided herein: *Provided furthermore*, That if the acts are committed by dealers, they shall suffer, in addition to the penalties provide herein, the automatic revocation of their license to operate: *Provided finally*, That if the offender is an alien, he shall be placed under the custody of the Bureau of Immigration for the appropriate proceedings under this Act, and shall be summarily deported after serving his/her sentence.

Heads of departments, commissions, bureaus, agencies or offices, officers and/or agents found to have intentionally failed to perform their required duty as prescribed by the deputization order under Section 28 of this Act shall be liable for nonfeasance and shall be penalized in accordance with applicable laws.

If the offense involves the non-registration of a cultural property such as those referred to in Section 14, and the non-registration occurs upon or after proper notification by the Commission or the cultural agency concerned, the offender shall be subject to a fine of not less than ten thousand pesos (P10,000.00) but not more than one hundred thousand pesos (P100,000).

The concerned head of agency, officer and/or employee of the government entities mentioned in Section 31 shall be held liable for failure to consult and coordinate with the Commission for the damage to the cultural property resulting from the implementation of the entity's program/project, and shall be meted the penalty mentioned in the first paragraph of this section: *Provided*, That the offender/s shall likewise be asked to pay for the repair or rebuilding of what has been damaged.

ARTICLE XIV ENDOWMENT

SECTION 50. National Endowment for Culture and the Arts. – The sum of Five hundred million pesos (P500,000,000.00) shall be contributed by the Philippine Amusement and Gaming Corporation (PAGCOR) and/or General Appropriations at the minimum rate of One hundred million pesos (P100,000,000.00) per year for five years, towards the establishment of a National Endowment for Culture and the Arts. Said amount shall be kept separate and deposited in a special account in the Bureau of Treasury specifically earmarked for culture and the arts.

ARTICLE XV FINAL PROVISIONS

SECTION 51. Implementing Rules and Regulations. – The Commission, in consultation with other government agencies mentioned in this Act, shall promulgate the implementing rules and regulations within ninety (90) days after the effectivity of this Act.

SECTION 52. Repealing Clause. – Pertinent provisions of Republic Act No. 7356, the “Law Creating the National Commission for Culture and the Arts”; Republic Act No. 8492, the “National Museum Act of 1998”; Republic Act No. 9072, the “National Caves and Cave Resources Management and Protection Act”; and Republic Act No. 7942, the “Philippine Mining Act of 1995”; and all other laws, presidential decrees, executive orders and rules and regulations inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 53. Separability Clause. – Any portion or provision of this Act that may be declared unconstitutional shall not have the effect of nullifying other portions or provisions hereof as long as such remaining provisions can still subsist and be given effect.

SECTION 54. Effectivity Clause. – This Act shall take effect fifteen (15) days after its publication in at least two (2) newspapers of general circulation.

Approved,

PROSPERO C. NOGRALES
Speaker of the House of Representatives

JUAN PONCE ENRILE
President of the Senate

This Act which is a consolidation of Senate Bill No. 3014 and House Bill No. 6733 was finally passed by the Senate and the House of Representatives on December 14, 2009 and December 16, 2009, respectively.

MARILYN B. BARUA-YAP
Secretary general
House of Representatives

EMMA LIRIO-REYES
Secretary of the Senate

Approved: March 26, 2010

GLORIA MACAPAGAL-ARROYO
President of the Philippines



**CONVENTION FOR THE SAFEGUARDING
OF THE INTANGIBLE CULTURAL HERITAGE**

Paris, 17 October 2003

MISC/2003/CLT/CH/14

CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

The General Conference of the United Nations Educational, Scientific and Cultural Organization hereinafter referred to as UNESCO, meeting in Paris, from 29 September to 17 October 2003, at its 32nd session,

Referring to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966,

Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development, as underscored in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, in the UNESCO Universal Declaration on Cultural Diversity of 2001, and in the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture,

Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage,

Recognizing that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage,

Being aware of the universal will and the common concern to safeguard the intangible cultural heritage of humanity,

Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity,

Noting the far-reaching impact of the activities of UNESCO in establishing normative instruments for the protection of the cultural heritage, in particular the Convention for the Protection of the World Cultural and Natural Heritage of 1972,

Noting further that no binding multilateral instrument as yet exists for the safeguarding of the intangible cultural heritage,

Considering that existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the intangible cultural heritage,

Considering the need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding,

Considering that the international community should contribute, together with the States Parties to this Convention, to the safeguarding of such heritage in a spirit of cooperation and mutual assistance,

Recalling UNESCO's programmes relating to the intangible cultural heritage, in particular the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity,

Considering the invaluable role of the intangible cultural heritage as a factor in bringing human beings closer together and ensuring exchange and understanding among them,

Adopts this Convention on this seventeenth day of October 2003.

I. General provisions

Article 1 – Purposes of the Convention

The purposes of this Convention are:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.

Article 2 – Definitions

For the purposes of this Convention,

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested *inter alia* in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

3. “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

4. “States Parties” means States which are bound by this Convention and among which this Convention is in force.

5. This Convention applies *mutatis mutandis* to the territories referred to in Article 33 which become Parties to this Convention in accordance with the conditions set out in that Article. To that extent the expression “States Parties” also refers to such territories.

Article 3 – Relationship to other international instruments

Nothing in this Convention may be interpreted as:

- (a) altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated; or
- (b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.

II. Organs of the Convention

Article 4 – General Assembly of the States Parties

1. A General Assembly of the States Parties is hereby established, hereinafter referred to as “the General Assembly”. The General Assembly is the sovereign body of this Convention.

2. The General Assembly shall meet in ordinary session every two years. It may meet in extraordinary session if it so decides or at the request either of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage or of at least one-third of the States Parties.

3. The General Assembly shall adopt its own Rules of Procedure.

Article 5 – Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage

1. An Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, hereinafter referred to as “the Committee”, is hereby established within UNESCO. It shall be composed of representatives of 18 States Parties, elected by the States Parties meeting in General Assembly, once this Convention enters into force in accordance with Article 34.

2. The number of States Members of the Committee shall be increased to 24 once the number of the States Parties to the Convention reaches 50.

Article 6 – Election and terms of office of States Members of the Committee

1. The election of States Members of the Committee shall obey the principles of equitable geographical representation and rotation.
2. States Members of the Committee shall be elected for a term of four years by States Parties to the Convention meeting in General Assembly.
3. However, the term of office of half of the States Members of the Committee elected at the first election is limited to two years. These States shall be chosen by lot at the first election.
4. Every two years, the General Assembly shall renew half of the States Members of the Committee.
5. It shall also elect as many States Members of the Committee as required to fill vacancies.
6. A State Member of the Committee may not be elected for two consecutive terms.
7. States Members of the Committee shall choose as their representatives persons who are qualified in the various fields of the intangible cultural heritage.

Article 7 – Functions of the Committee

Without prejudice to other prerogatives granted to it by this Convention, the functions of the Committee shall be to:

- (a) promote the objectives of the Convention, and to encourage and monitor the implementation thereof;
- (b) provide guidance on best practices and make recommendations on measures for the safeguarding of the intangible cultural heritage;
- (c) prepare and submit to the General Assembly for approval a draft plan for the use of the resources of the Fund, in accordance with Article 25;
- (d) seek means of increasing its resources, and to take the necessary measures to this end, in accordance with Article 25;
- (e) prepare and submit to the General Assembly for approval operational directives for the implementation of this Convention;
- (f) examine, in accordance with Article 29, the reports submitted by States Parties, and to summarize them for the General Assembly;
- (g) examine requests submitted by States Parties, and to decide thereon, in accordance with objective selection criteria to be established by the Committee and approved by the General Assembly for:

- (i) inscription on the lists and proposals mentioned under Articles 16, 17 and 18;
- (ii) the granting of international assistance in accordance with Article 22.

Article 8 – Working methods of the Committee

1. The Committee shall be answerable to the General Assembly. It shall report to it on all its activities and decisions.
2. The Committee shall adopt its own Rules of Procedure by a two-thirds majority of its Members.
3. The Committee may establish, on a temporary basis, whatever ad hoc consultative bodies it deems necessary to carry out its task.
4. The Committee may invite to its meetings any public or private bodies, as well as private persons, with recognized competence in the various fields of the intangible cultural heritage, in order to consult them on specific matters.

Article 9 – Accreditation of advisory organizations

1. The Committee shall propose to the General Assembly the accreditation of non-governmental organizations with recognized competence in the field of the intangible cultural heritage to act in an advisory capacity to the Committee.
2. The Committee shall also propose to the General Assembly the criteria for and modalities of such accreditation.

Article 10 – The Secretariat

1. The Committee shall be assisted by the UNESCO Secretariat.
2. The Secretariat shall prepare the documentation of the General Assembly and of the Committee, as well as the draft agenda of their meetings, and shall ensure the implementation of their decisions.

III. Safeguarding of the intangible cultural heritage at the national level

Article 11 – Role of States Parties

Each State Party shall:

- (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- (b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.

Article 12 – Inventories

1. To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.
2. When each State Party periodically submits its report to the Committee, in accordance with Article 29, it shall provide relevant information on such inventories.

Article 13 – Other measures for safeguarding

To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to:

- (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;
- (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;
- (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;
- (d) adopt appropriate legal, technical, administrative and financial measures aimed at:
 - (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof;
 - (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;
 - (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

Article 14 – Education, awareness-raising and capacity-building

Each State Party shall endeavour, by all appropriate means, to:

- (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through:
 - (i) educational, awareness-raising and information programmes, aimed at the general public, in particular young people;
 - (ii) specific educational and training programmes within the communities and groups concerned;

- (iii) capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and
- (iv) non-formal means of transmitting knowledge;
- (b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this Convention;
- (c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.

Article 15 – Participation of communities, groups and individuals

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

IV. Safeguarding of the intangible cultural heritage at the international level

Article 16 – Representative List of the Intangible Cultural Heritage of Humanity

1. In order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity, the Committee, upon the proposal of the States Parties concerned, shall establish, keep up to date and publish a Representative List of the Intangible Cultural Heritage of Humanity.
2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this Representative List.

Article 17 – List of Intangible Cultural Heritage in Need of Urgent Safeguarding

1. With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.
2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this List.
3. In cases of extreme urgency – the objective criteria of which shall be approved by the General Assembly upon the proposal of the Committee – the Committee may inscribe an item of the heritage concerned on the List mentioned in paragraph 1, in consultation with the State Party concerned.

Article 18 – Programmes, projects and activities for the safeguarding of the intangible cultural heritage

1. On the basis of proposals submitted by States Parties, and in accordance with criteria to be defined by the Committee and approved by the General Assembly, the Committee shall periodically select and promote national, subregional and regional programmes, projects and

activities for the safeguarding of the heritage which it considers best reflect the principles and objectives of this Convention, taking into account the special needs of developing countries.

2. To this end, it shall receive, examine and approve requests for international assistance from States Parties for the preparation of such proposals.

3. The Committee shall accompany the implementation of such projects, programmes and activities by disseminating best practices using means to be determined by it.

V. International cooperation and assistance

Article 19 – Cooperation

1. For the purposes of this Convention, international cooperation includes, inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage.

2. Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.

Article 20 – Purposes of international assistance

International assistance may be granted for the following purposes:

- (a) the safeguarding of the heritage inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding;
- (b) the preparation of inventories in the sense of Articles 11 and 12;
- (c) support for programmes, projects and activities carried out at the national, subregional and regional levels aimed at the safeguarding of the intangible cultural heritage;
- (d) any other purpose the Committee may deem necessary.

Article 21 – Forms of international assistance

The assistance granted by the Committee to a State Party shall be governed by the operational directives foreseen in Article 7 and by the agreement referred to in Article 24, and may take the following forms:

- (a) studies concerning various aspects of safeguarding;
- (b) the provision of experts and practitioners;
- (c) the training of all necessary staff;
- (d) the elaboration of standard-setting and other measures;

- (e) the creation and operation of infrastructures;
- (f) the supply of equipment and know-how;
- (g) other forms of financial and technical assistance, including, where appropriate, the granting of low-interest loans and donations.

Article 22 – Conditions governing international assistance

1. The Committee shall establish the procedure for examining requests for international assistance, and shall specify what information shall be included in the requests, such as the measures envisaged and the interventions required, together with an assessment of their cost.
2. In emergencies, requests for assistance shall be examined by the Committee as a matter of priority.
3. In order to reach a decision, the Committee shall undertake such studies and consultations as it deems necessary.

Article 23 – Requests for international assistance

1. Each State Party may submit to the Committee a request for international assistance for the safeguarding of the intangible cultural heritage present in its territory.
2. Such a request may also be jointly submitted by two or more States Parties.
3. The request shall include the information stipulated in Article 22, paragraph 1, together with the necessary documentation.

Article 24 – Role of beneficiary States Parties

1. In conformity with the provisions of this Convention, the international assistance granted shall be regulated by means of an agreement between the beneficiary State Party and the Committee.
2. As a general rule, the beneficiary State Party shall, within the limits of its resources, share the cost of the safeguarding measures for which international assistance is provided.
3. The beneficiary State Party shall submit to the Committee a report on the use made of the assistance provided for the safeguarding of the intangible cultural heritage.

VI. Intangible Cultural Heritage Fund

Article 25 – Nature and resources of the Fund

1. A “Fund for the Safeguarding of the Intangible Cultural Heritage”, hereinafter referred to as “the Fund”, is hereby established.
2. The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.

3. The resources of the Fund shall consist of:
 - (a) contributions made by States Parties;
 - (b) funds appropriated for this purpose by the General Conference of UNESCO;
 - (c) contributions, gifts or bequests which may be made by:
 - (i) other States;
 - (ii) organizations and programmes of the United Nations system, particularly the United Nations Development Programme, as well as other international organizations;
 - (iii) public or private bodies or individuals;
 - (d) any interest due on the resources of the Fund;
 - (e) funds raised through collections, and receipts from events organized for the benefit of the Fund;
 - (f) any other resources authorized by the Fund's regulations, to be drawn up by the Committee.
4. The use of resources by the Committee shall be decided on the basis of guidelines laid down by the General Assembly.
5. The Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by the Committee.
6. No political, economic or other conditions which are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.

