

**INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL
PROPERTY AND GENETIC RESOURCES TRADITIONAL
KNOWLEDGE AND FOLKLORE**

Seventeenth Session
Geneva, December 6-10, 2010

**WIPO INDIGENOUS PANEL ON THE ROLE OF THE PUBLIC DOMAIN CONCEPT:
EXPERIENCES IN THE FIELDS OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE
AND TRADITIONAL CULTURAL EXPRESSIONS: EXPERIENCES FROM INDONESIA**

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REFORMING 'PUBLIC DOMAIN'

The Role of Public Domain in Indonesian Cultural Community:
The Cases of Legong Keraton Peliatan Balinese Dance,
Sumba Woven Clothes, and Ulin Kalimantan Timber

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Indonesia

1. Indonesia as a Cultural Community

This presentation would be based on a view that the examples of Traditional Cultural Expressions explained in this paper are geographically originated from Indonesian archipelago. Thus, as a nation which are bound by the same socio-political and cultural history, Indonesia is also regarded as a big cultural community that includes hundreds of ethnic groups, tribal peoples, and traditional as well as local communities, where thousands of Traditional Knowledge, Traditional Cultural Expressions and millions of Genetic Resources related to Traditional Knowledge are situated and maintained from generation to generation by Indonesian people.

Although Indonesia now is known as a form of a modern state, the development of its original social-political and cultural jurisdiction is mainly rooted from the archipelagic traditional concept of the unity of Nusantara ('*nusa*' means islands, '*antara*' means the spaces between the islands). Epics about the vow of Gajah Mada from Majapahit Kingdom to unite thousands of islands of Nusantara under Java empires strongly indicate that this concept had been established hundred years before the first ship from Europe 'found' Indonesian archipelago in the 16th century.

Currently, legal bases of this view are written in article 32 and 33 of the 1945 Constitution of the Republic of Indonesia. Article 32 (1) of 1945 Constitution assures that the state develops Indonesian national culture in the world's civilization and guarantees the freedom of the people to maintain and enhance their cultural values, while article 33 (3) of the Constitution substantiates that a power upon lands, water and all incorporated natural resources in Indonesian jurisdiction is held by the state for the utmost welfare of Indonesian people.

These constitutional bases are in line with the concept of *the spirit of nation* from Friederich Carl von Savigny. Savigny believes that there is one spirit of a nation which are expressed in languages, behaviors and organizational means, which characterize their ideology and cultures, and are rooted from the same historical experiences. Ruth Benedict calls the map of these expressions as *the pattern of culture* of a nation¹. The views of these scholars ascertain that a nation, like Indonesia, can also be regarded as a cultural community that possesses its own unique and evolving cultural expressions.

* prepared for Indigenous Consultative Forum, Intergovernmental Committee on Intellectual Property and the Protection of Genetic Resources, Traditional Knowledge, and Folklores (IGC on IP & GRTKF) XVII, World Intellectual Property Organization (WIPO), Geneva, Switzerland, 5th of December, 2010.

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¹ Merryman, John Henry, *The Civil Law Tradition* (1969) 2, in Henry W. Ehrmann, *Comparative Legal Studies* (1976) 8, see also: Cita Citrawinda Priapantja, *Budaya Hukum Indonesia Menghadapi Globalisasi, Perlindungan Rahasia Dagang Di Bidang Farmasi (Indonesian Legal Culture in Globalization, the Protection of Trade Secret in Pharmacy)* (1999) 199.

However, as a cultural community that includes hundreds of smaller ethnic groups, and tribal peoples, there is also, quoted a term used by Bagir Manan, 'a natural power tension' between Indonesia as a bigger cultural community with the other smaller cultural communities in Indonesian jurisdiction.

Historically, this tension was worsened when Indonesia had been a colony of the Netherlands for 350 years. In those long period of time, thousands of traditional structures of villages and local kingdoms in Indonesian land had been destroyed under the Netherlands Indie legal regime which differentiated people living in Indonesia as three vertical classes with the third, the lowest, or 'the slave' class, was all Indonesian people ('*bumi putra*', the indigenous people of the Netherlands). After the proclamation of Indonesian independence on 17th of August, 1945, Indonesia erases the colonial classes, becomes a democratic modern state with European Continental legal system, and declares one of its main characters as 'a diverse in a unity' cultural community country of Indonesia, or Indonesian multicultural nation.

Since the proclamation of Indonesian independence, the tension has been swinging from the more dominant and centralised culture (western Indonesian culture, Javanese culture) to the more minor and peripheral cultures (eastern Indonesian culture, other cultures outside Java island). Under the multiple amendments of the 1945 Constitution as well as the provincial and local laws, the natural tension has been maintained. In this regard, there is an evolving concept of *functional decentralisation of culture* for the best implementation of the *freest autonomy* politic of law to be given to the more minor and peripheral cultures in provincial and local areas of Indonesia.

The legal bases of the above concepts can be found in article 18 B (2) and 28 I (3) of 1945 Indonesian Constitution. Article 18 B (2) ascertains that the state acknowledges and respects the existence of peoples of *Adat Laws* together with their traditional rights as long as the rights are still existed and in line with the development of the society and the constitutional principle of the unity of Indonesia. Article 28 I (3) guarantees that the cultural identity and the rights of traditional communities are respected in line with the development of human civilization.

