Keberadaan Masyarakat Hukum Adat (MHA) di berbagai belahan dunia dengan segala dinamika dan tantangannya terus mendorong masyarakat internasional untuk melahirkan berbagai kerangka dan norma guna memperkuat perlindungan dan pengakuan MHA. Namun demikian, tidak dapat dipungkiri bahwa konsepsi dan regulasi MHA dalam kerangka hukum internasional terus mengalami dinamika perkembangan yang menuntut negara-negara untuk melakukan penyesuaian dalam hukum domestik mereka.

Meskipun kajian tentang masyarakat hukum adat sudah banyak disusun, namun pemberlakuan, pengakuan dan perlindungan hukumnya baik di dalam maupun di luar negeri belum seluruhnya terpenuhi. Di Indonesia, misalnya, sampai saat ini belum memiliki perangkat hukum yang bersifat khusus dan komprehensif tentang Masyarakat Hukum Adat yang dapat memberikan panduan secara jelas tentang pengakuan dan perlindungannya, sehingga masih terdapat perdebatan yang berimplikasi pada pengakuan serta implementasi perlindungan hukum pada masyarakat hukum adat. Beberapa instrumen hukum internasional juga sudah memberi pengakuan, seperti Konvensi International Labour Organization Number 169 dan United Declaration on the Right of Indigenous People. Dalam Perubahan Undang-Undang Dasar 1945 telah menegaskan keberadaan masyarakat hukum adat, namun pengakuan dan pemberlakuannya masih diperlukan persyaratan administratif yang potensial membelenggu MHA.

Buku Bunga Rampai ini merupakan bentuk dukungan dari Asosiasi Pengajar Hukum Adat (APHA) Indonesia terhadap percepatan pengesahan RUU MHA, berisi kumpulan penelitian para akademisi dan ahli di bidang hukum adat yang telah dipaparkan dalam acara *International Conference* pada 7-8 Agusutus 2023.

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KATA PENGANTAR

Keberadaan Masyarakat Hukum Adat (MHA) di berbagai belahan dunia dengan segala dinamika dan tantangannya terus mendorong masyarakat internasional untuk menghasilkan berbagai kerangka dan norma untuk memperkuat perlindungan dan pengakuan MHA. Namun tidak dapat dipungkiri bahwa konsepsi dan pengaturan MHA dalam kerangka hukum internasional terus mengalami dinamika perkembangan yang mengharuskan negara-negara melakukan penyesuaian terhadap hukum domestiknya.

Meskipun banyak kajian mengenai masyarakat adat yang telah dilakukan, namun penegakan hukum serta pengakuan dan perlindungan hukum terhadap masyarakat adat, baik di dalam maupun di luar negeri, sebenarnya belum sepenuhnya terpenuhi. Di Indonesia misalnya, sampai saat ini belum ada instrumen hukum yang spesifik dan komprehensif mengenai Masyarakat Adat yang dapat memberikan pedoman yang jelas mengenai pengakuan dan perlindungannya, sehingga masih terdapat kontroversi signifikan yang berimplikasi pada pengakuan dan penerapan perlindungan hukum terhadap Masyarakat Adat.

Beberapa instrumen hukum internasional juga telah memberikan pengakuan terhadap komunitas ini, seperti Konvensi Organisasi Perburuhan Internasional Nomor 169 dan Deklarasi Bersatu tentang Hak Masyarakat Adat dan Masyarakat Adat. Dalam Perubahan UUD 1945, keberadaan Masyarakat Adat telah ditegaskan, namun pengakuan dan pengesahannya masih memerlukan persyaratan administratif yang berpotensi membelenggu MHA.

