

URGENCY OF SUI GENERIS PROTECTION FOR INDONESIA'S COMMUNAL INTELLECTUAL PROPERTY: STICK WITH DEFENSIVE, SHIFT TO POSITIVE, OR HYBRID APPROACH?

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ABSTRACT

Intellectual property involves exclusive rights granted to creators, categorized as non-communal and communal. Indonesia, rich in cultural diversity, possesses significant communal assets, offering vast potential if properly utilized. However, inadequate legal protection and overlapping regulations have left the country vulnerable to theft and piracy, as evident in cases such as Malaysia's claims on Wayang, Pendet, and Reog Ponorogo, and Singapore's unauthorized performance of I La Galigo. The study conducts a comprehensive analysis of Indonesia's legal framework, focusing on PP KIK and its defensive strategies. It also explores the necessity of implementing a *sui generis* regulation through doctrinal research and comparative analysis with leading countries like India, the Philippines, and Peru. The comparison underscores the limitations of relying solely on defensive data collection, emphasizing the need for a comprehensive strategy. This article provides tailored recommendations for Indonesia to develop its *sui generis* approach.

Keywords: communal intellectual property, legal protection, negative protection, positive protection, sui generis

A. Introduction

The era of globalization has brought about a multitude of outcomes, with a significant impact on cultural diversity, cross-cultural engagements, and the emergence of new cultural manifestations. Amidst the positive influence of information technology on human welfare and progress, there exists a dual narrative, as it also serves as a potential haven for illicit activities. Within this borderless context, entities with opportunistic motives may exploit information technology to assert proprietary rights over traditional knowledge that has not been widely disseminated.¹

Categorically, property rights encompass real property, personal property, and intellectual property ("IPR"). IPR, involving intangible assets born out of human creativity,

1 Mahmuda Febriaharini, "Eksistensi Hak Atas Kekayaan Intelektual Terhadap Hukum Siber," *Serat Acitya* Vol. 5, No. 1 (2016): 15.

is granted to the creators or owners of intellectual works. In general, IPR is divided into two categories: (i) non-communal, which includes copyrights, patents, trademarks, trade secrets, industrial design, integrated circuit layout design, and plant varieties; and (ii) communal ("KIK"), which includes traditional cultural expressions ("TCE"), traditional knowledge ("TK"), geographical indications ("GI"), and genetic resources ("GR").² Communal rights, serving as the embodiment of a community's identity, persist across generations without explicit attribution to individual creators, developing organically within the community and collectively owned and preserved.³

Presently, there is a heightened awareness regarding the significance of IPR, particularly through the issuance of Government Regulation Number 24 of 2022, facilitating the utilization of IPR as collateral for loans, taking the form of fiduciary guarantees.⁴ Consequently, there have been many studies about intellectual property, but most of them mainly concentrate on the rights owned by individuals. This article will delineate the imperative safeguarding of communal wealth, which holds significant potential.

The acknowledgment of KIK begins with recognizing it as a component of human rights, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Article 11(1) UNDRIP stipulates the right of indigenous peoples to preserve and promote their cultural traditions and customs. After the Convention on Biological Diversity was signed in 1992, there has been a push to protect TK. Several international conferences, especially under the World Intellectual Property Organization (WIPO), have been held to create a suitable system for safeguarding TK and other KIK.⁵

Indonesia stands out not only for having the largest biodiversity in the world, but also for being one of the six countries that have a high level of cultural diversity. Indonesia stands out for its high ecological uniqueness with a significant level of endemism, coupled with being the world's largest archipelagic country, hosting diverse tribes, languages, and a vibrant cultural arts scene.

According to the Directorate General of Intellectual Property, a total of 2,335 KIK have been registered: (i) 1,338 TCE (59%); (ii) 654 TK (28%); (iii) 187 GI (8%); and (iv) 117 GR (5%).⁶ These classifications cover a broad array of Indonesian cultural assets, including

2 Dara Effida, "Tinjauan Yuridis Indikasi Geografis Sebagai Hak Kekayaan Intelektual Non-Individual (Komunal)," *Ius Civile* Vol. 3, No. 2 (2019): 59.

3 Eman Suparman, "Perlindungan Hukum Kekayaan Intelektual Masyarakat Tradisional," *Jurnal Pengabdian Kepada Masyarakat* Vol. 2, No. 7 (2018): 558.

4 Humas OJK, "Prospek Hak Kekayaan Intelektual (HKI) sebagai Jaminan Utang," Otoritas Jasa Keuangan, <https://www.ojk.go.id/ojk-institute/id/capacitybuilding/upcoming/1110/prospek-hak-kekayaan-intelektual-hki-sebagai-jaminan-utang> (accessed 9 November 2023).

5 Simona Bustani, "Perlindungan Hak Komunal Masyarakat Adat Dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan Dan Harapan," *Hukum Prioris* Vol. 6, No. 3 (2018): 307–308.

6 Humas DJKI, "DJKI: Belum Memiliki Kedaulatan Kekayaan Intelektual Komunal, Kebudayaan Indonesia Rawan Dicuri," Ministry of Law and Human Rights, <https://www.dgip.go.id/artikel/detail-artikel/djki-belum->

tangible items like heritage sites, artifacts, traditional crafts, and genetic resources, as well as intangible forms such as music and dance. The substantial potential poses a significant challenge, emphasizing the crucial requirement to establish robust legal safeguards for these valuable assets.