In short, there are two layers of cultural communities; firstly, the national cultural community who develops their national culture, and secondly, the local cultural communities, whether they are tribal people, traditional people, and others, who possess their unique local cultures which are geographically originated from the land of Indonesia. In different degrees, all of the local cultural communities use *Adat Laws* in guarding their traditional knowledge, traditional cultural expressions as well as the associated genetic resources. In the logic of private property versus public domain in the existing Intellectual Property Rights system, the jurisdiction of Indonesian *Adat Laws* is in the space of public domain.

Surely, there is always a natural tension between the two layers. However, based on the spirit of cultural democracy in the existing Indonesian legal system, the most original and strongest rights on cultures, including in possessing and controlling their cultural properties, should be held by the second layers. The better the power is given to the local cultural communities upon their own traditional knowledge, traditional cultural expressions and the associated genetic resources, the stronger the national identity of Indonesia becomes.

Several examples of traditional cultural expressions, traditional knowledge and the associated genetic resources used in this paper are *Legong Keraton Balinese Dance*, *Sumba Woven Clothes*, and *Ulin Kalimantan Timber*². All of them are originated from areas outside Java, the predominant island. Their geographical origins are explained below:



2. The Nature of the Selected Traditional Cultural Expressions, Traditional Knowledge and Related Genetic Resources

a. Legong Keraton Peliatan Balinese Dance as a Traditional Cultural Expression of Bali, Indonesia

Legong Keraton Peliatan is the name of a classical Balinese dance, with a special style sustained in Peliatan Village, Ubud area, Bali Island, Indonesia. Legong Keraton is rooted from the ancient Balinese sacred dances Legongs in Balinese Hindi tradition. Epics in Bali believe that the vast various of Legong dances were firstly created based on a divine dream of a Balinese King, who had dreamt angels came down to the earth by dancing Legong. Legong itself means to move (*'leg'*) as the music (*'gong'*) moves. Now, Legong Keraton Peliatan is still being developed and regularly performed in its village more for tourism purposes. Two old dancer maestros who are still alive and regarded as the custodians of this dance are Anak Agung Ayu Raka Rasmii (Gung Raka) and Anak Agung Bulantrisna Djelantik (Biyang Bulan).

² Data about Sumba Woven Clothes and Ulin Kalimantan Timbers were obtained from the publication of PhD Research conducted in the Faculty of Laws, University of Technology Sydney (2004-2007) under the supervision of Professor Philip Griffith, in a book titled *Geographical Indications Protection in Indonesia based on Cultural Rights Approach* (2009) Nagara Institute, Indonesia.

As a traditional dance, Legong Keraton is one of the most difficult Balinese dances to master. Nowadays, it is learnt by advanced dancers who have already got proper ability in mastering 'wiraga' (flexibility of the movement techniques) and 'wirama' (sensitivity to dance in harmony with the music). As a dramatic Legong, dancing Legong Keraton also requires the dancers to understand the story of the dance and to express different characters of the actors in the story in a very symbolic means. So, Legong Keraton dancers should also be able to reach certain degree of 'wirasa' (spiritual ability to living the characters in their performance).

Interestingly, Legong Keraton used to be trained for small and virgin girls. The reasons are because small and virgin girls are believed to be more adequate to dance sacred dances. Besides that, the bodies of small girls are much more flexible to master complex movements in Legong Keraton dance. Especially for Legong Keraton Peliatan, the style of Peliatan adds more difficulty for the dancers because they should move in a very high speed and flexibility. Legong Keraton Peliatan is the only Legong Keraton dance from Bali which requires the dancers to fold their backs backward so their crowns nearly touch their back legs.

Balinese people regard dancing not only as to perform their artistic flairs or creativities in their leisure times, but also as a part of Balinese Hindu religious rituals. Similarly with dancing other traditional dances in other parts of Indonesia, dancing Balinese dances also has deep psychological impact. It refreshes the consciousness of the dancers and the community who participate in the whole process of the dance to be more easily rejoins the body, mind and soul as a unity, and as a part of the enchanting beauty of Balinese nature. Dancing teaches them to be always in harmony with their inner universe as well as their natural universe.

b. Sumba Woven Clothes as a Traditional Cultural Expression and Traditional Knowledge of Sumba Island, East Nusa Tenggara, Indonesia

The history of Sumbanese Woven Cloths lies in the traditional values of Indonesian people who originated and live on Sumba Island, East Nusa Tenggara, Indonesia, and who support their living by weaving cloths. The technique is passed on by a spoken tradition rather than written, and mostly taught outside of formal education.

It is said that before the Sumbanese people knew that they were ready to wear certain type of clothes or dress, they had to learn how to weave their clothes naturally by using natural resources. The skill of weaving in Sumba has been passed on for generations, thus it is difficult to find out who the first inventor of this skill was³.

In the Sumbanese traditional culture, weaving is one of the requirements of the so-called '*kuat gawé*' or to reach the state of maturity, especially for a young woman. For a Sumbanese girl, maturity is not considered as reaching a certain age, rather an ability to weave properly, to plait, to cook and to feed live stock.

There are several Sumbanese weaving designs which are well known and are still referred to as Sumbanese language, such as *Kobi*, *Labaleko*, and *Siku*. As Sumbanese people conduct numerous traditional ceremonies regularly, Sumbanese Woven Cloths are a necessary part of the traditional clothes required to be worn during the ceremonies.

