

# LEGAL POLICIES FOR THE PROTECTION OF THE COMMUNITY AS THE OWNER OF TRADITIONAL KNOWLEDGE

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**Abstract:** *Until now there is no agreement on the protection of traditional knowledge, especially to indigenous people who are considered the owners of traditional knowledge, this is due to differences in views regarding traditional ownership. then the problem in this research. How is the legal protection of traditional knowledge in Indonesia? What is the legal policy for protecting the community with traditional knowledge? The objectives of this research are as follows. Knowing how the legal protection of traditional knowledge in Indonesia. Knowing the legal policy of protection of the people who have traditional knowledge. The research method used is normative juridical research, namely legal research conducted by examining library materials or secondary data. In Indonesia itself, there is no legal protection that firmly regulates legal protection for people who have traditional knowledge, because the current rules do not provide firm legal protection, the government must take legal policies. In the form of law by making special rules that regulate the legal protection of people who have traditional knowledge and secondly, socializing from the government to people who have traditional knowledge. Suggestions from the authors in this study are that the government in this case is the DPR should be taken seriously in protecting the people who have traditional knowledge by immediately making strict rules showing legal protection so that they are not taken and recognized by other countries.*

**Keywords:** *Legal Protection, Traditional Knowledge, Policy, Regulation*

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## Introduction

The impact of the current digital era has caused countries in the world to appear to be without boundaries. Various developments in knowledge and technology in one country will quickly spread and be easily accessed by people in other parts of the world. This condition encourages further development. This condition further encourages Intellectual Property Rights (IPR) as an effort to protect the public, in this case as owners of traditional knowledge.

In general, all components of the international community agree that traditional knowledge has a very important meaning. This knowledge is not only important for developed countries but also important for developing countries, especially for indigenous people who play a role in developing, caring for and preserving it for generations. -next generation.

Traditional knowledge (traditional knowledge) is included in the scope of intellectual work originating from ideas, ideas, or inventions of a group of people in a country. The scope of traditional knowledge itself refers to tradition-based literature, artistic or scientific works, performances, inventions, scientific discoveries, designs, brands, names and symbols, undisclosed information, and all other tradition-based innovations and creations caused by intellectual activity. in industrial, scientific, literary or artistic fields. Tradition-based ideas refer to systems of knowledge, creations, innovations and cultural expressions that have generally been passed on from generation to generation, considered to be related to a particular community or region, have been developed non-systematically, and continuously as a response to a changing environment.<sup>1</sup> Traditional knowledge in a broad sense includes a large part of the knowledge and practices passed down from one generation to the next<sup>2</sup>

Traditional knowledge is the knowledge of indigenous people who are vulnerable and helpless in the midst of globalization. Traditional knowledge has the potential to become extinct in the not too distant future with the extinction of indigenous communities. The protection of traditional knowledge must be drawn into a universal interest, namely the interests of humanity, not only for today's generation but also for future generations. Traditional knowledge is the knowledge of indigenous people who are vulnerable and helpless in the midst of globalization. Traditional knowledge has the potential to become extinct in the not too distant future with the extinction of indigenous communities.<sup>3</sup>

In general, traditional knowledge can be described as literary, artistic or scientific works which are the result of intellectual activity and have been passed down from one generation to the

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<sup>1</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTFK/IC/3/9, 20 Mei 2002. 11

<sup>2</sup> Doris Estelle Long, Summer "Crossing The Innovation Divide "81 Temp. L. Rev. 507, *Temple Law Review*, pp. 507-543. 530 (2008)

<sup>3</sup> Shelton, D., "Fair Play, Fair Pay: Preserving Traditional Knowledge and Biological Resource' dalam Gunther Handl (Ed.), Year Book of International Environmental Law, Vol. 5. (1994)

next.<sup>4</sup> Traditional knowledge is broadly classified as traditional cultural expressions and traditional knowledge<sup>5</sup> relating to medicine, plant genetic resources, crafts, and so on.<sup>6</sup>

What makes traditional knowledge different from the results of other intellectual property is that traditional knowledge is a form of intellectual work that grows and develops from and within a communal society. There is a lot of traditional knowledge in Indonesia, for example the tor-tor dance, saman dance, plate dance, turmeric herbal drink, kencur, angklung, gondang Sembilan etc. which are concrete evidence that the existence of traditional knowledge lives in society. The concept of Traditional Knowledge is an intellectual property that deserves legal protection because it is an important source of knowledge related to human life that can be commercialized. Traditional knowledge possessed by Indonesia has the potential to become material wealth when it has manifested itself in the form of products that have a distinctive design.