Article 26 – Contributions of States Parties to the Fund

1. Without prejudice to any supplementary voluntary contribution, the States Parties to this Convention undertake to pay into the Fund, at least every two years, a contribution, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly. This decision of the General Assembly shall be taken by a majority of the States Parties present and voting which have not made the declaration referred to in paragraph 2 of this Article. In no case shall the contribution of the State Party exceed 1% of its contribution to the regular budget of UNESCO.
2. However, each State referred to in Article 32 or in Article 33 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance, approval or accession, that it shall not be bound by the provisions of paragraph 1 of this Article.
3. A State Party to this Convention which has made the declaration referred to in paragraph 2 of this Article shall endeavour to withdraw the said declaration by notifying the Director-General of UNESCO. However, the withdrawal of the declaration shall not take

effect in regard to the contribution due by the State until the date on which the subsequent session of the General Assembly opens.

4. In order to enable the Committee to plan its operations effectively, the contributions of States Parties to this Convention which have made the declaration referred to in paragraph 2 of this Article shall be paid on a regular basis, at least every two years, and should be as close as possible to the contributions they would have owed if they had been bound by the provisions of paragraph 1 of this Article.

5. Any State Party to this Convention which is in arrears with the payment of its compulsory or voluntary contribution for the current year and the calendar year immediately preceding it shall not be eligible as a Member of the Committee; this provision shall not apply to the first election. The term of office of any such State which is already a Member of the Committee shall come to an end at the time of the elections provided for in Article 6 of this Convention.

Article 27 – Voluntary supplementary contributions to the Fund

States Parties wishing to provide voluntary contributions in addition to those foreseen under Article 26 shall inform the Committee, as soon as possible, so as to enable it to plan its operations accordingly.

Article 28 – International fund-raising campaigns

The States Parties shall, insofar as is possible, lend their support to international fund-raising campaigns organized for the benefit of the Fund under the auspices of UNESCO.

VII. Reports

Article 29 – Reports by the States Parties

The States Parties shall submit to the Committee, observing the forms and periodicity to be defined by the Committee, reports on the legislative, regulatory and other measures taken for the implementation of this Convention.

Article 30 – Reports by the Committee

1. On the basis of its activities and the reports by States Parties referred to in Article 29, the Committee shall submit a report to the General Assembly at each of its sessions.
2. The report shall be brought to the attention of the General Conference of UNESCO.

VIII. Transitional clause

Article 31 – Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity

1. The Committee shall incorporate in the Representative List of the Intangible Cultural Heritage of Humanity the items proclaimed “Masterpieces of the Oral and Intangible Heritage of Humanity” before the entry into force of this Convention.

2. The incorporation of these items in the Representative List of the Intangible Cultural Heritage of Humanity shall in no way prejudice the criteria for future inscriptions decided upon in accordance with Article 16, paragraph 2.
3. No further Proclamation will be made after the entry into force of this Convention.

IX. Final clauses

Article 32 – Ratification, acceptance or approval

1. This Convention shall be subject to ratification, acceptance or approval by States Members of UNESCO in accordance with their respective constitutional procedures.
2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General of UNESCO.

Article 33 – Accession

1. This Convention shall be open to accession by all States not Members of UNESCO that are invited by the General Conference of UNESCO to accede to it.
2. This Convention shall also be open to accession by territories which enjoy full internal self-government recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.
3. The instrument of accession shall be deposited with the Director-General of UNESCO.

Article 34 – Entry into force

This Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

Article 35 – Federal or non-unitary constitutional systems

The following provisions shall apply to States Parties which have a federal or non-unitary constitutional system:

- (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;
- (b) with regard to the provisions of this Convention, the implementation of which comes under the jurisdiction of individual constituent States, countries, provinces or cantons which are not obliged by the constitutional system of the federation to

take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 36 – Denunciation

1. Each State Party may denounce this Convention.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of UNESCO.
3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the denouncing State Party until the date on which the withdrawal takes effect.

Article 37 – Depositary functions

The Director-General of UNESCO, as the Depositary of this Convention, shall inform the States Members of the Organization, the States not Members of the Organization referred to in Article 33, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 32 and 33, and of the denunciations provided for in Article 36.

Article 38 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the General Assembly for discussion and possible adoption.
2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.
3. Once adopted, amendments to this Convention shall be submitted for ratification, acceptance, approval or accession to the States Parties.
4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two-thirds of the States Parties. Thereafter, for each State Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that State Party of its instrument of ratification, acceptance, approval or accession.
5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 5 concerning the number of States Members of the Committee. These amendments shall enter into force at the time they are adopted.

6. A State which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered:

- (a) as a Party to this Convention as so amended; and
- (b) as a Party to the unamended Convention in relation to any State Party not bound by the amendments.

Article 39 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Article 40 – Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.



LAWS OF MALAYSIA

REPRINT

Act 645

NATIONAL HERITAGE ACT 2005

Incorporating all amendments up to 1 June 2006

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LAWS OF MALAYSIA

Act 645

NATIONAL HERITAGE ACT 2005

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LAWS OF MALAYSIA**Act 645****NATIONAL HERITAGE ACT 2005**

An Act to provide for the conservation and preservation of National Heritage, natural heritage, tangible and intangible cultural heritage, underwater cultural heritage, treasure trove and for related matters.

[1 March 2006; P.U. (B) 53/2006]

ENACTED by the Parliament of Malaysia as follows:

PART I**PRELIMINARY****Short title and commencement**

1. (1) This Act may be cited as the National Heritage Act 2005.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*; and the Minister may appoint different dates for the coming into operation of this Act to different parts of Malaysia.

Interpretation

2. (1) In this Act, unless the context otherwise requires—

“building” means a building or groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

“antiquity” means—

- (a) any moveable object which is or is reasonably believed to be at least fifty years old;
- (b) any part of any such object which has at any later date been added or re-constructed or restored; and
- (c) any human, plant or animal remains which is or is reasonably believed to be at least one hundred years old;

“heritage item” means any National Heritage, heritage site, heritage object or underwater cultural heritage listed in the Register;

“foreign heritage item” means any item designated and protected as such by a legislation of a foreign country, which is a party to a treaty on the protection of cultural object or material;

“Register” means the National Heritage Register established and maintained under section 23 containing a list of heritage items;

“treasure trove” means any money, coin, gold, silver, plate, bullion jewellery, precious stone or any object or article of value found hidden in, or in anything affixed to, the soil or the bed of a river or lake or of the sea, the owner of which is unknown or cannot be found, but does not include any tangible cultural heritage;

“area” includes works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view;

“Fund” means the Heritage Fund established under section 20;

“customs airport” and “customs port” have the same meaning assigned to it by the Customs Act 1967 [*Act 235*];

“Council” means the National Heritage Council established under section 8;

“safeguarding” means the identification, protection, conservation, restoration, renovation, maintenance, documentation and revitalization of historic or traditional matter, artefact, area and their environment;

“Minister” means the Minister charged with the responsibility for heritage;

“monument” means architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

“object” includes any moveable antiquity, tangible cultural heritage, intangible cultural heritage and historical object but excluding treasure trove;

“historical object” means any artefact or other object to which religious, traditional, artistic or historic interest is attached and includes any—

- (a) ethnographic material such as a household or agricultural implement, decorative article or personal ornament;
- (b) work of art such as a carving, sculpture, painting, architecture, textile, musical instrument, weapon and any other handicraft;
- (c) manuscript, coin, currency note, medal, badge, insignia, coat of arm, crest flag, arm or armour; or
- (d) vehicle, ship and boat, in part or in whole, whose production has ceased;

“heritage object” means an object declared under section 49 or registered under section 51 as a heritage object;

“proper officer of customs” has the same meaning assigned to it by the Customs Act 1967;

“port officer” has the same meaning assigned to it by the Merchant Shipping Ordinance 1952 [*Ord. No. 70 of 1952*];

“enforcement officer” means any officer appointed by the Minister under section 97;

“conservation management plan” means a plan for conservation prepared under section 46;

“restoration” means the process of accurately recovering the form and details of a structure or part of a structure and its setting, as it appeared at some period in time, by removing the latter work and replacing the missing original work, and includes—

- (a) full restoration which involves both exterior and interior;
- (b) partial restoration which involves the exterior, interior, or any partial combination and is adopted when only parts of a structure are important in illustrating cultural values at its level of historic significance, or contribute to the values for which the area was designated; and
- (c) adaptive restoration which involves all or a portion of the exterior restoration with the interior adapted to a modern functional use;

“reconstruction” means the process of accurately reproducing by new construction, the form and detail of a vanished structure, or part of it, as it appeared at some period in time and includes full or partial reconstruction;

“preservation” means aiming to halt further deterioration, decay or a state of dilapidation and providing structural safety and well being but does not contemplate significant rebuilding and includes—

- (a) techniques of arresting or slowing the process of deterioration, decay or state of dilapidation of an item or structure;
- (b) improvement of structural conditions to make a structure safe, habitable, or otherwise useful; and
- (c) normal maintenance and minor repairs that do not change or adversely affect the fabric or historic appearance of a structure;

“rehabilitation” means the process of returning a property to a state of utility through repair or alteration, which makes possible an efficient contemporary use while preserving those portions and features of the property which are significant to its historic architecture;

“conservation” includes preservation, restoration, reconstruction, rehabilitation and adaptation or any combination;

“owner”, in relation to any land, means the registered owner or the holder by customary tenure of the land;

“occupier” includes the cultivator or person in actual possession, management or control of any land, and includes any person having the possession or control of any moveable property in that premises or land;

“collector” means any person who acquires tangible moveable cultural heritage for purposes other than for sale;

“dealer” means any person who receives profit from the purchase and resale of exhibits and includes a registered dealer;

“registered dealer” means any dealer who is licenced under section 91;

“Malaysian waters” means the territorial waters of Malaysia determined in accordance with the Emergency (Essential Powers) Ordinance No. 7 of 1969 [*P.U. (A) 307A/1969*];

“Commissioner” means the Commissioner of Heritage appointed under section 4;

“local planning authority” shall have the same meaning assigned to it by the Town and Country Planning Act 1976 [*Act 172*] in Peninsular Malaysia and the competent planning authority under the State laws of Sabah and Sarawak;

“archaeological relic” means—

(a) any archaeological deposit; or

(b) any artefact, remains or material evidence associated with an archaeological deposit,

in any part of Malaysia and is fifty or more years old;

“archaeological reserve” means an area in which archaeological relics are situated;

“site” includes any area, place, zone, natural heritage, monument or building attached to land, archaeological reserve and any land with building, garden, tree or archaeological reserve;

“heritage site” means a site designated as a heritage site under section 24;

“heritage” imports the generic meaning of a National Heritage, sites, objects and underwater cultural heritage whether listed or not in the Register;

“National Heritage” means any heritage site, heritage object, underwater cultural heritage or any living person declared as a National Heritage under section 67;

“cultural heritage” includes tangible or intangible form of cultural property, structure or artefact and may include a heritage matter, object, item, artefact, formation structure, performance, dance, song, music that is pertinent to the historical or contemporary way of life of Malaysians, on or in land or underwater cultural heritage of tangible form but excluding natural heritage;

“underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least one hundred years such as—

- (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (b) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (c) objects of prehistoric character;

“tangible cultural heritage” includes area, monument and building;

“intangible cultural heritage” includes any form of expressions, languages, lingual utterances, sayings, musically produced tunes, notes, audible lyrics, songs, folksongs, oral traditions, poetry, music, dances as produced by the performing arts, theatrical plays, audible compositions of sounds and music, martial arts, that may have existed or exist in relation to the heritage of Malaysia or any part of Malaysia or in relation to the heritage of a Malaysian community;

“cultural heritage significance” means cultural heritage having aesthetic, archaeological, architectural, cultural, historical, scientific, social, spiritual, linguistic or technological value;

“natural heritage” includes natural features of any area in Malaysia which may consist of earthly physical or biological formations or group of such formations, geological or physiographical features, mountains, rivers, streams, rock formation, sea shore or any natural sites of outstanding value from the point of view of nature, science, history conservation or natural beauty including flora and fauna of Malaysia;

“zone” means an area or part of an area for the purpose of preservation and restoration in respect of rural and urban landscapes whether natural or man-made, which embraces any cultural heritage significance.

(2) In this Act, references to the State Authority in relation to the Federal Territory of Kuala Lumpur, the Federal Territory of Labuan and the Federal Territory of Putrajaya shall be construed as references to the Minister responsible for the Federal Territory of Kuala Lumpur, the Federal Territory of Labuan and the Federal Territory of Putrajaya.

(3) For the purposes of this Act, the following shall not be considered as underwater cultural heritage:

- (a) pipelines and cables placed on the seabed; and
- (b) installations other than pipelines and cables, placed on the seabed.

PART II

CONSERVATION AND PRESERVATION OF HERITAGE

Policy in relation to conservation and preservation of heritage

3. (1) Subject to subsection (2), the Minister shall be responsible for providing or issuing policies, statements or directives in respect of any matter, business, strategy or conduct on the conservation and preservation of heritage.

(2) The Minister shall not provide or issue any policies, statements or directives under subsection (1) where the matter, business, strategy or conduct on the conservation and preservation of heritage concerns the power or jurisdiction of a State unless the relevant State Authority has been consulted.

PART III

ADMINISTRATION OF THE ACT

Appointment of Commissioner of Heritage

4. (1) There shall be appointed by the Minister, an officer to be known as the “Commissioner of Heritage” for the purpose of carrying out the powers and functions assigned to the Commissioner under this Act.