Woven clothes are commonly produced throughout the Island of Sumba. However, the better known are produced in the eastern part of the island, especially in the coastal areas. The variety of designs in the Sumbanese woven cloths is in-line with the variety of Sumbanese coastal tribes stretching from Bungak Village in Tanjung Sasar on the east, to the westernmost part of the island. As the starting point of the area on the eastern Sumba, the village name of Bungak means 'the first', referring to the place where the sun rises. There is a traditional belief that there was a bridge between Sasar Cape and Flores Island in northern Sumba. From Bungak area, there are

³ Interview with Debora Dukapare (Waikabubak, Western Sumba, East Nusa Tenggara, Indonesia, 24th November, 2005).

many weaver villages throughout the northeast coastal lines of Sumba, stretching to the Cape *Munju* on the east. Meanwhile, on the west side of the island, the weaver villages are usually smaller, as seen in Tambolaka and Tarung Village, Waikabubak⁴.

The activities of the weaving society in Sumba are mainly concentrated on the coastal area, especially on the eastern beaches. Most people from the mainland work as farmers. Generally, the people who live on the Sumbanese coasts are the producers, while the mainlanders are the consumers. Traditional villagers still produce certain cloths, especially the ones worn by the board of leaders in traditional ceremonies. These special cloths could be purchased or ordered by outsiders as exclusive products under permission of the elders in the village. However, the designs in all areas of productions now are not considered sacred. Any weaver in Sumba can apply these designs on their cloths.

Interestingly, being a fisherman is not a part of the traditions of the island of Sumba. Their cultural and spiritual connection to the sea is very weak when compared to their cultural and spiritual connections to the land. The cultural meaning of Woven Cloth, in the mind of Sumbanese people that has been passed on for generations, is that by weaving the clothes along the beaches of Sumba Island, the weavers also 'tightened' the island of Sumba to stand still on the surface of the ocean.

Every traditional ornament woven in a cloth has a special meaning. The ornaments indicate the social status of the owner or the wearer. Other than that, every ornament has an educational meaning. It is also used as a soft reminder of the social status, for the people who see it being worn.

One of the most common ornamentations woven in the Eastern Sumbanese clothes is a '*duck*.' The leadership interpretation of ducks is regarded as the best leadership which should be followed by Sumbanese people, especially in leading their families and parenting their children. The noble traditional terms of this ornament is '*awamanu inarende*' which means that a parent, a mother or a father, should be like a wild duck. This was inspired by an occasion a long time ago when Sumbanese hunters saw a duck with its children. The flightless younger and weaker ducks are usually the main target of the hunters; because they are easier to kill. However, aware of the danger, the eldest wild duck, which was usually the father or the mother of the flock, approached the hunters, made noises and acted as if it was collapsed or dead. This fake death then deceived the hunters and diverted their attention from the younger and smaller ducks, thus they can escape and save themselves due to the risk of their parent. Therefore, the most respected attitude of leadership in a Sumbanese family is to take risks or even to sacrifice themselves for the best protection of their children.

Other ornamentations depicted in Sumbanese Woven Cloths are birds, monkeys and fish. They represent the variety of animals found in Sumba, especially by the hunters. Dragons are also found as an ornament influenced by the Chinese emperor who entered Sumba thousands of years ago. These ornaments are woven in a blazing motif called '*talaba*'.

Motifs of animal figures dominate the Eastern Sumbanese Woven Cloths. However, motifs of flowers can be found as additional ornamentations to enrich the design of cloths. Only one floral motif dominates certain Eastern Sumbanese Woven Cloths that is '*andung*'. '*Andung*' is a leafless tree whose branches are decorated with human skulls.

The motifs of human beings found in Eastern Sumbanese Woven Cloths are the motifs of '*Marapu*', '*Namuli*', '*Papanggang*', and '*Tautunggulung Kanja*'. They are woven on the '*Kombu*' or red cloths, or on '*Kayu Kuning*' or Woven Cloths coloured by yellow woods. '*Marapu*' symbolises

⁴ Interview with Freddy Hambuwalli (Waingapu, Eastern Sumba, East Nusa Tenggara, Indonesia, 26th November, 2005).

noble ancestors, while '*Namuli*' a womb of a woman. '*Papanggang*' is actually a figure of an ancient slave that was to be sacrificed in a burial ceremony of his or her master. In the ancient tradition of Sumba, being slaves was not a result of a crime as they believed it was their destiny that they were to be slaves and to follow their masters until death. '*Tautunggulung Kanja*' is the motif inspired by the Sumbanese ancestors who rode elephants. This is a typical influence of the Kingdom of Majapahit in the Javanese Island, which had expanded their territory from Sabang in the westernmost part of Nusantara archipelago (now Indonesia) to Merauke in the east, including the island of Sumba. The ship of '*Tautunggulung Kanja*' sometimes appears in various motifs.

There is a traditional know-how of making Sumba Woven Clothes that could be regarded as a kind of Traditional Knowledge in making a piece of cloth. In the Indonesian language, it is called '*kain tenun ikat Sumba*' which can be loosely translated into English as 'the Sumbanese tied woven clothes'. It is referred to as this since the colouring process of the Woven Cloths requires that the threads are tightened. The process to make tied Woven Cloths in Sumba Island is comparable to those used in the islands of Sagu, Timor, and Flores in the province of East Nusa Tenggara. Some of special characteristics of Sumbanese Woven Cloths are their larger size and the variations of two-dimensional ornaments.