Indonesia's KIK remains susceptible to theft and unauthorized recognition by foreign nations. An instance is Malaysia's assertion of possession of Wayang, Pendet, and Reog Ponorogo dances in a tourism promotion.⁷ Singapore has also been involved in misappropriating Indonesia's KIK through its unauthorized performance of the classic Bugis people's art piece called "I La Galigo" theater performance, which has sacred value.⁸ Other examples include the imitation of traditional music with rhythmic dance house music, T-shirts imitating Indonesia's KIK, and the sale of handicrafts as if they are "authentic" from their rightful owners.

These violations resulted in economic and non-economic losses to Indonesia. Economically, as exemplified by Kopi Gayo, the first GI product from Indonesia accepted in the European Union. Following its registration, there was a substantial surge in the per-kilogram price, escalating from Rp. 50,000.00 to Rp. 120,000.00.⁹ Meanwhile, from a non-economic perspective, this potential serves as a significant asset in shaping the nation branding of Indonesia,¹⁰ encompassing all dimensions of the international community's perception of the country. This is something of utmost importance, playing a crucial role in enhancing a nation's competitiveness. An example of this is Bali's Endek fabric, chosen by the fashion house Christian Dior as part of its collection during Paris Fashion Week 2021.¹¹

The weakness of legal protection for Indonesian KIK is based on various factors.¹² However, since 2020, the Indonesian government has taken action by making KIK one of the National Development Priority Programs (2020-2024) with a primary target of defensive

[memiliki-kedaulatan-kekayaan-intelektual-komunal-kebudayaan-indonesia-rawan-dicuri?kategori=ki-komunal](#) (accessed 27 April 2023).

- 7 Yenny Widyanti, "Protection of Indonesian Traditional Cultural Expressions in the *Sui Generis* System," *Arena Hukum* Vol. 13, No. 3 (2020): 390.
- 8 Simona Bustami, "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat," *Hukum Prioris* Vol. 2, No. 4 (2019): 247.
- 9 Directorate General of Intellectual Property, "Peran KI dalam Mendayagunakan UMKM," Presentation Material by the Secretary, June 2021. This inventory is an effort by the Government to maximize the economic potential for the community's economy, in line with the "*economic stimulus growth theory*".
- 10 Directorate General of Intellectual Property, "Rencana Strategis Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan HAM RI Periode 2020-2024," : 5.
- 11 Ministry of Foreign Affairs, "Kain Endek Bali Warnai Koleksi Christian Dior Spring/Summer 2021," <https://kemlu.go.id/paris/id/news/8677/kain-endek-bali-warnai-koleksi-christian-dior-springsummer-2021> (accessed 10 November 2023). Humas OJK, "Prospek Hak Kekayaan Intelektual (HKI) sebagai Jaminan Utang," Otoritas Jasa Keuangan, <https://www.ojk.go.id/ojk-institute/id/capacitybuilding/upcoming/1110/prospek-hak-kekayaan-intelektual-hki-sebagai-jaminan-utang> (accessed 9 November 2023).
- 12 Jake Philips, "Australia's Heritage Protection Act: An Alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore," *Pacific Rim and Policy Journal* Vol. 18 (2009): 549.

protection through the creation of an inventory of data integrated into a single database called the Communal Intellectual Property National Data Center. Defensive approach is commonly used for protection, employing a comprehensive database to prevent misuse,¹³ while positive protection focuses on legal measures against exploitation with regard to KIK. Although these two methods come from two opposite poles, some countries have started to integrate both approaches into positive law, one of which is Peru.

The research aims to investigate several key aspects: First, the *status quo* of the legal structure of Indonesia's KIK; Second, the classification of KIK in Indonesia; Third, the pros and cons of defensive and positive protection; Fourth, a comparative analysis of advanced protection models in countries such as India, the Philippines, and Peru, aiming to identify differences and draw valuable lessons from these models; and lastly, an analysis of whether Indonesia should consider adopting a *sui generis* approach, exploring the potential implications and benefits associated with such a decision.

This article introduces a fresh perspective by examining Indonesia's positive law through diverse approaches related to the intended protection. In contrast to existing publications, this work emphasizes comparative studies of countries with either advanced regulations or cultural contexts akin to Indonesia. These comparative analyses serve as a foundation for evaluating whether Indonesia's existing protective measures are adequate to preempt potentially detrimental actions by other nations.

B. Research Method

The present study adopts a normative juridical approach, which entails the scrutiny of pertinent literature materials, including legal provisions, regulations, books, journals, and reputable websites, as secondary sources of data.¹⁴ The analytical process involves a thorough examination, study, review, and comparison of diverse literature sources, followed by an interpretation of the findings. Qualitative juridical methods are employed to analyze the data and obtain insightful results that align with the protection of KIK under Indonesia's national law.

13 Teshager Dagne, "Law and Policy on Intellectual Property, Traditional Knowledge and Development: Legally Protecting Creativity and Collective Rights in Traditional Knowledge Based Agricultural Products Through Geographical Indications," *The Estey Centre Journal on International Law and Trade Policy*, Vol. 11 No. 1 (2010): 117.

