



## Traditional Knowledge Protection Models Are Criminally Oriented Fines

Dina Haryati Sukardi<sup>1</sup>; Sunaryo<sup>2</sup>; Ria Wierma Putri<sup>2</sup>; Rinaldy Amrullah<sup>2</sup>

<sup>1</sup>Universitas Mitra, Indonesia

<sup>2</sup> Universitas Lampung, Indonesia

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### **Abstract**

The problem in this research is how the protection of Traditional Knowledge rights holders is regulated in the provisions of national regulations. What is the model for protecting Traditional Knowledge which applies criminal fines as regulated in Law Number 1 of the Year? 2023, this research method uses the research method used, namely normative juridical with a statutory and regulatory approach, the research results show that traditional knowledge is protected as a constitutional right, traditional knowledge in Indonesia is subject to regulations through several laws and regulations, especially the UUHC. With the inclusion of an article regarding criminal fines in the UUHC which is based on Law no 1 of 2023 concerning the Criminal Code Article 79 where criminal fines are expected to ensure legal certainty which is a guarantee that the law operates.

**Keywords:** *Traditional Knowledge; Criminal Fines*

### **Introduction**

Legally, the definition of traditional knowledge is emphasized in the Elucidation of Article 38 paragraph (1) of Law Number 28 of 2014 concerning Copyright (Copyright Law) which states that it includes one or a combination of the following forms of expression:

1. Verbal textual, both oral as well as writing, in the form of prose and poetry, in various themes and message contents, which can be in the form of literary works or informative narratives;
2. Music, including vocal, instrumental, or a combination of both;
3. Movement, including dance;
4. Theatre, including puppet shows and folk drama;
5. Fine art, both in two-dimensional and three-dimensional form, made from various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or a combination thereof; and
6. Traditional ceremonies.

In fact, the concept of traditional knowledge is very closely related to regions as "owners" of traditional wisdom, so that regional governments, both provincial and district/city, have important duties and functions in protecting it. The administration of government in the concept of regional autonomy

emphasizes the duties and functions of government which are divided between the authority of the central government, provincial government, and district/city government. However, regions in exercising their authority to regulate and manage their households (regional autonomy) cannot be separated from the framework of the Unitary State of the Republic of Indonesia (NKRI) as mandated in Article 1 paragraph (1) of the 1945 Constitution.<sup>1</sup>

Indonesia has not yet fully realized that traditional knowledge, which is an inherent part of our daily lives, actually has extraordinary economic potential. Apart from that, this nation does not yet fully have the capabilities, especially from a technological perspective, and protection from a legal perspective where specific regulations are needed to protect cultural heritage.<sup>2</sup>

The state as the holder of the highest authority, and regional governments as representatives of the state in the protection and regulation of traditional knowledge are expected to prevent monopoly or commercialization as well as acts that damage or take advantage of commercialization carried out by outside parties without permission from the state as the copyright holder. The legal system for intellectual property is not a single legal system in the sense that it stands alone. Indonesian intellectual property law has interactions or intersections or relationships or linkages with other areas of law. Substantively, intellectual property law consists of legal norms and principles.<sup>3</sup>

Normatively, the legal regulation of intellectual property rights is regulated in various separate laws and regulations, namely Law no. 29 of 2000 concerning Protection of Plant Varieties, Law no. 30 of 2000 concerning Trade Secrets, Law no. 31 of 2000 concerning Industrial Design, Law no. 32 of 2000 concerning Integrated Circuit Layout Design, Law no. 28 of 2014 concerning Copyright, Law no. 13 of 2016 concerning Patents, Law no. 20 of 2016 concerning Brands and Geographical Indications. The concept of intellectual property itself continues to develop along with developments in science and technology. In other words, intellectual property develops dynamically in line with the development of human thought, which includes creativity and innovation.<sup>4</sup>

Even though it is regulated in separate norms, intellectual property is still seen to be related to other laws and regulations. In relation to the field of criminal law, all laws and regulations in the field of intellectual property contain criminal sanctions, which are legal sanctions that must be enforceable. Thus, it can be said that the function of sanctions in law is to give authority to the law and force people to obey the law. Sanctions in public law, including law in the field of intellectual property, are the main tool for forcing someone to comply with the provisions of the law.<sup>5</sup>

Based on the explanation above, we will discuss how the protection of Traditional Knowledge rights holders is regulated in the provisions of national legislation, What is the model for protecting Traditional Knowledge that applies fines as regulated in Law Number 1 of 2023.