Pengakuan dan perlindungan terhadap keberadaan Masyarakat Hukum Adat dalam Pasal 18 B ayat 2 dan Pasal 28 I ayat 3 UUD 1945 menegaskan bahwa Negara mengakui dan menghormati kesatuan-kesatuan Masyarakat Hukum Adat beserta hak-hak tradisionalnya sepanjang masih ada. Dan sesuai dengan prinsip Negara Kesatuan Republik Indonesia. Hal ini menunjukkan bahwa Negara Republik Indonesia menghormati keberadaan Masyarakat Adat dengan segala aspeknya, antara lain aspek hukum dan tata kelola dalam sistem hukum adat, hak ekonomi dan lingkungan masyarakat hukum adat, hak adat, hak atas sumber daya alam dan lain sebagainya. Sejak tahun 2002 RUU Masyarakat Adat yang kemudian diubah menjadi RUU Masyarakat Adat telah

diusulkan dan dimasukkan ke dalam Badan Legislasi (BALEG), namun hingga saat ini selalu terdapat kendala. Kendala utamanya adalah tarik-menarik kepentingan politik terhadap RUU Masyarakat Adat baik di tingkat eksekutif maupun legislatif.

Buku ini adalah kumpulan tulisan para pengajar, praktisi, peneliti dan pemerhati hukum adat dari seluruh Indonesia dalam kegiatan konfrensi Internasional tentang "PENGAKUAN DAN PERLINDUNGAN MASYARAKAT HUKUM ADAT DI TINGKAT NASIONAL DAN INTERNASIONAL" yang diselenggarakan di Jakarta. Buku ini diharapkan dapat membuka wawasan bahwa betapa pentingnya keberadaan dan eksistensi Masyarakat Hukum Adat di Indonesia walaupun hingga saat ini belum ada regulasi khusus yang mengatur tentang keberadaan dan eksistensinya. Penerbitan buku ini juga diharapkan kepada para legislatif dan eksekutif utuk lebih serius dalam membahas RUU Masyarakat Adat menjadi Undang-Undang agar adanya kepastian hukum tentang keberadaan dan eksistensi Masyarakat Hukum Adat di Indonesia.

Jakarta, Januari 2024

Tim Editor

DAFTAR ISI

Intersectionality of The Rights of Women and Children in Adat People

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Abstract

The indigenous people of Batak Toba adhere to the Patrilineal system as Batak is one of the ethnic groups located in the North Sumatra region. The concept of the Toba Batak society regarding human life can be defined as a life that is always related and governed by customary values. In the culture of the Toba Batak people have complex rules governing how humans behave in everyday life, both written and oral rules derived from their ancestors. However, in terms of these rules, several things were found related to discriminatory behavior, especially against women and children. This raises the idea of how to place an incident that in the customary law community has the perception that it is not a discrimination against women and children. Thus, the difference in perceptions about discrimination makes the autho want to examine the position of women and children in the Toba Batak Indigenous community by linking it with applicable laws in Indonesia.

1. Introduction

Indonesia has a diversity of various types, namely ethnicity, religion to belief streams. This diversity also needs to be maintained and managed properly to avoid conflicts that certainly cause differences, especially related to religion (Fatah, 2023). Cultural diversity in this case is regulated in Article 36 A of the 1945 Constitution (Tim Hukumonline, 2022). Of course, its empowerment is inseparable from the position of the community which is the unity of life of humans who are bound by a system of customs. Customary law is the whole rule of positive behavior which on the one hand has sanctions and the other party is in a state of non-codification in other words as customary customs that have legal consequences (Koentjaraningrat, 1996). The position of this Society is also regulated by its rights that must be protected, upheld and respected contained in articles 28 A-28 J. Thus, both women and men, have the same rights and obligations. Law, is a set of agreements made by a country or authorized institution that contains orders and / or prohibitions that are coercive and have legal consequences (sanctions) if violated (Rusli Dyka Nurchaesar, 2021). The existence of the law is expected to avoid discriminatory treatment against certain groups, especially against women and children who are vulnerable to injustice

(Dr. Hj. Asni, 2020). The position of the Indonesian state which in fact is a state of law, then the law becomes the highest supremacy in the Republic of Indonesia and all citizens have the same position before the law (Dr. Hj. Asni, 2020). This is supported in Article 27 paragraph (1) of the 1945 Constitution that every children simultaneously has a position in law and government and is obliged to uphold the law and government with no exception.