14 Soerjono Soekanto and Sri Mahmudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2003), p. 13.

C. Discussions

1. Status Quo of Indonesia's Communal Intellectual Property Legal Structure

The regulation of IPR in Indonesian law was first established in 1961 through Law No. 21 of 1961 on Trademarks, followed by Law No. 6 of 1982 on Copyrights. These laws laid the foundation for the current regulation, which has undergone various changes.¹⁵ KIK in Indonesia is regulated by various laws, including: (i) Law No. 28 of 2014 concerning Copyrights; (ii) Law No. 13 of 2016 concerning Patents; (iii) Law No. 20 of 2016 concerning Trademarks and Geographical Indications; and (iv) Law No. 5 of 2017 concerning the Advancement of Culture. In addition, more detailed regulations are also contained in various derivative regulations, such as Government Regulation No. 48 of 2011, and even regulations issued by local governments, such as Bali Provincial Regulation No. 1 of 2018.

However, not all legal frameworks apply universally to all types of KIK. The Berne Convention, an international agreement ratified by Indonesia through the Decree of President No. 18 of 1997, provides legal protection for traditional cultural expressions, which offers a crucial advantage in utilizing these expressions to support the nation's economy. Additionally, Article 33(3) of the 1945 Constitution of the Republic of Indonesia serves as the legal basis for TK and GR protection.

Safeguarding KIK poses a significant challenge, as there exists no regulated procedure for discerning KIK-identified works from those that are not, and no authorized implementing agency has been established since the law's inception in 1982. Although the Cultural Advancement Act was expected to provide a solution to the lack of legal provisions, it actually created more problems. Under Article 17, the Central and/or Local Governments are granted absolute autonomy to undertake an assessment of TCE, which imposes an obligation on the State to conduct an inventory, preserve, and uphold TCE.¹⁶ However, uncertainty emerged with regard to conflicting regulations, Article 18(1), which provides freedom for any individual to undertake an inventory of cultural artifacts. This lack of clarity in the legal framework has contributed to a long list of claims. One of the reasons for this failure is the individualistic nature of the Copyright regime, while TCE is a communal expression.¹⁷

15 Fadjar Adam, *Hak Atas Kekayaan Intelektual* (Palu: Yayasan Masyarakat Indonesia Baru Pers, 2002), p. 9.

16 In this regard, there is no further technical regulation. PP 56/2023, as one of the latest regulations on KIK, does make extensive mention of the phrase "Local Government" (*Pemerintah Daerah*). It states that Local Governments have the obligation to "inventory, safeguard and maintain" together with the Minister and/or minister/head of a non-ministerial government agency (Article 3). It has not been explicitly stated, the specific authority and role that each party carries out. This is seen by the author as essential, because of course the Local Government should have a more thorough understanding of the potential of KIK. Therefore, arrangements relating to the active role of the Local Government should be set out in various derivative regulations.

17 Simona Bustani, "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat," *Jurnal Hukum Prioris* Vol. 2, No. 4 (2016): 251.

Inventory-based data collection has been carried out since 2017 based on Minister of Law and Human Rights Regulation No. 13 of 2017. This regulation is one of the first to unify KIK data collection, which was previously spread across various Ministries and Institutions. However, the increase in the number of inventories is still not considered optimal. In an effort to further boost this effort, in 2022, the government issued a new regulation regarding KIK, Government Regulation of the Republic of Indonesia No. 56 of 2022 concerning Communal Intellectual Property (“**PP KIK**”).

Article 3(1) states that the state holds the right to KIK,¹⁸ with the obligation to inventory, safeguard, and maintain it.¹⁹ Article 5(1) states that the right to KIK is an inclusive moral right, which is held and/or carried out by the Indigenous Community, with economic benefits that apply indefinitely.²⁰ Article 12 regulates a detailed inventory, which is carried out through: (i) recording, conducted through a ministry/non-ministry government institution database and local government integrated with the KIK Indonesia information system;²¹ and (ii) data integration.²² Data loaded by the information system is open with two exceptions in Article 31(2): (i) data that is sacred, confidential, and/or held firmly based on the applicant's request; or (ii) determined otherwise by provisions of the legislation.²³ Furthermore, KIK utilization for commercial purposes is required to obtain a permit according to prevailing laws and regulations.²⁴

2. Classification of Communal Intellectual Property in Indonesia

WIPO classifies various forms of KIK into three interconnected areas: traditional knowledge, traditional cultural expressions, and genetic resources,²⁵ while in Indonesia, KIK is divided into four types, including:

a. Traditional Culture Expressions

TCE are defined as any form of creative expression, whether tangible, intangible, or a combination of both, that reflects the existence of a traditional culture held communally and across generations.²⁶ Article 38(1) of the UUHC also includes the definition of TCE,

18 Peraturan Pemerintah Tentang Kekayaan Intelektual Komunal (PP KIK), No. 56/2022, LN. 2022/ No. 232, TLN No. 6837, Article 3(1).