(2) The appointment of the Commissioner shall be published in the *Gazette*.

(3) The Commissioner appointed under subsection (1) shall be a body corporate having perpetual succession and a common seal.

(4) The Commissioner may sue and be sued in its name.

(5) The officer appointed to be the Commissioner shall hold office for a period of not more than three years and shall be eligible for reappointment.

Appointment of officers

5. (1) The Minister may, from time to time, appoint such number of Deputy Commissioners, Assistant Commissioners, authorized officers and such other officers as are necessary to assist the Commissioner in the performance of his functions and the exercise of his powers under this Act.

(2) All officers appointed under subsection (1) shall be subject to the supervision, direction and control of the Commissioner.

Functions of the Commissioner

6. The functions of the Commissioner are as follows:

- (a) to determine the designation of sites, registration of objects and underwater cultural heritage;
- (b) to establish and maintain the Register and to determine and specify the categories of heritage to be listed in the Register;
- (c) to supervise and oversee the conservation, preservation, restoration, maintenance, promotion, exhibition and accessibility of heritage;

- (d) to promote and facilitate any research relating to heritage;
- (e) to authorise, monitor and supervise excavations for heritage purposes;
- (f) to maintain documents relating to any excavation, exploration, finding or search for heritage;
- (g) to establish and maintain liaison and co-operation with the State Authority in respect of conservation and preservation of heritage matters;
- (h) to advise and co-ordinate with the local planning authority, the Council and other bodies and entities at all levels for the purpose of safeguarding, promoting and dealing with any heritage;
- (i) to promote and regulate that best standards and practices are applied in the conservation and preservation of heritage;
- (j) to advise the Minister with regard to any matter in respect of conservation and preservation of heritage;
- (k) to perform such other functions under this Act as the Minister may assign from time to time; and
- (l) to do all such things as may be incidental to or consequential upon the discharge of his powers and functions.

Powers of the Commissioner

7. Subject to and for the purpose of this Act, the powers of the Commissioner are as follows:

- (a) to enter into contracts;
- (b) to acquire, purchase, take, hold and enjoy movable and immovable property of every description;
- (c) to convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer, or otherwise dispose of, or deal with any movable or immovable property and any interest in any movable or immovable property, vested in the Commissioner; and

- (d) to do all things reasonably necessary for the performance of its duties under this Act.

PART IV

NATIONAL HERITAGE COUNCIL

Establishment of National Heritage Council

8. There shall be established a National Heritage Council.

Functions of Council

9. (1) The functions of the Council shall be—
- (a) to advise the Minister and the Commissioner on all matters relating to heritage, and the due administration and enforcement of laws relating to heritage; and
 - (b) to advise the Minister and the Commissioner on any matter referred to it by the Minister or the Commissioner.
- (2) The Minister and the Commissioner shall not be bound to act upon the advice of the Council.

Membership of Council

10. (1) The Council shall consist of the following members:
- (a) a Chairman, to be appointed by the Minister;
 - (b) the Secretary General of the Ministry of Culture, Arts and Heritage or his representative;
 - (c) the Secretary General of the Ministry of Tourism or his representative;
 - (d) the Director General of Town and Country Planning or his representative;
 - (e) the Director General of the Museums and Antiquity Department or his representative;
 - (f) the Commissioner; and

(g) not more than six other members, at least one of whom shall be a public officer who possess experience or expertise in relation to the management, conservation or preservation of sites and objects of natural or cultural heritage significance, to be appointed by the Minister.

(2) The Minister may appoint any member of the Council to perform the functions of the Chairman—

(a) if for any substantial period the Chairman is unable, by reason of illness, leave of absence or any other cause, to perform his functions; or

(b) during any period of vacancy in the office of the Chairman.

(3) A member appointed as the Chairman under subsection (2) shall, during the period in which he is performing the functions of the Chairman under this section, be deemed to be the Chairman.

Secretary

11. There shall be a secretary to the Council who shall be appointed by the Commissioner.

Tenure of office

12. Subject to section 13, a member appointed under paragraph 10(a) or (g) shall, unless he sooner resigns or his appointment is sooner revoked, hold office for such period not exceeding three years as the Minister may determine at the time of his appointment and shall be eligible for reappointment.

Revocation of appointment and resignation of members

13. (1) The appointment of members under paragraph 10(a) or (g) may at any time be revoked by the Minister.

(2) A member appointed under paragraph 10(a) or (g) may at any time resign his office by giving fourteen days' written notice addressed to the Minister.

Vacation of office

14. The office of a member appointed under paragraph 10(*a*) or (*g*) shall be vacated if—

- (*a*) he dies;
- (*b*) there has been proved against him, or he has been convicted of, a charge in respect of—
 - (i) an offence involving fraud, dishonesty or moral turpitude;
 - (ii) an offence under any law relating to corruption; or
 - (iii) any other offence punishable with imprisonment (in itself only or in addition to or in lieu of a fine) for more than two years;
- (*c*) he becomes bankrupt;
- (*d*) he is of unsound mind or is otherwise incapable of discharging his duties;
- (*e*) he absents himself from three consecutive meetings of the Council without leave of the Chairman and in the case of the Chairman without leave of the Minister;
- (*f*) his resignation is accepted by the Minister; or
- (*g*) his appointment is revoked by the Minister.

Filling of vacancies

15. Where a member appointed under paragraph 10(*a*) or (*g*) ceases to be a member of the Council, the Minister may appoint another person to fill the vacancy for the remainder of the term for which the vacating member was appointed.

Meetings of Council

16. (1) The Council shall meet as often as may be necessary in a year for the performance of its functions.

(2) The Chairman shall preside at all meetings of the Council.

(3) A meeting of the Council shall be convened by the Chairman by notice in writing to the other members and the meeting shall be held at the time and place specified in the notice.

(4) The quorum of the Council shall be five.

(5) The decision of the Council shall be by majority votes, and where there is an equality of votes, the Chairman shall have the casting vote.

Procedure of meetings

17. Subject to this Act, the Council shall determine its own procedure of meetings.

Committees

18. The Council may establish committees consisting of members of the Council or persons who are not members of the Council or a combination of both to advise or assist the Council on such matters concerning its functions as it may consider necessary in performing its functions under this Act.

Remuneration or allowance

19. Members of the Council or a committee may be paid from the Fund such remuneration or allowance as the Minister may, after consultation with the Minister of Finance, determine.

PART V

HERITAGE FUND

Establishment of the Fund

20. (1) For the purposes of this Act, a fund to be known as the “Heritage Fund” is established.

(2) The Fund shall be controlled, maintained and operated by the Commissioner.

- (3) The Fund shall consist of—
- (a) such sums as may be appropriated by Parliament from the Consolidated Fund and otherwise for the purpose of this Act;
 - (b) all moneys received by way of donations, gifts or grants;
 - (c) all moneys derived from levy imposed under this Act;
 - (d) interest received from investment by way of fixed deposit of moneys standing to the credit of the Fund;
 - (e) repayment of any loan disbursed under this Act;
 - (f) all moneys standing to the credit of the Fund that is not immediately required for the purposes of this Act as may be approved by the Minister;
 - (g) all moneys borrowed with the consent of the Minister of Finance for the purposes of the Fund; and
 - (h) all other moneys or property which may in any manner become payable to or vested in the Commissioner in respect of any matter incidental to its functions, powers or duties.

Expenditure to be charged on the Fund

- 21.** The Fund may be expended for the following purposes:
- (a) payment for the purchase of heritage and conservation areas in accordance with this Act;
 - (b) payment of the expenses incurred for—
 - (i) the conservation and preservation of any heritage and conservation areas whether they are owned by the Government or otherwise;
 - (ii) organizing campaigns, research, study, publication of materials for the protection of heritage and conservation areas; and
 - (iii) the conservation and preservation of any heritage item and activities incidental to it;

- (c) any disbursement of grant or loan under this Act; and
- (d) any other payment for the purpose of this Act.

Accounts and audit

22. The Commissioner shall cause proper accounts to be kept and maintained in respect of the Fund and in compliance with the provisions of the Statutory Bodies (Accounts and Annual Reports) Act 1980 [*Act 240*].

PART VI

NATIONAL HERITAGE REGISTER

National Heritage Register

23. (1) The Commissioner shall establish and maintain a register known as the National Heritage Register as may be prescribed containing the lists of heritage items registered under this Act.

(2) The Commissioner shall make the Register available for public inspection subject to such conditions as he thinks fit.

(3) Any person may on payment of a fee to be prescribed by the Minister—

- (a) inspect the Register; and
- (b) make a copy of, or take extracts from, the Register.

PART VII

HERITAGE SITE

Chapter 1

Designation of Heritage Site

Designation of heritage site

24. The Commissioner may designate any site which has natural heritage or cultural heritage significance to be a heritage site.

Adjacent and nearby site

25. (1) Where a site has no natural heritage or cultural heritage significance but the Commissioner is satisfied that it should be designated as a heritage site because of its proximity to and for the protection and enhancement of another site designated as a heritage site under section 24, the Commissioner may so designate such site as a heritage site.

(2) Any designation made under subsection (1) shall be revoked in the event the designation of that other site is revoked.

Inspection of site

26. (1) The Commissioner may at any time enter upon a site to inspect, survey, investigate or to carry out any work necessary for the purpose of determining whether to designate the site as a heritage site.

(2) The owner or occupier of the site shall be given a notice in writing of not less than seven days of any proposed entry.

(3) Where any person objects to such entry under subsection (1) on conscientious or religious grounds, such entry shall not be effected except with the permission in writing of the State Authority in which the site is situated.

(4) The Commissioner may enter into any arrangements with the owner or occupier of the site for any loss or damage suffered or alleged to have been suffered by the owner or occupier by reason of such entry under subsection (1).

(5) Any person who obstructs the Commissioner or refuses entry into any site for inspection, survey, investigation, or to carry out any work under subsection (1) commits an offence.

Notice to owner, etc.

27. (1) Upon determining to designate a site as a heritage site, the Commissioner shall, at least sixty days before making the designation, give a written notice in the form and manner as prescribed by the Commissioner to the owner of the site of the intention to register the site as a heritage site.

(2) As soon as possible after giving notice under subsection (1) the Commissioner shall—

(a) cause to be published in the *Gazette* and a local newspaper—

(i) a notice of intention to designate the site as a heritage site; and

(ii) any other matters constituting or relating to the designation which in his opinion is desirable to publish; and

(b) file a notice of intention to designate the site as a heritage site at the land office where the site is situated.

Objection

28. An owner of the site or any other person affected or likely to be affected by the designation of the site as a heritage site may make an objection to the designation of the site by serving a notice of objection on the Commissioner within thirty days from the date of the publication of the notice under paragraph 27(2)(a).

Hearing

29. Where a notice of objection to the designation of the site is served in accordance with section 28 the Commissioner shall set a date, time and place for the hearing of the objection and shall, at least twenty one days before the date of the hearing serve a notice of hearing in the form and manner as prescribed by the Commissioner, upon the objecting party and the owner of the site.

Consent of the State Authority

30. Where the site is situated in a State, the Commissioner shall obtain the consent of the State Authority of that State before any designation is made.

Decision of the Commissioner

31. (1) Where the Commissioner, after hearing the parties, if any, is satisfied that—

- (a) the site is of cultural heritage significance; and
- (b) the State Authority has given its consent under section 30, he shall—
 - (i) designate the site as a heritage site;
 - (ii) record the heritage site in the Register; and
 - (iii) give the owner a written notice of the Commissioner's decision.

(2) As soon as possible after the decision in subsection (1), the Commissioner shall—

- (a) cause to be published in the *Gazette* and a local newspaper—
 - (i) a notice that the site has been designated as a heritage site; and
 - (ii) any other matters constituting or relating to the heritage site which in his opinion is desirable to publish; and
- (b) file a notice in the land office where the heritage site is situated notifying that the site has been designated as a heritage site.

(3) Where the Commissioner makes a decision not proceed with the proposed designation of a site, he shall immediately notify the owner of the site and the land office where the site is situated in writing of such decision, with or without assigning any reason.

Notice to local planning authority

32. The Commissioner shall notify the local planning authority for the area of the local authority where the heritage site is situated of the designation of the heritage site so that the local planning

authority shall take into consideration any matter, policy, strategy or plan of action pertaining to the interest of the heritage site in preparing any development plan in that local authority area under the Town and Country Planning Act 1976 in Peninsular Malaysia or the relevant State laws in Sabah and Sarawak.

Chapter 2

Interim Protection Order

Commissioner may make Interim Protection Order

33. (1) Upon a notice being served on the owner of a site under subsection 27(1) the Commissioner may, with the concurrence of the State Authority, make an Interim Protection Order in relation to a site if in the opinion of the Commissioner it is necessary to do so for the purpose of conservation and preservation of the site.

(2) An Interim Protection Order shall contain such conditions as may be specified by the Commissioner.

(3) The Commissioner shall cause the Interim Protection Order to be served on the owner of the site.

(4) An Interim Protection Order takes effect upon the service of the Interim Protection Order.

(5) The Commissioner may at any time revoke an Interim Protection Order.

(6) Any person who contravenes an Interim Protection Order commits an offence.

(7) The Commissioner may enter into any arrangements with the owner or occupier of a site for any loss or damage suffered or alleged to have been suffered by the owner or occupier by reason of the Interim Protection Order.

(8) For the purposes of this section, the State Authority shall mean the Menteri Besar or Chief Minister of a State, as the case may be.

Period of Interim Protection Order

34. (1) An Interim Protection Order shall continue to be in force—

(a) for a period of ninety days or for such further period as may be extended by the Commissioner under subsection (2); or

(b) until—

(i) the site is designated as a heritage site;

(ii) the Commissioner makes a decision not to proceed with the proposed designation of the site; or

(iii) the Commissioner revokes the Interim Protection Order.

(2) The Commissioner may at any time extend the period during which an Interim Protection Order continues to remain in force.