The process of making a piece of Sumbanese tightened woven cloth is described in the following:

- Traditionally, cotton is first spun manually into threads. But today, it is more common to substitute threads with those from fabrics, since the quality is better and they are also easier to use. Threads spun manually have disadvantages such as unstable texture which causes a rubber-like property, so when these threads are woven, they will blur the motifs;
- The threads are then rolled into a ball named '*kabukul*';
- '*Pamining*' is the Sumbanese term for the process when '*kabukul*' threads are transferred into a rectangular sketch;
- '*Karandi*' is the Sumbanese term for the process when the threads on sketch are made smoother by a bamboo;
- '*Gambar*' is an Indonesian word used by Sumbanese weavers which refers to the 'drawing' of motifs;
- '*Ikat*' is an Indonesian word used by Sumbanese weavers to indicate the unique characteristic of a weaving process that uses knots in colouring clothes;
- '*Celup Biru*' is an Indonesian word used by Sumbanese weavers which refers to the process of immersing tightened threads which are taken off from a sketch into the traditional colour of blue or indigo;
- The blue or indigo tightened threads are then put back on the sketch;
- '*Katahmaukangurat*' is the Sumbanese term to refer to the process of untying knots. This process is done several times in order to get the desired colours;
- '*Wailanga*' is the Sumbanese term used to explain the next step after "*ikat*". This term refers to the process of soaking the threads into a mixture of water, nutmeg and other components to give ability to the thread fibre to absorb and maintain red colour. The drying process is done by hanging the threads under sunlight for a month during the dry season or for 2 months during the rainy season;
- '*Kombu*' is the process of putting the unique red colour obtained from Kombu tree, or in Javanese language '*pace*' tree. This process uses 'ikat';

- Weaving is done after 'kombu'. The weaving process of Sumbanese Woven Cloths uses traditional wood weaving machines to maintain the exotic appearance of the ornaments;
- All processes are concluded by washing the threads which now have become a piece of woven cloth. This soaking process is important to prevent the colours from fading easily. The washing process uses water or black tea water.

c. Ulin Kalimantan Timber as a Genetic Resources for Traditional Knowledge and Traditional Cultural Expressions in Kalimantan Island

The island of Kalimantan, or Borneo Island, is actually a land consisting of three different sovereignties. Indonesia governs the largest part covering the East, West, South, and Center of Kalimantan, while Malaysia rules the North strip, and Brunei Darussalam the big area on the top north of the North strip. Consequently, Ulin Kalimantan Timber has three indications of sources, namely Indonesian Kalimantan Timber, Malaysian Kalimantan Timber, and Brunei Darussalam's Kalimantan Timber. This paper will only be focused on Ulin Indonesian Kalimantan Timber, with the assumption that the right of the custodians on Ulin Kalimantan Timber is a shared right of the three different countries.

Kalimantan is one of the largest and richest rain forest islands in the world. Ulin is regarded as the queen of Kalimantan trees, found only on Kalimantan Island, and well known by its giant size, hundred years of life span, and extraordinary strength. In contrast with other timbers, the longer Ulin is placed in salty ocean, the stronger it becomes. Under current Indonesian Environmental Law, Ulin is protected from free cutting, logging or transporting to outside of Kalimantan⁵. However, there is no restriction to transport totems, carvings, or other traditional craftsmanship based on Ulin Kalimantan Timber outside the island.

One of Indonesian Dayak Tribes who depends their existence on Ulin Kalimantan Timber is Dayak Benuaq people. Some of them can be found in Jahab Traditional Village, which is located outside the border of Tenggarong and accessible by a two hour drive from the northern side of the city. However, in contrast to the glamorous Tenggarong, Jahab Traditional Village is filled with semi permanent and poor housing. Jahab is actually one of the relocation sites of indigenous Dayak people, especially of Benuaq Tribe, who have dwelled for hundreds of years on their original land and houses inside the dense rain forest of the north-east of Kalimantan Island, near the border between Indonesia and Malaysia. Beside Jahab, some Dayak Benuaq people also live separately in Pondok Labu Traditional Village, and the rest remain in isolation of the depth of the forest.

Ulin is a traditional name given by Dayak people themselves to note the finest well respected Kalimantan trees. Dayak people believe that Ulin Kalimantan trees are their ancestors. Ulin, with varied textures and extraordinary strength, can be found living in the dense rain forests of Kalimantan, on the mountaineous landscapes⁶; not on the very wet, sandy or clayed soil, but on the rich and yellowish soil⁷. The trees are difficult to cultivate because they need hundreds of years before they reach their strongest and tallest form. Moreover, they need a dense rain forest and suitable habitat to grow perfectly. The more various and taller the plants in a habitat, the better Ulin can grow. Dayak people secure the rain forests surrounding Ulin Kalimantan trees to

⁵ Law of the Republic of Indonesia Number 41, 1999 concerning Forestry art 50 (3)(d), (e), (j) , (l) principally prohibit any person to burn a forest, to conduct an illegal lodging, to freely chop, cut, or slice a tree with a modern machine in a forest without permission, as well as to move, to bring or carry an unprotected wild plant and animal from a forest without permission from an authorised person.

⁶ Focus Group Discussion with Dayak Benuaq People (Jahab Traditional Village, Kutai Kertanegara, East Kalimantan, Indonesia, 13 December 2005).

⁷ Interview with Aloysius Osik (Jahab Traditional Village, Kutai Kertanegara, East Kalimantan, 13 December 2005).

enable the best environment for the trees to grow to the maximum⁸. The Dayaks do not consider themselves as the master of the rainforest; instead they are a part of it and therefore regard Kalimantan Ulin trees as their neighbours⁹.

Due to the belief that the strength of *Lamin* or traditional long house will guarantee their personal strength as an individual as well as a group, they respectfully cut only one tree when building several *Lamin* for the whole extended families for several generations. They make the wooden tools from the remaining trunk, and never destroy its roots. They actively protect Ulin Kalimantan trees and develop their customs 'to interact' with the trees by using them in very limited number, craft them with traditional methods of manufacturing which naturally prevents them from the trees being exploited. These trees are left for four to seven years to allow the habitat and the trees to restore themselves. It is interesting to notice how fast the plants can grow in the environment with many types of vegetation and they can restore themselves if left for several years. Dayak people call the part of a forest that is self-restored as '*belukar*'¹⁰.