Until now there has been no agreement regarding the protection of traditional knowledge, especially for indigenous people who are considered as owners of traditional knowledge, this is due to different views regarding traditional ownership. The tendency of public opinion to place traditional knowledge as a shared heritage so that traditional knowledge is considered as public property (public domain). The problem is that traditional knowledge is owned by indigenous people or local communities, because this knowledge can be accessed and obtained freely and free of charge by anyone who is not a member of that community. The protection of traditional knowledge must be drawn into universal interests, namely the interests of humanity, not only for today's generation, but also for future generations. Debates between academics about the protection of traditional knowledge must avoid conflicts of interest between developed countries and developing countries.<sup>7</sup> Then the problem is why HKI has not been able to fully provide protection because HKI itself is intended to protect individual rights so that it is clear what subjects must be protected while in traditional knowledge it aims to protect joint ownership, generally depending on the area so it is difficult to fulfill the same perception of the matter who actually holds the rights to traditional knowledge.

The issue of protecting traditional knowledge as a field of intellectual property rights has become a common concern for international organizations. The World Intellectual Property Organization (WIPO), the world IPR organization providing , gives a mandate to members to discuss Genetic Resources Traditional Knowledge and Folklore (GRTKF) in international forums. Even some countries, especially developing countries where there is usually a lot of traditional knowledge, have tried to provide protection for traditional knowledge. For example, Peru has issued a law requiring potential users to obtain approval from communities that have traditional knowledge and enter into agreements on its use.<sup>8</sup>

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<sup>4</sup> J. Janewa Oseitutu, "Traditional Knowledge: Is Perpetual Protection A Good Idea?", *IDEA: The Intellectual Property Law Review*, 50 IDEA 697. 700

<sup>5</sup> Konsep pengetahuan tradisional yang banyak digunakan saat ini untuk merujuk kepada pengetahuan yang memiliki tradisi panjang dan / atau relevan dengan masyarakat asli. Yinliang Liu, "IPR Protection For New Traditional Knowledge: With A Case Study Of Traditional Chinese Medicine", *E.I.P.R.* 2003, 25(4), 194-199, *European Intellectual Property Review*, pp. 194-199. 194, (2003)

<sup>6</sup> Krishna Ravi Srinivas, "Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions", 3 *Asian J. WTO & Int'l Health L. & Pol'y* 81, *Asian Journal of WTO & International Health Law and Policy*, pp. 81-119. 84 (2008)

<sup>7</sup> Nunez, R.G.A.I. 'Intellectual Property and The Protection of Traditional Knowledge, Genetic Resources and Folklore: Peruvian Experience', dalam Armin von Bogdany Cs, (Ed.) (2008)

<sup>8</sup> Pelindungan Pengetahuan Tradisional di Indonesia Perlu Aturan Tegas, www.ugm.ac.id, 8 November 2022

Meanwhile, when compared to other countries, IPR in Indonesia can be said to be new, for the first time Indonesia has made regulations in the field of IPR, namely Law No. 6 of 1982 concerning copyright, which later resulted in other laws and their derivative regulations. Currently IPR regulations, among others, are contained in Law no. 14 of 2001 concerning Patents (Patent Law), UU. 15 of 2001 concerning Trademarks (Brand Law), Law no. 19 of 2002 concerning Copyright (Copyright Law), Law no. 29 of 2000 concerning Protection of Plant Varieties (UU PVP), Law no. 30 of 2000 concerning Trade Secrets (Trade Secret Law), and Law no. 18 of 2002 concerning the National System for Research, Development and Application of Science and Technology (UU Sisnas Litbang IPTEK) which in it alludes to the regulation of traditional knowledge. Therefore, in this research it is important to know about how legal policies protect the community as owners of traditional knowledge.