19 PP KIK, Article 3(2).

20 PP KIK, Article 5(1).

21 PP KIK, Article 13(4).

22 PP KIK, Article 12.

23 PP KIK, Article 31(2).

24 PP KIK, Article 33(3).

25 World Intellectual Property Organization, *Traditional Knowledge and Intellectual Property* (Geneva: WIPO, 2015), p. 1.

26 Direktorat Jenderal Kekayaan Intelektual, “Kekayaan Intelektual Komunal,” *Desa Gemilang Informasi Publik*, <https://www.dgip.go.id/menu-utama/ki-komunal/pengenalan> (accessed 20 April 2023).

which encompasses one or a combination of various types of arts and literary works such as music, dance, prose, drama, theater, all types of visual arts, and traditional ceremonies.²⁷ There are two forms of copyright protection for TCE. The first is where the identity of the creator is unknown, which includes oral, musical, and intangible cultural expressions. The WIPO Report refers to this cultural expression as “*mother-style folklore*”. The second arises when the originator(s) of a derivative TCE can be discerned, in which they intentionally or unintentionally refine and innovate fundamental designs or structures or offer fresh interpretations of sacred iconography or visuals that enhance their artistic value. This type is known as “*child-style folklore*”.²⁸

b. Traditional Knowledge

TK comprises intellectual innovations in the sphere of knowledge and technology, possessing distinctive attributes of customary inheritance produced, evolved, and upheld by a particular community or society.²⁹ As defined by the WIPO, knowledge is classified as TK if it meets the following criteria: (i) transmitted from one generation to another; (ii) encompasses an understanding of the environment and its interactions; (iii) integral and indivisible from the community of its origin; and (iv) represents a way of life that is collectively practiced.³⁰ The constraint faced by certain groups of Indonesian society is the notion that traditional knowledge is a public right, which results in communities not objecting to the imitation of their products.³¹ Another weakness is the limited availability of data, documentation, and information.³² It is not entirely inaccurate to say that other countries, such as the Netherlands, have more comprehensive documentation of KIK than Indonesia.³³

c. Genetic Resources

Genetic Resources refer to plants, animals, microorganisms, or their parts that have actual or potential value.³⁴ Protection of GR is regulated under the Convention on Biological Diversity (CBD), which has been ratified by Indonesia through Law No. 5 of 1994.³⁵ Based

27 Dyah Asri, “Perlindungan Hukum Preventif Terhadap Ekspresi Budaya Tradisional Di Daerah Istimewa Yogyakarta Berdasarkan Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta,” *Journal of Intellectual Property* Vol. 1, No.1 (2018): 20–22.

28 Lorraine Aragon, “Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia,” *International Journal of Cultural Property* Vol. 19 (2014): 292.

29 DJKI, “Kekayaan Intelektual Komunal...”

30 Atvi Lutviansori, *Hak Cipta dan Perlindungan Folklore di Indonesia* (Yogyakarta: Graha Ilmu, 2010), p. 96.

31 Muthia Septarina, “Perlindungan Hukum Pengetahuan Tradisional Dalam Konsep Hukum Kekayaan Intelektual,” *Al'Adl: Jurnal Hukum* Vol. 8, No. 2 (2016): 47–48.

32 *Ibid.*

33 Muhammad Citra Ramadhan and Fitri Yanni Dewi Siregar, “Protecting Communal Intellectual...,” p. 275.

34 DJKI, “Kekayaan Intelektual Komunal...”

35 Devica Masrur, “Upaya Perlindungan Sumber Daya Genetik Berdasarkan Undang-Undang Nomor 13 Tahun 2016 Tentang Paten,” *Jurnal Jurisprudence* Vol. 8, No. 2 (2019): 6.

on data from the World Conservation Monitoring Committee, Indonesia's biodiversity includes 27,500 species of flowering plants (10% of the world's plant species), 515 species of mammals, 1,539 species of birds, and 781 species of reptiles and amphibians.³⁶ One notable violation experienced by Indonesia is biopiracy by the Japanese cosmetic company Shiseido, which filed 51 patent applications for medicinal plants and native Indonesian spices. Based on the European Patent website, there are about 40% of Indonesian plants patented in the Japanese Patent Office, including Brotowali and Sambiloto.

d. Geographical Indication

GI denotes the provenance of a product or commodity that stems from its geographical milieu, encompassing both natural and human-induced factors, or a confluence of both, giving it a certain reputation, quality, and characteristic that has the potential to be protected.³⁷ According to Article 53 of the Trademark and Geographical Indication Law, GI is registered through a *first-to-file* system, which suggests that sole exclusivity to commercialize geographical indications, is only granted to the first GI registered with the Directorate General of IPR.³⁸ GI serves to demonstrate the connection between the quality, characteristics, or reputation of a product with its place of origin.

The imitation practice against GI occurs, for example, in coffee that is not originating from Toraja but is marketed under the name of "Kopi Toraja". Before "Kopi Toraja" was registered as GI in Indonesia, the name had been registered as a trademark in the United States. This hindered the export of coffee to be marketed using the name Toraja or the traditional Toraja house image to the domestic market of the United States.³⁹ As of now, effective protection for GI still encounters numerous obstacles, such as the lack of absence of a consensus on appointing a rights holder. Furthermore, the community's inadequate legal awareness results in their reluctance to deal with it.⁴⁰

3. Defensive and Positive Protection of Communal Intellectual Property

In relation to a country's efforts to protect its KIK rights, there are two different approaches. This is in line with the classification proposed by WIPO, namely defensive

36 *Ibid.*

37 Michael Blakeney, "Geographical Indications and Environmental Protection," *Frontiers of Law in China* Vol. 12 (2017): 2.