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<sup>1</sup> Miranda Risang Ayu dkk., *Hukum sumber daya genetik, pengetahuan tradisional dan ekspresi budaya tradisional di Indonesia* (Penerbit Alumni, 2022).

<sup>2</sup> Muthia Septarina, "Perlindungan Hukum Pengetahuan Tradisional Dalam Konsep Hukum Kekayaan Intelektual," *Al-Adl: Jurnal Hukum* 8, no. 2 (2016), <https://ojs.uniska-bjm.ac.id/index.php/aldli/article/viewFile/457/405>.

<sup>3</sup> Karlina Sofyanto, "Perlindungan Hukum Hak Kekayaan Intelektual atas Pengetahuan Tradisional terhadap Perolehan Manfaat Ekonomi," *Kanun Jurnal Ilmu Hukum* 20, no. 1 (2018): 149–62.

<sup>4</sup> Erisa Ardika Prasada, "Perlindungan Hukum Terhadap Pengetahuan Tradisional di Indonesia," *Jurnal Kepastian Hukum dan Keadilan* 4, no. 1 (2022): 45–54.

<sup>5</sup> Abdul Atsar, *Mengenal Lebih Dekat Hukum Hak Kekayaan Intelektual* (Deepublish, 2018).

## Discussion

### A. Protection Arrangements for Traditional Rights Holders Knowledge in National Legislative Provisions

The Second Amendment to the 1945 Constitution in 2000 recognized the existence of indigenous people and the rights granted to them. Article 18B Paragraph (2) of the 1945 Constitution and Article 28I Paragraph (3) of the 1945 Constitution add two articles relating to indigenous communities and their traditional rights. Article 18B Paragraph (2) of the Constitution 1945 states that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive, in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. In addition, the 1945 Constitution uses the terms "customary law communities" and "customary communities" to refer to indigenous communities. The term "indigenous communities" is used in this article.<sup>6</sup>

Apart from that, Article 28I paragraph (3) of the 1945 Constitution states that the cultural identity and rights of traditional communities must be respected in accordance with the progress of time and civilization. With the recognition of indigenous communities and their traditional rights in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution, traditional knowledge and cultural identity of indigenous communities are implicitly recognized as constitutional rights in Indonesia. Human Rights (HAM) include traditional knowledge as the cultural identity and rights of indigenous communities, as stated in Article 28I paragraph (3) of the 1945 Constitution. The realization of territorial rights and self-determination of indigenous communities is closely related to the protection of traditional knowledge, which is part of intellectual and cultural property of indigenous peoples. The appropriation and exploitation of undefined cultural property is an important current problem facing indigenous communities.<sup>7</sup>

Indigenous peoples usually view themselves as a culture or nation that has suffered from foreign invasion and colonization. The process of colonization, assimilation and land grabbing has had a negative impact on various aspects of the existence of indigenous peoples. Indigenous groups have an important role, both on an individual and communal scale, in maintaining their eternal and intrinsic culture, which is embodied in traditional knowledge. However, the use and development of traditional knowledge currently goes beyond indigenous communities, resulting in the ownership and use of traditional knowledge deviating from the original purpose of its creation. The inclusion of traditional knowledge into the human rights framework is in line with the principles outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The UN Declaration on the Rights of Indigenous Peoples recognizes and protects traditional knowledge through the provisions outlined in Article 11 and Article 31. Article 11 (1) of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) regulates the rights of indigenous peoples. to engage and rejuvenate their cultural traditions and practices.<sup>8</sup>

In addition, according to Article 31 (1) of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), indigenous peoples have the right to preserve, regulate, maintain and enhance their cultural heritage, traditional knowledge and traditional cultural expressions, as well as forms of science and technology. , and culture<sup>38</sup>. The 1945 Constitution guarantees the rights of indigenous tribes to preserve and enhance their traditional knowledge. The explanation is in Article 32, especially paragraphs (1) and (2) of the 1945 Constitution. According to Article 32 Paragraph (1) of the 1945 Constitution, the

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<sup>6</sup> Wina Puspitasari, "Perlindungan hukum terhadap pengetahuan tradisional dengan sistem perizinan: perspektif negara kesejahteraan," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 1, no. 1 (2014), <http://journal.unpad.ac.id/pjih/article/view/7061>.