(3) A notice of an extension shall be served in the same manner as the Interim Protection Order is served.

Works permitted during an Interim Protection Order

35. (1) Any person affected by the Interim Protection Order may apply to the Commissioner to carry out any work or activities on the site.

(2) Upon receipt of an application the Commissioner may approve any reasonable work or activities on the site provided that the proposed work or activities do not reduce or affect the cultural heritage significance of the site.

(3) An approval under subsection (2) may be subject to such conditions as the Commissioner may impose.

(4) Any person who fails to comply with conditions imposed under subsection (2) commits an offence.

Chapter 3

Dealings involving heritage site

Notice of intention to sell heritage site

36. An owner of a heritage site who enters into an agreement of sale of the whole or any part of the heritage site, shall notify the Commissioner in writing in the prescribed form of the information about the existence of that agreement within twenty-eight days of the date of the agreement.

Change of owner of a heritage site

37. (1) Any person who purchases or acquires any heritage site shall within twenty-eight days of the date of the completion of the purchase or acquisition, notify the Commissioner in writing of—

(a) that person's name and address; and

(b) whether the person intends to occupy the site.

(2) A person who has notified the Commissioner of information under subsection (1) shall, within twenty-eight days of any change to the information provided, notify the Commissioner in writing of the change.

Chapter 4

Conservation and preservation of heritage site

Care of heritage site

38. (1) Where a heritage site is situated on an alienated land, the Commissioner may after consultation with the State Authority—

(a) make arrangements with the owner or occupier for the inspection, maintenance, conservation and preservation of the heritage site;

(b) purchase or lease the heritage site;

- (c) acquire the heritage site in accordance with the provisions of any written law relating to the acquisition of land for a public purpose; or
- (d) remove the whole or any part of a building or monument on the heritage site.

(2) Where the owner or occupier agrees to such arrangements under paragraph 1(a), the Commissioner may make a contribution towards the costs of carrying out any works of repair or conservation which is deemed necessary.

(3) Where a contribution towards the costs of carrying out the works is made, such works shall be carried out in accordance with the direction of the Commissioner.

(4) The Commissioner shall make good any damage done to the site or to monument by the removal of any monument under paragraph 1(d) and may agree to the payment of any compensation to the owner of the site.

(5) Any dispute as to the amount of compensation shall be referred to the Minister whose decision shall be final.

Inspection of heritage site

39. (1) The owner or occupier of a heritage site situated on an alienated land shall permit the Commissioner or any authorized officer to enter upon the site to inspect, survey, investigate or to carry out any work necessary for the conservation, repair, maintenance and cleanliness as is deemed expedient or necessary.

(2) The owner or occupier shall be given a notice in writing of not less than seven days of any proposed entry.

(3) Where any person objects to such entry under subsection (1) on conscientious or religious grounds, such entry shall not be effected except with the permission in writing of the State Authority where the heritage site is situated.

(4) The owner or occupier shall be entitled to claim compensation for any loss or damage suffered or alleged to have been suffered by him by reason of such entry under subsection (1).

(5) Any dispute as to the amount of compensation shall be referred to the Minister whose decision shall be final.

Application for planning permission for heritage site

40. (1) The Commissioner shall coordinate and advise the local planning authority before any planning permission or development order is granted involving a heritage site.

(2) Where the local planning authority refers any application by any person for planning permission or development order to the Commissioner, such application shall contain—

- (a) sufficient particulars to identify the monument to which the application relates, including its layout plan, measured building plan and photographs of its every angle, including the exterior and interior of such monument;
- (b) such other plans and drawings as are necessary to describe the work which is the subject of the application;
- (c) measures that have been taken to secure the safety of the heritage site and the neighbouring land; and
- (d) such other particulars as may be required by the Commissioner.

(3) For the purpose of paragraph 2(c), neighbouring land means—

- (a) any land adjoining within a distance of two hundred metres from the boundary of the land to which an application under this section relates;
- (b) any land separated from the land to which an application made under this section relates by any road, lane, drain or reserved land, the width of which does not exceed twenty metres and which would be adjoining the land to which the application relates had they not been separated by such road, lane, drain or reserved land; or
- (c) any land located within a distance of two hundred metres from the boundary of the land to which an application under this section relates.

(4) The Commissioner shall advise the local planning authority to impose conditions when approving planning permission or a development order involving a heritage site which may include—

- (a) requiring compliance with any conservation guidelines and procedures issued by the Minister;
- (b) requiring the making good of any damage caused to any heritage site after the works authorized by the planning permission or the development order are completed; or
- (c) requiring the protection and retention of any specified feature of the heritage site.

(5) Where the planning permission is approved, the Commissioner shall liaise, cooperate and coordinate with the local planning authority to monitor and supervise that the terms and conditions imposed relating to the conservation of heritage are complied with.

(6) Any person who contravenes any condition imposed under subsection (4) commits an offence.

Monument Preservation Order

41. (1) Where the Commissioner, with the concurrence of the State Authority, is satisfied that any monument regarded as suitable to be registered as a heritage site is in dilapidation or in imminent danger of demolition, destruction, damage or alteration, the Commissioner shall serve on the owner of the monument a Monument Preservation Order pending approval of its registration.

(2) The Monument Preservation Order shall contain such conditions as may be specified.

(3) A Monument Preservation Order shall come into operation as soon as it is served on the owner of the monument.

(4) A Monument Preservation Order shall remain in operation for a period of ninety days from the date it is served and may be extended by the Commissioner for such period of time as he may think fit.

(5) Notwithstanding subsection (4), the Monument Preservation Order shall cease to be in force—

(a) if the monument is designated as a heritage site; or

(b) if the Commissioner has decided not to designate the monument as a heritage site.

(6) Any person who contravenes the Monument Preservation Order commits an offence.

Duty to keep heritage site in good repair

42. (1) The owner of a heritage site shall ensure that the heritage site is always in a state of good repair.

(2) Where the Commissioner is satisfied that reasonable steps are not being taken for properly preserving the monument, he may carry out such repair works, after giving any person appearing to the Commissioner to be the owner of the monument two weeks notice of his intention to do so, and all costs and expenses reasonably incurred to carry out the works shall be reimbursed by such person.

Financing conservation work

43. (1) An owner of a heritage site may, for the purpose of carrying out any conservation and preservation works on the heritage site apply to the Commissioner for any grant or loan.

(2) The Commissioner may, in consultation with the Council and the State Authority, make arrangements with the owner of a heritage site to carry out any conservation and preservation works as the Commissioner deems appropriate.

(3) The Commissioner may, with the approval of the Council, issue a grant or loan which is to be disbursed from the Fund for such conservation and preservation works.

(4) The Commissioner may, when giving the grant or loan, impose such conditions as he deems appropriate on the owner.

Power to impose entry fee

44. (1) An owner of a heritage site may, with the approval and subject to such conditions as the Commissioner may impose, charge an entrance fee into the heritage site.

(2) Where the Commissioner has contributed towards the expense of conservation and preservation of any heritage site, the Commissioner may impose a levy on the entrance fee received by the owner of that heritage site and any levy paid by such owner shall be paid into the Fund.

Chapter 5*Conservation area and conservation management plan***Conservation area**

45. (1) Where a site is designated as a heritage site, that site shall on the date of the designation become a conservation area and shall be conserved and preserved according to a conservation management plan.

(2) A conservation area may—

- (a) incorporate a buffer zone around a central core; or
- (b) incorporate a buffer zone around a site that has been designated as a heritage site.

(3) The Minister may, in consultation with the Council, determine the buffer zone and the central core.

Conservation management plan

46. (1) The Commissioner shall, in consultation with the Council, prepare a conservation management plan for the purposes of—

- (a) promoting the conservation, preservation, rehabilitation, restoration or reconstruction of a heritage site;

- (b) ensuring the proper management of a heritage site including the use and development of all buildings and lands in the heritage site and the preservation of the environment including measures for the improvement of the physical living environment, communications, socio-economic well-being, the management of traffic and the promotion of economic growth; and
- (c) promoting schemes for the education of, or for practical and financial assistance to, owners and occupiers, and for community involvement in decision making.

(2) The Commissioner shall from time to time submit such conservation management plan to the State Authority or the relevant local planning authority, as the case may be, and advise and co-ordinate with the State Authority or the local planning authority for the implementation of the conservation management plan and its guidelines.

(3) The Commissioner shall from time to time revise any conservation management plan.

PART VIII

HERITAGE OBJECT

Chapter 1

Discovery of object

Discovery of object

47. (1) Any person who discovers any object which he has reason to believe has cultural heritage significance shall immediately notify the Commissioner, any authorized officer or the District Officer of the district where the object was discovered, and where practicable, deliver the object to the Commissioner, authorized officer or the District Officer who shall give a written acknowledgement thereof.

(2) Where the District Officer has reason to believe that any object discovered in his area has cultural heritage significance, he may by notice in writing require the person having possession of it to deliver the object immediately to him, and the District Officer on receiving such object shall give a written acknowledgement and shall keep safely the said object.

(3) A District Officer shall communicate the notification under subsection (1) or the written notice under subsection (2) to the Commissioner as soon as practicable.

(4) Any agent, contractor or executor of a Federal Government, State Government or an owner of an alienated land who discovers at the project site any object which he has reason to believe that the object has cultural heritage significance, such agent, contractor or executor shall report to the Commissioner who shall immediately inspect the object.

(5) Any person who contravenes subsection (1) or (4) commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Proprietary right in the object

48. (1) Any object discovered after the date of the coming into operation of this Act shall be the absolute property of the Federal Government provided that where the object is discovered on an alienated land, compensation may be paid to the owner of the land.

(2) A competent heritage valuer may be appointed by the Commissioner to decide on the value of the object for the purposes of ascertaining the amount of compensation, and the decision of the competent heritage valuer shall be final.

(3) Every object which before the date of the coming into operation of this Act is not owned by any person or the control of which is not vested in any person as a trustee or manager, shall be deemed to be the absolute property of the Federal Government.

(4) All undiscovered objects whether lying on or hidden beneath the surface of the ground or in any river or in the sea, shall be

deemed to be the absolute property of the Federal Government but if the said object is at a later date found to be discovered on or in an alienated land the provisions of subsections (1) and (2) shall apply.

(5) In any legal proceedings relating to the date of discovery of an object of cultural heritage significance, it shall be presumed until the contrary is proved that it was discovered after the date of the coming into operation of this Act.

Declaration as heritage object by Commissioner

49. (1) The Commissioner may declare in the *Gazette* any object which has cultural heritage significance to be a heritage object and shall cause it to be listed in the Register.

(2) Before making the declaration under subsection (1), the consent of the owner of such object shall be obtained and for that purpose, the Commissioner may furnish the owner such prior opportunity for representation or submission in regard to the proposed declaration as may be practicable in the circumstances and in such manner as may be prescribed.

(3) The Commissioner may, in the same manner as in subsection (1), amend or revoke the *Gazette* and in each case of such amendment or revocation he shall substantiate his action with the necessary background and reason.

(4) Upon the object being listed in the Register, the object shall be a heritage object starting from the date of its registration and shall cease to be a heritage object when the Commissioner revokes registration.

Chapter 2

Application for registration

Application for registration of heritage object

50. (1) Any person may apply for an object to be registered as a heritage object.

(2) An application for registration shall be in such form and accompanied by such documents or information as may be prescribed.

(3) The Commissioner may at any time after receiving the application under subsection (1) and before it is determined, by a written notice require the applicant to provide such additional documents or information as the Commissioner deems necessary.

(4) Where any additional document or information required under subsection (3) is not provided by the applicant within the time specified in the notice or any extension thereof granted by the Commissioner, the application shall be deemed to be withdrawn and shall not be further proceeded with, but without prejudice to a fresh application being made by the applicant.

(5) An application under this section may be withdrawn at any time before it is approved or refused.

Approval or refusal of application for registration

51. (1) Where the Commissioner is satisfied that an object is of cultural heritage significance, he shall register the object as a heritage object in the Register and give the applicant a written notice of the Commissioner's decision under this section.

(2) Where the application involves an object which is attached to any alienated land, the concurrence of the State Authority shall be obtained before the application is approved.

(3) Where the application involves intangible cultural heritage in which copyright subsists, the consent of the copyright owner shall be obtained before the application is approved.

(4) An application for registration which is approved under this section may be subject to such conditions as the Commissioner may impose.

(5) As soon as possible after the approval in subsection (4), the Commissioner shall cause to be published in the *Gazette* a notice that the object has been registered as a heritage object and on any other matter constituting or relating to the heritage object which in his opinion is desirable to publish.

(6) Where the Commissioner refuses the application, he shall immediately notify the applicant in writing of the refusal with or without assigning any reason for the refusal.

Certificate of registration

52. (1) When an object is registered under section 51 the Commissioner shall issue a certificate of registration to the owner.

(2) Upon the heritage object being ceased to be registered as a heritage object, the owner of the object must surrender the certificate of registration to the Commissioner within three months from the date of such cessation.

Chapter 3

Management of heritage object

Compensation for certain heritage object

53. (1) On the discovery of any object having cultural heritage significance, the Commissioner shall be entitled to the custody and possession of the same on behalf of the Federal Government and shall be responsible for its safeguarding and safekeeping.

(2) If the Commissioner decides not to retain such object, it shall be returned to the person who delivered it subject to any condition that may be imposed by the Commissioner.

(3) When an object is retained by the Commissioner or where in the opinion of the Commissioner that object should be safeguarded at the place where it was found, the Commissioner shall at his discretion pay a reasonable amount of compensation to—

- (a) the finder;
- (b) the owner of an alienated land in or on which the object was discovered; or
- (c) the informant.

Apportionment of share of heritage object

54. The Commissioner may enter into a written agreement with the owner of the heritage object for the apportionment of share of such object as may be agreed upon by the Commissioner and the owner.

