

## UNLEASHING INDONESIA'S TRADITIONAL KNOWLEDGE: Navigating Legal Challenges in a Changing Landscape

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**Abstract:** As a country blessed with abundant cultural elements, Indonesia holds the potential to harness traditional knowledge for the betterment of its people's lives. Unfortunately, this concept is often forgotten within Indonesian society and faces various challenges that jeopardize cultural heritage. Hence, the objective of this study is to analyze the significance of traditional knowledge and the legal hurdles that arise in regulating this concept within Indonesia's intellectual property rights framework. The findings of this normative legal research demonstrate that traditional knowledge holds great importance for Indonesian society, particularly amidst the accelerating impacts of globalization, which pose a threat to cultural heritage. Taking a legislative approach, there is an urgent need for a normative framework to protect traditional knowledge as a communal intellectual asset in order to realize the implicit recognition reflected in the constitution, the 1945 Constitution.

**Keywords:** Traditional Knowledge, Communal Intellectual Property, Normative Construction.

**Abstrak:** Sebagai negara dengan kekayaan unsur budaya yang melimpah, Indonesia memiliki potensi untuk memanfaatkan pengetahuan tradisional guna meningkatkan kehidupan warganya. Konsep ini sering terlupakan dalam masyarakat Indonesia dan menghadapi berbagai masalah yang mengancam warisan budaya. Oleh karena itu, penelitian ini bertujuan untuk menganalisis pentingnya pengetahuan tradisional dan tantangan hukum yang muncul dalam mengatur konsep tersebut dalam kerangka hukum Indonesia tentang hak kekayaan intelektual. Hasil penelitian hukum normatif menunjukkan bahwa pengetahuan tradisional memiliki arti penting bagi masyarakat Indonesia, terutama di tengah dampak percepatan globalisasi yang mengancam warisan budaya. Menurut pendekatan peraturan perundang-undangan, sangat diperlukan konstruksi normatif untuk melindungi pengetahuan tradisional sebagai kekayaan intelektual bersama guna merealisasikan pengakuan implisit yang tercermin dalam konstitusi, Undang-Undang Dasar 1945.

**Kata Kunci:** Pengetahuan Tradisional, Kekayaan Intelektual Komunal, Konstruksi Normatif.

## Introduction

Traditional cultures play a vital role in shaping the identity of a nation.<sup>1</sup> This esteemed element of society has the potential to assist a country in preserving its history and cultivating a sense of belonging among the citizens.<sup>2</sup> Furthermore, the cultures are often rooted in the beliefs, customs<sup>3</sup>, and practices of a society's ancestors. These deep-rooted values are the reasons why traditional culture is considered the "soul" of a nation.<sup>4</sup> The preservation also maintains cultural diversity, which is an important aspect of heritage. In addition to cultural preservation, traditional cultures provide a source of income through tourism and the production of traditional crafts and products, specifically when combined with modern supporting factors such as digitalization and many forms of arts, which can multiply the impacts and influence of traditional culture.<sup>5</sup> They also contribute to social stability and community building by providing shared experiences and a sense of community among the citizens. Traditional knowledge and communal intellectual property are complex and multifaceted subjects that have become

increasingly relevant in recent years. With globalization and the rapid pace of technological advancement, communities are increasingly concerned about protecting cultural heritage and the knowledge passed down through generations.

Traditional knowledge encompasses a wide range of information and practices closely tied to the cultural identity of communities, including traditional medicines, farming techniques, and arts. Communal intellectual property refers to the collective ownership of such knowledge, closely tied to the cultural heritage and identity of a particular community. Traditional knowledge signifies the importance of ancestral values passed down for many generations, to build the many cultures in Indonesian society. In addition, multiculturalism has a massive influence on the perception of traditional cultures as it encourages the appreciation of the cultures.<sup>6</sup>

In many cases, traditional knowledge is highly valued and has been refined over generations. However, it is inadequately protected by intellectual property laws and has been exploited for commercial purposes<sup>7</sup>

<sup>1</sup> Ghozali Timbasz et al., "Preservation of The Begawi Abung Siwo Migo Tradition Development Oriented and Social Welfare in Lampung Multicultural Community," in *Proceedings of The International Conference on Environmental and Technology of Law, Business and Education on Post Covid 19*, ICETLAWBE 2020, 2020, p. 1-9, <https://doi.org/10.4108/eai.26-9-2020.2302620>.

<sup>2</sup> A. Zulkarnain et al., "Preserving Village Culture, Identity, and Sense of Belonging through Visual Identity Design for Public Children Playground (Case Study: Mekar Bakti Village, Panongan Regency, Tangerang)," in *IOP Conference Series: Earth and Environmental Science*, vol. 452, 2020, p. 1-10, <https://doi.org/10.1088/1755-1315/452/1/012064>.

<sup>3</sup> Karina L. Walters et al., "Growing from Our Roots: Strategies for Developing Culturally Grounded Health Promotion Interventions in American Indian, Alaska Native, and Native Hawaiian Communities," *Prevention Science* 21 (2020), <https://doi.org/10.1007/s11121-018-0952-z>.

<sup>4</sup> Zhang Jing and Yan Fengchi, "Inheritance and Innovation of Traditional Excellent Chinese Culture in the New Era," in *2018 International Conference on Arts, Linguistics, Literature and Humanities (ICALLH 2018)* (Francis Academic Press, 2018), p. 349-353, <https://doi.org/10.25236/icallh.2018.75>.

<sup>5</sup> Fitri Alfarisy et al., "The Phenomenon That Influenced The Development of Cool Japan in Indonesia," *Journal Of Social Research* 1, no. 1 (December 28, 2021): p. 9-12, <https://doi.org/10.55324/josr.v1i1.1>.

<sup>6</sup> Colleen Ward et al., "Immigration and Multiculturalism in Context: A Framework for Psychological Research," *Journal of Social Issues* 74, no. 4 (2018): p. 1-23, <https://doi.org/10.1111/josi.12301>.

<sup>7</sup> Ghazala Javed, Ritu Priya, and Deepa V. K., "Protection of Traditional Health Knowledge: International Negotiations, National Priorities and Knowledge Commons," *Society and Culture in South*

without adequate compensation or recognition for the communities.<sup>8</sup> With the increasing globalization and technological advancements, access to traditional knowledge has become easier for commercial and other interests. Traditional knowledge has also been proven to be a valuable resource for local communities and plays a crucial role in maintaining biodiversity and sustainable development. Concerning the biggest problem, the existing legal framework does not have significant importance on traditional knowledge. Therefore, there is growing interest in developing new legal frameworks to protect traditional knowledge and communal intellectual property.

The issue of traditional knowledge and communal intellectual property is complex, and there are many different approaches to addressing the concepts. Some proponents argued that traditional knowledge should be protected through the creation of *sui generis* systems, which are designed to address unique needs and characteristics.<sup>9</sup> Furthermore, existing intellectual property systems can be adapted to provide better protection for traditional knowledge, conducted by updating the existing IPR regimes to include protection.<sup>10</sup> Another key challenge identified in the literature is the

issue of defining traditional knowledge and its relationship to intellectual property.<sup>11</sup>

Despite these challenges, there have been several successes in the protection of traditional knowledge through communal intellectual property rights. For example, the indigenous community of San in southern Africa has established a communal intellectual property system to protect traditional knowledge, including healing practices, rituals, and beliefs.<sup>12</sup> This has helped to ensure that the cultural heritage is protected and the knowledge is used equitably and sustainably.

There have also been several legal initiatives aimed at protecting traditional knowledge, including the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore.<sup>13</sup> This committee has been working to develop international legal norms to provide a more comprehensive and effective legal framework for the protection of this knowledge.

The literature often highlights the importance of this issue for the preservation of cultural heritage and the promotion of diversity. However, it fails to provide a

*Asia* 6, no. 1 (2020): p. 98–120, <https://doi.org/10.1177/2393861719883069>.

<sup>8</sup> Tathagat Sharma and Prince Raj, "Measures and Methods for Effective Protection of Traditional Knowledge: Rethinking the Protection Under A Model IPR Regime," *SSRN Electronic Journal*, 2021, p. 175–192, <https://doi.org/10.2139/ssrn.3870289>.

<sup>9</sup> Muchtar Anshary Hamid Labetubun, Rory Jeff Akyuwen, and Marselo Valentino Geovani Pariela, "Perlindungan Pengetahuan Tradisional Secara Sui Generis Untuk Menyongsong Masyarakat Ekonomi Asean," *SASI* 24, no. 1 (2018): p. 1–10, <https://doi.org/10.47268/sasi.v24i1.113>.

<sup>10</sup> Moatoshi Ao, "Branding and Commercialisation of Traditional Knowledge and Traditional Cultural Expressions: Customary Law of North East Vis-à-Vis Contemporary Law," *The Indigenous Peoples' Journal of Law, Culture & Resistance* 6, no. 1

(February 4, 2020): p. 75–90, <https://doi.org/10.5070/P661051238>.

<sup>11</sup> Susy Frankel, "The Creative Sector and Traditional Knowledge," in *Research Handbook on Intellectual Property and Creative Industries*, 2018, p. 230–240, <https://doi.org/10.4337/9781786431172.00030>.

<sup>12</sup> Wana W. Chinsebu and Kazhila C. Chinsebu, "'Poisoned Chalice': Law on Access to Biological and Genetic Resources and Associated Traditional Knowledge in Namibia," *Resources* 9, no. 7 (2020): 1–34, <https://doi.org/10.3390/RESOURCES9070083>.

<sup>13</sup> Todd Berry and Charles Lawson, "'Local Communities' and Traditional Knowledge at WIPO: A Very Broad Application?," *SSRN Electronic Journal*, 2021, p. 485–489, <https://doi.org/10.2139/ssrn.3588130>.

concrete legal solution to safeguard and preserve traditional knowledge as an important part of Indonesia's multicultural society. This study engages in critical and constructive discussions about the ways to protect traditional knowledge and promote cultural heritage. It increases awareness regarding the safeguarding of traditional knowledge as a crucial component of Indonesian society while highlighting the challenges associated with its inadequate preservation.

## Method

This study used the normative legal method to analyze the internal aspects of positive laws.<sup>14</sup> The method was utilized to analyze the importance of traditional knowledge and its emerging legal challenges to regulate the concept into the Indonesian legal framework of intellectual property rights. To support the analysis, secondary data was employed in the form of primary law sources, namely *Undang-Undang Dasar* 1945 and Law No.13 of 2016 on Patents (Patents Law). Patents Law as secondary data did not necessarily reflect a specific way in which traditional knowledge has to be codified. The primary source of law explained the possible structure and the technical nature of normative construction relative to the elements of traditional knowledge as a legal topic.

## Results and Discussion

### *The Relevancy of Preserving Traditional Knowledge and Its Emerging Problems in Indonesia*

The preservation of traditional knowledge has long been a topic of concern for many nations, including Indonesia. In this Southeast Asian country, the concept refers to the knowledge, skills, and practices passed down from generation and are deeply rooted in the cultural identity of the Indonesian people. It encompasses a wide range of areas, including agriculture, medicine, fisheries, health, and arts, and is of immense significance to the cultural identity of the nation.<sup>15</sup> A multicultural society inherently possesses a wealth of traditional knowledge harnessed to advance different aspects of life.

In Indonesia, traditional knowledge plays a critical role in shaping the nation's cultural heritage and identity and is a vital source of livelihood for many of its citizens.<sup>16</sup> Traditional knowledge, with the process of its transmission, holds a vital place in the daily lives of many citizens, particularly in rural communities.<sup>17</sup> These communities rely on this concept for their livelihoods and the maintenance of cultural traditions. For instance, traditional knowledge is employed in the development of sustainable farming practices, which provide a source of food and income for rural communities. In rural areas, the concept finds application in agricultural practices, while in urban areas, it is employed in the manufacturing of traditional crafts,

<sup>14</sup> Hari Sutra Disemadi, "Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies," *Journal of Judicial Review* 24, no. 2 (November 30, 2022): p. 289-304, <https://doi.org/10.37253/jjr.v24i2.7280>.

<sup>15</sup> Andi Tyas Tri Wibowo and Joko Setiyono, "Legal Protection of Traditional Knowledge (Comparative Study of Bangladesh, Australia and Indonesia)," *International Journal of Social Science And Human Research* 05, no. 10 (October 23, 2022): p. 4602-9, <https://doi.org/10.47191/ijsshr/v5-i10-27>.

<sup>16</sup> Maya Ruhtiani, "Legal Protection of Traditional Architectural Design of Kampung Naga As Traditional Knowledge in Indonesia," *UNTAG Law Review* 5, no. 1 (May 28, 2021): p. 54, <https://doi.org/10.56444/ulrev.v5i1.2209>.

<sup>17</sup> Bernadette Montanari and Sylvia I. Bergh, "Why Women's Traditional Knowledge Matters in the Production Processes of Natural Product Development: The Case of the Green Morocco Plan," *Women's Studies International Forum* 77 (2019): p. 1-11, <https://doi.org/10.1016/j.wsif.2019.102275>.

such as batik textiles and silver jewelry. These industries make a substantial contribution to the country's economy.<sup>18</sup>

The significance of traditional knowledge extends beyond cultural and economic considerations. Furthermore, it represents a source of resilience for communities in the face of environmental and societal challenges<sup>19</sup>, as well as preserving the biodiversity of the region.<sup>20</sup> The concept provides a wealth of information about the environment and its ecosystems to manage natural resources sustainably. Traditional knowledge also serves as a means of preserving the cultural heritage of communities and as a way of fostering intergenerational understanding and connection. The correlation between the two cannot be emphasized enough due to the paramount significance of sustainability, particularly as the world prepares for the imminent repercussions of climate change.

Despite its significance, traditional knowledge is increasingly under threat. The country's rapid development and globalization have led to a decline in the use of traditional practices, and many skills and knowledge are at risk of being lost. The impact of globalization, which results in the convergence of cultures and the extensive dissemination of external knowledge, has caused the disconnection of many societies

from their indigenous cultures, impeding the preservation and transfer of intergenerational knowledge.<sup>21</sup> This loss of traditional knowledge is a cultural, economic, and environmental problem. It erodes the sustainability of traditional livelihoods and weakens the ability of the country to adapt to changing circumstances.

The emerging problems require critical examination and urgent resolution. These issues pose a threat to the nation's cultural heritage and its economic and environmental sustainability. In the case of the decline in the use of traditional practices which results in the loss of traditional knowledge. The rapid advancement of modernization and globalization has also led to the marginalization of traditional knowledge and skills often perceived as outdated and lacking practical significance in contemporary society. This predicament assumes greater magnitude as communities intricately linked to traditional knowledge cease to hold the concept in high regard, leading to its disappearance and relegation to the annals of history. The decline carries the potential to erode Indonesia's vibrant cultural heritage and undermine the resilience of communities in tackling environmental and societal challenges.<sup>22</sup>

Another significant challenge is the exploitation of traditional knowledge by

<sup>18</sup> Labetubun, Akyuwen, and Pariela, "Perlindungan Pengetahuan Tradisional Secara Sui Generis Untuk Menyongsong Masyarakat Ekonomi Asean."

<sup>19</sup> Cindy Alexandra Córdoba Vargas, Sonia Hortúa Romero, and Tomás León-Sicard, "Resilience to Climate Variability: The Role of Perceptions and Traditional Knowledge in the Colombian Andes," *Agroecology and Sustainable Food Systems* 44, no. 4 (2020): p. 419-45, <https://doi.org/10.1080/21683565.2019.1649782>.

<sup>20</sup> Palpu Pushpangadan et al., "Biodiversity, Bioprospecting, Traditional Knowledge, Sustainable Development and Value Added Products: A Review," *Journal of Traditional Medicine & Clinical Naturopathy* 7, no. 1 (2018): 1-7, <https://doi.org/10.4172/2573-4555.1000256>.

<sup>21</sup> Clinton Beckford, "Climate Change Resiliency in Caribbean SIDS: Building Greater Synergies between Science and Local and Traditional Knowledge," *Journal of Environmental Studies and Sciences* 8, no. 1 (2018): p. 42-50, <https://doi.org/10.1007/s13412-017-0440-y>.

<sup>22</sup> Imamul Haq, Ibrahim, and Surahmat Tiro, "Artikulasi Dan Revitalisasi Kultur-Natur Masyarakat Adat (Kajian Atas Resilensi Masyarakat Adat Saat Pandemi Di Dataran Tinggi Kabupaten Gowa)," *SOSIORELIGIUS: JURNAL ILMIAH SOSIOLOGI AGAMA* 7, no. 1 (June 13, 2022): p. 43-67, <https://doi.org/10.24252/sosioreligius.v7i1.30715>.

external entities, including multinational corporations. The concept is frequently regarded as a valuable commodity that can be commercialized, leading to its misappropriation and exploitation for profit. This exploitation undermines the cultural heritage of communities and denies the economic benefits.<sup>23</sup> Furthermore, the exploitation is often carried out without the consent of the communities from which the knowledge originates, exacerbating the marginalization of these communities and the unsustainability of cultural heritage.

The protection of traditional knowledge is complicated by the absence of a legal framework that recognizes its unique characteristics and importance. In many cases, the concept is not considered intellectual property and is not protected by existing laws and regulations. This leaves traditional knowledge open to exploitation and erosion, highlighting the necessity for the creation of a legal framework acknowledging the importance of preserving traditional knowledge. Despite intellectual property is one of the most advanced legal domains, the concept often receives sporadic attention from the media and the government, typically reserved for commemorating specific occasions.

One of the paramount and frequently underestimated factors is the active involvement of communities in safeguarding and perpetuating the significance of cultural knowledge, regardless of its domain of value. The preservation necessitates the active participation of communities to truly understand the philosophy and cultural values of their traditional knowledge. Communities must be empowered and motivated to maintain traditional practices and pass on the knowledge to future generations. This requires the provision of

education and training programs, as well as the creation of incentives to preserve cultural heritage.

One of the key challenges is the need to strike a balance between respecting the cultural heritage of communities and the protection of intellectual property rights. In Indonesia, this is particularly important given the frequent exploitation of the concept by multinational corporations and other outside interests. To ensure that traditional knowledge is protected and respected, it is necessary to develop and implement laws and regulations recognizing the unique nature of the concept. This is important to protect the important cultural, economic, and environmental well-being impacts of cultural knowledge. The government and other stakeholders must take concrete steps to protect and preserve this valuable legacy, for the benefit of present and future generations. Therefore, Indonesia can sustain its position as a proud and thriving nation, distinguished by its abundant cultural heritage and time-honored traditions.

### *The Overlapping Aspects of Traditional Knowledge and Communal Intellectual Property in Indonesia*

The intersection of traditional knowledge and communal intellectual property is a complex and multifaceted topic that deserves serious intention, specifically in the context of multicultural identity. The concept encompasses a wide range of knowledge, skills, and practices passed down within indigenous communities, while communal intellectual property refers to the collective ownership and control of intangible cultural assets, such as music, art, and folklore. The relationship between the two is significant since traditional knowledge often serves as the foundation for communal intellectual

<sup>23</sup> Patrick Agejoh Ageh and Namrita Lall, "Biopiracy of Plant Resources and Sustainable Traditional Knowledge System in Africa," *Global Journal of*

*Comparative Law* 8, no. 2 (2019): p. 162-181, <https://doi.org/https://doi.org/10.1163/2211906X-00802003>.

property, providing the cultural context that gives these assets meaning and significance. The overlap has important implications for the preservation and protection of these cultural assets and the communities.

Even though traditional knowledge and communal intellectual property may seem distinct, there is a significant overlap between the concepts. In many cases, traditional knowledge forms a critical component of communal intellectual property, providing the cultural context and foundation upon which these assets are built. For example, indigenous music is often rooted in the traditional knowledge of the community and reflects the beliefs, values, and practices of the community.<sup>24</sup> Similarly, traditional medical practices often form the basis for communal intellectual property in the form of herbal remedies and treatments.<sup>25</sup> These recent examples, considered as novel knowledge or innovative creations, can be easily registered as patents through a simplified procedure.

In response to these concerns, different international treaties and agreements have been established to protect traditional knowledge and communal intellectual property. The most notable of these is the Convention on Biological Diversity, which recognizes the important role of conserving biodiversity and protecting the rights of indigenous communities. Additionally, the World Intellectual Property Organization has established the Intergovernmental Committee on Intellectual Property and

Genetic Resources, Traditional Knowledge, and Folklore, tasked with developing international legal instruments to protect these assets.<sup>26</sup>

Despite these efforts, the protection and preservation of the variables remain a challenge due to the difficulty of defining and classifying these assets.<sup>27</sup> For example, traditional knowledge is often difficult to quantify and measure since it is often based on intangible cultural practices and beliefs. Communal intellectual property is often based on collective ownership and control, which can be difficult to define and enforce. This is where conflicting interests of local actors come into play, attributed to all kinds of peer pressure, which is not necessarily about the collective mission of preserving traditional knowledge.

There are often conflicting interests since the protection and preservation may conflict with the commercial interests of corporations and other external actors.<sup>28</sup> An illustrative case involves the patenting of traditional medical remedies, which has sparked controversy due to corporations aiming to capitalize on the knowledge and practices of indigenous communities. However, these endeavors often neglect the appreciation of traditional communities and fail to consider their best interests.<sup>29</sup> This raises important questions about the role of traditional knowledge and communal intellectual property in a rapidly globalizing world, as

<sup>24</sup> Ulia Gosart, Luciann Kinnally, and Rachel Sprouse, "Protecting Indigenous Music in the Public Domain: HathiTrust Digital Library Case Study," *Collection Management*, May 5, 2022, p. 1-15, <https://doi.org/10.1080/01462679.2022.2068464>.

<sup>25</sup> Mohamed Djamel Miara et al., "Herbal Remedies and Traditional Knowledge of the Tuareg Community in the Region of Illizi (Algerian Sahara)," *Journal of Arid Environments* 167 (2019): p. 65-73, <https://doi.org/10.1016/j.jaridenv.2019.04.020>.

<sup>26</sup> Berry and Lawson, "'Local Communities' and Traditional Knowledge at WIPO: A Very Broad Application?"

<sup>27</sup> Frankel, "The Creative Sector and Traditional Knowledge."

<sup>28</sup> Jaime Delgado, "Genetic Resources and Traditional Knowledge: The Search for a Compromise Between Their Exploitation and Their Protection," *SSRN Electronic Journal*, 2019, p. 1-14, <https://doi.org/10.2139/ssrn.3335134>.

<sup>29</sup> Sergio Puig, "International Indigenous Economic Law," *UC Davis Law Review* 52, no. 3 (2019).

well as the ethical and legal implications of their exploitation and appropriation.

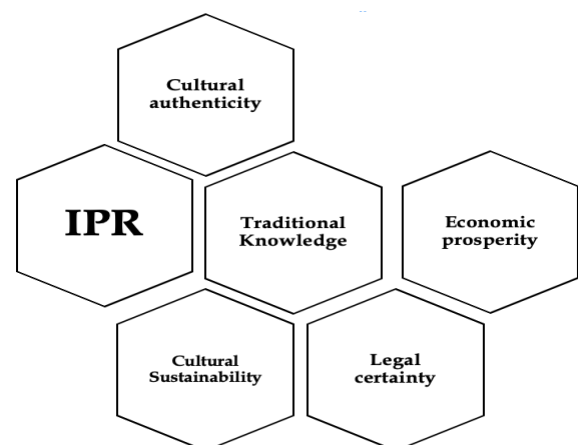
In the legal field, the overlapping aspect comes from the Indonesian constitution, *Undang-Undang Dasar 1945*, which has a serious emphasis on the importance of protecting and preserving cultural heritage as a part of national identity. The argument considered comes from the addition of Article 18B paragraph (2) and 28I paragraph (3)<sup>30</sup>, which respectively state: "Article 18B (2)-The state recognizes and respects the customary law community units with their traditional rights provided they are still alive and under the development of society and the principles of the Unitary State of the Republic of Indonesia, regulated by law, Article 28I (3)-The cultural identity and rights of traditional communities are respected under the times and civilizations."

The Indonesian Constitution, through Article 18B Paragraph (2), affirms the state's recognition and respect for customary law communities and their traditional rights, provided they persist and align with the principles of community development and the Unitary State of the Republic of Indonesia, as established by legal regulation. The term "customary law community" within the Constitution refers to indigenous peoples. Furthermore, "customary law community" and "indigenous people" are used interchangeably in Indonesian laws and regulations. The significance of safeguarding traditional knowledge is increasingly acknowledged as a result of the declaration of cultural identity and indigenous peoples' rights as constitutional entitlements through the amendment of the 1945 Constitution in 2000. Article 28I paragraph (3) stipulates that

the cultural identity and rights of traditional communities shall be honored under the progression of time and civilization.<sup>31</sup>

As the basis of Indonesia's legal framework, there is a normative obligation for the legislative bodies to make sure that the recognition of all elements in the *UUD 1945*, is reflected in other relevant regulations of the legal system. The conceptualization of traditional knowledge should also be reflected in a concrete form to provide legal certainty to communities<sup>32</sup> This is essential to safeguard against potential misappropriation or exploitation by large corporations, which could ultimately diminish the cultural and practical value inherent in traditional knowledge.<sup>33</sup>

**Figure 1.** Traditional Knowledge Conceptual Intersections



Traditional knowledge is also important since it is crucial in protecting the cultural values within a multicultural Indonesian society. The denial of the importance of this issue can lead to social unrest since it threatens the way of life of many communities, recognized as an important entity within the Indonesian legal system. Therefore, cultural sustainability as a concept

<sup>30</sup> Reh Bungana Beru Perangin-angin, Ramsul Nababan, and Parlaungan G. Siahaan, "Perlindungan Pengetahuan Tradisional Sebagai Hak Konstitusional Di Indonesia," *Jurnal Konstitusi* 17, no. 1 (2020): p. 178-196, <https://doi.org/10.31078/jk1718>.

<sup>31</sup> Perangin-angin, Nababan, and Siahaan.

<sup>32</sup> Delgado, "Genetic Resources and Traditional Knowledge: The Search for a Compromise Between Their Exploitation and Their Protection."

<sup>33</sup> Ageh and Lall, "Biopiracy of Plant Resources and Sustainable Traditional Knowledge System in Africa."

is crucial to be considered in legal development. These concepts must be taken into consideration and implemented to ensure that traditional knowledge receives adequate protection under intellectual property rights (IPR), providing legal certainty. The approach is crucial for fostering the development of cultural sustainability, preserving authenticity, and promoting economic prosperity.

### ***The Urgency for A Specialized Normative Construction to Protect Traditional Knowledge as Communal Intellectual Property in Indonesia***

The protection of traditional knowledge is a critical issue that has been ignored. In Indonesia, this is even more problematic, because Indonesia is one of the most culturally rich countries, with countless potentials used to benefit society socially or economically.<sup>34</sup> This problem is apparent when analyzing the issue of biopiracy.<sup>35</sup> Traditional knowledge is often not adequately protected by existing intellectual property laws, leaving the concept vulnerable to exploitation and misuse. Furthermore, it is often passed down from generation and forms an integral part of the cultural and spiritual identity of communities. This knowledge is often not written down but transmitted orally through practical demonstration. Therefore, the concept is at risk of being lost or forgotten since communities face external pressures such as modernization, globalization, and cultural assimilation.

The exploitation of traditional knowledge also raises significant ethical and moral concerns. For example, companies may appropriate and commercialize the concept without obtaining the prior informed consent of the communities. This is particularly concerning when the commercialization involves the exploitation of medicinal plants or other resources critical for the survival and well-being of communities. Therefore, a specialized normative construction is necessary to address these challenges and to ensure the concept is protected by cultural values. This construction should be designed to balance the need to protect traditional knowledge with the need to promote the sustainable use and management of natural resources. Additionally, it should be designed to provide communities with the tools and resources to safeguard their cultural heritage and resist exploitation.

The need for a specialized normative construction to protect traditional knowledge as communal intellectual property is urgent. This is because it is an essential component of cultural heritage and diversity. Furthermore, the concept is critical for the preservation of this heritage for future generations.<sup>36</sup> Traditional knowledge is often a critical source of livelihood for communities, and the protection is essential for the sustainable use and management of natural resources. Ensuring the protection of the concept as a valuable societal asset should align with the broader endeavor to safeguard sustainability. Traditional knowledge emphasizes the sustainable utilization of resources to

<sup>34</sup> Agung Sujatmiko, "A Model of Legal Protection for Traditional Medicines (Jamu) as Part of Traditional Knowledge," *Review of International Geographical Education Online* 11, no. 4 (2021), <https://doi.org/10.33403/rigeo.800635>.

<sup>35</sup> Jinyup Kim, "Tackling Biopiracy in Southeast Asia: The Need for a Legally Binding Regional Instrument," *Asia Pacific Journal of Environmental Law* 23, no. 1 (May 15, 2020): p. 74–98, <https://doi.org/10.4337/apjel.2020.01.03>.

<sup>36</sup> Dina W. Kariodimedjo, "Safeguarding Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions within the Association of Southeast Asian Nations (ASEAN)," in *The First International Conference On Islamic Development Studies 2019, ICIDS 2019* (Bandar Lampung, 2019), p. 1–7, <https://doi.org/10.4108/eai.10-9-2019.2289413>.

promote its principles for the benefit of present and future generations.<sup>37</sup>

The existing intellectual property regimes are not well-suited to the protection of traditional knowledge. This is because the concept often lacks the characteristics associated with intellectual property, such as the creation of new and original works. This normative restriction is reflected in Law No. 13 of 2016 on Patents (Patents Law) which states, in Article 1 number 2 "Invention is an inventor's idea translated into a specific problem-solving activity in the field of technology in the form of a product or process."

This particular provision gives room for traditional knowledge to be considered intellectual property, as long it has the problem-solving element and is an improvement of the existing process relative to that technology. However, this potential is canceled out by the provision in Article 3 stating: "(1) A patent as referred to in Article 2a is granted for an invention that is new, contains an inventive step, and applied in the industry, (2) A simple patent as referred to in Article 2 letter b is granted for each new invention, development of an existing product or process, and can be applied in industry."

One limitation of the current provision is the exclusive focus on new inventions, while traditional knowledge is inherently rooted in the past, having been transmitted across generations throughout culturally diverse history. Even though proving distinctiveness may be relatively simpler due to Indonesia's

unique geographical position as an archipelago, the existing intellectual property regime primarily concentrates on safeguarding individual rights. Therefore, it lacks the necessary mechanisms to effectively address the multifaceted challenges associated with the protection of traditional knowledge.<sup>38</sup>

The current IPR regime does not encompass the necessary provisions to effectively address the common challenges associated with communal intellectual property, such as the difficulty in proving ownership, establishing economic incentives, and resolving individual conflicts within the community. Consequently, a normative framework needs to be developed to address these issues while considering the potential impact on existing IPR regimes. Given these challenges, Indonesia must formulate a specialized normative construction tailored to protect traditional knowledge as communal intellectual property. This construction should be built on the principles of cultural heritage and diversity, with a primary objective of promoting the sustainable utilization and management of traditional knowledge. A potential model for the protection of traditional knowledge as communal intellectual property is the indigenous community of San in southern Africa.<sup>39</sup> The community has established a system to protect its traditional knowledge, including healing practices, rituals, and beliefs. This system ensures that cultural heritage is protected and knowledge is used equitably and sustainably. For normative construction to be efficacious, there exists no

<sup>37</sup> Vikram S. Negi et al., "Traditional Knowledge and Biodiversity Conservation: A Case Study from Byans Valley in Kailash Sacred Landscape, India," *Journal of Environmental Planning and Management* 61, no. 10 (2018): p. 1722-43, <https://doi.org/10.1080/09640568.2017.1371006>.

<sup>38</sup> Putu Ayu Sriasih Wesna, "Legal Protection of Communal Intellectual Property in Traditional Culture Expression of The Bali Region," in

*Proceedings of the 2nd International Conference on Law, Social Science, Economics, and Education, ICLSSEE 2022, 16 April 2022, Semarang, Indonesia* (Semarang: EAI, 2022), 1-6, <https://doi.org/10.4108/eai.16-4-2022.2320129>.

<sup>39</sup> Chinsembu and Chinsembu, "'Poisoned Chalice': Law on Access to Biological and Genetic Resources and Associated Traditional Knowledge in Namibia."

conclusive solution concerning the construction method. The word “specialized” does not necessarily mean “sui generis” but can also be in the form of adaptation through the process of revising the existing IPR Regimes in the Indonesian legal system.

## Conclusion

In conclusion, the urgency for a specialized normative construction aimed at safeguarding traditional knowledge since the communal intellectual property in Indonesia was evident, as supported by the findings of this study. The absence of legal mechanisms to protect traditional knowledge, as extensively discussed had the potential to give rise to legal complications. These complications resulted in the erosion of cultural integrity, engendering numerous adverse consequences for Indonesian society and its economy. Therefore, the preservation of cultural heritage, promotion of diversity, and sustainable utilization and administration of natural resources heavily relied on the imperative protection of traditional knowledge. The absence of adequate protection also led to the exploitation of traditional knowledge, which raised significant ethical and moral concerns. Moreover, the recognition of traditional knowledge implied by the Indonesian constitution needed to be addressed. A specialized normative construction was instrumental in addressing these challenges and ensuring the concept was protected. Failure to provide adequate protection resulted in the loss of valuable cultural heritage and the marginalization of communities holding this knowledge. The urgency for this normative construction cannot be overstated, and efforts had to be made to establish a comprehensive and effective protection regime for traditional knowledge in Indonesia.

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