It is interesting to note that according to the *Adat* Law of Dayak communities – the Dayaks are the oldest native tribes in Kalimantan – traditional ownership of land is an absolute right. The ownership exists once a person or a group of people, usually a tribe, opens an area and changes the wild rain forest into a land for farming and living. Theoretically, the right holders even have the right to cut all trees in the area. This seldom happens, however, since Dayak people respect the trees as their 'neighbours' and even regarded Ulin as the divine manifestation of their ancestors in their current lives. Moreover, Dayak people only a view in amount. They only open a small part of the forest in contrast to the vast area of the Kalimantan rain forest¹¹ and have been maintaining the sustainability of the rain forest by naturally conduct a periodical recovery on the area the have opened. This has made Dayak people live in harmony with the forests for thousands of years without raising any concern to deforestation issues.

There are numerous varieties of timbers in Kalimantan Island, such as the well known *Pasak Bumi* which is also the name of a traditional medicine, the *Rattan*, and many others. In the case of Ulin Kalimantan Timber, however, traditional knowledge from its uses mainly consist of the knowledge to maintain sustainability of the timbers.

Ulin Kalimantan tree is an extreme example of how a dense tropical rain forest, especially the Kalimantan rain forest as one of the densest rain forests in the world, dominates and influences their growth. Ulin trees cannot grow properly in isolation, in farms or in a neighbourhood to achieve their maximum height and strength. They require dense forestation and hills. Moreover, they can not grow in a homogenous forest, because they need a high degree of density and diversity of species to maximise their capability to grow tall in competition with other wild plants for sunlight. Consequently, reserving and managing the exploitation of Kalimantan Ulin trees mean the reservation and management of the exploitation of its habitat: the tropical rain forest of Kalimantan itself. If deforestation occurs or if the forest is endangered, Ulin Kalimantan Timbers will gradually become extinct, along with the richness of Dayak culture.

Beside the importance to preserve the sustainability of Kalimantan rain forest, the traditional knowledge to preserve the sustainability of Ulin Kalimantan Timber is as follows:

i. The Traditional Cultivation Shift

Dayak people use a shifting cultivation system when farming. However, this is said to have caused the severe deforestation in the forest of Kalimantan. This is due to the use of fire as the

⁸ Discussion with Taufik Rahzen and Matius Bakri (Tenggarong, Kutai Kertanegara, East Kalimantan, Indonesia, 12 December 2005).

⁹ Interview with Matius Bakri (Tenggarong, Kutai Kertanegara, East Kalimantan, Indonesia, 12 December 2005).

¹⁰ '*Belukar*' is a Dayak Traditional as well as an Indonesian word to explain a form of thick bush whose the varieties of plants are very varied and dense, including trees.

¹¹ Interview with Mohammad Nasir, (Balikpapan, East Kalimantan, Indonesia, 12 December 2005).

first step to open a forest to become farm land, followed by the use of the land to farm for a period of time then the abandonment of the land before they move to open another land. It seems irresponsible to burn a part of forest and to leave it after it has been destroyed.

However, Dayak people consider that shifting cultivation as a very old method which has been used for hundreds of years, and during this long period, there has never been any strong evidence that shifting cultivation causes severe deforestation. The Dayak people argue that the severe deforestation is actually caused by the modern companies during the era of the New Order, with permission from the New Order Government to open major areas of the forest and cut down a large number of trees, including the giant and hardwood trees like Ulin Kalimantan trees, in a very high speed and big scale. This is to be called as an immature approach of the company that disregards *the wisdom of natural time* and conducts action on the forest in 'egoistic' manner because they do not consider *the need of the forests* for sustainability.

Secondly, the Dayak Benuaq people argue that their shifting cultivation has nothing to do with irresponsible nomadic farming. They leave a piece of land which has been farmed on purpose, in order to come back to the same land after several years. In Kalimantan, due to the richness of soil, good humidity, high amount of sunlight and rain, plants grow quickly and densely without human intervention. Some artificial forests can be found in several parts of Kalimantan. They are usually monoculture farms, thus can not complement the richness and density of the species of Kalimantan's natural forest. Therefore, by Dayak Benuaq wisdom, it is considered that in a tropical rain forest environment, *a passive method of maintaining forest*, is more appropriate. They believe that human beings can never rejuvenate nature as good as the nature itself, therefore they give the environment the chance to restore itself by moving to other land. After a period of four to seven years, the soil on the first land should be densely filled with plants again. This is the sign from the forest that the Dayak tribe can return and farm on the land.

For hundreds of years, the duration of farming usually takes about a year. Some Dayak tribes, including the people of Dayak Benuaq, usually have four to seven pieces of lands. They name the land '*belukar*' or 'a dense and diversified bush'. They farm all '*belukar*' in rotation of four to seven years for each land.

It is common to find Ulin trees growing in one '*belukar*'. Due to the prime value of the trees, Dayak people take care of their Ulin Kalimantan Trees without hesitation. In contrast to the companies who cut a large number of Ulin trees within a short period and exploit the deforested land without a break, Dayak people conducted a special ceremony dedicated to use only one Ulin tree they found in *belukar*, and let the '*belukar*', including the tree, grow again. They claimed that they burn an Ulin tree carefully because the tree will not die as long as they only burn the bark. They never fell Ulin trees together with the roots.