38 Syarifah Mahila, "Keberadaan Hak Kekayaan Intelektual Seni Batik Jambi Di Kota Jambi," *Universitas Batanghari Jambi* Vol. 18, No. 3 (2018): 270.

39 Ahmad Ramli, *Hukum Kekayaan Intelektual: Indikasi Geografis dan Kekayaan Tradisi dalam Teori dan Praktik* (s.l.: Rafika Aditama, 2019), p. 10.

40 Rashmi Aggarwal, "Branding of Geographical Indications in India: A Paradigm to Sustain Its Premium Value," *International Journal of Law and Management* Vol. 56 (2014): 435.

and positive protection.⁴¹ This section will discuss both methods of protection, as well as their advantages and disadvantages.

a. Defensive Protection

This approach is implemented by registering or inventorying cultural heritage to preserve it for future generations,⁴² as well as protecting its assets by safeguarding against illegitimate rights acquired by third parties.⁴³ Cultural preservation and administration are typically intertwined by undertaking an assessment and recording through the employment of information technology.⁴⁴ Numerous countries consider defensive protection essential as they believe that the current intellectual property system, particularly patents, has flaws that permit companies to exploit KIK unjustly.⁴⁵

Furthermore, defensive protection may be easier to implement compared to positive protection. Defensive protection is not attained through asserting IPRs, although in certain situations, pursuing or obtaining such rights may be part of a defensive strategy.⁴⁶ A defensive protection system must include certain elements: (i) criteria that define relevant prior art; (ii) a mechanism that guarantees the availability and accessibility of prior art to search authorities;⁴⁷ and (iii) prior art, which is crucial in determining patent eligibility, as it must fulfil novelty and non-obviousness.⁴⁸

However, it should be noted that defensive protection should not be considered as a replacement for positive protection. Its effect is only to prevent others from obtaining rights over KIK.⁴⁹ A criticism of this method is the potential for it to be a double-edged sword due to the disclosure requirement of patent law. While it can prevent third parties from obtaining

41 Yunita Putri, "Perlindungan Bagi Hak Kekayaan Intelektual Komunal," *Jurnal Hukum De'Rechsstaat* Vol. 7, No. 2 (2021): 183.

42 Nuzulia Sari and Dinda Mawaradah, "Sistem Pendataan Kebudayaan Terpadu Alternatif Perlindungan Hukum Ekspresi Budaya Tradisional," *Jurnal Legislasi Indonesia* Vol. 18, No. 3 (2021): 409.

43 World Intellectual Property Organization, *Intellectual Property and Genetic Resources* (Geneva: WIPO, 2020), p. 22.

44 Martin Fredriksson, "Balancing Community Rights And National Interests In International Protection Of Traditional Knowledge: A Study Of India's Traditional Knowledge Digital Library," *Third World Quarterly* Vol. 43, No. 2 (2022): 359.

45 Graham Duffield, *Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy and Formulation Issue Paper No. 1* (Geneva: ICTSD and UNCTAD, 2003), p. 27.

46 Vera Shrivastav, "Protection Of Traditional Knowledge Within The Existing Framework Of Intellectual Property Rights: Defensive And Positive Approach," *Social Science Research Network Electronic Journal* (2014): 17.

47 Juhi Chowdhary, "Intellectual Property and Traditional Knowledge," Legal Service India, <https://www.legalserviceindia.com/article/I98-Intellectual-Property-and-Traditional-knowledge.html> (accessed 20 April 2023).

48 Rudi Bekkers, Arianna Martinelli and Federico Tamagni, "The Impact Of Including Standards-Related Documentation In Patent Prior Art: Evidence From An EPO Policy Change," *ScienceDirect Research Policy* Vol. 49 (2020), <https://www.sciencedirect.com/science/article/pii/S004873332030086X> (accessed 20 April 2023).

49 Vera Shrivastav, "Protection Of Traditional...", p. 15.

patents over that knowledge, it also provides them with access to the information, which they can use to develop novel and patentable inventions.

b. Positive Protection

Positive protection is a means of empowering communities to assert their KIK, regulate its use, and benefit from its commercialization by granting them rights.⁵⁰ These rights are typically in the form of an IPR, such as a patent or a *sui generis* right.⁵¹ Positive protection enables IPR holders to take legal action or seek redress for certain forms of infringement.⁵² Various mechanisms have been developed for positive protection, including: (i) existing IP systems, such as patents or registered trademarks; (ii) adaptations and *sui generis* elements of existing IP systems, such as copyright and unregistered trademarks; and (iii) stand-alone *sui generis* IP systems.⁵³ Positive protection involves using legal remedies, such as applying relevant laws that protect KIK rights or establishing special laws. Nonetheless, the protection granted under national laws may not be applicable in other countries, so there is a growing call for an international legal instrument.⁵⁴