Dispute as to compensation or apportionment

55. Where there is any dispute regarding the compensation to be paid for any heritage object or apportionment of share of such object, such dispute shall be referred to the Minister whose decision shall be final.

Sale or disposal of heritage object

56. (1) The Commissioner may by notice in writing require any person in possession of any heritage object which is deemed to be of a national importance or interest, not to sell or dispose of such object without prior written consent of the Commissioner.

(2) Any person who receives such notice shall not sell or dispose of any heritage object in his possession or custody.

(3) Within the period of thirty days from the date of the notice under subsection (1) the Commissioner shall have the first right to purchase such heritage object at an agreeable value.

(4) Any person who contravenes subsection (2) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

Notice of intention to sell or transfer a heritage object

57. The owner of a heritage object who enters into a contract to sell or transfer the heritage object shall notify the Commissioner in writing of the information about the existence of that contract within twenty-eight days of the date of the contract.

Change of owner of a heritage object

58. (1) Any person who purchases or acquires a heritage object shall, within twenty-eight days of the date of the purchase or acquisition, notify the Commissioner in writing of that purchaser or acquirer's name, particulars and address.

(2) Any change to the information under subsection (1) shall be notified to the Commissioner in writing within twenty-eight days.

(3) Any person who contravenes subsection (1) or (2) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

Conservation of heritage object

59. (1) The owner or custodian of a heritage object shall keep the heritage property in good condition and in a secure place.

(2) The owner or custodian of a heritage object shall immediately report to the Commissioner any loss or damage to such heritage object or any part of it upon discovery of such loss or damage.

(3) Any person who fails to comply subsection (1) or (2) commits an offence.

Conservation of intangible cultural heritage

60. (1) The owner or custodian of a heritage object in the form of an intangible cultural heritage shall take all necessary steps to develop, identify, transmit, cause to be performed and facilitate the research on the intangible cultural heritage according to the guidelines and procedures as may be prescribed.

(2) The Commissioner may enter into any arrangements with the owner or custodian of the intangible cultural heritage for the compliance with the guidelines and procedures as prescribed.

PART IX

UNDERWATER CULTURAL HERITAGE

Discovery of underwater cultural heritage

61. (1) Any person who discovers an underwater cultural heritage in the Malaysian waters shall, as soon as practicable, give notice of such discovery to the Commissioner or the port officer.

(2) The port officer upon receiving such notice shall as soon as practicable notify, and where possible deliver the underwater cultural heritage to, the Commissioner.

(3) The Commissioner may, upon being satisfied that the underwater cultural heritage has cultural heritage significance, cause it to be listed in the Register.

(4) Any person who fails to give notice under subsection (1) commits an offence.

Possession, custody or control of moveable underwater cultural heritage

62. (1) Where it appears to the Commissioner that a person is in or may have had possession, custody or control of any moveable underwater cultural heritage or part of an underwater cultural heritage the Commissioner may, by notice in writing to the person, require the person within the specified time in the notice furnish him with the full information of such moveable underwater cultural heritage.

(2) Where the person has ceased to have such possession, custody or control of the moveable underwater cultural heritage, the person shall give the Commissioner particulars of the circumstances in which he ceased to have the possession, custody or control of such moveable underwater cultural heritage.

(3) Where the person has transferred such possession, custody or control of the moveable underwater cultural heritage to another person, he shall give to the Commissioner the name and address of the person to whom such possession, custody or control of such moveable underwater cultural heritage was transferred.

(4) Any person who fails to comply with any of the requirements under this section commits an offence.

Declaration of underwater cultural heritage

63. (1) Where the Commissioner is of the opinion that any underwater cultural heritage is situated in Malaysian waters is of cultural heritage significance but less than one hundred years old, he shall advise the Minister and the Minister may by notice published in the *Gazette* declare the site or object to be a underwater cultural heritage.

(2) Any site or object declared to be an underwater cultural heritage shall be listed in the Register.

Protected zone

64. (1) The Minister may on the advise of the Commissioner, declare in the notice published in the *Gazette* any area within which an underwater cultural heritage is situated to be a protected zone.

(2) No person shall carry out any activity in the protected zone except with approval in writing from the Commissioner.

(3) Any person who contravenes subsection (2) commits an offence.

Salvage and excavation works to be licensed

65. (1) No person shall carry on any salvage or excavation work in any Malaysian waters for the purpose of finding any underwater cultural heritage, except with a licence approved by the Commissioner.

(2) Any person who contravenes subsection (1) commits an offence.

Ownership of underwater cultural heritage found during survey, salvage or excavation

66. (1) Any underwater cultural heritage discovered during any survey, salvage or excavation works shall vest in the Commissioner and shall be listed in the Register.

(2) Where the Commissioner takes possession of any underwater cultural heritage, he shall within forty-eight hours cause to be posted a list of the underwater cultural heritage in any port office within the district where the underwater cultural heritage was discovered.

(3) Any owner of the underwater cultural heritage may, upon establishing his claim to the satisfaction of the Commissioner, within one year from the time at which the underwater cultural heritage came into the possession of the Commissioner, and upon paying the salvage fees and expenses due, be entitled to have the possession of the underwater cultural heritage upon such terms and conditions as may be imposed by the Commissioner.

(4) An owner who fails to comply with any of the terms and conditions imposed under subsection (3) commits an offence.

(5) Where no owner establishes a claim within one year, the underwater cultural heritage shall be the absolute property of the Federal Government.

(6) Unless otherwise directed by the Minister, the Commissioner may preserve the underwater cultural heritage *in situ*.

PART X**NATIONAL HERITAGE****Declaration of National Heritage**

67. (1) The Minister may, by order published in the *Gazette*, declare any heritage site, heritage object, underwater cultural heritage listed in the Register or any living person as a National Heritage.

(2) In making a declaration under subsection (1) the Minister may consider—

- (a) the historical importance, association with or relationship to Malaysian history;
- (b) the good design or aesthetic characteristics;
- (c) the scientific or technical innovations or achievements;
- (d) the social or cultural associations;
- (e) the potential to educate, illustrate or provide further scientific investigation in relation to Malaysian cultural heritage;
- (f) the importance in exhibiting a richness, diversity or unusual integration of features;
- (g) the rarity or uniqueness of the natural heritage, tangible or intangible cultural heritage or underwater cultural heritage;
- (h) the representative nature of a site or object as part of a class or type of a site or object; and
- (i) any other matter which is relevant to the determination of cultural heritage significance.

(3) Where the site, object or underwater cultural heritage is situated on State land, the Minister shall consult the State Authority before making any declaration under subsection (1).

(4) Where the site, object or underwater cultural heritage is on an alienated land or belongs to any person other than the Federal Government or a State Government, the owner, custodian or trustee of that site, immovable object or underwater cultural heritage shall be notified at least thirty days prior to the date of the proposed declaration.

(5) Where the declaration under subsection (1) involves an intangible cultural heritage and copyright still subsists in such works, the consent of the copyright owner shall be obtained before any declaration is made.

(6) Where the declaration under subsection (1) involves a living person, the consent of that person shall be obtained before any declaration is made.

(7) A copy of the order shall be served on the owner, custodian or trustee of the site, object or underwater cultural property or on the living person.

(8) Any person who objects to the making of the declaration under subsection (1) may submit an objection in writing to the Minister within three months of its publication and may apply to the Minister for the revocation of the order.

(9) The Minister may, after having been advised by the Council, revoke or refuse to revoke the order and such decision shall be final.

Nomination as National Heritage

68. Any person may nominate to the Minister in the prescribed form any natural heritage, tangible or intangible cultural heritage, living person or underwater cultural heritage to be declared as a National Heritage.

Ownership or possession of National Heritage

69. Any National Heritage which is owned or possessed by a person other than the Federal Government or the State Government may remain in the possession of its owner, custodian or trustee.

Change in the ownership of National Heritage

70. (1) There shall be no change in respect of the ownership of any National Heritage except by—

(a) inheritance; or

(b) sale, with the prior approval of the Commissioner.

(2) Where the owner, custodian or trustee intends to sell a National Heritage, that owner, custodian or trustee shall give priority to the Commissioner to purchase that National Heritage on an agreed value or upon the instruction of the Commissioner to deal with in such manner that the Commissioner deems fit.

(3) Where there is any dispute between the Commissioner and the owner as to the reasonable compensation for such National Heritage, such dispute shall be referred to the Minister whose decision shall be final.

(4) Where a sale is effected pursuant to paragraph (1)(b) the owner, custodian or trustee and the purchaser shall inform in writing to the Commissioner within thirty days after the change in ownership and the Commissioner shall cause to be made the necessary amendment in the Register.

Listing of the National Heritage in the Register

71. The Commissioner shall cause to be listed a National Heritage declared under subsection 67(1) in the Register.

Conservation and preservation of National Heritage

72. (1) The Minister may impose different procedures and guidelines as may be prescribed for the management, conservation and preservation of different categories of National Heritage.

(2) The Minister may approve any financial assistance to the owner, custodian or trustee of a National Heritage for the compliance with any procedure or guidelines prescribed under subsection (1).

PART XI

TREASURE TROVE

Uniformity of law with respect to treasure trove

73. This Part is made pursuant to Clause 1(b) of Article 76 of the Federal Constitution for the purpose of promoting uniformity of the laws of the States of Malaysia relating to treasure trove.

Notice of discovery of treasure trove

74. (1) Any person who discovers any treasure trove shall, immediately give notice of such discovery to the Commissioner or District Officer of the district where the treasure trove was discovered and shall deliver the treasure trove to the District Officer who shall acknowledge receipt.

(2) A District Officer receiving a notice under subsection (1) shall notify the same to the Commissioner where such treasure trove was discovered.

(3) If the District Officer has reason to believe that any treasure trove has been discovered in his district and the discovery of the same has not been notified to him under this Act, he shall by notice in writing require the finder or suspected finder or the owner or occupier of the place in which the treasure trove is discovered to appear personally before him on a day and at a place mentioned in the notice and deliver to him such treasure trove or suspected treasure trove so discovered, and the District Officer shall acknowledge receipt.

Notification for enquiry

75. (1) The District Officer shall cause a notice to the finder or suspected finder or the owner or occupier of the place in which the treasure trove is discovered or other person claiming the treasure trove or any part of it requiring them to appear personally before the District Officer on a day and at a place mentioned in the notice for purpose of enquiring to determine—

- (a) whether any object or article is treasure trove;
- (b) the person by whom, the place at which, and the circumstances under which, such treasure trove was discovered; and
- (c) as far as is possible, the person by whom, and the circumstances under which, such treasure trove was hidden.

(2) The rights of a person mentioned in subsection (1) over the treasure trove if they are found to be so are forfeited upon failure of that person to appear.

Time to be allowed for suit by claimant

76. Where, after an enquiry made under section 75, the District Officer has reason to believe that the treasure trove was hidden within fifty years before the date of the discovery by a person appearing as required by the said notification and claiming such treasure trove, or by some other person under whom such person

claims, the District Officer shall make an order adjourning the hearing of the case for such period as he deems sufficient, to allow a suit being instituted in a court of competent jurisdiction by the claimant to establish his right.

When treasure trove may be declared ownerless

77. (1) Where—

- (a) after such enquiry the District Officer sees no reason to believe that the treasure trove was so hidden;
- (b) a period is fixed under section 76, no suit is instituted within such period to the knowledge of the District Officer; or
- (c) such suit is instituted within such period and the claimant's claim is finally rejected,

the District Officer may declare the treasure trove to be ownerless.

(2) Any person aggrieved by a declaration made under subsection (1) may appeal against the declaration within two months from the date of the declaration to the High Court.

When treasure trove vests in State Government

78. When a declaration has been made in respect of any treasure trove under section 77, such treasure trove shall vest in and belong to the State Government.

Disposal of treasure trove

79. The State Authority may in its discretion pay as a reward to the finder of any treasure trove and to the owner of any land in which it was discovered such sums as it may think fit.

Power of the Commissioner to inspect any treasure trove

80. (1) The Commissioner or any officer authorized by him in writing for that purpose may at all reasonable times inspect any treasure trove in the possession of any person.

(2) It shall be the duty of every such person to permit such inspection and to give to the Commissioner or such officer all reasonable facilities to study such treasure trove and to make drawings, photographs, prints, squeezes or reproductions by the making of casts or by any other means.

(3) No such drawings, photographs, prints, squeezes or reproductions under subsection (2) shall be sold without the consent of the person in possession of the treasure trove.

Offence

81. Any person who, being the finder of any treasure trove, fails to report the same or to deliver up the treasure trove or to state the circumstances of the discovery or the origin of the same, or wilfully makes a false report of such circumstances or such origin commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Forfeiture of claim to and interest in treasure trove

82. (1) Any person who is convicted of any offence under this Part in respect of any treasure trove shall by virtue of such conviction be not entitled to all claims to or interests in the same or the value thereof or any reward in connection with the discovery thereof, and in any such case the Magistrate may order the treasure trove to be delivered to the State Secretary on behalf of the State Authority wherein the same was discovered and in the case of the Federal Territory of Kuala Lumpur, the Federal Territory of Labuan and the Federal Territory of Putrajaya to the Minister responsible for the Federal Territory of Kuala Lumpur, the Federal Territory of Labuan and the Federal Territory of Putrajaya, and where the Magistrate makes such order it shall be the duty of any person in whose possession the treasure trove to deliver it accordingly.

(2) The respective State may order any treasure trove forfeited under this section to be delivered to the owner or other person entitled thereto or returned to the finder, as the case may be, upon such terms and conditions as it may deem fit.

PART XII

LICENSING

Chapter 1

Export and import of heritage item

Licence to export

83. (1) No person shall export any heritage item unless a licence to export has been obtained from the Commissioner.

(2) The Commissioner shall not issue such a licence if in his opinion the heritage item concerned is reasonably believed to be of national importance or interest.