### **Literature review**

Based on the background above, the problems in this study are as follows. First, how is the legal protection of traditional knowledge in Indonesia? Second, how is the legal policy to protect the people who own traditional knowledge? The objectives in this study are as follows. The first is to find out how legal protection is for traditional knowledge in Indonesia. The second is to find out the legal policies for protecting people who own traditional knowledge.

The research method used is normative juridical research, namely legal research conducted by examining literature or secondary data.<sup>9</sup> The type of data used is secondary data including primary legal materials and secondary legal materials. Primary legal materials include laws and regulations in the fields of copyrights, patents, and culture. The secondary legal materials are in the form of books and journals. Data analysis used qualitative juridical analysis.<sup>10</sup>

## **Second Level Heading with Each Initial Letter Capitalized**

### **1. Legal Protection of Traditional Knowledge**

Basically, the scope of traditional knowledge includes many things in the form of works of art, traditional food, traditional clothes, and other cultures that have been used for a long time and passed down to the next generation which are the common property of indigenous peoples which are guarded and preserved. In the WIPO document, traditional knowledge is not limited to one particular knowledge but refers to a very broad range of knowledge. What separates traditional knowledge from other knowledge is its attachment to a particular community, and it is these characteristics that give it traditional characteristics (passed down from generation to generation). Traditional knowledge is created, maintained, used, and protected within traditional circles and usually refers to knowledge that has been accumulated by people in a long process of experience and in certain locations. Not infrequently traditional knowledge is important knowledge of an identity in a community, so that in essence traditional knowledge is an innovation, creation, and cultural expression that is produced and maintained from generation to generation by indigenous people, local communities, or individuals in the local community of a country.<sup>11</sup>

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<sup>9</sup> Padian Adi Salamet Siregar, Ismail Koto, Syarat Objektivitas Dan Subjektivitas Penanganan Penahanan, *De Lega Lata Jurnal Ilmu Hukum Fakultas Hukum Umsu*, Volume 4 Nomor 2, Juli- (2019)

<sup>10</sup> Koto, Ismail, and Faisal Faisal. "Penerapan Eksekusi Jaminan Fidusia Pada Benda Bergerak Terhadap Debitur Wanprestasi." *Journal of Education, Humaniora and Social Sciences (JEHSS)* 4.2 (2021): 774-781

<sup>11</sup> Nainggolan, Ibrahim. "Analisis Yuridis Pengembalian Barang Bukti Dalam Tindak Pidana Perikanan (Juridical Analysis Of Returns Of Investigation Goods Action Of Fisheries Criminal)." *De Lega Lata: Jurnal Ilmu Hukum* 3.1 (2018): 68-80.

Intellectual property rights are a translation of intellectual property rights which are known in the Anglo Saxon legal literature. IPR within the framework of civil law can be categorized as property rights, this is in line with the provisions of Article 499 and Article 503 of the Indonesian Civil Code (KUHPer) which define objects as goods or rights that can be controlled by property rights. The object itself is classified into tangible objects and intangible objects. According to Mahadi, what is meant by tangible objects is material objects (*stoffelijk voorwerp*) and intangible objects are immaterial objects in the form of rights.<sup>12</sup>

Immaterial property rights can be objects of object rights, where object rights are absolute rights over an object. IPR is an absolute right whose object is not a thing. Intellectual Property Rights Concept:<sup>13</sup> According to international conventions and laws, IPR can be classified into 2 groups, namely: industrial property rights consisting of patents/simple patents; trade secrets; Brand; Industrial design; protection of plant varieties; integrated circuit layout design; and geographical indications and indications of origin; and copyright.

Intellectual property cannot be separated from global trade, in which countries carry out conventions or international agreements that can produce legal products or even an international organization such as the World Trade Organization (WTO). In the global order, IPR is seen as a trade issue that has a relationship between three important aspects, namely intellectual property, commercialization, and legal protection.<sup>14</sup>

In this case the purpose of the State providing legal protection is to provide legal certainty for the owner of traditional knowledge so that it cannot be misused by unauthorized and irresponsible parties. The elements of IPR protection include:<sup>15</sup>

- a. Legal subjects consist of: owners or rights holders; law enforcement officers; IPR registration officials, and lawbreakers.
- b. Protected objects are all types of IPR regulated by law.
- c. Protection registration is an important element in IPR because protected IPR is limited to IPR that has been registered and proven by a registration certificate, unless the law determines otherwise.
- d. Protection period. Each IPR has a protection period as specified in the law that regulates it.
- e. Protective legal action. If it is proven that there has been an IPR violation, the violator is subject to criminal and/or civil sanctions