To summarize, Dayak people's style of shifting cultivation cannot be blamed for the deforestation and the possibility of extinction of Ulin Kalimantan trees, instead it is due to the unacceptable behaviours of irresponsible companies and, in some cases, the government who gives the companies permission to do that.

ii. Abandonment

Abandonment is a special method used by Dayak people to reserve the forest. This is probably the only way which is suitable for environmental characteristics of places like Kalimantan. However, rather than 'opening and cleaning' a part of a dense Kalimantan rain forest without pausing and then cultivating a monoculture variety instead (like government and the companies did), it is best to leave and abandon the forest, including the Ulin Kalimantan trees, to let them rejuvenate. Today, severe deforestation of Kalimantan natural rain forest has attracted critical attention. For Dayak people, it is a sign that human intervention, and especially machines, has been doing too much damage to the forest and their livelihood. It is the time to preserve the forests, abandon it with care, and give the forest and its species, including Kalimantan trees, chance to recover themselves.

iii. Limiting the Use of and Avoiding Intensive Exploitation

Traditional ways in cultivating land and cutting trees, including Kalimantan Ulin trees, are the key methods used by Dayak people to limit the risk of over exploitation. In addition, Dayak people, especially the Benuaq tribe, regard several traditional products as sacred and prohibited from sale, therefore only replicas are available for sale today. They manufacture the timbers and make utensils from the remnants of the trunk rather from the fresh, new and complete tree. Although their *Adat* requires that every *Blontang* or traditional coffin is used only once, it is actually reusable by paying a traditional fine which only costs the price of a chicken.

Dayak people have the wisdom to work and use forestry based products in a time span which is about equal or is less than the speed of the forest to grow. They do not recognise the term intensification in relation to farming. Instead, they limit the number and reduce the speed of use to stay in harmony with the forest.

iv. Conducting Special Treatments for Ulin Kalimantan Timber

Dayak Benuaq people conduct special treatments in respect to the forest, and especially to Kalimantan Ulin trees as the queen of the forest. Firstly, they perform a special ceremony called '*Mekanyahu*' when opening the forest to ask permission and give compensation to all the spirits in the forest, including the spirit of Ulin Kalimantan trees. This ceremony symbolizes their hesitation to exploit the forest, because they preserve collective and animistic fear against any possible disharmony in the forest that would affect their livelihood.

In relation to Ulin Kalimantan trees, if they cut an Ulin tree, they would cultivate the buds surrounding the trunk to make the buds grow faster. Some forests with Ulin trees are regarded as sacred or preserved forests. In the upriver, a reserved forest where Ulin trees, Kalimantan Rattan, and fish live, a '*belikunko*' or rich wetland is found. They usually avoid cutting trees in these sacred areas.

Dayak people, especially the Benuaq tribe, make unique crafts, which are known for their simplicity and fine carvings of all types of Ulin Kalimantan Timbers. Some are regarded as sacred and therefore are not for sale, some others can be duplicated and sold as exotic artistic works. To decrease the use of Ulin Kalimantan Timbers, these duplications now are being made by using other types of timbers.

3. Customary Laws and Practices on the Sustainability and the Development of Traditional Cultural Expressions, Traditional Knowledge and Related Genetic Resources in Indonesia

In Indonesia, there are more than 100 customary laws and protocols attached to about 300 Indonesian cultural communities. Based on their similar characters, all of these laws are called *Adat* Law. In the existing Indonesian legal system with the strong influence of the Continental Europe legal system, *Adat* Law is regarded as Human Rights in the last amendment of the written Constitution and an integral part of unwritten Constitution¹². In the Republic of Indonesian 1945 Constitution, *Adat* Laws' special jurisdiction is respected in article 18, while its existence as a bearer of original rights is strengthened in article 28 i concerning Human Rights of traditional communities. In this regard, *Adat* Laws system provides a legal ground for the existence of vastly varied customary institutions which represents each traditional and local community. It also provides certain mechanisms for the customary institutions to act for the welfare of the communities. Thus, customary laws and protocols enhance the fulfillment of Cultural Rights of traditional and local communities through the customary institutions.

¹² Ali Abdurrahman, Miranda Risang Ayu, Lailani Sungkar, 'The Role of National Conventions as a Legal Source of Constitutional Law in the Indonesian Governance', unpublished Research, Faculty of Laws, University of Padjadjaran, Bandung, Indonesia (2009).

The functions of customary institutions are explained in the following table:

Cultural Rights Fulfillment Functions of Customary Institutions	P o l i t i c a l A s p e c t s	E c o n o m i c A s p e c t	P s y c h o l o g i c a l A s p e c t
Agent of Traditional Democracy			
Media of Vertical Political Communications			
Horizontal Mediator			
Original Guardian of Traditional Intellectual Property Rights			
Agent of Community Empowerment			

Based on the above table, Adat Laws, through the existence of its customary institutions in the local community level, hold the rights to be the original guardian of their Traditional Intellectual Property Rights in Indonesia. They are the custodians of their own Traditional Cultural Expressions, Traditional Knowledge and related Genetic Resources in the places of their origins as well as their inhabitation.

Legal wise, it is interesting to note that regarding the protection of Traditional Cultural Expressions, Traditional Knowledge and Related Genetic Resources, there are two links to be importantly established. The two links are:

- a. Link between the objects or artefacts and the geographical areas where the objects or artefacts are originated or having their main local characters
- b. Link between the objects and their source communities, whether they are traditional community, local community, tribal people, ethnic group, or in a more general term, cultural community in national and local levels.