(3) In an application for a licence to export any heritage item, the applicant shall submit the description, declare the value and furnish such relevant particulars which the Commissioner may require and shall, if so required, deposit such heritage item with the Commissioner for inspection.

(4) No licence shall be issued to any person unless he proves to the satisfaction of the Commissioner that he is the owner of such heritage item or that he is acting on behalf of and with the authority of the owner.

(5) Where an enforcement officer or a proper officer of customs has any reason to believe that an object or material which is to be exported is a heritage item and without having a valid export licence, he shall detain such object or material and immediately notify the Commissioner within twenty-four hours for the determination of such object or material.

(6) If the Commissioner is satisfied that the object or material is a heritage item and is or will be of national importance or interest, he may prohibit the export thereof.

(7) Any person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand ringgit or to both.

Importation of foreign heritage item

84. (1) A person who intends to import any foreign heritage item shall notify the Commissioner with the documents certifying that such foreign heritage item was lawfully transported out of a foreign country.

(2) If there is a valid reason to believe that a foreign heritage item which is in transit or has already been imported was unlawfully transported out of a foreign country, the Commissioner may take possession of it and keep it in custody but before he executes such act he shall consult the Minister whose decision shall be final.

(3) Where a foreign heritage item is detained under subsection (2), the Commissioner shall keep and manage it as he thinks fit.

(4) Where such foreign heritage item is proven to have been lawfully transported out of the foreign country, the Commissioner shall return it to the person importing it without delay.

(5) Where any country has proved that such foreign heritage item was unlawfully exported and requested it be returned in accordance with the terms of a treaty, or when the Commissioner performs the duty of returning it in accordance with a treaty, he shall, with the help of the competent authorities, take necessary measures to return it to such country.

Minister may prescribe the necessary procedure

85. Where a foreign heritage item is brought into Malaysia by any means, the Minister may prescribe the necessary procedure and methods of safekeeping and may direct the Commissioner accordingly to comply with such directions.

Chapter 2*Licence to excavate***Excavation of heritage object**

86. (1) No person shall excavate any land for the purpose of discovering an object unless he holds a licence approved by the Commissioner.

(2) Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

Application for licence to excavate

87. An application for a licence to excavate shall—

- (a) be made to the Commissioner in the prescribed form; and
- (b) contain a full and accurate description of the land on which it is proposed to be carried out, the purpose, nature and extent of the proposed excavation and such other particulars as may be required.

Approval or refusal of licence to excavate

88. (1) The Commissioner may in his discretion approve or refuse any application for a licence to excavate.

(2) No licence under subsection (1) shall be approved unless the Commissioner is satisfied—

- (a) that the owner of the land where the proposed excavation is to be made has consented to the excavation;
- (b) that the proposed excavation will not cause any damage or inconvenience to persons residing in the vicinity of such land, or to any place used for religious purposes, or to any cemetery, school, water source or supply, irrigation or drainage works or public road, or that if any such damage is likely to be caused adequate provision has been made by the applicant for the payment of compensation; and
- (c) that the applicant is able to furnish security for the due observance by him of any conditions imposed on the licence or any regulations as may be prescribed.

Terms and conditions of licence

89. A licence approved under section 88 shall be valid for such period as specified in the licence and subject to such conditions as may be specified in it.

Extension and revocation of licence

90. (1) Any licence to excavate may, at any time before the expiration of the period for which it was granted, be extended by the Commissioner for such further period as he thinks fit.

(2) Any licence to excavate may, at any time before the expiration of the period for which it was granted, be revoked by the Commissioner in the event the licence holder is in breach of any term or condition of the licence or such revocation is necessary to safeguard the national interest, interest of national security or for the purpose of any Government policy.

(3) A licence holder shall not be entitled to claim compensation for any loss or damage suffered or alleged to have been suffered by him by reason of such revocation under subsection (2).

(4) For the purposes of this section, what constitutes “national interest”, “interest of national security” or “Government policy” shall be determined by the Minister on the recommendation of the Commissioner and such determination shall be final.

(5) No appeal shall lie against the decision of the Minister under subsection (4).

Chapter 3*Registration of dealer of heritage item***Registered dealer of heritage item**

91. (1) No person shall deal in any heritage item unless he is a registered dealer and holds a certificate of registration approved by the Commissioner.

(2) Any person who contravenes the provision of subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

(3) Any person may apply to be registered as a registered dealer of cultural heritage to the Commissioner in the prescribed form and manner.

(4) The Commissioner may approve or refuse such application.

Information of stolen heritage item

92. (1) Any information on any stolen or lost of heritage item which has been received by the police shall be communicated to the Commissioner.

(2) Upon receiving the information under subsection (1) the Commissioner shall notify the registered dealers the list and description of such stolen or lost heritage item.

(3) If any property answering to the list and description is in the possession of any registered dealer or which has been offered or shown to any registered dealer, he shall without any delay give information to that effect at the nearest police station or to any police officer, with the name and address of the person from whom he acquired or who offered or showed him the same.

(4) Any registered dealer who fails to give information required under subsection (3) commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or to both.

(5) The registered dealer in such case may detain the person offering or showing such item to him until the arrival of the police.

Reports of sale or purchase of heritage item

93. (1) Every registered dealer who deals in heritage item shall, when so required by order in writing by the Commissioner, in respect of such period and in such manner as may be specified in such order, report in writing to the nearest authorized officer full details of any heritage item which he has bought or sold with the price paid and the name and address of the vendor or purchaser thereof, as the case may be.

(2) Such reports shall be legibly written in the national language or in English language.

(3) Any registered dealer who, without reasonable excuse, fails to comply with such order commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Enforcement officer may enter and search registered dealer's business premises, etc.

94. Any enforcement officer may enter any registered dealer's business premises at any time and may search without warrant such premises which he has reason to suspect that any stolen or lost heritage item is found in the premises.

Delivery to owner

95. (1) If any person is convicted in any court of an offence under Chapter XVII of the Penal Code [Act 574] in respect of any heritage item and it appears to the court that the same has been sold to a registered dealer, the court, on proof of the ownership of the property, may, if it thinks fit, order, the delivery of that heritage item to the owner either on payment to the registered dealer of the amount of the purchase price or any part thereof or without payment thereof or of any part thereof as the court may deem fit and proper.

(2) The court may also adjourn the proceeding for the attendance of the registered dealer and may summon the registered dealer to attend the adjourned hearing for the determination under subsection (1).

PART XIII

APPEAL

Appeal

96. (1) Any person may, within thirty days from the date of the notification of the decision of the Commissioner, appeal in writing to the Minister if that person is aggrieved—

- (a) by the decision of the Commissioner to designate or not to designate a site as a heritage site under section 31;

- (b) by the issuance of an Interim Protection Order under section 33;
- (c) by the issuance of a Monument Preservation Order under section 41;
- (d) by the decision of the Commissioner to approve or refuse the application to register an object as a heritage object under section 51; or
- (e) by the refusal of the Commissioner to approve any licence under section 83 or 86 or any registration under section 91.

(2) The Minister may confirm, reverse or vary the decision appealed against and, in confirming, reversing or varying the decision, may impose such terms or conditions as he deems just or necessary.

(3) Before making any decision under subsection (2), the Minister may refer the matter to the Council.

(4) The decision of the Minister under this section shall be final.

(5) Where the decision is reversed or varied, the particulars of the reversal or variation shall be entered in the Register.

PART XIV

POWERS RELATING TO ENFORCEMENT, SEIZURE, ARREST, *ETC.*

Appointment of enforcement officers

97. The Minister may appoint such number of enforcement officers as may be necessary for the purposes of this Act and regulations made under this Act.

Power to investigate

98. An enforcement officer or a police officer shall have the power to investigate any offence under this Act.

Authority card

99. (1) There shall be issued to each enforcement officer an authority card which shall be signed by the Minister.

(2) Whenever an enforcement officer exercises any of the powers under this Act or any regulations made under this Act, he shall on demand produce to the person against whom the power is being exercised the authority card issued to him under subsection (1).

Search and seizure with warrant

100. (1) If it appears to a Magistrate, upon written information on oath and after such enquiry as he considers necessary, that there is reasonable cause to believe that—

- (a) any premises has been used or are about to be used for;
or
- (b) there is in any premises evidence necessary to the conduct of an investigation into,

the commission of an offence under this Act or any regulations made under this Act, the Magistrate may issue a warrant authorizing the enforcement officer or police officer named therein, at any reasonable time by day or by night and with or without assistance, to enter the premises, if need be by force.

(2) A warrant issued under subsection (1) may authorize the enforcement officer or police officer to search the premises for, and to seize and remove from the premises—

- (a) any object, material, book, document or other thing in respect of which an offence has or is suspected to have been committed; and
- (b) any object, material, book, document or other thing that is reasonably believed to furnish evidence of the commission of the offence.

(3) An enforcement officer or a police officer acting under subsection (1) or (2) may—

- (a) break open any outer or inner door of the premises or any fence, enclosure, gate or other obstruction to the premises, in order to effect entry into the premises;

- (b) remove by force any obstruction to entry, search, seizure or removal as he is empowered to effect under subsection (1) or (2); and
- (c) detain every person found in the premises until the search has been completed.

Search and seizure without warrant

101. Whenever an enforcement officer or a police officer has reasonable grounds to believe that any object, material, book, document or other thing in respect of which an offence under this Act or any regulations made under this Act has been committed is likely to be found in or on any place, premises, person, vehicle, vessel or conveyance and that by reason of delay in obtaining a warrant under section 100 the object of the search is likely to be frustrated, he may, without warrant, with such assistance and force as is necessary—

- (a) enter and search that place or those premises;
- (b) stop and search that person, vehicle, vessel or conveyance; and
- (c) seize any object, material, book, document or other thing which may be found and may be evidence of the commission of such offence.

Search of persons

102. No person shall be searched except by another person of the same gender, and such search shall be conducted with strict regard to decency.

Seizure of thing, etc.

103. Without prejudice to subsection 100(2) and section 101, any object, material, book, document or other thing that an enforcement officer or a police officer reasonably suspects has been used or will be used in the commission of any offence under this Act or any regulations made under this Act may be seized and detained by the enforcement officer or police officer.

Notice of seizure

104. (1) Where any seizure is made under this Part, the enforcement officer or police officer making the seizure shall prepare a list of every object, material, book, document or other thing seized and of the place in which it is found and shall sign the list.

(2) The list prepared in accordance with subsection (1) shall be delivered immediately to the occupant of the place or premises where the object, material, book, document or other thing seized is found.

(3) Where the seizure is made in or from any place or premises which are unoccupied, the enforcement officer or police officer making the seizure shall whenever possible post a list of the things seized conspicuously at the place or premises.

(4) Where any object, material, book, document or other thing is seized otherwise than in or from any place or premises, the enforcement officer or police officer making the seizure shall give a notice in writing of the seizure and the grounds of the seizure to the owner of the object, material, books, document or other thing seized by delivering a copy of such notice to the owner in person or by post at his place of business or residence.

(5) A notice under subsection (4) need not be given where the seizure is made in the presence or with the knowledge of the owner.

Power of arrest

105. (1) Any enforcement officer or police officer may arrest without warrant any person whom he reasonably believes has committed or is attempting to commit an offence under this Act or any regulations made under this Act.

(2) An enforcement officer making an arrest under subsection (1) shall without unnecessary delay make over the person so arrested to the nearest police officer or, in the absence of a police officer, take such person to the nearest police station, and thereafter the person shall be dealt with as is provided for by the law relating to criminal procedure for the time being in force as if he had been arrested by a police officer.

Obstruction of search, etc.

106. Any person who—

- (a) assaults, obstructs, hinders or delays any enforcement officer in effecting any entrance which he is entitled to effect under this Act, or in the execution of any duty imposed or power conferred by this Act; or
- (b) fails to comply with any lawful demand of an enforcement officer in the execution of his duty under section 105,

commits an offence and shall on conviction be liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand ringgit or to both.

Power to require attendance of persons acquainted with case

107. (1) The enforcement officer making an investigation under this Act or any regulations made under this Act may, by order in writing, require the attendance before himself of any person who appears to him to be acquainted with the facts and circumstances of the case, and such person shall attend as required.

(2) If any such person refuses to attend as required by an order made under subsection (1), the enforcement officer may report his refusal to a Magistrate who shall issue a warrant to secure the attendance of such person as may be required by the order.

Examination of persons acquainted with case

108. (1) An enforcement officer making an investigation under this Act or any regulations made under this Act may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(2) Such person shall be bound to answer all questions relating to such case put to him by the enforcement officer, but he may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) The enforcement officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).

(5) A statement made by any person under this section shall, wherever possible, be reduced into writing and signed by the person making it or affixed with his thumb print, as the case may be, after—

- (a) it has been read to him in the language in which he made it; and
- (b) he has been given an opportunity to make any correction he may wish.

Admissibility of statements by accused persons

109. (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not, is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to questions, by an accused person to or in the hearing of any enforcement officer or a police officer, whether or not interpreted to him by any other enforcement officer or police officer or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

(2) No statement made under subsection (1) shall be admissible or used as provided for in that subsection if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

(3) Where any person is arrested or is informed that he may be prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

“You have been arrested/informed that you may be prosecuted for ... (the possible offence under this Act). Do you wish to say anything? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.”.

(4) Notwithstanding subsection (3), a statement by any person accused of any offence under this Act made before there is time to serve a notice under that subsection shall not be rendered inadmissible in evidence merely by reason of no such notice having been served on him if such notice has been served on him as soon as is reasonably possible thereafter.

(5) No statement made by an accused person in answer to a written notice served on him pursuant to subsection (3) shall be construed as a statement caused by any inducement, threat or promise as is described in subsection (2), if it is otherwise voluntary.