In addition to the 1945 Constitution, Indonesia's material criminal law system has been regulated in the Criminal Code (KUHP) which is a legal product left by the Dutch colonial state which has been codified into the Indonesian criminal law system, but the Criminal Code has been updated in its entirety as it will be enforced in 2026 (Panrb, 2023). Law has peculiarities that other social rules do not have and it can be examined how far the definition of law is. Broadly speaking, the legal system in the world is divided into several parts, namely the common law legal system (Anglo America), the continental European legal system, the Islamic legal system and many other legal systems (Rahmat Budiman, 2022). This is for example customary law, which in the framework of national law development in NKRI, customary law occupies a very important position, because customary law is one of the legal materials that will be included in Indonesia's national legal framework in the future (Rahmat Budiman, 2022). The existence of customary law has a relationship of connection with the community, where customary law applies customary law patterns and the need to live together which means as a guide for the community how to behave or behave thus the purpose of customary law as a form of regulating the behavior of community members in their association (A.A. Gede Oka Parwata, SH., 2016). Adat is a reflection of the personality of a nation and is the incarnation of the soul of the nation from century to century (Rusli Dyka Nurchaesar, 2021). The position of customary law in national law refers to Article 18B paragraph (2) of the 1945 Constitution which states:

> *The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Republic of Indonesia regulated in law.*

Based on this article, the state recognizes the existence of customary law and constitutional rights in the Indonesian legal system (Aulia Maharani, 2022). Savigny explained that the law exists as an expression of the soul of a nation (volgkeist) about what is considered

right and just, the soul of a nation is different for each nation (Hasanudin & Raharusun, 2022). Hazairin in Danuti Darwis explains that customary law in roundness regarding all matters related to legal issues, what is meant by legal society is every group of people from among our nation who are subject to the unity of the applicable law.

Speaking of the equal position between women and men, in this case, it is generally said that society in Indonesia is in a patriarchal structure, where men are positioned superior to women and derive legitimacy from social values, religion, state law, customary law, etc. (Happy Budi F, 2008). According to the Encyclopedia of Feminism states "Patriarchy is a male authority that oppresses women through social, political and economic institutions. The patriarch has the power of greater male access to, mediation, and reward of authority structures inside and outside the home." (Happy Budi F, 2008). Quoting Karen D. Pyke, three important assumptions underlie patriarchal ideology:

a. Social agreements that actually benefit only the interest of the dominant group tend to be perceived as representing everyone's interest
b. This kind of hegemonic ideo is part of everyday thinking that tends to be accepted as it is
c. This ideology is regarded as a guarantor of social cohesion and cooperation by ignoring the obvious contradicitions between the various interested groups (Karen D. Pyke, 2001).

The plan for criminal law reform that juxtaposes the principle of legality with the recognition of the laws that live in this society is not without problems, the limits of criminal acts are extended not only to written in law but according to customary criminal law both written and unwritten. The position of women who should have an important role in the social system where this regulates the existence of patterns that regulate the reciprocal relations between individuals Society and between individuals and their society and the behavior of the individuals themselves (Happy Budi F, 2008). However, there is often an imbalance between the fulfillment of rights and obligations between men and women. In this case, of course, the author will compare the Toba custom with the Minang custom as a form of illustration and explanation of how the position of women in the custom.

2. Methods

This research uses a doctrinal approach that is normative or what is called normative juridical legal research which is an activity that examines aspects (in solving problems including in positive internal law). According to Peter Mahmud said that normative research is a

process to find a rule of law, legal principles, and legal doctrines to answer legal problems faced by producing various arguments, theories and new concepts as a form of prescription in solving the problems faced (Peter Mahmud Marzuki, 2005). Normative legal research with doctrinal research is "research on laws conceptualized and developed on the basis of doctrines adopted by the conceptualizer and the developer" (Wigyosubroto, 2002). This research has a descriptive nature where descriptive research describes the characteristics of the population or phenomenon being studied so that the focus of this research is to explain the object of research to answer the events that occur (M. Syamsudin, 2007). This study also conducted data collection using secondary data and primary data. Secondary data is data obtained from the results of literature review and other literature or library materials related to problems or research materials (Mukti Fajar, 2015). Then in terms of legal material as a means of research used in solving existing problems, in this case legal material consists of primary legal material which has the nature of being authoritative which means it has authority, while primary legal material will be distinguished again into primary legal material which is mandatory authority (including laws and regulations issued in its own jurisdiction and judges' decisions) and persuasive authority (including: laws and regulations in the jurisdiction of other countries but concerning the same and the decisions of judges in the jurisdiction of other countries) (Soekanto & Soekanto, 1972).