In this regard, as Adat Laws and Practices in Indonesia are commonly based on oral tradition, the existence of the custodians as the subjects of the protection's viability is essential. This is the main differences between the prospected protection for Traditional Intellectual Property Rights and the protection already provided in the existing communal Intellectual Property Rights,

notably, in the broad sense of Geographical Indications protection system that includes the protection of Indication of Sources. In Geographical Indication protection system, the essential links should be established is only the link between the products and their natural environments. The link with the source communities is secondary in so far the related communities live the related geographical origins.

In the case of Legong Keraton Peliatan Balinese Dance, for example, the living maestros of the dance, Anak Agung Ayu Raka Rasmi and Anak Agung Ayu Bulantrisna Djelantik, are the persons 'authorized' by their community to whom the link should be firstly referred to. They have a power to control whether their students have met the criterias to become the true Legong Keraton dancers. They also choose their successors from their offsprings, members of their community in Peliatan Village, as well as Balinese dancers outside Bali Island.

The interesting point of their existence is that, even though both are come from noble families, Anak Agung Ayu Raka Rasmi is a pure Balinese lady, while Anak Agung Ayu Bulantrisna Djelantik is actually a daughter from a Balinese father and a Dutch mother. However, they used to be the most famous and highly regarded Legong Keraton Peliatan dancers when they were young.

Now, in Peliatan, Raka Rasmi still teaches hundreds of dancers from Bali as well as from other parts of Indonesia. Quite differently, since 1994, Bulantrisna Djelantik has established a group who represents Peliatan cultural community to preserve all types of Legong Dances with their uniqueness of Peliatan style in Bali in Bandung, West Java, and in Jakarta capitol city, under the name of *Bengkel Tari Ayu Bulan* (Ayu Bulan Dance Community). While Raka Rasmi sticks to the most ancient style of the Legong, Bulantrisna Djelantik also explores collaboration with other cultural communities, such as the community of Javanese Dance maestros.

Yet, the custodianship of Legong Keraton Peliatan Balinese Dances is still strictly preserved by direct and regular quality controls by the maestros. Annually, the maestros also manage to perform parts of the dances with their chosen successors to provide living examples and spirit, even though they have already been very old in age.

Beside the quality control, the most important aspect of their custodianship is their undeniable power to enable their chosen successors to have '*taksu*'. It is strongly believed that everybody, as long as she or he is committed to learn a 'high level' Balinese dance such as Legong Keraton Peliatan, can eventually master '*wiraga*' and '*wirama*', and in certain degree, '*wirasa*'. However, the highest level of '*wirasa*' which connects the dancer with the core of the most beautiful Balinese spirit, called '*taksu*', can only be conquered by the 'true' Balinese dancer. To be able to reach this highest level of dance ability, after well mastering a dance, the dancer should follow a special Balinese Hindi ritual in Gunung Sari Temple. In this ritual, the role of the maestro is praying to God, who manifests into the spirits of God and Goddess of Balinese dancers, Panji and His Wife, to bequeath '*taksu*' for their successors. Though, whether '*taksu*' would be given or not, only God and the maestro would know. The other people will only see and feel it later, when the dancer performs the dance after the ritual. This ritual is part of Adat Laws and Practices in Balinese Hindi tradition.

4. Needs and Expectations

Following cases of how Traditional Cultural Expressions (traditional dances and songs), Traditional Knowledge (traditional medicines) and related Genetic Resources (plants, animals and viruses) of local cultural communities in Indonesia had been used improperly and without consents by parties outside Indonesia, there are major concerns in Indonesian society nowadays to have more comprehensive protections for such objects.

Indonesia has had considerably complete legal bases to protect the existing Intellectual Property Rights substantiated in Paris Convention, Berne Convention, WTO-TRIPS Agreement, Rome Convention, in many more related international conventions, and even in the Biodiversity Convention (CBD). However, it has been widely known that the main characters of the existing Intellectual Property regime do not give adequate protection for community based and traditional

Intellectual Property Rights. Except several parts of Traditional Cultural Expressions and small amounts of Traditional Knowledge and related Genetic Resources which have already enjoyed legal protection from Law Number 19 Year 2002 about Copyrights and Law Number 15 Year 2001 about Trade Marks with its Government Regulation Number 51 Year 2007 about Geographical Indications, there are hundreds more objects which are still unprotectable because all of them have still being regarded as objects in the public domain.

While Indonesia is known as one of the richest country in cultural as well as natural resources, there is still a lack of legal instruments to protect them from moral as well as financial loss caused by unjust enrichments, mostly by foreigners. These lacks have lead Indonesia to terrible conflicts, both between local cultural communities and Indonesian government, and between Indonesia as a big cultural community and other countries. In this regard, reforms of legal instruments in national and international levels are highly demanded.

a. Law Reform in National Level

The reformation in Indonesian national legal instruments should include:

- i. Endorsements of the bill of law concerning Genetic Resources, the bill of Protection of Traditional Knowledge and Traditional Cultural Expressions, and the bill of Culture. These endorsements should be followed by the amendments of other laws concerning the existing Intellectual Property Rights subject matters, and harmonizations with the contents of laws concerning environmental issues, in accordance with the contents of the bills.
- ii. Establishment of integrated database systems to defensively protect Traditional Knowledge and related Genetic Resources, Traditional Cultural Expressions, and Intangible Cultural Heritages, based on their specific characters and uses.
- iii. Intensive advocative and empowerments programs for local cultural communities who are the original right holders of their cultural and natural resources by Indonesian government based on national financial budgets as well as in cooperation with other countries or related international organizations.
- iv. Constitutional and legal mechanisms available in the case of the government fails to manage Indonesian natural and cultural resources for the best interest of the local cultural communities.