4. Cross-Cultural Perspectives on Communal Intellectual Property Protection: A Comparative Study of India, the Philippines, and Peru

Although there are various positive methods of protection, such as patents and trademarks, many countries are opting to develop a *sui generis* approach of protection.⁵⁵ *Sui generis*, in legal terms, means the science of its own kind. Several countries are developing a concept to handle specific practical needs or policy aims to contain specific legitimized stipulations and measures of implementation or administration.⁵⁶ WIPO's Statement by the Committee of Intergovernmental on The Intellectual Property and Genetic Resources Traditional Knowledge and Folklore emphasizes that the success of this *sui generis* law hinges significantly on the collaboration among indigenous communities, the implementation of equitable benefit-sharing mechanisms, and the competence of local stakeholders who perceive that communal interests are duly represented in national law. This section will

50 World Intellectual Property Organization, *Traditional Knowledge and Intellectual Property: Background Brief No. 1* (Geneva: WIPO, 2012), p. 2; Ken & Krishme Attorney at Law, "Traditional Knowledge," <https://kankrishme.com/service/traditional-knowledge/> (accessed 20 April 2023).

51 Poorvika Chandanam, "Intellectual Property Rights and Traditional Form of Expressions," *IP Matters*, <https://www.theipmatters.com/post/intellectual-property-rights-and-traditional-form-of-expressions> (accessed 20 April 2023).

52 Vera Shrivastav, "Protection of Traditional...", p. 19.

53 World Intellectual Property Organization, "Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore" (Document WIPO/GRTKF/IC/5/12 Prepared by the Secretariat at the Fifth Session of the Intergovernmental Committee, Geneva, 7-15 July, 2003), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_12.pdf (accessed 20 April 2023).

54 Vera Shrivastav, "Protection of Traditional...", p. 19.

55 Deekshitha Ganesan, "Sui Generis is...", p. 53.

56 Rohaini and Nenny Dwi Ariani, "Positive Protection: Protecting Genetic Resources Related to Traditional Knowledge in Indonesia," *Fiat Justisia Jurnal Ilmu Hukum* Vol. 11 No. 2 (2017): 129.

discuss the advantages and disadvantages of various approaches taken by some leading countries, namely India, Peru, and the Philippines.

a. India

India's cultural diversity has given birth to many distinctive products. As mentioned in the previous section, India adopted a defensive mechanism by creating the Traditional Knowledge Digital Library ("TKDL") database, one of the earliest initiatives to protect KIK in the world.⁵⁷ The TKDL was developed in response to the indiscriminate patenting of Indian TK and is now one of the largest databases of its kind.⁵⁸ However, it still faces difficulties in consolidating the entirety of India's oral and undocumented TK, which could also be a challenge for Indonesia.⁵⁹ While India is one of the first and most advanced countries in data collection, it recognizes that databases alone are not enough to prevent the misappropriation of traditional knowledge.⁶⁰

b. Philippines

On October 29, 1997, the Philippines became the first country to introduce laws safeguarding the rights of indigenous people through the Indigenous People Rights Act ("IPRA"). This legislation aims to offer protection to TK, customary practices, culture, religious sites, ceremonies, and biological resources, reflecting a positive approach.⁶¹ Following Article 32 of IPRA, the indigenous people are entitled to have their cultural and intellectual rights recognized, fully controlled, and protected. Additionally, Section 10 affirms their right to manage, develop, and safeguard science, technology, and cultural expressions.⁶² These rights are in accordance with the Philippine Constitution, specifically Section 17, Article 14. The indigenous people, acknowledged as the rightful general owners of KIK in perpetuity, are entitled to all benefits arising from knowledge and innovations, emphasizing the importance of fair sharing.⁶³ Commercial use of KIK must only be undertaken with the prior informed consent under mutually agreed terms.⁶⁴

57 Deekshitha Ganesan, "Sui Generis is...," p. 49.

58 *Ibid.* This initiative has successfully documented at least 400 GIs in various product categories of goods and/or services, as well as quality assurance as an economic foundation. In addition, India also provides protection facilities with maximum registration for areas with special flora and fauna richness.

59 Azadi Ka Amrit Mahotsav, "Cabinet Approves Widening Access Of The Traditional Knowledge Digital Library (TKDL) Database To Users, Besides Patent Offices," PIB Delhi, <https://pib.gov.in/PressReleasePage.aspx?PRID=1852528> (accessed 20 April 2023).

60 Martin Fredriksson, "Balancing Community Rights...," p. 358.

61 Yenny Eta Widyanti, "The Urgency Of *Sui Generis* Protection Of Communal Intellectual Property In Indonesia: A Comparative Study in Philippines," *Jurisdictie: Jurnal Hukum dan Syariah* Vol. 13 No. 1 (2022): 16.

62 Yenny Eta Widyanti, "The Urgency Of...," p. 10.

63 *Ibid.*, p. 18.