(6) Where in any criminal proceedings against a person for an offence under this Act, evidence is given that the accused, on being informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed, the court, in determining whether the prosecution has made out a *prima facie* case against the accused and in determining whether the accused is guilty of the offence charged, may draw such inference from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(7) Nothing in subsection (6) shall, in any criminal proceedings —

- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from that subsection; or

- (b) be taken to preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from that subsection.

Forfeiture of things, etc., seized

110. (1) Any object, material, book, document or other thing seized under this Act shall be liable to forfeiture.

(2) Where anything has been seized under this Act the enforcement officer may at his discretion temporarily return such thing to the owner of the same on security being furnished to his satisfaction that such thing shall be surrendered to him on demand or to produce it before a court of competent jurisdiction.

(3) An order for the forfeiture under subsection (1) shall be made if it is proved to the satisfaction of the court that an offence under this Act or any regulations made under this Act has been committed and that the object, material, book, document or other thing was the subject-matter of or was used in the commission of the offence, even though no person has been convicted of such offence.

(4) If there is no prosecution with regard to any object, material, book, document or other thing seized under this Act, such object, material, book, document or other thing shall be taken and deemed to be forfeited at the expiration of a period of one calendar month from the date of service of a notice to the last known address of the person from whom the object, material, book, document or other thing was seized indicating that there is no prosecution in respect of such object, material, book, document or other thing, unless before the expiration of that period a claim thereto is made in the manner set out in subsections (5), (6), (7) and (8).

(5) Any person asserting that he is the owner of the object, material, book, document or other thing referred to under subsection (4) and that it is not liable to forfeiture may personally or by his agent authorized in writing give written notice to the enforcement officer or police officer in whose possession such object, material, book, document or other thing is held that he claims the object, material, book, document or other thing.

(6) On receipt of the notice referred to in subsection (5), the enforcement officer or the police officer shall refer the matter to the Magistrate for a decision.

(7) The Magistrate to whom a matter is referred under subsection (6) shall issue a summons requiring the person asserting that he is the owner of the object, material, book, document or other thing and the person from whom it was seized to appear before the Magistrate, and when they appear or when they fail to appear, due service of the summons having been proved, the Magistrate shall proceed to examine the matter.

(8) If it is proved that an offence under this Act or any regulations made under this Act has been committed and that object, material, book, document or other thing referred to in subsection (7) was the subject-matter of or was used in the commission of such offence, the Magistrate shall order the object, material, book, document or other thing to be forfeited and shall, in the absence of such proof, order its release.

(9) Any object, material, book, document or other thing forfeited or deemed to be forfeited shall be delivered to an enforcement officer or a police officer and shall be disposed of in accordance with the directions of the Magistrate.

(10) Where anything seized in exercise of the powers conferred under section 100 or section 101 is of a perishable nature or where the custody of such thing involves unreasonable expense and inconvenience, the Commissioner, Deputy Commissioner or Assistant Commissioner or the enforcement officer, as the case may be, may direct that such thing be sold at any time and the proceeds of the sale be held to abide by the result of any prosecution or claim under this section.

No costs or damages arising from seizure to be recoverable

111. No person shall, in any proceedings before any court in respect of the seizure of anything seized in the exercise or the purported exercise of any powers conferred under this Act be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause.

PART XV

OFFENCES

Offences in respect of heritage site

112. (1) No person shall, without the approval in writing of the Commissioner—

- (a) dig, construct, excavate, build, plant trees, quarry, irrigate, burn lime or deposit earth or refuse, on or in the heritage site or conservation area;
- (b) demolish, disturb, obstruct, modify, mark, pull down or remove any monument in any heritage site;
- (c) erect any building or structure abutting upon a monument in any heritage site;
- (d) destroy the relationship of a building and its environment that is incompatible with the character of the neighbourhood in any heritage site;
- (e) clear any area or interfere with, destroy or remove any tree, plant undergrowth, weed, grass or vegetation in any heritage site; or
- (f) do any activities or actions that would likely cause damage to the adjacent and surrounding land which have been registered as heritage site.

(2) Any person who, without lawful authority, contravenes subsection (1) shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

(3) Any person who has in his possession or custody or under his control, any material originating from the land which constitutes a natural heritage or cultural heritage, shall be presumed to have extracted, removed or transported or permitted the extraction, removal or transportation of natural heritage or cultural heritage without lawful authority.

(4) Any person convicted of an offence under this section may be ordered to pay, in addition to any punishment, imposed under subsection (2), compensation equal to the value of the object and of anything damaged in the course of its extraction.

(5) For the purposes of subsection (4), the value of any object shall, in the absence of evidence to the contrary, be deemed to be such amount as the Federal Government valuer may certify.

(6) Any sum ordered to be paid under subsection (4) shall be recoverable as if it were a fine imposed on conviction.

Offences in respect of heritage object

113. Any person who destroys, damages, disfigures, disposes or alters a tangible cultural heritage, without a permit issued by the Commissioner commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

Offences in respect of National Heritage

114. (1) No person shall, without the written approval of the Commissioner, transfer, demolish, remove, alter, renovate, export, add to or deal with any National Heritage except in case of urgent and immediate necessity for the safety of persons or property.

(2) Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

PART XVI

MISCELLANEOUS

Prosecution

115. No prosecution in respect of any offence under this Act or any regulations made under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

Jurisdiction of Court of First Class Magistrate

116. Notwithstanding anything contained in any written law to the contrary, a Court of a First Class Magistrate shall have the jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

Offences committed by body corporate

117. Where a person charged with an offence under this Act or any regulations made thereunder is a body corporate, every person who, at the time of the commission of such offence was a managing director, manager or other similar officer of such body corporate, may be charged jointly in the same proceedings with the body corporate, and where the body corporate is convicted of the offence charged, every such managing director, manager or officer shall also be deemed to have committed the offence and shall be liable to the same penalty as the body corporate, unless he proves that the offence was committed without his knowledge, consent or connivance or that he took reasonable precautions to prevent its commission.

General penalty

118. (1) Any person who commits an offence under this Act or any regulations made under this Act where no penalty is expressly provided shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both, and for a second or subsequent offence he shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

(2) Where the offence committed resulted in damage to or the demolition or destruction of a heritage item, the court may order the person to pay, in addition to any penalty that may be imposed under subsection (1), the costs of the repair, restoration or reconstruction of the heritage item.

Compounding of offences

119. (1) The Commissioner may, with the consent in writing of the Public Prosecutor, compound any offence committed by any person under this Act or any regulations made under this Act, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding fifty percent of the maximum fine for that offence, within the time specified in the offer.

(2) An offer under subsection (1) may be made at any time after the offence has been committed, but before any prosecution for it has been instituted.

(3) If the amount specified in the offer under subsection (1) is not paid within the time specified in the offer or within such extended period as the Commissioner may grant, prosecution for the offence may be instituted at any time after that against the person to whom the offer was made.

(4) Where an offence has been compounded under subsection (1) no prosecution shall be instituted after that in respect of the offence against the person to whom the offer to compound was made and where possession has been taken of any books, records or other documents or any other thing, such books, records, documents or things may be released subject to such conditions as may be imposed in accordance with the conditions of the compound.

(5) The amounts received under this section shall be paid into and form part of the Federal Consolidated Fund and in the case of offences under Part XI the amounts received shall be paid into and form part of the State Consolidated Fund.

Public servants

120. The Commissioner, Deputy Commissioner, Assistant Commissioners, authorized officers, enforcement officers, all members of the Council and the committee, any member of the staff or agent of the Commissioner while discharging their duties or performing their functions or exercising their powers under this Act, shall be deemed to be public servants within the meaning of the Penal Code.

Immunity from legal action

121. No legal proceeding, prosecution or other form of litigation may be instituted or maintained against—

- (a) the Commissioner, Deputy Commissioner or Assistant Commissioner;
- (b) any member of the Council;

- (c) any authorized officer or enforcement officer; or
- (d) any person employed in the office of the Commissioner or the Council,

in his personal capacity in respect of any act, omission, decision or statement done or made for the purpose of or incidental to the implementation or proposed implementation of the provisions of this Act or any regulations made under this Act unless such act, omission, decision or statement was done or made by his wilful neglect or default.

Public Authorities Protection Act 1948

122. The Public Authorities Protection Act 1948 [*Act 198*] shall apply to any action, suit, prosecution or proceeding against the Commissioner, Deputy Commissioner, Assistant Commissioners, authorized officers, enforcement officers, any member of the Council or the committee, any member of the staff or agent of the Commissioner or the Council in respect of any act, neglect or default done or committed by it or by him, as the case may be, in such capacity.

Delegation of powers

123. The Commissioner may generally or specially authorize the exercise, performance or discharge of any of his powers, duties or functions under this Act or any regulations made under this Act to any officer appointed under subsection 5(1).

Regulations

124. (1) The Minister may make any regulations as may be expedient or necessary for the better carrying into effect of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may be made for all or any of the following purposes:

- (a) prescribing any matter which is required under this Act to be prescribed;

- (b) prescribing the conservation management plan;
- (c) prescribing the conditions and restrictions (including the payment and amount of a fee) subject to which any licence or permit under this Act may be granted or issued;
- (d) providing for procedures for application, terms and conditions to be imposed on licences, and for fees, charges and deposits in respect thereof, including provisions for the forfeiture, use or return of such deposits;
- (e) prescribing the management and procedures for the conservation and preservation of heritage sites, heritage objects, underwater cultural heritage and National Heritage;
- (f) prescribing guidelines and procedures for the conservation and preservation of intangible cultural heritage;
- (g) prescribing the procedure for compounding such offences; and
- (h) prescribing a penalty or a fine not exceeding twenty-five thousand ringgit for the contravention of or failure to comply with any of the provisions of any regulations made under this Act or with the restrictions or conditions of any licence or permit granted under any such regulations.

PART XVII

REPEAL AND SAVING PROVISIONS

Repeal and saving

125. (1) Subject to subsection (2), the Antiquities Act 1976 [*Act 168*] and the Treasure Trove Act 1957 [*Act 542*] are repealed.

(2) The Treasure Trove Act 1957 shall continue to apply to those States which do not adopt the provisions of Part XI of this Act by a law made by the Legislature of the relevant States in accordance with Clause (3) of Article 76 of the Federal Constitution.

(3) All appointments, regulations, rules, by-laws, exemptions, directions and orders made, all registers kept and all certificates granted or having effect under the laws or orders repealed by this section and in force or having effect at the commencement of this

Act, shall (without prejudice to the power of the Minister to amend the regulations, rules and by-laws or to amend, revoke or withdraw the exemptions, directions or certificates by order or direction made under the appropriate provisions of this Act and subject to such modifications as may be necessary to bring the regulations, rules, by-laws, exemptions, directions or orders in conformity with this Act) continue to be in force and have effect as if they had been made, kept or granted under this Act, until otherwise provided for under this Act.

Prevention of anomalies

126. (1) The Minister may, by order, make such modifications in the provisions of this Act as may appear to him to be necessary or expedient for the purpose of removing any difficulty occasioned by the coming into force of this Act.

(2) The Minister shall not exercise the powers conferred by this section after the expiration of two years from the date of coming into operation of this Act.

(3) In this section, “modifications” includes amendments, additions, deletions, substitutions, adaptations, variations, alterations and non-application of any provision of this Act.

LAWS OF MALAYSIA
Act 645
NATIONAL HERITAGE ACT 2005

LIST OF AMENDMENTS

Amending law	Short title	In force from
	-NIL-	

LAWS OF MALAYSIA
Act 645
NATIONAL HERITAGE ACT 2005

LIST OF SECTIONS AMENDED

Section	Amending authority	In force from
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-NIL-



DICETAK OLEH
PERCETAKAN NASIONAL MALAYSIA BERHAD,
KUALA LUMPUR
BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA

Recommendation on the Safeguarding of Traditional Culture and Folklore

15 November 1989

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 17 October to 16 November 1989 at its twenty-fifth session,

Considering that folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity,

Noting its social, economic, cultural and political importance, its role in the history of the people, and its place in contemporary culture,

Underlining the specific nature and importance of folklore as an integral part of cultural heritage and living culture,

Recognizing the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost,

Stressing the need in all countries for recognition of the role of folklore and the danger it faces from multiple factors,

Judging that the governments should play a decisive role in the safeguarding of folklore and that they should act as quickly as possible,

Having decided, at its twenty-fourth session, that the safeguarding of folklore should be the subject of a recommendation to Member States within the meaning of Article IV, paragraph 4, of the Constitution,

Adopts the present Recommendation this fifteenth day of November 1989:

The General Conference recommends that Member States should apply the following provisions concerning the safeguarding of folklore by taking whatever legislative measures or other steps may be required in conformity with the constitutional practice of each State to give effect within their territories to the principles and measures defined in this Recommendation.

The General Conference recommends that Member States bring this Recommendation to the attention of the authorities, departments or bodies responsible for matters relating to the safeguarding of folklore and to the attention of the various organizations or institutions concerned with folklore, and encourage their contacts with appropriate international organizations dealing with the safeguarding of folklore.

The General Conference recommends that Member States should, at such times and in such manner as it shall determine, submit to the Organization reports on the action they have taken to give effect to this recommendation.

A. Definition of folklore

For purposes of this Recommendation:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

B. Identification of folklore

Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses. To this end, Member States should encourage appropriate survey research on national, regional and international levels with the aim to:

- (a) develop a national inventory of institutions concerned with folklore with a view to its inclusion in regional and global registers of folklore, institutions;
- (b) create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist by way of handbooks, collecting guides, model catalogues, etc., in view of the need to co-ordinate the classification systems used by different institutions;
- (c) stimulate the creation of a standard typology of folklore by way of:
 - (i) a general outline of folklore for global use;
 - (ii) a comprehensive register of folklore; and
 - (iii) regional classification of folklore, especially field-work pilot projects.