The contents of the expected endorsements of the bills of laws concerning Genetic Resources, the Protection of Traditional Knowledge and Traditional Cultural Expressions, and Culture, should also include principles as follows:

- i. Beneficiaries to be differentiated between the original right holders that include cultural communities, traditional communities (*Adat communities*), ethnic minorities and tribal peoples in the one hand, and Indonesian nation on the other hand. Indonesian nation is the evolving cultural community where all of the said original right holders rely on.
- ii. Manager of right on behalf of the original right holders to be authorized to the Indonesian government as the representation of Indonesian nation who should play the main role as the protector and facilitator of the original rights holders. As a national competent authority, Indonesian government should be able to work with local governments, other public authorities, and where appropriate, non government organizations, based on decentralisation or deconcentration of power on cultural and related natural resources managements.

b. Law Reform in International Level

The protection of Traditional Cultural Expressions, Traditional Knowledge and related Genetic Resources should be the content of legally binding instrument/instruments, which includes:

- acknowledgment that the Intellectual Property Rights upon Traditional Cultural Expressions, Traditional Knowledge and related Genetic Resources are cultural rights or basic rights of the original right holders
- compulsory Prior Informed Consent from the original right holders from potential access and use by outsiders
- compulsory financial or non financial Benefit Sharing decided for the best interest of the original right holders
- optional rights for the original right holders to use or not to use their rights
- compulsory management for the manager of rights on the advantage of the original right holders
- objects of protection should be of the living culture decided by the original right holders
- the most minimum formalities of protections, especially for the protection of Traditional Cultural Expressions.

5. The Role of the Public Domain in the Cultural Communities in Indonesia

The role of the public domain¹³ in the Indonesian cultural communities can be viewed from several ways:

- a. 'Public domain' is a space where the possessions and management of the natural and cultural resources are not held by individuals, but by the communities, or in the case of the communities are still unknown, by the government on behalf of the communities, including the residue of the space that still exist after **all** of Traditional Cultural Expressions, Traditional Knowledge and related Genetic Resources have been counted as certain forms of possession, beside individual possession.
- b. 'Public domain' is a concept based on the the existing Intellectual Property Rights, and more specifically, on the existing Industrial Property regimes, which regard the creativities of 'modern' people is peaked in the individuals' creativity only. Without disrespecting the Justice Brandeis's famous dissent in *International News Service v. Associated Press* who argued that, '*The general rule of law is, that the noblest of human productions - knowledge, truths ascertained, conceptions, and ideas -- become, after voluntary communication to others, free as the air to common use,*¹⁴' facts from the other side of the world show that 'public domain' is a concept that diminishes the existence of many cultural, traditional, local, and indigenous

¹³ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, *Note on the Meanings of the Term 'Public Domain' in the IP System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore* (WIPO/GRTKF/IC/17/INF/8) 4 December 2010.

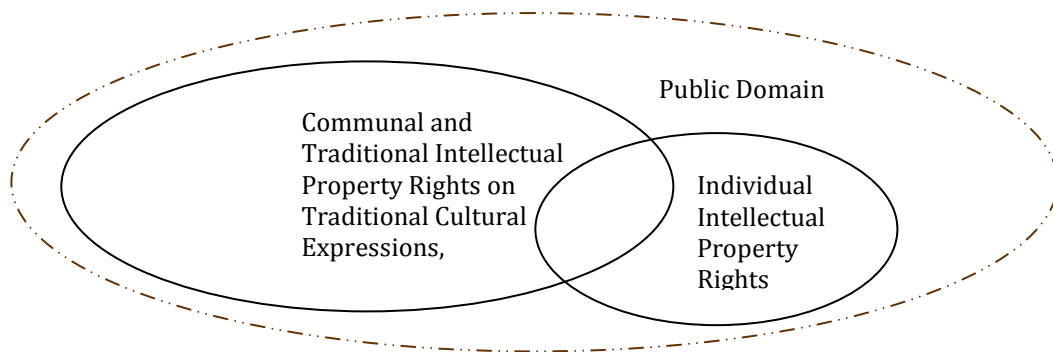
¹⁴ Pamela Anderson, 'Enriching Discourse on Public Domains' (2006) *Duke Law Journal*, 55 *Duke L.J.* 783, *see also*: 2009 Harvard Law Review Association, 'Defending and Defining Public Domain' (2009) *Harvard Law Review*, 122 *Harv. L. Rev.* 1489, *see also*: Edward Lee, 'The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property', (2003) *University of California, Hastings College of Law*, 55 *Hastings L.J.* 91.

communities and their communal ownerships. So, the doctrine of 'public domain' has an oppressive impact for the original right holders of communal properties.

So far, based on Indonesian situation, it is likely to consider the first view of public domain above as being more compatible with the importance of the protection of Traditional Cultural Expression, Traditional Knowledge and related Genetic Resources in general, while the second view is more connected with the urgency to provide specific and more reserved protection for Traditional Knowledge and the related Genetic Resources for the utmost benefits for local cultural communities as the original right holders.

6. Lessons for the Intergovernmental Committee

In short, the concept of 'public domain' should be viewed not simply as the residu of individual or private rights. Rather, it should be viewed as the residu of individual rights **and** the rights on traditional cultural expressions, traditional knowledge and related genetic resources, as drawn in the figure below:



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