64 *Ibid.* Prior Informed Consent (PIC) stipulates that KIK holders must be consulted before their KIK is accessed or used by a third party. An agreement must be reached in advance on appropriate terms, as one way to ensure fair access and benefit sharing.

c. Peru

Peru has one of the most comprehensive regulations, as stated in Law 27811 of July 24, 2002, which primarily focuses on the rights of indigenous communities.⁶⁵ Peru is one of the countries that perform both defensive and positive mechanisms. This regulation has led to the opinion that India, as a country that wants to establish a *sui generis* model, should adopt the Peru model in order to strengthen its existing protection and fill the gap created by oral and undocumented IPs.⁶⁶

The law prohibits individual ownership of KIK and requires indigenous people to exercise their rights collectively through a representative organization.⁶⁷ The communities should have exclusive authority to make decisions about licensing agreements, with the State providing necessary assistance and ensuring fair sharing of benefits. The funds obtained are subsequently utilized for the welfare of all aboriginal communities. Two distinct forms of royalty payments must be deliberated: (i) a share of the market sales generated of the product developed; and (ii) a minimum of 5 percent of the gross value of the market sales as remuneration for sustainable progress.⁶⁸ If any rights granted by the law are transgressed, the communities possess the authority to initiate infringement actions.⁶⁹

Peru has categorized its TK into three groups.⁷⁰ The first group includes TK, which has been disseminated outside the indigenous community and is therefore considered in the public domain. The second group includes TK, which has become public within the last 20 years, but usage of this information will require payment of royalties. These categories are documented in the Public Register of Collective Knowledge of Indigenous People. The third group is made up of undisclosed TK, which is recorded in the Confidential National Register of Indigenous People.⁷¹

	India	Philippines	Peru
Approach	Defensive , through Data Inventory by developing the TKDL Database (one of the largest) in response to indiscriminate patenting; a benchmark in KIK protection worldwide.	Positive , first to introduce legislation protecting the rights of indigenous peoples; in accordance with the Philippine Constitution.	Sui Generis , both Defensive (e.g. Public Register & Confidential National Register) and Positive.
Initiation	Initiated in 2001.	IPRA : October 29, 1997	Law 27811 : July 24, 2002

65 Susanna E. Clark, Isabel Lapeña and Manuel Ruiz, "The Protection of Traditional Knowledge in Peru: A Comparative Perspective," *Washington University Global Studies Law Review* Vol. 3, Iss. 3 (2004): 757.

66 *Ibid.*

67 Deekshitha Ganesan, "Sui Generis is...", p. 54.

68 WIPO, "Intergovernmental Committee On..."

69 *Ibid.*

70 Deekshitha Ganesan, "Sui Generis is...", p. 54.

71 *Ibid.*

<p>Main Substances</p>	<ul style="list-style-type: none"> • Available in digital format, in 5 languages: English, German, French, Japanese, and Spanish. • Bridge information in ancient Sanskrit and patent examiners; minimising possibility that patents be granted for "inventions" that involve insignificant modifications. • Facing difficulties in consolidating the entirety of oral and undocumented KIK. 	<ul style="list-style-type: none"> • Communities are recognised as the lawful general owners in perpetuity. • Entitled to all benefits derived from knowledge and innovation, which must be shared equitably. • Commercial use should only be made with the consent of the public owner on mutually agreed terms. 	<ul style="list-style-type: none"> • Prohibits individual ownership; exercises rights collectively through representative organization. • Communities have exclusive authority to make decisions on license agreements, even to initiate infringement actions. • State provides necessary assistance, and fair and equitable sharing of benefits. • Categorises TK into 3 groups: (i) Public Domain; (ii) become public within the last 20 years; and (iii) undisclosed. Each with a different protection.
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Table 1. KIK Protection in India, the Philippines, and Peru

5. Urgency of A Sui Generis Protection for Indonesia's Communal Intellectual Property: Defensive, Positive, or Hybrid?

Indonesia adopts a defensive protection approach, as explicitly stated in Article 27(2) of the PP KIK, "*The integration of KIK data [...] constitutes a form of defensive protection against KIK.*"⁷² Furthermore, the Explanation of the Article clarifies that the intended protection is used to defend the existing rights against misuse, misrepresentation, and misappropriation.⁷³ This database approach aims to prevent the grant of conventional IP that lacks novelty⁷⁴ and avoids claims from third parties.⁷⁵ This approach to establish a national database is similar to India's approach with its TKDL. However, to date, there appears to be a lack of discernible commitment from the Government in mobilizing concerted efforts concerning inventory initiatives. This raises significant concerns about the efficacy of the approach, emphasizing the need for robust and accurate data collection.

Nevertheless, even if these measures are diligently implemented, they may fail to ensure optimal protection for Indonesia's cultural heritage. Drawing insights from India,

72 PP KIK, Article 27(2).

73 PP KIK, Explanation of Article 27(2).

74 Ministry of Law and Human Rights, *Inventarisasi Kekayaan Intelektual Komunal: Buku Panduan* (Kupang: Ministry of Law and Human Rights of East Nusa Tenggara, 2019), p. 3.

75 Humas DJKI, "PP Nomor 56 Tahun 2022 Disahkan, Inventarisasi Kekayaan Intelektual Komunal Akan Semakin Digeber," Ministry of Law and Human Rights, <https://www.dgip.go.id/artikel/detail-artikel/pp-nomor-56-tahun-2022-disahkan-inventarisasi-kekayaan-intelektual-komunal-akan-semakin-digeber?kategori=liputan-humas> (accessed 20 April 2023).

which faced substantial challenges in documenting orally transmitted cultures, databases alone do not provide a sufficient solution. Therefore, a more comprehensive and nuanced strategy, informed by the complexities encountered by India, is imperative for Indonesia to consider in its pursuit of effectively safeguarding its cultural heritage.