a. The primary legal materials used are:
    1) Constitution of 1945
    2) Law Number 23 of 2004 concerning the Elimination of Domestic Violence
    3) Law Number 39 of 1999 concerning Human Rights
    4) Law Number 35 of 2014 concerning Amendments to the Law – Law Number 23 of 2002 concerning Child Protection
    5) Law No. 1 of 2023 concerning the Criminal Code
b. Secondary Legal material, is legal material obtained from literature studies in the form of literature – literature related to research problems and that supports and stregthens primary legal material provides an explanation of existing primary legal material so that deeper analysis and understanding can be carried out.
c. Tertiary Legal Materials, are legal materials that provide instructions or explanations to primary legal material and secondary legal materials in the form of general dictionaries, language dictionaries, newspapers, articles, the internet (M. Iqbal Hasan, 2002).

3. Findings and Discussions

3.1. Diskriminasi dan Pemenuhan terhadap Hak Perempuan dan Anak

In the Human Development Report, Indonesia is at number 0.451, which describes for every 100,000 births, 126.0 women die due to problems in pregnancy, and the number of teenage births is at 47.4 births per 1,000 women aged 15-19 years. Then on the empowerment dimension, statistics illustrate that at least 19.8% of parliamentary seats are held by women, and adult women have reached the level of secondary education depicted at 44.5% compared to 53.2% of their male counterparts. It's their man. Another study that illustrates gender inequality in Indonesia is mentioned in the 2016 Indonesian National Women's Life Experience Survey (2016 SPHPN): Study on Violence Against Women and Girls (2016), that one in three Indonesian women aged 15-64 years claimed to have experienced physical and sexual violence committed by or not their partner during their lifetime, and statistics also show about 9.4% of women experienced it in the past 12 months. The organization Equal Measures 2030 (2019), stated that in 2017, women also still faced obstacles in regulations and discrimination in the economic sector by 51%. Thus, the large level of participation of the Indonesian Women's labor force is far below that of men who occupy approximately 80% of the participation rate. Seeing this, gender inequality, especially among women, still occurs today.

The government has issued Law Number 7 of 1984 concerning the ratification of the Convention on the Elimination of All forms of discrimination against women or that are biased with CEDAW, there are several components that are classified as discriminatory treatment, namely views and assumptions about the roles and abilities of gender-based women, namely when there are negative thoughts and prejudices against women that affect women's access to rights and opportunities, then It is classified as discrimination (Sarah Apriliandra, 2021). Various forms of discrimination are direct discrimination, namely if someone is treated differently due to behavior or attitudes from a rule, and indirect discrimination is through policies or regulations that result in certain types (Defi Uswatun H, 2016).

The United Nations (UN) first declared human rights on December 10, 1948 known as UDHR, several articles on human rights, namely:

> *All people are born free and have equal dignity and rights. They are endowed with reason and conscience and should associate with each other in a spirit of brotherhood.* (Article 1 UDHR).

Then in Article 2 of the UDHR:

> *Everyone has the right to all the rights and freedoms set forth in this statement, without exception of any kind, such as ancestry, colour, sex, language, religion, political or other establishment or other origin, nationality or social origin, property rights, birth status or any other status*

