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## Exploring the Discourse of Subject in Intellectual Property Rights: Communal Rights in Indonesia

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### Abstrak

Tujuan dari penelitian ini adalah untuk menguraikan wacana seputar kategorisasi hak kekayaan intelektual (HAKI) dalam hukum internasional publik dan swasta, yang telah menjadi topik perdebatan di kalangan ahli hukum. Melalui analisis mendalam tentang perdebatan HKI, termasuk contoh kasus publik dan privat, serta kontras antara HKI tradisional dan komunal, studi ini bermaksud untuk mengeksplorasi cara pandang Indonesia terhadap HKI dan hak komunal. Indonesia mengakui hak komunal dalam HKI dan telah menerapkan berbagai instrumen hukum dan kebijakan untuk melindunginya. Diperkirakan bahwa temuan penelitian akan memajukan wacana yang sedang berlangsung tentang klasifikasi HKI di bawah hukum internasional publik atau swasta, dan meningkatkan pemahaman tentang kerangka hukum yang mengatur HKI di Indonesia. Studi ini juga akan menyoroti pengakuan dan perlindungan hak-hak komunal dalam HKI, yang merupakan subjek penting dalam hukum internasional modern.

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### Abstract

*The objective of this study is to expound on the discourse surrounding the categorization of intellectual property rights (IPR) under public and private international law, which has been a topic of contention among legal experts. Through an in-depth analysis of the IPR debate, including public and private case examples, and the contrast between traditional and communal IPR, this study intends to explore Indonesia's perspective towards IPR and communal rights. Indonesia acknowledges communal rights within IPR and has implemented various legal and policy instruments to safeguard them. It is envisaged that the research findings will advance the ongoing discourse on the classification of IPR under public or private international law, and enhance the comprehension of the legal framework governing IPR in Indonesia. This study will also bring into focus the recognition and protection of communal rights in IPR, which is a crucial subject in modern international law.*

## INTRODUCTION

Intellectual property rights (IPRs) have become increasingly important in today's global economy. They are critical to promoting innovation, creativity, and economic growth. However, the classification of IPRs under public or private international law has been the subject of ongoing debate among legal scholars for many years. The debate over whether IPRs are under the purview of private or public international law has been ongoing for decades. Those who argue that IPRs are private matters contend that they are rights created by individual creators or inventors, which should be protected under domestic laws. Supporters of this view argue that IPRs are private because they allow for the protection of individual rights over their own creations, and the government's role should be limited to enforcing these private rights.<sup>1</sup>

On the other hand, those who argue that IPRs are public matters contend that they are rights granted by the government, which should be regulated by international law. Proponents of this view argue that IPRs have a public function and serve the public interest by promoting innovation, creativity, and economic growth. As a result, they should be subject to public regulation. The debate on the classification of IPRs has important implications for the international legal system, as it affects the scope of regulation and the balance between private and public interests.<sup>2</sup>

One way to approach the debate on the classification of Intellectual Property Rights (IPRs) is to consider the holder of the rights. IPRs held by individuals are typically classified as private IPRs and are associated with conventional IPRs such as patents, trademarks, and copyrights. Conversely, communal IPRs represent the interest of an entire community and relate to cultural heritage, traditional knowledge, and biodiversity. Communal IPRs are not associated with a single individual, but rather a particular group or community. The key difference between conventional and communal IPRs lies in their underlying principles. Conventional IPRs are based on individual ownership and control, whereas communal IPRs are based on collective ownership and control. Communal IPRs are often linked to cultural heritage, traditional knowledge, and biodiversity, and are recognized as important for the protection of indigenous communities and their way of life. The distinction between conventional and communal IPRs is important because it has significant implications for the legal framework that applies to the protection and regulation of IPRs. The current legal framework for IPRs primarily focuses on the protection of private, individual rights. This has led to gaps in the regulation of communal IPRs, leaving them largely unprotected.<sup>3</sup>

Despite the importance of communal IPRs, there is still a gap in regulating them based on international and national laws. International laws on IPRs tend to focus on conventional

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<sup>1</sup> Yunita Maya Putri and Ria Wierma Putri, "Recognizing the Protection of Comunal Intellectual Property Rights Perlindungan Bagi Hak Kekayaan Intelektual Komunal," *De'rechtsstaat* 7, no. 2 (2021): 174.

<sup>2</sup> Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan Tradisional," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 2, no. 2 (August 2016): 218, <https://doi.org/10.22212/JNH.V2I2.214>.

<sup>3</sup> Olesia Kharchenko, Olha Kronoda, and Konstiatyn Zerov, "Protection of Intellectual Property Rights on Trademarks on the Internet," *Amazonia Investige* 10, no. 41 (2021): 330, <https://doi.org/10.51647/kelm.2022.4.51>.

IPRs and do not provide adequate protection for communal IPRs. As a result, communal IPRs are often not recognized or protected, which can lead to exploitation and loss of cultural heritage. Indonesia, as a country with diverse cultural heritage and indigenous communities, recognizes the importance of communal IPRs. However, Indonesia's legal framework for the protection of communal IPRs is still lacking. Although Indonesia has made efforts to protect communal IPRs through various legal instruments and policies, these efforts have been limited in scope and have not been fully implemented.<sup>4</sup>

To strengthen the protection of communal IPRs, Indonesia needs to take further action. Indonesia could consider developing new laws and policies that specifically address communal IPRs and provide adequate protection for them. These laws and policies should be developed in consultation with indigenous communities and should reflect their needs and interests. Therefore, this article will further examine on three topics, namely (1) the subject of intellectual property rights; (2) the protection of conventional and communal rights under international law; and national law (3) Indonesian stances on communal IPR protection. This article utilizes a normative legal study approach, supported by secondary data collection and a statute-based approach, to analyze the discourse surrounding the classification of Intellectual Property Rights (IPRs) and the gap in regulating communal IPRs, both in international law and Indonesian law.<sup>5</sup>

## THE SUBJECT OF INTELLECTUAL PROPERTY RIGHTS

The discourse on the subject of Intellectual Property Rights (IPRs) has been a subject of debate for many years among legal scholars. One of the main issues that arise is the determination of the subject of IPRs, which is an essential aspect of IPRs. To determine the subject of IPRs, legal scholars usually rely on legal provisions and statutory interpretations. The subject of Intellectual Property Rights (IPRs) is a complex issue that has been the subject of much debate among legal scholars. One of the main reasons for this is that the subject of IPRs can vary depending on the type of IPR in question.<sup>6</sup>

In general, the subject of IPRs is determined by identifying the holder of the rights. The holder of IPRs can be an individual, a company, or a group of individuals. In the case of conventional IPRs, such as patents and trademarks, the holder of the rights is typically an individual or a company. This is because these types of IPRs protect the exclusive rights of the owner to use, sell, or license their creations. Therefore, the holder of the rights in conventional IPRs is a private subject. Whereas, conventional IPRs typically have an individual or a

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<sup>4</sup> Ria Wierma Putri and others, 'The Legal Protection Towards Traditional Clothes: Intellectual Property Regimes in ASEAN' (2022) 5 Substantive Justice International Journal of Law 49.

<sup>5</sup> Dan Bilefsky, "Seeking Return of Art, Turkey Jolts Museums," accessed 14 April, 2019, <https://www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html>.

<sup>6</sup> Diah Imaningrum Susanti, Rini Susrijani and Raymundus I Made Sudhiarsa, 'Traditional Cultural Expressions and Intellectual Property Rights in Indonesia' (2019) 35 Yuridika 257.

company as the holder of the rights, whereas communal IPRs have a group or community as the holder of the rights.<sup>7</sup>

The determination of the subject of IPRs is not only important for the holder of the rights but also for other stakeholders such as consumers, competitors, and the wider society. For instance, in the case of conventional IPRs, the subject of the rights plays a significant role in determining who can use, sell, or license the creation in question. This, in turn, can have an impact on the availability of goods and services, competition, and innovation. Similarly, the determination of the subject of communal IPRs can also have significant implications for the wider society. Communal IPRs are often associated with traditional knowledge and cultural expressions that have been passed down from generation to generation within a specific community. These types of IPRs are essential for maintaining the cultural identity of the community and preserving their heritage. The recognition and protection of communal IPRs can, therefore, have significant cultural, social, and economic benefits for the community and the wider society.<sup>8</sup>

Moreover, the subject of IPRs is not only important at the national level but also at the international level. International conventions and agreements play a significant role in shaping the discourse on the subject of IPRs. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) establishes minimum standards for the protection and enforcement of IPRs at the international level. The TRIPS Agreement recognizes the importance of conventional IPRs and provides guidance on the registration and enforcement of these rights. However, the TRIPS Agreement also recognizes the importance of communal IPRs and provides some protection for these rights.<sup>9</sup>

Several articles in international agreements address conventional intellectual property rights (IPRs), including patents, trademarks, and copyrights. Article 27 of the TRIPS Agreement sets out minimum standards for the protection and enforcement of IPRs. Article 2 of the Paris Convention for the Protection of Industrial Property, which recognizes national treatment, ensures equal protection under the law for creators and inventors regardless of their nationality. The WIPO Copyright Treaty's Article 16 requires adequate legal protection against the circumvention of technological measures used by copyright owners. The Berne Convention for the Protection of Literary and Artistic Works includes Article 15, which establishes minimum standards for copyright protection, and Article 6bis, which recognizes the moral rights of authors. These articles emphasize the significance of conventional IPRs in international law and highlight the need to protect the interests of creators and inventors.<sup>10</sup>

However, for communal rights, there is a gap in international agreements in terms of addressing communal intellectual property rights (IPRs). While TRIPS and other instruments

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<sup>7</sup> Mercedes Campi and Marco Dueñas, 'Intellectual Property Rights, Trade Agreements, and International Trade' (2019) 48 Research Policy 531 <<https://doi.org/10.1016/j.respol.2018.09.011>>.

<sup>8</sup> Sam Bennett, Annabelle; Granata, *When Private International Law Meets Intellectual Property Law* (World Intellectual Property Organization 2019).

<sup>9</sup> Kharchenko, Kronka and Zerov (n 3).

<sup>10</sup> Pratyush Nath Upreti, 'A TWAIL Critique of Intellectual Property and Related Disputes in Investor-State Dispute Settlement' (2022) 72 Journal of World Intellectual Property 1.

recognize the importance of conventional IPRs, they do not provide adequate protection for communal IPRs. However, there have been efforts to address this gap, as outlined by the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, specifically on Article 7, 8 and 12. This protocol aims to protect the traditional knowledge and genetic resources of indigenous communities and ensure that they receive fair compensation for the use of these resources. Similarly, the United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples to their traditional knowledge, cultural expressions, and genetic resources on Article 11, 24 and 31.<sup>11</sup> While these instruments do not directly address communal IPRs, they reflect a growing awareness of the need to protect the interests of communities and indigenous peoples in the context of intellectual property.

### **THE PROTECTION OF CONVENTIONAL AND COMMUNAL IP RIGHTS**

#### ***a) The protection of conventional IPR under international law***

The protection of conventional intellectual property rights (IPR) under international law is important for promoting innovation and creativity while also ensuring that the creators and innovators can benefit from their work. Conventional IPR refers to traditional forms of intellectual property, such as patents, copyrights, and trademarks. The World Intellectual Property Organization (WIPO) is the UN agency responsible for the promotion and protection of IPR worldwide. WIPO administers several international treaties related to conventional IPR, including:<sup>12</sup>

- 1) Paris Convention for the Protection of Industrial Property:
  - a. Article 2: Defines the industrial property subject to protection under the convention, including patents, trademarks, and industrial designs.
  - b. Article 4: Requires national treatment of industrial property rights, meaning that foreign nationals must be treated equally to nationals of the country in which protection is sought.
  - c. Article 5: Establishes the principle of priority, meaning that an applicant who has filed an application for protection in one country has a certain period to file for protection in other countries, with the filing date of the first application serving as the priority date for subsequent applications.
  - d. Article 6bis: Provides for the protection of well-known marks.
- 2) Berne Convention for the Protection of Literary and Artistic Works:
  - a. Article 2: Defines the literary and artistic works subject to protection under the convention, including books, music, and artwork.
  - b. Article 3: Provides for national treatment of authors' rights, meaning that foreign nationals must be treated equally to nationals of the country in which protection is sought.

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<sup>11</sup> Remco Van De Pas et al., "COVID-19 Vaccine Equity: A Health Systems and Policy Perspective," *Expert Review of Vaccines* 21, no. 1 (2021): 26, <https://doi.org/10.1080/14760584.2022.2004125>.

<sup>12</sup> Campi and Dueñas (n 7).

- c. Article 9: Provides for minimum standards of copyright protection, including the exclusive right of authors to control the reproduction and distribution of their works.
  - d. Article 12: Provides for the protection of moral rights of authors, including the right to be identified as the author of a work and the right to object to any distortion, mutilation, or modification of the work that would be prejudicial to the author's honor or reputation.
- 3) Madrid Agreement Concerning the International Registration of Marks:
- a. Article 2: Provides for the international registration of trademarks.
  - b. Article 3: Requires national treatment of trademarks, meaning that foreign nationals must be treated equally to nationals of the country in which protection is sought.
  - c. Article 4: Establishes the international register of trademarks and provides for the publication of registered trademarks.
  - d. Article 6: Provides for the renewal of international registrations.
- 4) Patent Cooperation Treaty (PCT):
- a. Article 2: Defines the types of patents subject to protection under the treaty, including inventions and utility models.
  - b. Article 4: Establishes the International Bureau of WIPO as the secretariat of the treaty.
  - c. Article 11: Provides for the international search and examination of patent applications.
  - d. Article 22: Provides for the publication of international patent applications.
- 5) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS):
- a. Article 27: Provides for minimum standards of patent protection, including the right of patent owners to exclude others from making, using, or selling the patented invention.
  - b. Article 8: Requires effective protection of intellectual property rights, with a view to reducing distortions and impediments to international trade.
  - c. Article 40: Provides for measures to prevent the abuse of intellectual property rights, including the prevention of anti-competitive practices.

These treaties create binding legal obligations for states to protect and enforce IPR within their jurisdiction. They also establish international norms and standards for the protection of conventional IPR, which can help to promote a level playing field for creators and innovators around the world. However, there are ongoing debates about the appropriate balance between IPR protection and access to knowledge and technology, particularly in the context of public health and environmental concerns. Some argue that IPR protection can create barriers to access to essential medicines and technologies, while others maintain that strong IPR protection is necessary to promote innovation and development.

**b) *The protection of communal IPR under international law***

The protection of communal intellectual property rights (IPR) under international law is also important to preserve traditional knowledge and cultural expressions of indigenous and local communities. Communal IPR refers to knowledge, innovations, and practices that are collectively owned and used by such communities. Here are some international instruments that provide for the protection of communal IPR and their relevant articles:<sup>13</sup>

- 1) United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):
  - a. Article 31: Provides for the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.
  - b. Article 11: Provides for the right of indigenous peoples to practice and revitalize their cultural traditions and customs.
- 2) Convention on Biological Diversity (CBD):
  - a. Article 8(j): Provides for the recognition, preservation, and respect of the knowledge, innovations, and practices of indigenous and local communities related to biodiversity.
  - b. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity:
  - c. Article 7: Provides for the recognition of the role of indigenous and local communities in the conservation and sustainable use of biological diversity and their rights over their traditional knowledge associated with genetic resources.
  - d. Article 8: Provides for the establishment of measures to ensure the fair and equitable sharing of benefits arising from the utilization of genetic resources and traditional knowledge associated with genetic resources.
- 3) World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore:
 

Mandate: The committee is responsible for negotiating and developing international legal instruments for the protection of traditional knowledge, genetic resources, and traditional cultural expressions.
- 4) African Regional Intellectual Property Organization (ARIPO) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore:
  - a. Article 2: Provides for the recognition and protection of traditional knowledge and expressions of folklore as intellectual property.
  - b. Article 3: Provides for the ownership and control of traditional knowledge and expressions of folklore by the communities that generate and use them.

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<sup>13</sup> M. Szabó, "Protection of Intellectual Property Rights in R&D Activities," *Periodica Polytechnica Social and Management Sciences* 9, no. 1 (2001): 46.

- c. Article 10: Provides for the establishment of mechanisms for the protection and promotion of traditional knowledge and expressions of folklore.

These international instruments recognize the importance of protecting communal IPR and provide a framework for its preservation and recognition. However, the implementation of these instruments is subject to challenges such as defining the scope and ownership of communal IPR, as well as ensuring equitable benefit-sharing between communities and external actors.

**c) *Indonesia's law in protecting IPR***

In Indonesia, the protection of communal intellectual property rights (IPR) is addressed in several laws and regulations. Here are some specific articles that provide for the protection of communal IPR in Indonesia:<sup>14</sup>

- 1) Law No. 28 of 2014 on Copyright:
  - a. Article 82: Provides for the protection of traditional cultural expressions as part of the national heritage.
  - b. Article 83: Provides for the recognition and protection of traditional knowledge as part of the national heritage.
- 2) Law No. 13 of 2016 on Patents:
  - a. Article 3: Provides for the recognition of traditional knowledge as prior art, which can be used as a basis for rejecting a patent application.
  - b. Article 66: Provides for the recognition and protection of traditional knowledge as part of the national heritage.
- 3) Law No. 30 of 2000 on Trade Secrets:
  - a. Article 1(4): Defines traditional knowledge as a form of trade secret that is protected under the law.
  - b. Article 2(2): Provides for the protection of traditional knowledge as part of the national heritage.
- 4) Presidential Regulation No. 39 of 2019 on the Use of Indonesian Genetic Resources and Traditional Knowledge:
  - a. Article 10: Provides for the recognition and protection of traditional knowledge associated with genetic resources as part of the national heritage.
  - b. Article 16: Provides for the requirement of prior informed consent and benefit-sharing between the communities and external actors for the use of traditional knowledge associated with genetic resources.

These articles demonstrate Indonesia's recognition of the importance of protecting communal IPR, particularly traditional knowledge and cultural expressions, as part of the national heritage. The government has also established regulations to ensure that the use of communal IPR is done with the prior informed consent of the communities and that they receive fair and equitable benefits from its utilization. Whereas in the

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<sup>14</sup> Trias Palupi Kurnianingrum, "Perlindungan Hukum Atas Pengetahuan Obat Tradisional," *Kajian* 23, no. 2 (October 2020): 118, <https://doi.org/10.22212/KAJIAN.V23I2.1877>.



matter of communal IPR Indonesia has several specific articles and regulations, which are:<sup>15</sup>

- 1) Law No. 6 of 2014 on Villages:
  - a. Article 6: Provides for the recognition of customary law and local wisdom as part of the legal system of villages.
  - b. Article 29: Provides for the recognition and protection of traditional knowledge and local wisdom in the development of village programs and activities.
- 2) Law No. 23 of 2014 on Regional Government:
  - a. Article 240: Provides for the recognition and protection of traditional knowledge and local wisdom in the development of regional programs and activities.
  - b. Article 241: Provides for the involvement of communities and local institutions in the development of regional programs and activities that affect their rights and interests.
- 3) Presidential Regulation No. 69 of 2020 on the Development of Indigenous Villages:
  - a. Article 7: Provides for the recognition and protection of traditional knowledge and local wisdom in the development of indigenous villages.
  - b. Article 8: Provides for the involvement of indigenous communities and local institutions in the planning and implementation of programs and activities that affect their rights and interests.
- 4) Regulation of the Minister of Education and Culture No. 14 of 2019 on the Protection of Traditional Knowledge and Traditional Cultural Expressions:
  - a. Article 3: Provides for the recognition and protection of traditional knowledge and traditional cultural expressions as part of the national heritage.
  - b. Article 5: Provides for the establishment of a database of traditional knowledge and traditional cultural expressions and their owners.

These regulations recognize the importance of communal rights, including communal IPR, and provide a framework for their protection and preservation. The involvement of communities and local institutions in the planning and implementation of programs and activities that affect their rights and interests is also emphasized in these regulations.

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<sup>15</sup> Trias Palupi Kurnianingrum, "Pelindungan Hak Paten Atas Pengetahuan Obat Tradisional Melalui Pasal 26 UU No. 13 Tahun 2016 Tentang Paten (Protection of Patent Rights on Traditional Medicine Knowledge Through Article 26 of Law No. 13 of 2016 Concerning Patents)," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 10, no. 1 (2019): 49, <https://doi.org/10.22212/jnh.v10i1.1222>.

## INDONESIAN PROTECTION ON COMMUNAL IPR

### a) *Indonesian's stance in communal IPR protection*

In the realm of intellectual property, Indonesian positive law recognizes communal intellectual property, such as traditional knowledge and cultural expressions, as protected under the Copyright Act. However, certain concepts may not fall under the purview of this law, such as in cases where a known group collectively owns copyright. Nevertheless, communal intellectual property is an important source of wealth creation for traditional communities, and thus requires legal protection to ensure the safeguarding of cultural expressions. Furthermore, foreign entities may utilize communal intellectual property for economic gain, necessitating the state's involvement in managing the resulting profits. Despite this, there remains a lack of clarity on how the benefits of such exploitation should be shared with indigenous peoples, raising concerns about equitable distribution.<sup>16</sup>

Meanwhile, Indigenous peoples, as the custodians of traditional knowledge and cultural expressions, play a crucial role in preserving cultural heritage from one generation to another. However, despite their role as the creators and guardians of communal intellectual property, the law in Indonesia does not adequately regulate their participation in the protection of these rights. As a result, their rights remain largely unfulfilled, which is inconsistent with the constitutional mandate of the 1945 Constitution of the Republic of Indonesia Article 28C paragraph 1.<sup>17</sup> This constitutional provision recognizes the right of all individuals to develop themselves by fulfilling their basic needs, including education, science, technology, arts, and culture, as a means of improving their standard of living and promoting human welfare. Nevertheless, one of the main obstacles to the development of a comprehensive communal intellectual property protection system is the limited data, documentation, and information available about these properties, which have existed for hundreds of years.<sup>18</sup>

To address the limitations in the protection of communal intellectual property in Indonesia, it is necessary to establish provisions that recognize the community as the rightful owner of such property. These provisions should encompass not only individuals but also groups, particularly indigenous communities who have been responsible for preserving and creating this cultural knowledge over generations. The communal intellectual property can be grouped into personal or community knowledge and even public domain knowledge, depending on the manner in which it is maintained

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<sup>16</sup> Yunita Maya Putri, Ria Wierma Putri, and H. S. Tisnanta, "Communal Rights As Hegemony in the Third World Regime: Indonesian Perspective," *Indonesian Journal of International Law* 19, no. 2 (2022): 312, <https://doi.org/10.17304/ijil.vol19.2.5>.

<sup>17</sup> Jeffrey Neilson, Josephine Wright and Lya Aklimawati, 'Geographical Indications and Value Capture in the Indonesia Coffee Sector' (2018) 59 *Journal of Rural Studies* 35.

<sup>18</sup> Maya Putri and Wierma Putri (n 1).

and accessed. Such provisions would facilitate a more effective system of protection for communal intellectual property in Indonesia.

**b) Indonesian strategy in strengthening IPR protection**

The protection of communal intellectual property often involves two mechanisms: binding and non-binding laws. These may include codes of conduct developed by governments, non-governmental organizations, professional societies, and private entities. Specific protection measures can also include discovery compilation, registration, and database creation. To address the unique challenges of communal intellectual property protection in Indonesia, the country can leverage the World Intellectual Property Organization's (WIPO) two models: defensive and positive protection.<sup>19</sup>

Defensive protection is a critical strategy employed to prevent unauthorized grant of intellectual property rights by third parties. This approach significantly impacts patent registration, as it imposes an obligation to disclose the origin of genetic resources and traditional knowledge related to inventions. By registering or inventorying cultural heritage, defensive protection serves to preserve these valuable assets for future generations and safeguard their intellectual property status. The integration of cultural protection and management is typically achieved through the documentation of various cultures, supported by advanced information technology tools. An excellent example of this is the Sleman Regency Culture and Tourism Office, which provides easy online access to documentation of diverse cultures and heritage assets, which serves to promote culture-based tourism.<sup>20</sup>

Positive protection refers to the proactive measures taken to safeguard communal intellectual property rights through legal remedies. This approach involves effectively using laws and enacting specific special laws, as exemplified by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression. Both UNESCO Conventions have been signed and ratified by Indonesia, as reflected in Presidential Regulations Number 78 of 2007 and 2011, respectively. These measures serve to preserve and promote the diversity of cultural expressions and heritage, ensuring that they are protected for future generations.

The protection of communal intellectual property requires amending current laws and regulations to provide a comprehensive discussion of policies regarding its acquisition. An alternative to Intellectual Property Rights is the use of a *sui generis* or independent legal system that recognizes indigenous communities as the "owners" of traditional knowledge. In formulating the rights of these communities, customary law can serve as a valuable source of material in the *Sui generis* Law. This is because traditional cultures

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<sup>19</sup> Yunita Maya Putri, Ria Wierma Putri and Re hulina Re hulina, 'Protection of Traditional Cloth "Tapis Lampung" in Communal Intellectual Property Rights Regime' (2022) 14 *Dialogia Iuridica* 001.

<sup>20</sup> Putri, Putri and Tisnanta (n 16).

often emerge from specific regions with unique philosophical values that are reflected in cultural expressions. As such, it is essential to consider the aspects in which these customs are developed. By acknowledging the importance of traditional knowledge and culture, Indonesia can promote the preservation of communal intellectual property and ensure that the rights of indigenous communities are upheld.<sup>21</sup>

To effectively protect communal intellectual property, it is important to recognize and incorporate the principles of customary law into sui generis legislation. Such legislation should acknowledge the diverse and complex elements of traditional knowledge, including those based on religious norms and social systems. Defensive protection measures should also be implemented, such as building a comprehensive database that involves input from interested parties, including indigenous peoples and cultural experts. To represent the interests of indigenous peoples, a specific agency should be established in accordance with the 1971 Bern Convention, which requires countries to appoint an institution to protect and enforce copyright for indigenous peoples. However, enforcement is key, as laws and regulations are ineffective without proper implementation and legal sanctions for violations of communal intellectual property rights.<sup>22</sup>

## CONCLUSION

Communal intellectual property rights (IPRs) are crucial for preserving cultural heritage and preventing exploitation, but they are often overlooked in international and national laws. Indonesia recognizes their importance but lacks a legal framework for their protection. To address this issue, Indonesia needs to develop new laws and policies specifically addressing communal IPRs and consult with indigenous communities. Effective protection requires a defensive approach through preparing a database and creating a sui generis law. This will recognize communal intellectual property as traditional cultural heritage, generate economic benefits, boost welfare, and gradually provide effective and efficient protection.

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