The author recommends a *sui generis* approach that adopts a complementary approach by combining two key approaches, defensive and positive approaches. Peru's approach can serve as a basis for Indonesia to enhance its legal protection of KIK. In addition, their more advanced regulations should also be considered to be adopted for more comprehensive protection. The government cannot be satisfied with protecting assets from theft, but must also prepare infrastructure so that the long-term financial aspects can bring fair benefits. These include access and benefit sharing,⁷⁶ clarifying the rules on prior informed consent, and a more detailed classification to distinguish between the secret and the non-secret ones.⁷⁷ Philippine regulations also offer insights to formulate more specific rules on KIK ownership, covering aspects like the ownership period.

In addition to strengthening protection through the *sui generis* approach by adding a positive protection perspective with the issuance of relevant regulations, negative protection efforts must also be much more serious by the Government. Firstly, there is still a lack of an "active" perspective by the relevant parties charged with inventorying obligations.⁷⁸ Secondly, there is no clear division of authority, especially Local Governments with a comprehensive understanding of the region's characteristics and potential. Third, there is no measurable agenda and framework at the national level. This is necessary so that each Regional Government with its Work Unit (SKPD) can be encouraged to create its own framework, starting from data collection, pre-registration assistance, to consistent guidance. The existence of specific targets at the national and regional levels allows the application of "carrot and stick"⁷⁹, especially with regard to budget allocation.

76 Anissa Rizkytia, "Analisis Yuridis Perlindungan Defensif Atas Kekayaan Intelektual Komunal (KIK) di Indonesia Dalam Kaitannya Dengan Pembangunan Nasional (Studi Kasus Pusat Data Nasional KIK)". The distribution of benefits in connection with providing access to parties that will utilise KIK can be in the form of: (i) monetary; (ii) non-monetary, i.e. improving conditions in the area of origin of the KIK, and (iii) transfer of knowledge. This should be in line with regulations on the rights of indigenous peoples and regional autonomy.

77 WIPO IGC, *Tiered and Differentiated Approach to Traditional Knowledge*. In addition to the classification approach taken by Peru, there are several other forms of classification that can be done. First, distinguishing KIK that has the potential to be commercialised and those that are not non-commercial. Second, the tiered or different approach introduced by the WIPO Intergovernmental Committee (IGC), which includes: *sacred*, *secret*, *narrowly diffused*, and *widely diffused*. In addition, there are also those who divide it into *secret*, *sacred*, *publicly access*, and *public domain*. There are also those who add one criterion to TK, namely *closely hand*. This classification is important in Indonesian law, to clarify the essential position and protection for each KIK.

78 PP KIK, Article 3(3). This includes Ministers, ministers/ministers/heads of non-ministerial government agencies, and/or Regional Governments.

79 "Carrot and stick" is a system where you are rewarded for certain actions and threatened with punishment for others.

Defensive Approach	Positive Approach
<ul style="list-style-type: none"> • Foster an "active" perspective among relevant parties responsible for inventorying obligations. • Establish a clear division of authority, emphasizing the role of Local Governments (and its Work Unit) with a comprehensive understanding of regional characteristics and potential. • Implement a measurable agenda and framework at both the national and local levels to enhance effectiveness and accountability. 	<p>Issue relevant regulations to integrate the positive approach into Indonesia's legal framework, with some arrangements to consider:</p> <ul style="list-style-type: none"> • Access and benefit sharing; government prepares long-term financial infrastructure. • More detailed classification. • Period of ownership. • Prior informed consent.

Table 2. Recommendations for Indonesia's Sui Generis Approach

D. Closing

As a country with extraordinary cultural diversity, Indonesia is blessed with extensive KIK that can become one of the pillars of the national economy, and also foster the nation branding of Indonesia. However, the protection is still ineffective due to the lack of clarity of the responsible parties; the absence of an active participation perspective from the parties charged with the obligations, especially the Regional Government; absence of a measurable agenda and framework, both at the central and regional levels.

Furthermore, various countries adopt different approaches regarding the protection of KIK. India, which has similarly embraced such an approach, illustrates the challenges associated with documenting oral cultures. In addition, the Indian government also stated that defensive protection through data collection alone is not enough. Therefore, the establishment of *sui generis* KIK protection in Indonesia by combining defensive and positive approaches is considered essential by the author. The purpose is to uphold the rights of indigenous peoples, as stipulated by the 1945 Constitution of the Republic of Indonesia. Through a comparative analysis of the approaches taken by Peru and the Philippines, it is recommended that the Government consider adopting a positive protection approach through legal frameworks. The author recommends incorporating several regulatory elements from both countries, including ensuring fair benefits to indigenous communities (benefit sharing and royalty payments), introducing a more detailed classification system to differentiate between secret and non-secret information, and establishing clear guidelines for the duration of ownership of KIK.

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United Nations Declaration on the Rights of Indigenous Peoples

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