<sup>7</sup> Miqdad Abdullah Siddiq, "Dilema Komersialisasi Pengetahuan Tradisional dalam sistem hukum Indonesia: antara perlindungan dan pembagian manfaat," *Jurnal Hukum & Pembangunan* 48, no. 1 (2018): 164–80.

<sup>8</sup> Budi Agus Risawandi, "Hak Kekayaan Intelektual dan Budaya Hukum.," 2005, <http://library.stik-ptik.ac.id/detail?id=26529&lokasi=lokal>.

State advances Indonesian national culture amidst global civilization by guaranteeing that society has the right to preserve and enhance its values. its cultural value. According to Article 32 Paragraph (2) of the 1945 Constitution, the state recognizes and preserves regional languages as valuable national cultural resources. Traditional knowledge, which includes cultural identity and the rights of indigenous peoples, is legally protected by the state as a human right and constitutional right, as regulated in the 1945 Constitution.

Maintaining traditional knowledge is very important to prevent misuse and inappropriate use. Safeguarding traditional knowledge also functions to preserve the cultural identity of its keepers, thereby reducing the risk of cultural erosion that accompanies the decline of traditional knowledge. The protection of traditional knowledge is regulated by international and national laws. Currently, traditional knowledge is protected by the international community under the umbrella of Intellectual Property Rights (IPR). The World Intellectual Property Organization (WIPO) has extensively considered the potential for protecting traditional knowledge through a variety of intellectual property rights, such as copyrights, patents, plant varieties, industrial designs and trademarks.<sup>9</sup>

However, in practice, safeguarding traditional knowledge through intellectual property rights (IPR) can pose challenges due to concerns about ownership, originality, longevity, fixation, inventiveness and uniqueness. Apart from protecting intellectual property rights (IPR), the international community also upholds the rights of indigenous peoples by protecting their traditional knowledge. The international community's recognition of traditional knowledge is regulated by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Indonesia is in line with global trends by enforcing rules and regulations to safeguard traditional knowledge.<sup>10</sup>

According to the 2014 Copyright Law, the state has the authority to protect and own traditional works of art. Unfortunately, currently there are no government regulations that specifically regulate traditional arts. As a result, legal protection and copyright ownership of traditional works of art in Indonesia is still unclear. This shows that the Indonesian government has not provided adequate legal protection for traditional works of art. On the other hand, many foreign entities obtain copyright protection for traditional intellectual property which is recognized as original Indonesian products in their respective countries.

The government's efforts to preserve national culture, especially traditional dance forms, are still in the initial stages of inventory. This inventory is obtained using data provided by the local government or related institutions. Currently, the government's efforts to legally protect folklore and cultural products through regional regulations, in the context of protecting works of art and traditional cultural products, remain only conceptual proposals and no real action. Likewise, the Indonesian government's efforts to protect copyright in this regard have not produced significant results.<sup>11</sup>

So far, traditional dance arts have only focused on preserving, fostering and advancing these traditional forms of artistic expression. The preservation of this traditional knowledge cannot be separated from the state's responsibility in upholding the principles of Indonesian law, where the state is obliged to maintain the integrity of the Indonesian state and its collective heritage which is rooted in unity. The state aims to achieve social justice for all individuals. It is a sovereign state led by the people, with a

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<sup>9</sup> Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan Tradisional," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 2, no. 2 (2016): 213–38.

<sup>10</sup> Raden Muhammad Arvy Ilyasa, "Perlindungan Hukum Atas Pengetahuan Tradisional Indonesia Terhadap Praktek Biopiracy Dalam Rezim Hak Kekayaan Intelektual," *Gema Keadilan* 7, no. 3 (2020): 170–94.