Protection of owners of traditional knowledge is important for developing countries to developed countries, if you look at the neighboring country, namely the Philippines, which is the first country to regulate the protection of indigenous peoples' rights through a special law. Protection of the rights of native peoples is a mandate from the constitution of this country. Therefore, everything related to the protection of people's rights is regulated in a separate law contained in the "Republic Act" No. 8371, known as "The Indigenous Peoples Rights Act - IPRA", 1997 (Act on Community Rights Original).

<sup>12</sup> Dalam Saidin, *Aspek Hukum HKI (Intellectual Property Right)*, (Jakarta: Raja grafindo Persada, 1997) .8.

<sup>13</sup> Abdulkadir. Muhammad, *Kajian Hukum Ekonomi HKI*, (Bandung: Citra Aditya Bakti, 2001), 1-2.

<sup>14</sup> Muhammad Ahkam Subroto dan Suprapedi, *Eksplorasi Konsep Kekayaan Intelektual untuk Menumbuhkan Inovasi*, (Jakarta: LIPI Perss, 2005), 10.

<sup>15</sup> Abdulkadir. Muhammad, *Op.cit*, hal 144-145

One of the rights protected in the law is the indigenous people's right to their knowledge. In addition, traditional knowledge, especially medicinal knowledge is also regulated in a separate law, namely in "Republic Act" No. 8423 which is called the "Traditional and Alternative Medicine Act- TAMA", 1997 (Traditional and Alternative Medicine Act). In the following, the elements of the traditional knowledge ownership system adopted by this country are discussed with reference to the two provisions above.

From the results of a study of the system of traditional knowledge ownership in the Philippines, it appears that this country has established a system of protecting community intellectual rights in a special law. In this system, it is determined that the owner of traditional knowledge is the local community and this ownership is private. There are a number of normative rights and authorities obtained by ICCs/IPs as owners of knowledge, including: first, the right to practice and revitalize their own cultural customs and traditions; secondly, the right to return ownership of spiritual, religious, intellectual and cultural objects which have been taken by force and without prior permission or violated their laws, traditions and customs; and third, the right to special measures to control, develop and protect their knowledge, technology and cultural manifestations. These rights and authorities were born from state recognition and are further regulated through more specific provisions, namely in the Declaration of State Policy.

While in Indonesia itself, until now there has been no specific regulation that comprehensively regulates the protection of traditional knowledge. The only law that regulates traditional knowledge is Law Number 5 of 1994 concerning the Ratification of the United Nations Convention on Biodiversity. In fact, the law is a form of ratification, not a special regulation adapted to Indonesian traditional knowledge. The provisions regarding traditional knowledge in this law are only as long as those regulated in Article 8 letter (j) which are only related to biodiversity. In this case, Indonesia is very behind when compared to other developed countries, even behind developing countries such as the Philippines.

Many things then become problematic and hinder Indonesia itself does not have specific rules in protecting owners of traditional knowledge, for example, when viewed from the definition and scope of traditional knowledge, it is very clear that traditional knowledge is closely related to communal ownership of indigenous peoples and the characteristics of traditional knowledge as well reflects the concept of customary law ownership. According to Hilman Hadikusumah, in general, Indonesian customary law has features:<sup>16</sup>

1. Traditional, which is hereditary from the time of the ancestors until now, its existence is still valid and maintained by the community concerned.
2. Religious magic, legal behavior or existing legal rules are always related to belief in the supernatural or based on the teachings of God Almighty.
3. Communal, customary law prioritizes common interests where individual interests are encompassed by common interests and legal relations between community members are based on the principles of togetherness, kinship, mutual help and mutual cooperation.
4. Open and simple, customary law can accept the entry of elements from outside as long as it does not conflict with its customary law. In addition, customary law is also simple, not complicated, not much administration, mostly unwritten, easy to understand and implemented based on mutual trust..

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<sup>16</sup> Tolib Setiady, Intisari Hukum Adat Indonesia (Kajian Kepustakaan), (Bandung: Alfabeta, 2008), 32-35.

