

POLICIES CONCERNING SACRED AND OPEN
TRADITIONAL CULTURAL EXPRESSIONS: TOURISM
AND CREATIVE ECONOMY IN BALI CONTEXT
(KEBIJAKAN MENGENAI EKSPRESI BUDAYA
TRADISIONAL SAKRAL DAN TERBUKA:
PERSPEKTIF PARIWISATA DAN EKONOMI KREATIF
DI BALI)

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ABSTRACT

This study aims to elaborate on the policies regarding the protection of TCEs related to creative economy businesses in the tourism sector; and the implementation of these policies in Bali. The study uses a socio-legal research method by using statutes, conceptual, economic, and technological approaches. The study indicated that TCEs are transformed across generations in custodian communities that are not sacred can be categorized as open TCEs and can be developed to support tourism creative economy businesses. Meanwhile, the type of TCEs that are sacred can only be used by the community carrying them for sacred purposes, categorized as closed TCEs. The policies at the international, national, and local levels related to open TCEs have regulated access for it to be developed for creative economy businesses including the tourism sector as well as protection of benefit sharing for the community. Meanwhile, the Indonesia Copyright Law and Provisions on Communal Intellectual Property Data have not accommodated benefit sharing. In Bali, policy related to sacred TCE can be observed through the 2019 Joint Decree on the Strengthening and Protection of Balinese Sacred Dances that prohibits Balinese Sacred Dances from being performed outside of sacred purposes. The implementation of an inventory of the protection of TCEs in Bali has been carried out by the Office of the Ministry of Law and Human Rights of Bali Province in collaboration with the Regional Government in Bali including university, although has not been maximized due to the large variety of cultural expressions in the community.

Keywords: Policy; Traditional Cultural Expressions Protection; Open and Close; Tourism; Bali.

A. INTRODUCTION

Bali is one of the islands in Indonesia which has been known as one of the most well-known tourist destination. Bali is also described in several names by people who have ever been to Bali, “the Last Paradise in the World”, to name one of many. A lot of travellers from all over the world are attracted to come and visit Bali for its beautiful scenery and cultural diversity. Bali has numerous world-known places for their natural, religious, and culture, which are still preserved. As an international tourist destination, actually, the island of Bali is considered a relatively small island compared to other islands in Indonesia. Bali has 9 (nine) regions or regencies, namely Badung, Tabanan, Gianyar, Klungkung, Karangasem, Buleleng, Bangli, Jembrana, and Denpasar. Each region has its own unique tourism potential, and various interesting places, including various kinds of natural beauty such as beaches, rice fields, waterfalls, as well as religious and cultural attractions. Further, there are temples and other religious buildings that have a high spirit value and culture that are still believed by its community from generation to generation.

In Bali, the culture and its local wisdom have blended really well. Bali’s culture can be felt literally everywhere, from the airport to the hotel lobbies, and even in sacred temples. The Balinese honour their ancestors and the spirit world and perform religious rituals based on the ancient Balinese calendar. Traditional attires, such as *kebaya* and *deslar* or *udeng* are a common sight. Ever since the beginning, the type of tourism that is developed in Bali is cultural tourism inspired by Hinduism.¹ The Balinese culture and Hinduism affect almost every single aspects of life on this beautiful island. The unique mix between sacred *Hindu-Dharma* and sophisticated local customs and culture transforms in various art masterpieces that can be found in every corner of Bali.

The development of tourism in Bali which is being supported by its culture brings advantages to the Balinese. There is plenty of creative economy businesses in Bali which originated from the Balinese culture. Even though some areas in Bali are very tourism-oriented and mass tourism in Bali has thrived for many decades now, the Balinese have kept their unique and beautiful culture alive and vibrant. This condition indicates that culture has become part of Balinese life. Thus, Balinese culture becomes one of the most dominant attractions in the development of Bali tourism. Culture is Bali’s defining feature, and Balinese culture is renowned for its dynamic resilience. Balinese culture has become the most dominant attraction in the development of tourism in Bali. Therefore, Bali is also known for its Cultural Tourism that is based on the Balinese culture animated by the teaching of Hinduism and the philosophy of *Tri Hita Karana*² in order to maintain synergy, harmony, and sustainable relation welfare to the community, cultural, and environmental sustainability. The basic values of the *Tri Hita Karana* imply a balance relationship between human and God, human and fellow humans, as well as human and nature.³

The uniqueness and distinctiveness of Balinese culture that has developed from ancestral heritage can be categorized as the work of ancestors passed down from generation to generation to their descendants, it is usually referred to as Traditional Cultural Expression (hereinafter referred to as TCE or TCEs) or in Bahasa is known as *Ekspresi Budaya Tradisional* or EBT. The existence of TCE shall be protected by law, bear in mind that these intellectual works not only reflect cultural diversity but it also contains great economic value, including the sacred values that are still recognized and believed by its community.

¹Mudana, I. G., Ernawati, N. M., & Voda, M. (2021). Analysis of the Evolving Cultural Tourism Implementation in Bali Indonesia. *Multicultural Education*, 7(6). p. 609.

²Hendrik, P. J., & Wardana, W. (2014) *Discovering the Spirit of Bali* in Michael Gerbert Faure et.al., *Sustainable Tourism and Law*. The Hague: Eleven International Publishing. p 25.

³Hendrik, P. J., & Wardana, W. (2013). *Tri Hita Karana: The Spirit of Bali*. Gramedia, Jakarta. p. 12.

In Indonesia, the protection of TCE is regulated under Law No. 28 of 2014 concerning Copyright (hereinafter referred to as Copyright Law). Generally, TCE includes any artistic or traditional expressions, both tangible and intangible. It comes from individual or communal creativity that shows the characteristic and the identity of a specific community, which still maintained, used or developed by the community.

Further, TCE is also known as a culture born from a community group and passed down from generation to generation, such as music, dances, songs, handicrafts, games, designs, rituals, folklore, and other art forms.⁴ In the context of creative economy business in the tourism sector, it has been acknowledged that TCE plays a strategic role to support the development of tourism, especially in Bali.⁵ Various policies and regulations have been issued in order to support the protection of TCE related to creative economy business. Following the development of the creative economy business, it is important to be highlighted that there are TCEs that cannot be used commercially because of the sacred values contained. These types of TCEs can only be used for a specific purpose such as religious purposes. However, there is no specific regulation that classifies TCEs into so called “sacred” or “not sacred” TCEs. The classification of sacred or not sacred TCE can only be found out after carrying the inventory process. Therefore, it is important to examine the legal issue related to the protection of TCE, particularly sacred ones related to creative businesses in the tourism sector in Bali.

The purpose of this study was to identify, analyze and elaborate the policies that regulates the protection of Traditional Cultural Expressions related to creative economy businesses in the tourism sector from International, Indonesia and Bali level. Further, the study also examined the implementation of the protection of TCEs related to creative economy businesses in the tourism sector in Bali Province. Therefore, the writing will discuss relevant substances in a structured and systematic way. Initially, it is discussed the policies regulates the protection of TCEs related to creative economy businesses in the tourism sector from International, Indonesia and Bali level. In addition, it is also discussed about the implementation on the protection of TCEs related to creative economy businesses in the tourism sector in Bali Province.

Compared to the previous studies, this writing has similarities in terms of topics, which discusses the protection of TCE, however, it has a different focus of study. In 2018, Dyah Permata Budi Asri conducted research concerning “Legal Protection of Traditional Cultural Expression as a Regional Asset in Yogyakarta”.⁶ The study mainly discussed the legal protection of TCE in Yogyakarta, which has tangible and intangible cultural diversity that considered as a tourist destination. In 2022, Nenny Dwi Ariani, Rohaini, and Sunaryo conducted similar research concerning “Legal Protection of Traditional Cultural Expression as a Copyright in Indonesia”.⁷ The study mainly discussed the form of the legal protection of TCE as copyrights. Meanwhile, this writing is focused on the policies regulates the protection of TCEs related to creative economy businesses in the tourism sector from International, Indonesia and Bali level, as well as the implementation on the protection of TCEs related to creative economy businesses in the tourism sector in Bali Province. Thus, this study is important to be conducted in the article entitled “Policies Concerning Sacred and Open Traditional Cultural Expressions: Tourism And Creative Economy In Bali Context”.

⁴Blakeney, M. (2015). Protecting Knowledge and Cultural Expressions of Aboriginal Peoples. *UW Austl. L. Rev.*, 39, 180. p. 184-185.

⁵ Dharmawan, N. K. S., Kasih, D. P. D., Dewi, A. A. A. A., Kurniawan, I. G. A., Pranajaya, M. D., Resen, G. M. S. K., & Sutrisni, N. K. E. (2019). Protecting Balinese Culinary Innovation Through Patent Law. *International Journal of Innovation, Creativity and Change*, 9(10), 116-126. p. 122.

⁶ Asri, D. P. B. (2018, July). Legal Protection of Traditional Cultural Expression as a Regional Asset in Yogyakarta. In *1st International Conference on Indonesian Legal Studies (ICILS 2018)* (pp. 100-104). Atlantis Press.

⁷ Ariani, N. D. (2022, January). Legal Protection of Traditional Cultural Expression as a Copyright in Indonesia. In *Universitas Lampung International Conference on Social Sciences (ULICoSS 2021)* (pp. 082-083). Atlantis Press

B. RESEARCH METHOD

This is a socio-legal research that examines both text and context. In this case, the study of the text is in the form of legal text that is in the form of the text of legislation combined with the study of the context that is to examine the implementation of the law in the community. Brian Z Tamanaha states that the relationship between law and the community is under a frame called “the Law-Society Framework” with some distinct characteristics.⁸ The study uses several approaches namely the statutory approach, conceptual approach, economic, technological, and facts approaches. The technique of collecting legal materials is done by collecting, inventorying legal material, and recording in detail related to the subject matter discussed, including deep interviewing key persons and maestros for the empirical research.

C. RESULT AND DISCUSSION

1. The Policies Regarding the Protection of Traditional Cultural Expressions Related to Creative Economy Businesses in the Tourism Sector

TCEs also known as “expressions of folklore”.⁹ It may include dance, art, music, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or other artistic or cultural expressions.¹⁰ TCEs may be considered as part of the identity and heritage of a traditional or indigenous community that are passed down from generation to generation.¹¹ They are integrated with the culture and social identity of its community or custodians, embody know-how and skills, and transmit core values and beliefs. In Indonesia, the protection of TCEs is regulated under the copyright regime.¹² According to the provisions of the Copyright Law, the protection of works that are related to communal and traditional values, are provided in the form of TCE. The protection is regulated in Article 38 paragraph (1) of the Copyright Law. Constitutionally, the protection against traditional values has been guaranteed and recognized in the provision of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (*hereinafter* the 1945 Constitution), which stipulated that¹³, “The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.”

Further, Article 28I paragraph (3) of the 1945 Constitution also stipulated that: “The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations”.¹⁴ The provisions of Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution emphasize the recognition of the traditional communities and their rights as long as it remains alive and in accordance with the development and the prevailing law in Indonesia. It means that the States has recognized and provided legal protection as well as recognition of TCE as a part of the traditional rights and cultural identities of the traditional community.

⁸Brian Z. Tamanaha. (2006). *A General Jurisprudence of Law and Society*. New York: Oxford University Press. p. 3-4.

⁹ Carugno, G. (2018). How to protect traditional folk music? Some reflections upon traditional knowledge and copyright law. *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique*, 31(2), 261-274.

¹⁰ Santyaningtyas, A. C., & Noor, M. Z. M. (2016). Preserving Of Traditional Culture Expression in Indonesia. *Asian Social Science*, 12(7), 59-65. p. 60.

¹¹ Dharmawan, Ni Ketut Supasti. “Protecting Traditional Balinese Weaving Through Copyright Law: Is It Appropriate?.” *Diponegoro Law Review* 2, no. 1 (2017): 57-84. p. 58.

¹² Purwandoko, P. H., Sulistiyono, A., & Hawin, M. (2021). The Implementation of the Traditional Cultural Expression (TCE) Protection in Indonesia Based on Article 38 Law Number 28 of 2014 regarding Copyright. *Indonesian Journal of International Law*, 18(4), 543-570. p. 550.

¹³ Nurdin, Fransiskus Saverius. (2019). “Kewajiban negara mengakui dan menghormati masyarakat hukum adat sebagai entitas dasar pembentuk peradaban bangsa.” In *Seminar Nasional Inovasi dalam Penelitian Sains, Teknologi dan Humaniora-InoBali*, pp. 1005-1020. 2019. p. 1007.

¹⁴ Burhanudin, Achmad Asfi. “Eksistensi Hukum Adat di Era Modernisasi.” *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 2, no. 4 (2021): 96-113. p. 106.

Protection for TCE is provided in the copyright regime bear in mind that the creation of a TCE is closely related to the creativity that comes from human intellect in the fields of knowledge, literature and art which is then realized in tangible form, hence it can be seen, read, heard and so on. Protection of TCE is an opportunity for the customary law community throughout Indonesia to preserve intellectual works that have been passed down from generation to generation. TCE is important to be protected considering that the existence of TCE has traditional values, noble norms, and a strong culture that grows, lives, develops, and is trusted by the customary law community as a local community.¹⁵ Hence, TCEs are considered a communal right. Further, some of TCEs are transmitted from generation to generation without any information related to the creator, therefore there is no certainty about the originality of the work.¹⁶

In the context of creative economy business in the tourism sector, it has been acknowledged that TCEs play a strategic role to support the development of tourism, especially in Bali. Various policies and regulations have been issued in order to support the protection of TCEs related to creative economy business. TCEs that can be used to support business activities, including tourism creative economy business, are TCEs classified as “open” TCEs or TCEs that do not contain sacred values. On the other hand, there are some TCEs that cannot be used commercially because of the sacred values contained, which are classified as “closed” TCEs. These types of TCEs can only be used for specific purpose such as religious purposes. The terms of “open” and “closed” TCEs cannot be found explicitly under the wordings of the laws and regulations, but those are terms that are used to indicate the availability of TCEs whether it can be used for commercial purposes or not. Also, it is important to highlight that this TCEs classification of sacred (closed) or not sacred (open) TCE can only be found out after carrying the inventory process.

One of the many tourism creative economy businesses that are most helped by the existence of these open TCEs is Micro Small and Medium Enterprises (hereinafter referred to as MSMEs) engaged in the tourism sector. Along with the times, MSMEs in Indonesia have been able to grow, develop and enliven the business world in the midst of the presence of large companies such as various Multi-National Corporations.¹⁷ In developing tourism, cultural adaptation may arise. The host needs to adopt some elements of tourist culture to meet the needs of tourists.¹⁸ In this context, it is very possible for TCE to be adapted for products and also be developed into a creative economy in order to meet the needs of tourists, it should be done wisely so as not to damage the values of the TCE

Government Regulation Number 7 of 2021 concerning Convenience, Protection and Empowerment of Cooperative and MSMEs (hereinafter referred to as Government Regulation on MSMEs) can be used to refer the definition and classification of MSMEs. According to Article 35 (1) of Government Regulation on MSMEs the grouping of MSMEs is based on business capital or annual sales results. Micro enterprise is business that has a business capital of up to a maximum of Rp. 1 (one) billion, excluding land and buildings for business premises (Article 35 (3)(a) of Government Regulation on MSMEs). Small business is business that has a business capital of more than IDR 1(one) to 5 (five) billion, excluding land and buildings for business premises (Article 35 (3)(b) of Government Regulation on MSMEs). Meanwhile medium enterprise is business that has a business capital of IDR 5 (five) to 10 (ten) billion, excluding land and buildings for business premises (Article 35 (3)(c) of Government Regulation on MSMEs).

¹⁵ Purwandoko, P. H., Sulistiyono, A., & Hawin, M. *Op. cit.*, p. 557

¹⁶ *Ibid.*, p. 555

¹⁷ Ni Ketut Supasti Dharmawan, *et.al.* (2021). *Hukum Kepariwisata Kekayaan Intelektual dan UMKM*. Denpasar: Swasta Nulus. p.102.

¹⁸ Yvette Reisinger. 2009. *International Tourism Cultures and Behavior*. USA, Butterworth-Heinemann Elsevier. p.80.

In the international level, legal instrument that promotes the TCEs protection is WIPO/GRTKF/IC/40/19. According to the WIPO/GRTKF/IC/40/19, TCEs can be defined as any form of traditional culture practice and knowledge are expressed, manifested, as the result of intellectual activity or experience by indigenous peoples, local communities, and/or other beneficiaries, in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.¹⁹ The protection of TCEs is provided in order to support appropriate use and effective, balanced and adequate protection, as well as recognizing and respecting the rights and interest of the custodians.

Following the provisions of Article 5 of the WIPO/GRTKF/IC/40/19, it can be seen that TCEs fall into three classifications, namely: 1) Sacred TCEs; 2) Publicly Available but not commonly known sacred; and 3) Publicly Available, widely accessible, and in the domain public. The States must offer legal protection to retain, control, and develop the protected TCEs if they are considered sacred, secret, or tightly held by indigenous peoples or the local community.

The States must also stop the illegal usage of these TCEs as well as the unauthorized disclosure and fixing of them. In order to support the protection of sacred TCEs, the State must encourage users to credit the protected TCEs to the beneficiaries, use all reasonable efforts to reach an agreement with the beneficiaries to establish terms of use for the protected TCEs, and use the knowledge in a way that respects both the inalienable moral rights associated with the protected sacred TCEs as well as the cultural norms and practices of the beneficiaries. Any use of the protected TCEs must therefore be approved by the beneficiaries based on their free, prior, and informed permission or approval of their participation and on terms that have been mutually agreed upon.

On the other hand, the protection of protected TCEs that are still held, maintained, used, and/or developed by indigenous people or local groups and that are publicly accessible but neither widely recognized nor sacrosanct was also underlined in the WIPO/GRTKF/Article IC/40/19's 5 Provision. According to the provision, it is known that the States shall encourage users to: (a) "Attribute and acknowledge the beneficiaries as the source of the protected TCEs, unless the beneficiaries decide otherwise, or the protected TCEs is not attributable to a specific indigenous people or local community; (b) Use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected TCEs; (c) Use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable nature of the moral rights associated with the protected TCEs; and (d) Refrain from any false or misleading uses of the protected TCEs, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries".

Additionally, the State shall encourage the user to: (a) "Attribute said protected TCEs to the beneficiaries; (b) Use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable nature of the moral rights associated with the protected TCEs; (c) Refrain from any false or misleading uses of the protected TCEs in the event that the protected TCEs are widely known, widely available, and in the public domain.

It is clear from the foregoing that, in accordance with the WIPO/GRTKF/IC/40/19, TCEs can be divided into three categories: 1) Sacred TCEs; 2) Publicly Available but not commonly known sacred; and 3) Publicly Available, widely accessible, and in the domain public. The States must offer legal protection to retain, control, and develop the protected TCEs if they are classified as sacred, secret, or closely held by indigenous peoples or the local community. The

¹⁹ WIPO, The Protection of Traditional Cultural Expressions: Draft Articles URL: https://www.wipo.int/edocs/mdocs/tk/wipo_grtkf_ic_40/wipo_grtkf_ic_40_19.pdf, accessed on 3 October 2022

States must also stop the illegal usage of these TCEs as well as the unauthorized disclosure and fixing of them. Meanwhile, the State shall encourage the user to attribute the protected TCEs if the TCEs are deemed generally available, well recognized, or in the public domain..

Following the WIPO/GRTKF/IC/40/19, Indonesia also regulates the protection of TCEs related to creative economy business in tourism sector in several regulations, both in national and local levels. Nationally, the protection is regulated under Law No. 5 of 2017 concerning Advancement of Culture (hereinafter referred to as the Law on Advancement of Culture), Law No. 20 of 2008 concerning Micro, Small, and Medium Enterprises (hereinafter referred to as MSMEs Law), Government Regulation on MSMEs, Law No. 10 of 2009 concerning Tourism (hereinafter referred to as Tourism Law), Copyright Law and the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 13 of 2017 concerning Communal Intellectual Property Data (hereinafter referred to as *Permenkumham* 13/2017). Regionally, the protection of TCEs related to creative economy business is regulated under the Bali Provincial Regulation No. 4 of 2020 concerning Strengthening and Advancing Balinese Culture (hereinafter referred to as Bali Provincial Regulation 4/2020), Bali Provincial Regulation No. 2 of 2012 on Bali Cultural Tourism (hereinafter referred to as Bali Provincial Regulation 2/2012), and Joint Decree of the Head of Bali's *Parisadha Hindu Dharma Indonesia*, *Bendesa Agung* of Bali's Customary Village Assembly, Head of Balis's Council for Consideration and Cultural Development No: 117/PHDI-BALI/IX/2019, No: 005/MDA.Prov. Bali/IX/2019, No: 08/Lišt/2019, No: 431/8291/DISBUD/2019, No: 2332/ITS.5.2/KS/2019 on the Strengthening and Protection of Balinese Sacred Dances (hereinafter referred to as Joint Decree on Balinese Sacred Dances).

Regulations related to the use of culture that are related to TCE are precisely regulated in the Law on the Advancement of Culture. Pursuant to the provision of Article 5 of the Law on the Advancement of Culture, it can be seen that there are several objects that shall be protected as the object of Advancement of Culture, namely:²⁰ (a) Oral traditions; (b) Manuscripts; (c) Customaries; (d) Rites; (e) Traditional knowledge; (f) Traditional technology; (g) Arts; (h) Languages; (i) Folk games; and (j) Traditional sports. Further, the Law on Advancement of Culture also emphasizes the commercial use of objects for the promotion of culture, which is stipulated under the provision of Article 37 paragraph (1) of the Law on the Advancement of Culture.²¹ According to the provision of Article 37 paragraph (1) of the Law on the Advancement of Culture, it is stipulated that, "Major industry and/or foreign party that will Utilize Objects of Advancement of Culture for commercial purposes must have a license for the Utilization of Objects of Cultural Advancement from the Minister."

The provisions as referred to in Article 37 of the Law on the Advancement of Culture emphasize the use for commercial purposes by major industries and/or foreigners of the object of advancement of culture, which includes TCE that is closely related to the licensing process, including but not limited to the inclusion of the origin of TCE and the sharing of benefits, also known as benefit sharing.²² Furthermore, provisions of Article 37 paragraph (2) of the Law for the Advancement of Culture states that the utilization permit for large industries must meet the following requirements: (a) having the approval based on informed consent; (b) having benefit-sharing scheme; and (c) acknowledging the origin of the Objects of Advancement of Culture. Further, related to the distribution of benefits or benefit sharing on the commercial

²⁰ Sardjono, A. (2017). Artikel Kehormatan: Symphonizing Intellectual Property Laws in the Advancement of Culture. *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)*, 4(3), 437-453. p. 439.

²¹ Sari, Nuzulia Kumala, and Dinda Agnis Mawardah. "SISTEM PENDATAAN KEBUDAYAAN TERPADU ALTERNATIF PERLINDUNGAN HUKUM EKSPRESI BUDAYA TRADISIONAL." *Jurnal Legislasi Indonesia* 18, no. 3 (2021): 405-418. p. 415.

²² Herzani, Andhika Putra. "PERAN PEMERINTAH DALAM MENGINVENTARISASI EKSPRESI BUDAYA TRADISIONAL INDONESIA." *Jurnal Hukum & Pembangunan* 50, no. 4 (2021): 954-976. p. 972.

use of TCE is regulated under the provisions of Article 37 paragraph (3) of the Law on the Advancement of Culture, which stated that, “The Central Government must use the shared benefits as referred to in section (2) letter b to vitalize and sustain the ecosystem related to the Objects of Advancement of Culture.” Those provisions emphasize the protection of copyright on the TCE which is communal, hence, all the benefits derived from the use of the TCE must be used to revive and maintain the related TCE ecosystem. In this regard, it can be understood that benefit sharing is considered as a communal right that is used to support efforts to maintain the existence of TCE. Further, a permit for the utilization of the TCE as an object of cultural advancement, if it is going to be used commercially by major industries and/or foreign parties. This permit is issued by the Minister. There are several requirements that need to be fulfilled, inter alia: a) approval for initial information; b) benefit sharing; and c) the inclusion of the origin of the object of cultural promotion. Following the issuance of the permit, the Law on the Advancement of Culture also regulates the distribution of benefits. According to the provision of Article 37 paragraph (3) of the Law on the Advancement of Culture, it has clearly determined that the proceeds from the distribution of benefits are used to vitalize and sustain the ecosystem of the Object for the Advancement of Culture, including TCE.

Similar idea that support the protection of TCEs related to creative economy business in the tourism sector is also provided under the Tourism Law. According to the provision of Article 4 of the Tourism Law, tourism affairs shall be intended to promote the culture, to name one of many.²³ Following the idea to promote the culture in the tourism sector, the provision of Article 5 of Tourism Law also regulates that the tourism affairs shall be held with several principles, such as: (a) “highly uphold the religious norms and cultural values as the manifestation of the life concept in the balance of the human being and God Almighty relationship, inter-human being relationship, and inter-human being and environment relationship; (b) highly uphold the human rights, cultural diversity, and local wisdom; (c) provide benefits for the people’s welfare, justice, equality, and proportionality; (d) preserve nature and environment; (e) empower the local communities”, etc.

Pursuant to Article 26 of the Tourism Law, it can be seen that every tourism business shall maintain and respect the religion, custom, cultural, and values norm in the local community.²⁴ According to this provision, it is known that every tourism business, which include the actors of creative economy business in the tourism sector are oblige to maintain and respect the religion, custom, cultural, and values in the local community, which might be categorized as TCEs. Further, according to the Article 31 of the Tourism Law, it is known that for every individual, tourism organizations, government agency, as well as business entity having extraordinary achievement or having significant service in its participation to increase the development, pioneering, and dedication in the tourism sector that is able to be proven by the concrete fact shall be provided with appreciation. The appreciation may be in the form of certification, money, or another useful form of appreciation.

In addition, the idea of the protection of TCEs is stipulated under the *Permenkumham* 13/2017. This regulation also emphasizes the protection of TCE as communal intellectual property under copyright regime.²⁵ According to the provision of Article 1 point 1 of the *Permenkumham* 13/2017, it is stipulated that, “Communal Intellectual Property, hereinafter abbreviated as KIK, is intellectual property in the form of traditional knowledge, traditional cultural expressions, genetic resources, and potential geographic indications.” In particular, the

²³ Oktaviarni, F. (2018). *Perlindungan Hukum Terhadap Wisatawan Menurut Undang-Undang Nomor 10 Tahun 2009 Tentang Kepariwisataaan*. Wajah Hukum, 2(2), 138-145. p. 141.

²⁴ *Ibid.* p. 142.

²⁵ Martini, Dwi, Budi Sutrisno, Ahmad Zuhaeri, and Yudhi Setiawan. “Urgensi Perlindungan Kekayaan Intelektual Atas Motif Kain Tenun Lombok Dalam Rangka Meningkatkan Pemberdayaan Perempuan Adat di Desa Sukarara.” *Prosiding PE-PADU* 3 (2021): 455-464. p. 456.

definition of TCE is emphasized in the provisions of Article 1 point 4 of the *Permenkumham* 13/2017 which stipulates, “Traditional Cultural Expressions are all forms of expression of copyrighted works, both in the form of objects and intangibles, or a combination of both that indicate the existence of a traditional culture that is held communally and across generations.” Following the provisions of the *Permenkumham* 13/2017, it can be understood that inventory is the essential thing to be implement in protecting TCEs. The inventory process shall be carried out by the Minister as a defensive protection or a prevention step toward protection of TCE. In carrying out such process, the Minister shall work hand-in-hand with other institutions and/or Regional Government. The inventory process can be carried out in various ways, namely: (a) field/feasibility studies; (b) administrative requirements; (c) proposing the determination of the results of the inventory; and/or (d) data exchange”.

Regarding the inventory process, all the stakeholders are obliged to fill out a form, namely the Inventory Form of Communal Intellectual Property. There are two things shall be prepared in filling out the Inventory Form, namely: (a) Valid data related to the existence of the TCE in concern; (b) There should be a description of the TCE work that is supported by other documentation, for instance in a written form (books or journals), photos or videos. According to the Article 9 of the *Permenkumham* 13/2017, it is known that there are several data that need to be completed in the process of inventorying TCE, namely: (a) Name or Identity of the TCE; (b) Custodian; (c) Form of TCE; (d) Classification; (e) Area/location; and (f) Description. Based on *Permenkumham* 13/2017, it can be seen the importance of inventory as a defensive protection. However, this regulation only regulates about inventorying, none of the provision mention about benefit sharing, even though it is already known that there are plenty of creative economy business, especially those in tourism sector are utilizing TCE as the source of their income.

In regional level, specifically in Bali, there are various regulations that promotes the protection of TCEs. Bali Provincial Regulation 4/2020 for example, although not explicitly mention TCEs, but the objects of the strengthening and advancing of Balinese Culture stated in Article 7 (1) letters (b),(k),(l),(n),(o) and (r) (each in sequence is rites, art, traditional architecture, folk game, traditional sport, and clothing) of this regulation falls into form of expression categorized as TCEs under the *Permenkumham* 13/2017. Furthermore, the Joint Decree on Balinese Sacred Dances prohibits Balinese Sacred Dances from being performed outside of sacred purposes. This joint decree is equipped with Annex which lists various names of Balinese dances categorized as sacred dances. The annex also provides space for other sacred Balinese dances (which are an integral part of rites, ceremonies and *upakara* performed in various temples and customary village areas) that have not been specifically mentioned in the annex to be later also included as sacred dances that should not be performed/ shown outside of sacred purposes (Hindu rituals and ceremonies). Bali Provincial Regulation 2/2012 focuses more on Balinese cultural tourism, such as regulation on the implementation of Balinese cultural tourism and various aspects closely related to such activity.

Based on the abovementioned, it can be seen that the protection of TCEs has been provided in international, national and regional level. Further, there are TCEs that can be used commercially, which known as Open TCE and there are TCEs that can only be used for sacred purposes. Pursuant to the policies regarding the protection of TCE related to creative economy businesses in the tourism sector abovementioned, it is indicated that the State shall encourage the user to attribute the protected TCEs to the beneficiaries, to use it in a manner that respects the cultural norms, and if applicable, deposit any user fee. Following this idea, then every tourism business shall maintain and respect the religion, custom, cultural, and values norm in the local community hence, all the benefits derived from the use of the TCE must be used to revive and maintain the related TCE ecosystem.

2. The Implementation Regarding the Protection of Traditional Cultural Expressions Related to Creative Economy Businesses in The Tourism Sector in Bali Province

Following the regulations concerning TCEs, it has been stated clearly that inventory is essential to be carried out as a defensive protection of TCEs. Defensive measure focuses on preventing TCEs from being lost or extinct²⁶. In Bali, the implementation regarding the protection of TCEs related to creative economy businesses, especially in the tourism sector has been carried out by conducting inventory process in several regions that has TCEs. However, it has not been maximized due to the large variety of cultural expressions in the community. According to the Annual Report of 2020 concerning Intellectual Communal by the Directorate General of Intellectual Property,²⁷ Tenun Endek Bali, to name one of many TCE that has been record as TCE under the recordation number EBT.12.2020.0000085.²⁸ Tenun Endek Bali has been known as woven fabric that also considered as a form of identity and cultural artifacts.²⁹ Historically, it has existed since the 18th century, but its development has only begun around the 80s. The origin of Tenun Endek Bali is in Gelgel Klungkung during the reign of King Dalem Waturenggong who develops it in the Klungkung area, especially in Sulang Village.³⁰

Initially, Tenun Endek Bali is commonly used by Balinese people while performing various rituals in temples.³¹ At the beginning of the 18th century, Tenun Endek Bali becomes a status symbol that was worn by the nobles and certain people at that time.³² During its development, Tenun Endek Bali slowly transform to become one of the main sources of creative economy business in tourism sector. Various souvenirs were produced by utilizing Tenun Endek Bali. The weaving process of Tenun Endek Bali is strongly influenced by religion and cultural values. Several weaver believe that the process shall not be conducted when the weaver is having her period, some also believe that the process can only be carried out on Full Moon (*Purnama*), Dead Moon (*Tilem*), or major holidays such as Galungan and Kuningan Days, from *Sugihan* Day to *Soma Pemacekan Agung*.³³

Referring to those values, it can be seen that cultural aspects were implemented in Tenun Endek Bali and it has been passed down from generation to generation. Further, the existence of Tenun Endek Bali not only been used for religious purposes only. With the development of creative economy business, the uniqueness of Tenun Endek Bali turn out to be able to attract the attention of one of the world-class fashion houses from France, Christian Dior Couture, S.A (*hereinafter* Christian Dior).³⁴ The interest shown by Christian Dior has succeeded in bringing Tenun Endek Bali to be known internationally even during the Covid-19 pandemic, hence they are able to help the lives of the weaver that affected by the pandemic. Moreover, it also contribute to promote Tenun Endek Bali as one of the TCE from Bali, therefore more people

²⁶ Kholis Roisah. (2021). *Perlindungan Ekspresi Budaya Tradisional: Perspektif Hukum Internasional dan Nasional*. Semarang: Yoga Pratama. p.30.

²⁷ Direktorat Jenderal Kekayaan Intelektual. (2020). Laporan Tahunan Direktorat Jenderal Kekayaan Intelektual Tahun 2020, URL: <https://dgip.go.id/unduh/laporan-tahunan?tahun=2020>, accessed on 3 October 3, 2022.

²⁸ *Ibid.*

²⁹ Dharmawan, N. K. S. (2017). *Op. cit.*, p. 71.

³⁰ Radiawan, I. M., Sudharsana, T. I. R. C., & Diantari, N. K. Y. (2022). Application of Balinese Ornament (Keketusan Kakul-Kakulan) In Endek Woven Fabric with Airbrush Technique for Evening Dress. *Journal of Aesthetics, Design, and Art Management*, 2(1), 73-86. p. 77.

³¹ Direktorat Jenderal Kekayaan Intelektual. Endek Bali, URL: <https://kikomunal-indonesia.dgip.go.id/jenis/2/pengetahuan-tradisional/29232/endeck-bali>, accessed on 3 October 2022.

³² Denpasar Viral. (2021). Filosofi dan Sejarah Kain Endek Bali, Wastra yang Dipakai Dalam Koleksi Christian Dior, URL: <https://denpasarviral.com/2021/01/22/filosofi-dan-sejarah-kain-endeck-bali-wastra-yang-dipakai-dalam-koleksi-christian-dior/>, accessed on 3 October 2022.

³³ Direktorat Jenderal Kekayaan Intelektual. Endek Bali, URL: <https://kikomunal-indonesia.dgip.go.id/jenis/2/pengetahuan-tradisional/29232/endeck-bali>, accessed on 3 October 2022.

³⁴ Pemerintah Provinsi Bali. (2021). Kain Tenun Endek Bali Mendunia di Masa Pandemi Covid-19, URL: <https://www.baliprov.go.id/web/kain-tenun-endeck-bali-mendunia-di-masa-pandemi-covid-19/>, accessed on 3 October 2022.

will find out about Bali. It shows that TCE does have huge potential in supporting creative economy business, including tourism sector.

Further, knowing the potential of Tenun Endek Bali as TCE in supporting creative economy business, then the State shall encourage user to attribute the protected TCEs to the beneficiaries, to use it in a manner that respects the cultural norms, and if applicable, deposit any user fee, as stipulated under the WIPO/GRTKF/IC/40/19. Similar to this provision, the provisions of Article 26 of the Tourism Law, it can be seen that every tourism business shall maintain and respect the religion, custom, cultural, and values norm in the local community. According to this provision, it is known that every tourism business, which include the actors of creative economy business in the tourism sector are obliged to maintain and respect the religion, custom, cultural, and values in the local community. Further, the provision of Article 37 of the Law on the Advancement of Culture emphasize the use for commercial purposes by major industries and/or foreigners of the object of advancement of culture, which includes TCE that is closely related to the licensing process, including but not limited to the inclusion of the origin of TCE and the sharing of benefits, also known as benefit sharing.³⁵ However, there are still Tenun Endek Bali that can only be used for ritual purposes only, such as Traditional *Endek* weaving with motive of Traditional *Endek* weaving with motive of *Kapu Kapu orti* ornament, which developed in Jembrana.³⁶

Directorate General of Intellectual Property also classifies several TCEs as sacred TCE. According to the data from Directorate General of Intellectual Property, Bali has several sacred TCEs, for instance, *Tari Rejang Pande Suci Wedana Tihingan*³⁷ and *Drama Tari Wayang Wong Pura Taman Pule Desa Adat Mas, Ubud – Gianyar*. *Tari Rejang Pande Suci Wedana Tihingan* is a sacred dance from Bali that was created on a sacred ceremony named *Karya Ngenteg Linggih/Karya Utama* in *Pura Penataran Dalem Pande Urip Wesi*.³⁸ This TCE was not created intentionally by the custodian. The process started when one of the *Pemangku* (holy men) *Pamucuk* in *Pura Penataran Dalem Pande Urip Wesi* received “*pawisik*” or vision called “*Rejang pinaka Penyucian*” from *Ida Betara Kawitan*.³⁹ *Tari Rejang Pande Suci Wedana Tihingan* can only be performed in *Pura Pande* by women with cast “*Pande*”.⁴⁰

In 2022, another research has been conducted by Faculty of Law, Udayana University, the Regional Government of Gianyar and the Custodian of *Drama Tari Wayang Wong Pura Taman Pule Desa Adat Mas, Ubud – Gianyar*. According to the research, it can be seen that *Drama Tari Wayang Wong Pura Taman Pule Desa Adat Mas, Ubud – Gianyar* is classified as a TCE that contains religion, custom, cultural, and values norm of its custodian. Further, based on the interviews with the maestros, it is known that *Drama Tari Wayang Wong Pura Taman Pule Desa Adat Mas, Ubud – Gianyar* can only be performed for sacred purposes only and it can only be performed by the custodian of this TCE. Hence, it shall be classified as sacred TCE as well.

Following the inventory of TCE, the Office of the Ministry of Law and Human Rights of Bali Province has carried it out in collaboration with the Regional Government in Bali. This collaboration also involved Udayana University, specifically Faculty of Law Udayana University, to name one of many universities involved. During the inventory process, it can be seen that there are two classification to indicate TCEs, namely 1) Sacred TCE known as Closed TCE and 2) Not Sacred TCE known as Open TCE. TCEs that are transformed across

³⁵ Herzani, Andhika Putra. *loc. cit.*

³⁶ Dharmawan, Ni Ketut Supasti., *op. cit.* p. 80

³⁷ Direktorat Jenderal Kekayaan Intelektual . *Tari Rejang Pande Suci Wedana Tihingan*, URL: <https://kikomunal-indonesia.dgip.go.id/jenis/1/ekspresi-budaya-tradisional/2351/tari-rejang-pande-suci-wedana-tihingan>, accessed on 5 October 2020.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

generations in custodian communities that are not sacred can be categorized as open TCE. This kind of TCE can be developed to support tourism creative economy businesses. Meanwhile Sacred TCE, which also known as Closed TCE that are sacred in nature can only be used by the community carrying them for sacred purposes. This kind of TCE shall not be used commercially. In order to find out whether a TCE is sacred or not, it is important to conduct study in-depth related to the TCE itself. There are several steps that have been carried out during the inventory process, such as: (a) Finding data or sources directly from the custodian; (b) In-depth interview with key respondents; (c) Double check with the relevant TCE's maestros; (d) Determining the relevant maestros; (e) Classifying TCE as open or closed.

There are several obstacles arose during the inventory process, such as: (a) There is no sufficient written resources; (b) There is no proper description concerning the TCE; (c) There is no specific time stated regarding the forming of TCE, and (d) Some TCE came from unknown authors but still being preserve and maintain by the custodian. Fortunately, all the obstacles could be overcome by implementing socio-legal research. The main concern of socio-legal research is to keep harmonizing legal aspects with other disciplines, for instance social, technology, economy, etc. The implementation of social-legal research is very helpful in the inventorying process, especially in describing information related TCE that is accurate, clear, firm, and approved by the custodian. The recordation of TCE can be conducted once the requirements are fulfilled. In the event that all requirements are fulfilled, then a certificate will be issued. Recordation is served as defensive measure in legal context.

Based on the above mentioned, it can be seen that the implementation regarding the protection of TCEs related to creative economy businesses, especially in the tourism sector has been carried out in Bali, although has not been maximized due to the large variety of cultural expressions in the community. Therefore, more cooperation between stakeholders is needed.

D. CONCLUSION

Based on the abovementioned, it can be concluded that the protection of TCEs has been provided in international, national (Indonesia) and regional (Bali) level. Such regulations related to open TCEs have regulated access for it to be developed for creative economy businesses including the tourism sector as well as protection of benefit sharing for the community. However, the Indonesia Copyright Law and Provisions on Communal Intellectual Property Data have not accommodated benefit sharing. Pursuant to the policies regarding the protection of TCE related to creative economy businesses in the tourism sector abovementioned, it is indicated that the State shall encourage the user to attribute the protected TCEs to the beneficiaries, to use it in a manner that respects the cultural norms, and if applicable, deposit any user fee. Thus, every tourism business shall maintain and respect the religion, custom, culture, and values norm in the local community hence, all the benefits derived from the use of the TCE must be used to revive and maintain the related TCE ecosystem. Further, the implementation regarding the protection of TCEs related to creative economy businesses, especially in the tourism sector has been carried out in Bali, although has not been maximized due to the large variety of cultural expressions in the community. Following the inventory of TCE, the Office of the Ministry of Law and Human Rights of Bali Province has carried it out in collaboration with the Regional Government in Bali. This collaboration also involved Udayana University, to name one of many universities involved. During the inventory process, it can be seen that there are two classifications can be used to indicate TCE, namely 1) Sacred TCE known as Closed TCE and 2) Not Sacred TCE known as Open TCE. Recordation is served as a defensive measure in the legal context. Therefore, more cooperation between stakeholders is needed.

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