<sup>11</sup> Yeni Eta, "Rancangan Undang-Undang Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Ditinjau Dari Aspek Benefits Pasal 8J UNCBD," *Arena Hukum* 7, no. 3 (2014): 458–71.

representative and inclusive decision-making process. The foundation of the state is rooted in belief in a just and civilized humanitarian system, guided by faith in God Almighty.<sup>12</sup>

The government is actively involved in diplomatic negotiations regarding the preservation of intellectual property rights (IPR) in all international agreements. In addition, they also formulate policies and implement measures to combat all attempts to unlawfully expropriate the nation's valuable traditional knowledge and cultural expressions. The 1945 Constitution of the Republic of Indonesia specifically regulates the state's responsibility to protect its people and promote their welfare. However, the structure of the statutory regulations that have been formed is not yet harmonious and in line with the principles outlined in the 1945 Constitution of the Republic of Indonesia.<sup>13</sup>

Examining a state's constitution requires more than just reading the words; a thorough examination is required to uncover the underlying concepts it contains. The government is responsible for fulfilling the state's obligations to protect its citizens. Traditional knowledge protection policies will be clearly visible in laws and regulations governing intellectual property rights (IPR) that specifically address this issue. The aim of the proposed law on the Protection of Traditional Knowledge is to provide a clear understanding of the characteristics of traditional knowledge and efforts to safeguard it.<sup>14</sup>

This law aims to safeguard not only the economic value of traditional knowledge but also its social dimension. Current protection is only limited to copyright protection for folklore, as regulated in the Copyright Law. This law stipulates that the state has copyright over folklore and community cultural creations, including narratives, fables, myths, legends, historical records, songs, crafts, choreography, dance, calligraphy and other works of art.<sup>15</sup>

Various international organizations seek to provide protection for traditional knowledge by providing protection in the form of IPR for traditional knowledge. This is because the world considers traditional knowledge to be an important source of knowledge related to human life. However, legal protection of traditional knowledge is always associated with IPR protection in the form of patents whose ownership is owned by individuals. This certainly contradicts the principles of traditional knowledge ownership which is communal and has a non-profit orientation.<sup>16</sup>

People in Indonesia think that IPR given to traditional knowledge is a "public right" which has a social function, so that people do not mind if their products can be imitated by other parties. This is in contrast to the concept of IPR and Patents which developed in western society which is more capitalistic. Capitalistic concepts of IPR and patents in western society consider Traditional Knowledge as wealth (property) that can be owned individually. The problem is, if traditional knowledge is not given legal protection in the form of IPR and Patents, it will be vulnerable to misappropriation. Misappropriation is defined as the use of the traditional knowledge of an indigenous community by another party, to the detriment of the indigenous community original owner of traditional knowledge. To overcome this act of misappropriation, there needs to be a legal regulation that confirms the ownership of traditional knowledge in Indonesia. So that the position of communal traditional knowledge in Indonesia becomes clear.<sup>17</sup>

<sup>12</sup> I Gede Mahatma Yogiswara Winatha dkk., "Analisis Kepastian Hukum Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Sebagai Bagian Hak Kekayaan Intelektual," *Jurnal Ilmiah Raad Kertha* 6, no. 1 (2023): 34–48.

<sup>13</sup> Rohaini Rohaini, "Perlindungan Hukum terhadap Pengetahuan Tradisional melalui Pengembangan Sui Generis Law," *Fiat Justitia: Jurnal Ilmu Hukum* 9, no. 4 (2015).

<sup>14</sup> Sri Asih Roza Nova, "Perlindungan Hukum Terhadap Pengetahuan Tradisional Di Indonesia Dari Tindakan Misappropriation," *UNES Journal of Swara Justisia* 6, no. 4 (2023): 433–43.

<sup>15</sup> Rahmadany Rahmadany, "Perlindungan Hukum Terhadap Pengetahuan Tradisional Sebagai Hak Kekayaan Intelektual," *Juripol (Jurnal Institusi Politeknik Ganesha Medan)* 5, no. 2 (2022): 160–69.

<sup>16</sup> Andy Usmina Wijaya dkk., "Perlindungan Pengetahuan Tradisional Di Indonesia Dengan Hukum Sui Generis," *Jurnal Kajian Hasil Penelitian Hukum* 6, no. 2 (2023): 165–81.

<sup>17</sup> Kholis Roisah, "Perlindungan ekspresi budaya tradisional dalam sistem hukum kekayaan intelektual," *Masalah-Masalah Hukum* 43, no. 3 (2014): 372–79.

## B. Model of Protection of Traditional Knowledge Oriented to Criminal Fines Based on Law Number 1 of 2023

The Indonesian Government's efforts to protect traditional works of art in Indonesia are currently limited to the broad provisions contained in article 10 of the copyright law. As a result, the protection given to traditional works of art is considered inadequate, giving rise to repeated legal challenges in preserving these works. conventional forms of artistic expression<sup>45</sup>. In general, communal intellectual property rights in Indonesia consist of four types, namely traditional cultural expressions, traditional knowledge, genetic resources and geographical indications. These four types of communal rights do not yet have legal regulations. Basically there is a concept of protection for communal intellectual property rights which includes 2 (two) models of protection that can be provided, namely through defensive protection (prevention) and positive protection (legislation).<sup>18</sup>

The relevance of legal protection for individual Intellectual Property Rights and communal Intellectual Property Rights is the need for defensive protection in the sense of preventing other parties from recognizing and taking over communal intellectual property rights as well as positive protection that is realized in the form of statutory regulations.<sup>19</sup> The Indonesian government needs to immediately form legislation in the form of a special law that regulates communal intellectual property rights. This is due to the acceleration of legal protection for various communal intellectual property rights in Indonesia.<sup>20</sup>

Apart from that, traditional knowledge includes aspects of traditional cultural expression, which are all forms of openness, both material (objects) and immaterial (non-objects) or a combination of both in the field of arts and culture, including literary expressions that contain elements of traditional characteristics typical of heritage. The resulting culture is developed through generation to generation, and is also managed by its custodian (Traditional Society). Custodians of traditional knowledge are authorities and/or heirs who are traditional communities who live in a certain area and have equal social value to protect, maintain and develop traditional knowledge traditionally, communally and across generations.<sup>21</sup>

Basically there is a concept of protection for communal intellectual property rights which includes 2 (two) models of protection that can be provided, namely through defensive protection (prevention) and positive protection (legislation). Regarding the positive protection model (legislative regulations) which will be researched by the author, where the protection model tries to include criminal elements contained in Law Number 28 of 2014 concerning Copyright by applying criminal fines based on Law Number 1 of 2023 Article 79, regarding the protection of traditional knowledge as stated in Article 38 of the UUHC which states that:

1. The State holds the Copyright for traditional cultural expressions.
2. The state is obliged to inventory, preserve and maintain traditional cultural expressions as intended in paragraph (1).
3. The use of traditional cultural expressions as intended in paragraph (1) takes into account the values that live within the custodians who practice them.
4. Further provisions regarding Copyright owned by the State for traditional cultural expressions as intended in paragraph (1) are regulated in Government Regulations.

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<sup>18</sup> Syaiful Bahri, "Perlindungan hukum terhadap pengetahuan tradisional sebagai aset masyarakat perspektif masalah mursalat," 2014.

<sup>19</sup> DR AFRILYANA PURBA dan MH SH, *Perlindungan Hukum Seni Batik Tradisional berdasarkan UU No. 19 Tahun 2002 tentang Hak Cipta* (Penerbit Alumni, 2023).

<sup>20</sup> Trias Palupi Kurnianingrum, "Pelindungan Hukum Atas Pengetahuan Obat Tradisional," *Kajian* 23, no. 2 (2020): 111–28.

<sup>21</sup> Anak Agung Sinta Paramisuari dan Sagung Putri ME Purwani, "Perlindungan Hukum Ekspresi Budaya Tradisional Dalam Bingkai Rezim Hak Cipta," *Kertha Semaya: Journal Ilmu Hukum* 7, no. 1 (2019): 1–16.

Where the law does not provide an explicit deterrent effect against perpetrators of piracy in the field of traditional knowledge. If we examine the current copyright law, there are several weaknesses regarding the protection of Traditional Knowledge, namely first, IPR creates a clash between communal and individual ownership systems, second, IPR regulations only protect the economic aspects of traditional knowledge, but are unable to protect the economic aspects of traditional knowledge. spiritual and cultural identity. Thus, the use of the IPR concept to protect traditional knowledge can be done, one of which is by updating the current IPR laws and regulations, especially those governing traditional knowledge, in order to provide a more complete discussion regarding the regulations regarding the acquisition of Traditional Knowledge rights.<sup>22</sup>

With the inclusion of articles regarding criminal fines based on Law number 1 of 2023 concerning the Criminal Code Article 79 where criminal fines include 8 (eight) categories, namely:

- a. Category I, Rp. 1,000,000 (one million rupiah)
- b. Category II, Rp. 10,000,000 (ten million rupiah)
- c. Category III, Rp. 50,000,000 (fifty million rupiah)
- d. Category IV, Rp. 200,000,000 (two hundred million rupiah)
- e. Category V, Rp. 500,000,000 (five hundred million rupiah)
- f. Category VI, Rp. 2,000,000,000 (two billion rupiah)
- g. Category VII, Rp. 5,000,000,000 (five billion rupiah)
- h. Category VIII, Rp. 50,000,000,000 (fifty billion)

It is hoped that legal certainty is a guarantee that the law operates, that those who have the right to sue the law can obtain their rights. Legal certainty is a justifiable protection against arbitrariness, which means that someone will be able to obtain something they hope for in certain circumstances. Law is tasked with creating order in society.

This refers to Article 96 of Law number 1 of 2023 concerning the Criminal Code which states that paragraph (1) states that additional punishment in the form of fulfilling local customary obligations takes priority if the criminal act committed meets the provisions as intended in Article 2 paragraph (2). Paragraph (2) Fulfillment of local customary obligations as referred to in paragraph (1) is considered comparable to a category II fine. Paragraph (3) In the event that the customary obligations as intended in paragraph (1) are not fulfilled, the fulfillment of the customary obligations is replaced with compensation whose value is equivalent to a category II fine. Paragraph (4) In the event that compensation as intended in paragraph (3) is not met, the compensation is replaced with a supervision penalty or social work penalty.

In Article 97 additional punishment in the form of fulfilling local customary obligations can be imposed even though it is not included in the formulation of the criminal act while still paying attention to the provisions of Article 2 paragraph (2).

## **Conclusion**

- A. In Indonesia, traditional knowledge is protected as a constitutional right. The basis for this comes from Article 18B, especially paragraph (2), which recognizes and upholds the rights of indigenous peoples and their traditional customs. In addition, the 1945 Constitution highlighted the importance of protecting traditional knowledge as a fundamental constitutional right. Article 28i paragraph (3) specifically emphasizes the need to uphold the cultural identity and rights of traditional communities, while also recognizing the need to adapt to changing times and societal

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<sup>22</sup> Ruth Thresia Mika Pratiwi, "Potensi Perlindungan Hukum Terhadap Kain Tapis Melalui Rezim Pengetahuan Tradisional," 2017.

progress. In addition, traditional knowledge in Indonesia is subject to regulation through several laws and regulations, especially UUHC, patent law. In UUHC, traditional knowledge regulations are limited to traditional cultural expressions. Other forms of traditional knowledge, such as agricultural knowledge, scientific knowledge, technical knowledge, ecological knowledge, and medicinal knowledge, are not subject to regulation. In relation to patent law, protected traditional knowledge refers to traditional knowledge related to new technological discoveries that are involved and can be implemented in industry. On the other hand, traditional knowledge that is not refined by new technological discoveries cannot be registered as a patent.

- B. With the inclusion of an article regarding criminal fines based on Law number 1 of 2023 concerning the Criminal Code, Article 79, which contains criminal fines, legal certainty is expected, which is a guarantee that the law is running, that those who have the right to sue the law can obtain their rights. Legal certainty is a justifiable protection against arbitrariness, which means that someone will be able to obtain something they hope for in certain circumstances. Law is tasked with creating order in society.

### **Suggestion**

One of the ways in which the IPR concept can be used to protect traditional knowledge is by updating the current IPR laws and regulations, especially those governing traditional knowledge, to provide a more complete discussion of the regulations regarding the acquisition of Traditional Knowledge rights.

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