If the patterns above are examined, they are traditional in nature which are hereditary from their ancestors and continue to be maintained until later generations while in the application for IPR they must also meet substantive requirements. According to Joseph E. Stiglitz in his book *Making Globalization Work*, argues that under the TRIPS flag set by developed countries, all member countries are forced to implement an intellectual property system that requires certain standards that are considered high, especially for developing countries.<sup>17</sup>

The conditions and capabilities of countries in the world are not the same or balanced, the application of high IPR recognition standards under the pretext of providing recognition and protection to those who have works and intellectual abilities without considering the limitations and conditions faced by developing countries will only benefit these countries. proceed. Furthermore, Joseph E. Stiglitz, gave several criticisms of TRIPs related to TRIPs rules that are not suitable for developing countries, including: first, protection facilities are given to developed countries as they wish but do not provide protection for traditional knowledge in developing countries. Second, TRIPs have reduced developing countries' access to knowledge and forced them to pay royalties in large quantities, for example developing countries were promised to get wider access to agriculture, but on the other hand developed countries reduced their subsidies. Setting high standards as a requirement for obtaining IPR will be difficult for the community or governments of developing countries to fight for their IPR for traditional knowledge, which causes Indonesia to not yet have specific regulations governing legal protection for communities as owners of traditional knowledge.

In Permenkumham No. 13 of 2017 also regulates communal intellectual property which includes: Traditional Knowledge; Traditional Cultural Expressions; Genetic Resources; and Potential Geographical Indications. The traditional knowledge itself consists of: technical skills (know how); Skills; innovation; draft; learning; agricultural knowledge; technical knowledge; ecological knowledge; medical knowledge including related drugs and healing procedures, as well as knowledge related to Genetic Resources; community customs; (magical) rites; celebrations; traditional economic system; social organization system; knowledge and behavioral habits regarding nature and the universe, traditional medicine; and/or proficiency in making traditional crafts, traditional food/beverages, traditional modes of transportation. The presence of the Minister of Law and Human Rights 13/2017 shows the government's positive steps in providing legal certainty and protection to the community as owners of traditional knowledge.

## **2. Legal Policy for the Protection of Communities with Traditional Knowledge Owners**

Traditional culture or also traditional knowledge is a work that not only needs to be developed but also preserved and utilized. Indonesia is known as a nation rich in traditional arts and culture. 1,128 tribes spread throughout Indonesia with more than 300 language dialects and more than 3,000 original Indonesian dances. There are also various other arts such as traditional songs, regional traditional arts and others.<sup>18</sup> Traditional arts and culture or also known as Traditional Cultural Expressions (EBT) are the identity of the Indonesian nation which can be used economically for the progress and welfare of society. Therefore it is necessary to have rules in the form of special laws and regulations that regulate traditional cultural expressions.

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<sup>17</sup> Joseph E. Stiglitz, *Making Globalization Work Menyiasati Globalisasi Menuju Dunia yang Lebih Adil (Making Globalization Work)*, diterjemahkan oleh Endrijani Azwardi, (Bandung: Mizan Pustaka, 2007), 432

<sup>18</sup> Bayangsari Wedhatami, Budi Santoso, *Upaya Perlindungan Ekspresi Budaya Tradisional Dengan Pembentukan Peraturan Daerah*, 33.

Traditional cultural expressions are a material form of ethnic and ethnic diversity in Indonesia. So far, Indonesia is included in the top five countries in the world that have the most diverse traditional ethnic wealth.<sup>19</sup>

Indonesia as an archipelagic country has a very rich diversity of arts and culture. This is in line with ethnic, ethnic and religious diversity which as a whole is a national potential that needs to be protected. This artistic and cultural wealth is a source of intellectual works that can and needs to be protected by law. This wealth is not solely for art itself, but can be used to increase the ability in the field of commerce and industry that involves its creators. Thus, protected artistic and cultural wealth can increase the welfare not only of the creators, but also of the nation and state.