C. Conservation of folklore

Conservation is concerned with documentation regarding folk traditions and its object is, in the event of the non-utilization or evolution of such traditions, to give researchers and tradition-bearers access to data enabling them to understand the process through which tradition changes. While living folklore, owing to its evolving character, cannot always be directly protected,

folklore that has been fixed in a tangible form should be effectively protected. To this end, Member States should:

(a) establish national archives where collected folklore can be properly stored and made available;

(b) establish a central national archive function for service purposes (central cataloguing, dissemination of information on folklore materials and standards of folklore work including the aspect of safeguarding);

(c) create museums or folklore sections at existing museums where traditional and popular culture can be exhibited;

(d) give precedence to ways of presenting traditional and popular cultures that emphasize the living or past aspects of those cultures (showing their surroundings, ways of life and the works, skills and techniques they have produced);

(e) harmonize collecting and archiving methods;

(f) train collectors, archivists, documentalists and other specialists in the conservation of folklore, from physical conservation to analytic work;

(g) provide means for making security and working copies of all folklore materials, and copies for regional institutions, thus securing the cultural community an access to the materials.

D. Preservation of folklore

Preservation is concerned with protection of folk traditions and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities which produce them beyond. To this end, Member States should:

(a) design and introduce into both formal and out-of-school curricula the teaching and study of folklore in an appropriate manner laying particular emphasis on respect for folklore in the widest sense of the term, taking into account not only village and other rural cultures but also those created in urban areas by diverse social groups, professions, institutions, etc., and thus promoting a better understanding of cultural diversity and different world views, especially those not reflected in dominant cultures;

(b) guarantee the right of access of various cultural communities to their own folklore by supporting their work in the fields of documentation, archiving, research, etc., as well as in the practice of traditions;

(c) set up on an interdisciplinary, basis a National Folklore Council or similar co-ordinating body in which various interest groups will be represented;

(d) provide moral and economic support for individuals and institutions studying, making known, cultivating or holding items of folklore;

(e) promote scientific research relevant to the preservation of folklore.

E. Dissemination of folklore

The attention of people should be drawn to the importance of folklore as an ingredient of cultural identity. It is essential for the items that make up this cultural heritage to be widely disseminated so that the value of folklore and the need to preserve it can be recognized. However, distortion during dissemination should be avoided so that the integrity of the traditions can be safeguarded. To promote a fair dissemination, Member States should:

(a) encourage the organization of national, regional and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops, training courses, congresses, etc., and support the dissemination and publication of their materials, papers and other results;

(b) encourage a broader coverage of folklore material in national and regional press, publishing television, radio and other media, for instance through grants, by creating jobs for folklorists in these units, by ensuring the proper archiving and dissemination of these folklore materials collected by the mass media, and by the establishment of departments of folklore within those organizations;

(c) encourage regions, municipalities, associations and other groups working in folklore to establish full-time jobs for folklorists to stimulate and co-ordinate folklore activities in the region;

(d) support existing units and the creation of new units for the production of educational materials, as for example video films based on recent fieldwork, and encourage their use in schools, folklore museums, national and international folklore festivals and exhibitions;

(e) ensure the availability of adequate information on folklore through documentation centers, libraries, museums, archives, as well as through special folklore bulletins and periodicals;

(f) facilitate meetings and exchanges between individuals, groups and institutions concerned with folklore, both nationally and internationally, taking into account bilateral cultural agreements;

(g) encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.

F Protection of folklore

In so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of

promoting further development, maintenance and dissemination of those expressions,- both within and outside the country, without prejudice to related legitimate interests. Leaving aside the 'intellectual property aspects' of the protection of expressions of folklore, there are various categories of rights which are already protected and should continue to enjoy protection in the future in folklore documentation centers and archives. To this end, Member States should:

(a) regarding the 'intellectual property' aspects call the attention of relevant authorities - to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent;

(b) regarding the other rights involved:

(i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality);

(ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner;

(iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise;

(iv) recognize the responsibility of archives to monitor the use made of the materials gathered.

G. International co-operation

In view of the need to intensify cultural co-operation and exchanges, in particular through the pooling of human and material resources, in order to carry out folklore development and revitalization programmes as well as research made by specialists who are the nationals of one Member State on the territory of another Member State, Member States should:

(a) co-operate with international and regional associations, institutions and organizations concerned with folklore;

(b) co-operate in the field of knowledge, dissemination and protection of folklore, in particular through:

(i) exchanges of information of every kind, exchanges of scientific and technical publications;

(ii) training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment;

(iii) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary folklore;

(iv) the organization of meetings between specialists, of study courses and of working groups on particular subjects, especially on the classifying and cataloguing of folklore data and expressions

and on modern methods and techniques in research;

(c) co-operate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighbouring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore;

(d) guarantee Member States on whose territory research has been carried out the right to obtain from the Member States concerned, copies of all' documents, recordings, video-films, films and other material;

(e) refrain from acts likely to damage folklore materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of other States;

(f) take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories, or public disorders of other kinds.

Draft Model Provision/Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

The Preamble

The Contracting States,

Considering that expressions of folklore, developed and maintained by communities of various countries or by individuals reflecting the expectations of those communities, represent an important part of the living cultural heritage of mankind,

Considering that modern technology facilitates the commercialization of expressions of folklore beyond the frontiers of the countries in which they originate,

Considering that such commercialization of expressions of folklore may lead to the improper exploitation and distortion of the cultural heritage involved,

Considering that the international regulation of the protection of expressions of folklore against illicit exploitation and other prejudicial actions has thus become indispensable as a means of promoting their further development, authentic maintenance and dissemination, without prejudice to legitimate interests in having access to them,

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve legal protection in a manner analogous to that provided for works protected by copyright,

have agreed as follows:

Article 1 Protected Expressions of Folklore

For the purposes of this Treaty, "expressions of folklore" mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of their community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
 - (ii) musical expressions, such as folk songs and instrumental music;
 - (iii) expressions by action, such as folk dances, plays and artistic forms or rituals,
- whether or not reduced to a material form; and

(iv) tangible expressions, such as

(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;

(b) musical instruments;

(c) architectural forms."

Article 2 National Treatment

Each Contracting State shall accord the same protection to expressions of folklore originating in other Contracting States as it accords to expressions of folklore originating in its own territory, subject to the protection specifically guaranteed, and the exceptions specifically provided for, by this Treaty."

Article 3 Competent Authorities

1. Each Contracting State shall designate one or more competent authorities (hereinafter referred to as "the competent authority") which shall administer the protection, under this Treaty, of expressions of folklore and to ask for the enforcement of the protection in other Contracting States of such expressions originating in its own territory.

2. Each Contracting State shall, at the time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of all designations made in accordance with paragraph (1) and giving full information concerning the rights and obligations of the authority thus designated. Any subsequent changes in the designation, or in the said rights and obligations, shall be promptly notified in like manner."

Article 4 Utilizations Subject to Authorization

1. The following utilization of the expressions of folklore shall require written authorization by the competent authority of the Contracting State in which the expression of folklore originated, if the utilization is intended to be made for profit in another Contracting State:

(i) the publication, reproduction, distribution or importation, for the purpose of distribution to the public, of reproductions or recordings of recitations or performances of expressions of folklore;

(ii) the public recitation or performance of expressions of folklore, as well as any transmission to the public by wireless means, by wire, or by any other means, of expressions of folklore or of their recitations or performances, whether live or recorded.

2. Each Contracting State shall, at any time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of the kinds the main characteristics and the source of the artistic expressions of folklore originating in its territory the utilization of which is subject to the written authorization of its competent authority. Subsequent changes shall be notified in like manner.

Article 5 Request and Grant of Authorization

1. The application for authorization under article 4 shall be submitted by the prospective utilizer of the expression of folklore (hereinafter referred to as "the applicant"), [through the competent authority of the Contracting State of which the utilizer is a national or where he or it has his or its habitual residence or headquarters] to the competent authority of the Contracting State in which the expression of folklore originates, duly in advance; the application shall unequivocally specify, in written form, the expression of folklore intended to be used, its source, as well as the nature and extent of the intended utilization.

2. The authorization shall be given in written form without undue delay; it may be made conditional upon the payment of an equitable remuneration whose amount, in the absence of agreement, shall be fixed by the competent authority of the Contracting State in which the expression of the folklore originates. No application shall be refused, except where the intended use would be prejudicial to the honour or dignity of the originating country or community. Any refusal shall be justified in writing."

Article 6 Exceptions

1. The provisions of Article 4 shall not apply where the utilization is:

(i) for purposes of education;

(ii) for creating an original literary or artistic work.

2. Furthermore, the provisions of Article 4 shall not apply where the utilization is incidental. Incidental utilization includes, in particular:

(i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

(ii) utilization of objects containing the expressions folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast."

Article 7 Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place in which it has originated.

2. The provisions of paragraph (1) shall not apply in the case of creation of original works inspired by expressions of folklore or in the case of the incidental use of expressions of folklore."

Article 8 Offenses

Each Contracting State shall punish by penal sanctions any act of

(i) wilful or negligent non-compliance with the requirement obtaining authorization under Article 4;

(ii) wilful or negligent non-compliance with the requirement of acknowledgement of source according to Article 7;

(iii) wilful deception of others in respect of the origin of expressions of folklore;

(iv) wilful distortion, in any direct or indirect manner, of an expression of folklore in a way prejudicial to the honour, dignity or cultural interests of the community in which it originates.

Article 9 Seizure

Each Contracting State shall provide for the possibility of the seizure of any object which was made or imported in a way constituting an offence under this Treaty and any returns from such offenses."

Article 10 Civil remedies

Each Contracting State shall provide for the possibility of claiming damages or other civil remedies where the utilization was made without the required authorization or payment or in any other manner causing economic harm to the State or community in which the utilized expression of folklore has originated."

Article 11 Relations to Other Forms of Protection

This Treaty shall in no way limit or prejudice any protection applicable to expressions of folklore under national laws or any international treaty protecting copyright, the rights of performers, producers of phonograms and broadcasting organizations, or industrial property, nor shall it in

any way prejudice other forms of protection provided for the safeguard and preservation of folklore."

Article 12 Deposit and Signature of the Treaty

This Treaty shall be deposited with the Secretary-General of the United Nations and shall be open until... for signature by any State that is [a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice] [a party to the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention]".

Article 13 Entry into Force of the Treaty

1. This Treaty shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State covered by Article 12.

2. Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations. The Treaty shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance or accession.

3. For each State ratifying, accepting or acceding to this Treaty after the deposit of the fifth instrument of ratification, acceptance or accession, the Treaty shall enter into force three months after the date of the deposit of the respective instrument with the Secretary-General of the United Nations.

4. It is understood that at the time a State becomes bound by this Treaty, it will be in a position in accordance with its domestic law to give effect to the provisions of the Treaty."

Article 14 Denunciation of the Treaty

Any Contracting State may denounce this Treaty. Denunciation shall take effect 12 months after the date on which the Secretary-General of the United Nations has received the relevant declaration."

Article 15 Notifications by the Secretary-General of the United Nations

1. The Secretary-General of the United Nations shall promptly notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization of:

(a) signatures of this Treaty;

(b) the deposit of instruments of ratification, acceptance or accession;

(c) the date of entry into force of this Treaty;

(d) notifications and declarations received from Contracting States under this Treaty.

2. The Directors General of the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization shall promptly communicate to the Contracting States any notification received from the Secretary-General of the United Nations."

Article 16 Languages of the Treaty

1. This Treaty shall be signed in a single copy in...[specify the language(s)], [all texts being equally authentic].

2. Official texts of this Treaty shall be established, after its having entered into force, jointly by the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization, in consultation with the interested Governments, in...[specify the languages]."

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

- A. “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
- i. verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
 - ii. musical expressions, such as songs and instrumental music;
 - iii. expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and, tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;
- which are:
- a) the products of creative intellectual activity, including individual and communal creativity;
 - b) characteristic of a community’s cultural and social identity and cultural heritage; and
 - c) maintained, used or developed by such community, or by individual having the right or responsibility to do so in accordance with the customary law and practices of that community.
- B. The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

ARTICLE 2:

BENEFICIARIES

Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:

- i. in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and
- ii. who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

ARTICLE 3:

ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

- a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:
 - i. in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:
 - the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public

- and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;
- ii. in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

- b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:
 - i. the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;
 - ii. any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;
 - iii. any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and
 - iv. where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and Secret traditional cultural expressions/expressions of folklore
- c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

ARTICLE 4:

MANAGEMENT OF RIGHTS

- a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as “the Agency”). Where authorizations are granted by the Agency:

- i. such authorizations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes;
 - ii. any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.
- b) The Agency should generally be tasked with awareness-raising, education, advice and guidance functions. The Agency should also:
 - i. where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (b); and,
 - ii. establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant community.

ARTICLE 5:

EXCEPTIONS AND LIMITATIONS

- a) Measures for the protection of TCEs/EoF should:
 - i. not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;
 - ii. extend only to utilizations of TCEs/EoF taking place outside the traditional customary context, whether or not for commercial gain; and,
 - iii. not apply to utilizations of TCEs/EoF in the following cases:
 - by way of illustration for teaching and learning;
 - non-commercial research or private study;
 - criticism or review;
 - reporting news or current events;
 - use in the course of legal proceedings;
 - the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
 - incidental uses, provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.
- b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

ARTICLE 6:

TERM OF PROTECTION

Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and;

- i. in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and;
- ii. in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.

**ARTICLE 7:
FORMALITIES**

- a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.
- b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.
 - i. To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.
 - ii. Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.
 - iii. Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.
 - iv. The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

**ARTICLE 8:
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS**

- a. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.
- b. The Agency referred to in Article 4 should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting

civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

**ARTICLE 9:
TRANSITIONAL MEASURES**

- a. These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.
- b. Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.

**ARTICLE 10:
RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER
FORMS OF PROTECTION, PRESERVATION AND PROMOTION**

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

**ARTICLE 11:
INTERNATIONAL AND REGIONAL PROTECTION**

The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions