

LEGAL PROTECTION ORIENTATION AND FORMULATION FOR TRADITIONAL MUSICAL INSTRUMENTS AS PATENTS: AN INCLUSIVE LEGAL PARADIGM

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Abstract

One of the consequences of the extinction of several traditional musical instruments in Indonesia is the reduction in traditional musical instrument craftsmen because the manufacture of traditional musical instruments does not guarantee a substantive economic increase for the craftsmen. Therefore, legal action is needed so that traditional musical instruments can have an economic orientation and implications for the craftsmen so that they can become an important factor in preserving traditional musical instruments in Indonesia. This study aims to orient the legal protection of traditional musical instruments through patents in an inclusive legal perspective. This research is a normative legal research with a concept and statutory approach. The results of the study confirm that the legal protection orientation of traditional musical instruments as patents can be carried out by qualifying traditional musical instruments as simple patents. Internal legal protection is carried out by classifying traditional musical instruments as simple patents, must be accompanied by awareness and understanding of every traditional musical instrument craftsman to be able to register patents, besides that externally, the state needs to provide convenience, facilitation and incentives for traditional musical instruments as simple patents including making certain legal breakthroughs and policies by providing formulations regarding affirmative action legal policies related to efforts to register traditional musical instruments in an inclusive legal perspective that needs to be implemented so as to provide facilitation as well as empowerment for traditional musical instruments to be registered as simple patents.

Keywords: Inclusive Law; Intellectual Property; Patents; Traditional Musical Instruments.

Abstrak

Punahnya beberapa alat musik tradisional di Indonesia salah satu akibatnya adalah berkurangnya pengrajin alat musik tradisional karena pembuatan alat musik tradisional tidak menjamin peningkatan ekonomi secara substantif bagi pengrajinnya. Oleh karena itu, perlu upaya hukum supaya alat musik tradisional dapat memiliki orientasi dan implikasi ekonomis bagi pengrajinnya sehingga dapat menjadi faktor penting dalam melestarikan alat musik tradisional di Indonesia. Penelitian ini bertujuan mengorientasikan perlindungan hukum alat musik tradisional melalui hak paten dalam perspektif hukum inklusif. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan konsep dan perundang-undangan. Hasil penelitian menegaskan bahwa orientasi perlindungan hukum alat musik tradisional sebagai hak paten dapat dilakukan dengan mengkualifikasi alat musik tradisional sebagai paten sederhana. Perlindungan hukum secara internal dilakukan dengan mengklasifikasikan alat musik tradisional sebagai paten sederhana harus disertai dengan kesadaran dan pemahaman setiap pengrajin alat musik tradisional untuk dapat mendaftarkan paten, selain itu secara eksternal, negara perlu memberikan kemudahan, fasilitasi, serta insentif terhadap alat musik tradisional sebagai paten sederhana termasuk juga melakukan terobosan dan kebijakan hukum tertentu dengan memberikan formulasi mengenai kebijakan hukum yang sifatnya *affirmative action* terkait upaya mendaftarkan alat musik tradisional dalam perspektif hukum inklusif perlu dilakukan supaya dapat memberikan fasilitasi sekaligus pemberdayaan bagi alat musik tradisional untuk didaftarkan sebagai paten sederhana.

Kata kunci: Alat Musik Tradisional, Hukum Inklusif, Kekayaan Intelektual, Paten.

Introduction

Traditional music is a cultural treasure of the nation that must be preserved as an asset of the nation in the future. Traditional music must get special attention to be learned and preserved by the next generation. Salah satu karakteristik dari musik tradisional adalah terdapat nilai intelektual baik dalam makna lirik hingga penggunaan alat musik untuk mengiringi suatu musik tradisional (Zhou, 2022). Traditional musical instruments occupy an important position because they are used to accompany traditional music performances. Traditional musical instruments are actually developed from equipment available in nature which is then carried out through a certain process so that it becomes a traditional musical instrument. Traditional musical instruments become the identity of traditional music because with the help of traditional musical instruments, then a traditional music has distinctive characteristics even if traditional musical instruments are replaced then the characteristics of the distinctiveness of traditional music become lost (Mambang et al., 2022). Therefore, traditional musical instruments occupy an important position in traditional music performances.

Although it has an important role in maintaining the distinctiveness of traditional music, traditional musical instruments actually increasingly encounter obstacles in practice, especially in accompanying traditional music. One of the problems related to traditional musical instruments is the extinction of traditional musical instruments along with the times (Nurtikawati et al., 2023). The extinction is actually caused by two factors, namely the scarcity of natural resources and the consciousness factor of the next generation. Natural resource factors are the cause of the extinction of traditional musical instruments because with the fact of natural damage some of the main materials related to making traditional musical instruments become scarce and even these materials can no longer be found (Fauzi, 2022). This makes it difficult to make traditional musical instruments and has the potential to make traditional musical instruments extinct.

Another factor that makes traditional musical instruments scarce is due to the lack of awareness of the next generation about traditional musical instruments. Facts confirm that in East Nusa Tenggara (*Nusa Tenggara Timur* or NTT) For example, there are only 3 out of 16 traditional musical instruments that still exist (Ama, 2023). 13 traditional musical instruments can be said to have become extinct such as *prere*, *sunding tongkey*, *knobe kbetes*, *nuren*, and so on (Ama, 2023). In line with the facts found in NTT, in the Nias community in North Sumatra, traditional musical instrument craftsmen are also declining in number,

which is still dominated by the older generation (Kompas TV, 2022). The progress of the times and the low economic value of traditional musical instruments are the main factors why there are fewer and fewer traditional musical instruments.

The facts from NTT and Nias above are examples that one of the problems regarding the lack of traditional musical instruments due to the progress of the times that makes the younger generation feel reluctant to use music along with traditional musical instruments and the absence of promising economic orientation in making traditional musical instruments (Fajarianty et al., 2022). In fact, judging from the legal aspect, traditional musical instruments can be granted patents so that they have more economic value that can prosper traditional musical instrument craftsmen. Even so, in order for traditional musical instruments to be granted patents, various aspects must be fulfilled as stated in Law No. 13 of 2016 concerning Patents (Patent Law). This study aims to analyze aspects of legal protection for traditional musical instruments through patent guarantees in an inclusive legal perspective. An inclusive legal perspective is used as an analytical knife to strengthen the position of traditional musical instruments in order to obtain patent guarantees.

Research that discusses legal protection for traditional musical instruments through patent guarantees has never been done by previous researchers. In general, regarding traditional songs, only copyright-related research is often emphasized to provide economic and moral aspects of traditional songs or music. The three previous studies include: 1). Research from Suryani, et al. (2021) which focuses on legal protection for Balinese gamelan (Anak Agung Ayu Gayatri, Anak Agung Sagung Laksmi Dewi, 2021). The novelty of this study is that copyright arrangements must exclusively regulate and facilitate copyright for traditional songs. 2). Research conducted by Susanti (2022) whose discussion is related to the dimension of communal rights in relation to intellectual property related to community culture (Susanti, 2022). The novelty of this research is that the human rights perspective needs to be raised in discussions about intellectual property related to culture. Research conducted by 3). Cita, et al. (2023) also simultaneously focuses on the right to traditional cultural expression including folk songs and musical instruments to obtain legal certainty guarantees (Anak Agung Ayu Gayatri, Anak Agung Sagung Laksmi Dewi, 2023). The novelty of this research is the need for an integrated legal policy strategy that regulates the right of traditional cultural expression as part of communal intellectual property rights.

Research Problems

From the background description above, there are two legal issues to be answered in this study, which include: 1). orientation of legal protection of traditional musical instruments as patents, and 2). formulation in legal protection of traditional musical instruments as patents in an inclusive legal perspective.

Research Methods

This research, whose focus is an analysis of aspects of legal protection for traditional musical instruments through patent guarantees, is a normative legal research (J. Efendi, 2016). This research focuses on the study of Patent Law and related legal concepts and theories, especially referring to an inclusive legal perspective. The primary legal materials used are the 1945 NRI Constitution and the Patent Law. Secondary legal materials are journal articles, books, and other references both in the form of softfiles and hardfiles that discuss traditional musical instruments and patents. Non-legal material is a dictionary of languages. The approach used is a legislative approach whose main focus is on the Patent Law and a conceptual approach whose main focus is on an inclusive legal perspective.

Discussion

The Orientation of Legal Protection on Traditional Musical Instruments as Patents

Traditional musical instruments are part of the nation's cultural treasures that must be protected and facilitated by the state. This is in accordance with the mandate of Article 32 paragraph (1) of the 1945 NRI Constitution which affirms that the state has an important role in maintaining and preserving national culture (Bagus Prayogi, 2021). In this context, the state also has an important role in maintaining the existence of traditional music. Traditional music is understood as a game and / or musical performance that is sung by utilizing traditional musical instruments and with a string of songs in the form of traditional songs (Ramadhan Muda et al., 2022). Traditional music as part of the culture that develops in society actually encounters obstacles in the era of globalization and technological development, including several aspect. *First*, traditional music is often ignored and even minimally recognized and understood by the younger generation. This is because the younger generation is more interested in modern music that develops along with technological developments. Modern music is considered more in line with the times and is

even considered more "slang" and in accordance with the characteristics of the millennial generation (Priest, 2021)(Huffman, 2020).

Second, traditional music is rarely recognized by the younger generation because the younger generation is not given an understanding and deepening of the meaning and philosophy of traditional music. Traditional music even tends to be sacred for certain ceremonies so that sometimes the younger generation is afraid to create traditional music. This causes traditional music to slowly become "foreign" and unrecognized by the younger generation (Pardede et al., 2022). Third, the constraints on the existence and preservation of traditional music are one of them due to the decline in the number of traditional musical instrument manufactures. The decline in the number of traditional musical instrument manufactures is actually caused by two factors, namely natural resources and economic factors. In the natural resources factor, traditional musical instruments made with certain materials are natural resource products available in the environment around the community (Juwita, 2021). With the depletion of raw materials for traditional musical instruments due to environmental damage, it also has an impact on making traditional musical instruments that are increasingly minimal.

The next factor is the economic factor that the sale of traditional musical instruments economically does not generate significant profits (Sahadi, 2019). One of the reasons is because traditional musical instruments are considered to have no intellectual property value because traditional musical instruments are made exactly the same and exactly as previous traditional musical instruments. Of the three obstacles regarding the existence and preservation of traditional music, the third aspect related to the manufacture of traditional musical instruments is an important aspect because there is an assumption that traditional musical instruments do not have intellectual property value so that their economic value is low. This is certainly different when compared to the right to geographical indications which when it has obtained registration of intellectual property, it can increase economic value significantly (de Souza Meirelles et al., 2023). Judging from the legal aspect, there is actually an orientation to empower legal protection related to the preservation of traditional music referring to intellectual property rights in the form of patents.

A patent is generally understood as an invention of an intellectual property work that is a particular technological development that is different from previous inventions (Kock, 2021). Referring to Article 2 of the Patent Law, patents consist of patents and simple patents (*paten sederhana*). Article 1 point 1 of the Patent Law defines that a patent is an exclusive right from the state to the

inventor to carry out or give approval related to his findings to other parties, including obtaining economic benefits for the findings. Article 3 paragraph (1) of the Patent Law provides three main requirements for a patent which include: new inventions, inventive steps and efforts (based on the novelty of the invention), and can be applied in the industrial world. In the aspect of a new invention, a patent must be an invention that has originality so that it is different from previous inventions (Zuami & Tresnawati, 2020). In the aspect of inventive steps and efforts based on the novelty of inventions, patents are required to be oriented towards the latest inventions that are able to offer solutions to problems in society. In the aspect that can be applied in the industrial world, it is emphasized that patents must have relevance related to application in the industrial world (Mafulah, 2020).

Related to simple patents as in the provisions of Article 3 paragraph (2) of the Patent Law, it is affirmed that simple patents are patents that have three orientations (Indra & Santiago, 2022), namely: a new invention or invention, development of existing products, and has relevance or can be applied in the industrial world. In the aspect of a new invention or invention, this is actually the same as patents in general, that even a simple patent must be a new invention. In the development aspect of existing products, simple patents emphasize that to be referred to as a simple patent it is enough to develop or differ from previous products (Amoroso & Link, 2021). This aspect is actually the difference between patents and simple patents. If patents generally require inventive steps and efforts based on the novelty of the invention, then a simple patent is sufficient in the form of a development or difference from the previous product (Rudzite, 2022). The next aspect is that it has relevance or can be applied in the industrial world where a simple patent can be applied directly in the industrial world.

Referring to the above characteristics of patents and simple patents, it can be concluded that related to traditional musical instruments can be qualified in legal protection as simple patents. This is based on at least three arguments, namely: first, traditional musical instruments are indeed quite difficult to qualify as "inventive steps and efforts" based on the latest and current technology as patent requirements in general. However, to be qualified as a simple patent, traditional musical instruments meet their relevance when in simple patents that emphasize enough novelty or differences with traditional musical instruments in general (Marthavira, 2020). This means, as long as traditional musical instruments can be developed and have even a little novelty, then traditional musical instruments can be given legal protection in the form of simple patents.

Second, judging from the validity period of simple patents, simple patents have a period of ten years and can then be extended (Hakim & Kurniawan, 2020). This ten-year period is relatively lower than patents in general whose tenure reaches twenty years. This ten-year period is actually relevant to traditional musical instruments as simple patents because they have a lower term than patents in general, So traditional musical instruments as simple patents can be seen their development and orientation, especially in economic aspects. If economically traditional musical instruments as simple patents can optimally generate profits while increasing the number of traditional musical instrument craftsmen, then it can actually be extended after a period of ten years (Barizah, 2020).

Third, the explanation of Article 3 paragraph (2) of the Patent Law emphasizes that simple patents must have a more practical orientation compared to previous products. The practical orientation in that a simple patent also includes a new method established in a simple patent product (Wesna, 2021). This actually has relevance to traditional musical instruments as a simple patent, because in its development the manufacture of traditional musical instruments can be constructed practically so that they are more applicable and can be applied more practically. From the three important orientations related to the relevance of classifying traditional musical instruments as simple patents, it can be concluded that this effort in addition to preserving traditional musical instruments can also improve the economic level of traditional musical instrument craftsmen because it has been registered as a simple patent.

An important orientation related to efforts to qualify traditional musical instruments as simple patents is to provide legal protection so that traditional musical instruments can be formulated as simple patents. Legal protection is simply understood as an effort to optimize the law as a means to protect the rights of the parties (Syafrialdi & Hardiogo, 2021). In the context of intellectual property rights in the form of simple patents on traditional musical instruments, this is the realm of legal protection in the civil dimension as stated by M. Isnaeni. M. Isnaeni believes that legal protection in the civil dimension actually has two characteristics (Isnaeni, 2016), namely: internal and external legal protection. Internal legal protection in the civil dimension emphasizes legal awareness and participation of the parties to carry out a legal protection on their own initiative. This confirms that in internal legal protection, active personal awareness and participation to seek legal protection is the most important aspect (Btarifia Filza Zahra, 2021).

External legal protection is legal protection that emphasizes the role of the state in formulating regulations and policies that aim to provide legal protection to the community (Hidayat, 2020). Judging from the aspect of internal legal protection, efforts to classify traditional musical instruments as simple patents must be accompanied by awareness and understanding of every traditional musical instrument craftsman to be able to register simple patents including strengthening every administrative pose of traditional musical instrument registration as a simple patent. In the aspect of external legal protection, the state needs to provide convenience, facilitation, and incentives for traditional musical instruments as simple patents including making certain legal breakthroughs and regulations by harmonizing the provisions of the Patent Law with laws and regulations in the field of culture so as to increase legal protection for traditional musical instruments as simple patents.

Formulation of Legal Protection of Traditional Musical Instruments as Patents: An Inclusive Legal Paradigm

Legal protection for traditional musical instruments through patent registration is actually an important step and effort in terms of two aspects, namely from the cultural aspect and the economic aspect. Viewed from the cultural aspect, legal protection efforts for traditional musical instruments through patent registration are actually efforts to preserve traditional musical instruments so that they can be passed on by the younger generation (Kusumaningtyas et al., 2022). The role of the younger generation is important so that traditional musical instruments can be learned and preserved by the next generation. From an economic aspect, legal protection for traditional musical instruments through patent registration can actually increase the value and bargaining power of traditional musical instruments to get prices that can compete in the market (Setiawan & Fality, 2021). This proportional price can certainly provide economic benefits for traditional musical instrument craftsmen in order to enjoy decent economic benefits. With these economic benefits, traditional musical instrument craftsmen will continue to exist and be creative to make traditional musical instruments.

Efforts to register traditional musical instruments through patents must be comprehensively understood and studied, including what kind of patent categories these traditional musical instruments are. Referring to Article 2 of the Patent Law, patents consist of patents and simple patents so that in an effort to register traditional musical instruments through patents, it must be ensured that traditional musical instruments are qualified as patents or simple patents. In

general, patents are understood as intellectual works in the field of cutting-edge technology that can directly help solve human problems practically (Efriani, 2021). Therefore, the main characteristic of patents is cutting-edge technology based on the latest innovations and inventions. Simple patents have little difference from patents, namely simple patents are engineering certain technologies that have differences or novelty with previous technologies and can be implemented appropriately in the industrial world (Indra & Santiago, 2022).

In general, it can be understood that there are three main differences between patents and simple patents in the Patent Law, namely: first, patents are more oriented to inventions (inventions) in the field of technology using a high level methodology so that they need testing and verification from authorized parties (Yulia, 2021). This is different from simple patents that only emphasize engineering aspects of technology that are different from those that existed before. Second, the characteristics of patents are in aspects of inventions and innovations that have novelty compared to previous or similar technological engineering. The invention and innovation aspect emphasizes the importance of research and development efforts in an effort to formulate a patent (Stamatoudi, 2023). This is certainly different from simple patents that only enough of a technology that is different from previous technology while having a practical dimension or can be applied in society. Third, regarding the validity period of intellectual property rights, patents have a validity period of up to 20 years. This period of time is actually relevant considering that an invention and efforts to carry out technological novelty also require research with a long time.

This is certainly different from a simple patent whose term is only for 10 years. This period is intended for patent holders to be able to utilize their economic rights as well as be able to evaluate simple patent technology that has been registered (Rudzite, 2022). Referring to the three things that distinguish between patents and simple patents above, it can be concluded that traditional musical instruments have been qualified as simple patents. Therefore, the effort to register traditional musical instruments in order to have a patent is in accordance with simple patent qualifications. Efforts to register traditional musical instruments actually have relevance to the idea of inclusive law, one of whose orientations is the strengthening and strengthening of a legal subject so that its substantive rights are fulfilled (Jawahir Thontowi, 2017). The lack of traditional musical instrument craftsmen coupled with the extinction of several traditional musical instruments in Indonesia is a phenomenon that needs to be addressed and given legal solutions to deal with the phenomenon.

The effort to register traditional musical instruments as simple patents is actually part of the implementation of inclusive law that prioritizes the strengthening of traditional musical instruments through legal instruments, namely intellectual property in the form of patents. The idea of inclusive law itself was put forward by Jawahir Thontowi who is part of the thinking of Madzab Tamsis (Tamsis circle) which has the basic assumption of breaking as well as linking an aspect of law to empower legal subjects who are being marginalized (J Thontowi et al., 2023). This basic assumption was born from the anxiety of Jawahir Thontowi who saw that in the legal phenomenon there was actually discrimination which was "unconsciously" considered something commonplace. Legal discrimination "unconsciously" is facilitated by positive law so that discrimination is increasingly detrimental to the subject of the law concerned. The idea of inclusive law prioritizes reasoning and substantive deepening of a law so that a discriminatory law needs to be made certain efforts so that the law is free from the shackles of discrimination. In this context, inclusive law offers affirmative action in the face of legal discrimination (Khuzaeni, 2020).

Affirmative action in short is a special and integrated effort to deal with legal discrimination so that certain legal remedies need to be made that are special in nature (Rahmat, 2020). Affirmative action is also referred to as "positive discrimination" which is an attempt to apply different legal policies in a different legal problem (Daniel P. Maes, Julia Tucher, 2021). This also confirms that affirmative action is a characteristic and identity of the idea of inclusive law. Regarding efforts to register traditional musical instruments as simple patents, this is actually an inclusive legal implementation because it seeks to provide legal solutions to legal problems caused by traditional musical instruments. Referring to the idea of inclusive law, the regulation of simple patents is actually an important aspect so that patents are not only synonymous with high technology and high risk so that they ignore aspects of traditional technological engineering such as traditional musical instruments (Sulistianingsih & Prabowo, 2019). Patents that are understood as cutting-edge technology will actually be discriminatory on traditional technological engineering such as traditional musical instruments.

Simple patent arrangements in the Patent Law actually have an inclusive legal spirit that seeks to facilitate aspects of traditional technology to obtain patent guarantees. In this context, the effort to register and qualify traditional musical instruments as part of simple patents is a progressive step to facilitate traditional musical instruments to have an economic impact. Therefore, efforts to register and qualify traditional musical instruments as part of a simple patent

also need to obtain a legal policy that is affirmative action. The formulation of affirmative action legal policies related to efforts to register traditional musical instruments as simple patents needs to be formulated with certain legal rules governing how to provide facilitation and empowerment for traditional musical instruments to be registered as simple patents. The formulation of these special legal rules can be done by harmonizing in advance with the Patent Law and various laws and regulations in the field of culture.

Conclusion

The orientation of legal protection of traditional musical instruments as patents can be done by qualifying traditional musical instruments as simple patents. In addition, the most important aspect of qualifying traditional musical instruments as simple patents is to provide legal protection internally and externally. Internally, efforts to classify traditional musical instruments as simple patents must be accompanied by the awareness and understanding of every traditional musical instrument craftsman to be able to register simple patents including strengthening every administrative pose of traditional musical instrument registration as a simple patent. In the aspect of external legal protection, the state needs to provide convenience, facilitation, and incentives for traditional musical instruments as simple patents including making certain legal breakthroughs and regulations by harmonizing the provisions of the Patent Law with laws and regulations in the field of culture so as to increase legal protection for traditional musical instruments as simple patents. The formulation of affirmative action legal policies related to efforts to register traditional musical instruments in an inclusive legal perspective needs to be carried out in order to provide facilitation as well as empowerment for traditional musical instruments to be registered as simple patents.

Suggestion

The formulation of special legal regulations to facilitate affirmative action legal policies related to efforts to register traditional musical instruments in an inclusive legal perspective can be done by harmonizing in advance with the Patent Law and various laws and regulations in the field of culture.

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