The government has made appropriate legal protection efforts for traditional cultural expressions by drafting the Bill on the Protection and Utilization of Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions, although until now it has not been promulgated as a law. Arrangements regarding traditional cultural expressions in the Intellectual Property Rights legal system already exist in Law Number 28 of 2014 Concerning Copyright, Permenkumham No. 13 of 2017 concerning Communal Intellectual Property Data but has not been fully enforced optimally in providing legal protection, seeing the urgency that there is a lot of knowledge in Indonesia as a cultured country and global progress which is making more and more efforts in making claims on traditional knowledge by other countries in there needs to be a legal policy from the government.

Traditional knowledge is a very important aspect to be fought for and protected by countries that have potential in this field, especially Indonesia itself. So there should be a government policy as an effort to extend legal protection for people who have traditional knowledge. There are two mechanisms for making government policies in providing protection for people who own traditional knowledge, namely: Policy in the legal aspect; Policies in non-legal aspects.

### **1. Policy in Legal Aspects**

The legal policy in an effort to protect the community as the owner of traditional knowledge is clear which is the beginning and foundation for the community possessing traditional knowledge by forming binding legal rules such as the Patent Law, Permenkumham No. 13 of 2017 concerning Communal Intellectual Property Data, Law NO. 5 of 2017 concerning the Advancement of Culture, Law no. 28 of 2014 concerning Copyright and others, but there are no implementing regulations that strictly regulate the protection of traditional knowledge. Whereas the purpose of efforts to protect traditional knowledge is as follows:

1. Encouraging the creation of new intellectual works (for example based on copyrights, patents and industrial designs)
2. There is openness to new intellectual works (based on patent law and industrial designs)
3. Facilitating market order through the elimination of confusion (policies based on legal, brand and geographical indications), and unfair competition actions.
4. Protecting the confidentiality of information from users who are not in good faith

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<sup>19</sup> Miranda Risang, *Hukum Sumber Daya Genetic Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional di Indonesia*, (PT Alumni, Bandung, 2014), 4.



Then, because Indonesia is a part of the World Intellectual Property Organization (WIPO), which is a special administrative body under the United Nations that handles Intellectual Property Rights (IPR) issues for UN members, the rules formed are then adjusted to the joint agreement made by the WIPO countries. . Meanwhile, at the international level, the debate regarding the protection of traditional knowledge is more inclined towards protection in terms of Intellectual Property Rights, especially patents. This patent instrument can be used for ownership and control of traditional knowledge that is used for commercial purposes. Although traditional knowledge has been alluded to in several international agreements, it has not been expressly protected by international forums that specifically regulate IPR.

Likewise, IPR regulations in Indonesia do not explicitly regulate the protection of traditional knowledge. Therefore, there is a need to improve the protection of IPR regulations in Indonesia, especially the 2001 Patent Law. Improvements to IPR regulations in Indonesia are not enough without the support of international agreements. This is caused by the possibility that Indonesian traditional knowledge can be taken by other countries that do not recognize the traditional knowledge of other countries.

## **2. Policies in Non-Legal Aspects**

Then the next policy that can be taken in an effort to protect the people who own traditional knowledge is in a non-legal form given to traditional knowledge which is not in the form of binding rules regarding traditional knowledge. Includes code of conduct adopted by international, government and non-governmental organizations, national communities and the private sector. Other safeguards include compilation of findings, registration and databases of traditional knowledge. All levels of society and the government must collaborate to then form an organization to become a forum for traditional knowledge so that people can register it or carry out an inventory of traditional knowledge while supporting efforts to form special laws that regulate it, because it is important that traditional knowledge living in society can also be registered or inventoried Certain. The government must also actively conduct outreach to indigenous peoples or owners of traditional knowledge so that good cooperation can be realized between the community and the government in maintaining shared traditional knowledge.

## **Acknowledgments**

There are no legal arrangements related to legal protection for people who own traditional knowledge, this is caused by the current rules that do not provide strict legal protection, then the implementing regulations also do not exist as a legal umbrella for the community, even though according to the author there are rules which is firm becomes urgent because Indonesia is a country that has thousands of traditional knowledge from various aspects, such as food, dance, medicine etc.

Seeing that there are no strict rules and implementing regulations, the government must adopt a legal policy. There are two mechanisms, namely: in the form of law by making special rules governing the legal protection of communities who own traditional knowledge and secondly by conducting outreach from the government to people who own traditional knowledge, then the people who own traditional knowledge immediately carry out an inventory of traditional knowledge.

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