The State has the responsibility to form an instrument in fulfilling its obligation in creating the protection and preservation of human rights for all elements of society. As according to CEDAW which was ratified by Law Number 7 of 1984 in Rahayu's writing, there are principles of state obligations including guaranteeing women's rights through laws and policies, the policy of protecting women's human rights in question includes policies in public law houses and in the realm of private law. Apart from this there is Komnas Perempuan which in this case has the duty to provide institutional protection to women in Indonesia in any form of discrimination. In writing Rifa' Rosyaadah (2021) Women's rights in Indonesia, which is a manifestation of international agreements, can be found again in Law Number 39 of 1999 concerning Human Rights, namely:

a. Women's rights in the political field are regulated in several articles in the Human Rights Law, including; Article 46 of the Human Rights Law essentially stipulates that the electoral system, political parties, and government (executive and legislative) must guarantee a minimum of 30% female turnover. Article 49 Paragraph 1 which in essence women have the right to be appointed in professional positions in accordance with laws and regulations. This proves that women's rights in politics have been accommodated in laws and regulations;
b. Women's rights in the field of Education, regulated in Article 48, which basically stipulates that women anf men equally have. Opportunity to get education as stipulates in laws and regulations;
c. Women's rights in the economic and work fields, regulated in Article 49 paragaraphs 2 and 3 which essentially regulate that women have the right to protection in doing work that threatens their reproductive safety and health, guaranteed by law;
d. Women's rights in marriage and after marriage are regulated in several articles, including Article 47, which essentially stipulates that Indonesian women married to foreign men have the right to maintain or renounce their Indonesian citizenship status. In addition,

it is also regulated in Article 50 which basically stipulates that adult women have the right to perform legal acts as capable legal subjects, as long as allowed by their respective religious laws, including the right to marry. Article 51 of the Human Rights Law also regulates women's rights in marriage, which in essence stipulates that a wife has the same rights and responsibilities as her husband, both in terms of relationships with children and the right to ownership and management of joint property. When the marriage ends, women are entitled to rights that have been stipulated in laws and regulations, such as the right to get property, and the right to take care of children.

3.2. Discussion

3.2.1. A Women of the Marriage in Adat's Toba Presence

Adat comes from Arabic which is in accordance with Indonesian , where adat indicates an undestanding of custom. In the 20th century after using legislation, the word *adatrecht* has often been used in literature on customary law, including the following:

a. Nederburgh eith his book wet en Adat;
b. Juynboll in manual To the Knowledge of Mohammaedan law;
c. Scheuer in het Personnenrecht Voor de Inlanders op Java en Madura (Law of Personal Entities for Javanese and Madurese) (Tolib Setiady, 2013)

Adatrecht during the Dutch East Indies period applied to people who were not subject to the Civil Code and Gewoonte Recht (Customary Law) which applied to those subject to the Civil Code[1]. According to Van Dijk says that:

> *The term Adatrecht means custom with this name now meant all the decency and customs of Indonesian people in all fields of life, so all kinds of behavior whatsoever, according to which Indonesians usually behave. So, there are also legal regulations that surround and regulate living together from the Indonesian people.* (Supriadi, 2008).

Culture and Society will never be separated from each other, in a community group inhabiting an area, in one of the communities that has a fairly firm culture, on of which is the Toba Batak found in North

[1] During the Dutch East Indies a population classification was enacted and for each population group its own civil law was applied. The European group applies BW civil law (Civil Code), the Foreign Eastern group (Chinese and Non-Chinese) partially applies BW and the Customary Civil law of the group concerned, and the Bumi Putera group (Original Indonesia) applies Customary Civil Law.

Sumatra Province, among five other Batak tribes such as the Mandailing, Karo, Simalungun, and Pakpak sub-tribes, The Batak tribe, especially the Toba Batak people, assume that they come from one ancestor (geneological) lineage, namely the Batak King (O.H.S. Purba and Elvis Purba, 1997). The Batak King is a descendant of Mula to Na Bolon, the son of the Batak King there are three people, namely:

A Thousand Kings

a. Limbong Mulana
b. Sagala Raja
c. Malau King
d. King Biak-Biak

His four daughters are:

a. Boru Paromas
b. Boru Pareme
c. Boru Sea Field
d. In Tijo

King Isombaon (Dragon Sumba), his son three peope, namely:

a. Mr. Sori Mangaraja
b. King Asi-Asi
c. Somalidang Cage

Batak people never say themselves with the word Batak tribe but always say that they are Batak people because Batak people have an area called **Tano** Batak, Batak language, writing or letters, and Batak culture that has its own characteristics. Batak people have Batak customs usually refered to as Mangaraja Adat which is appointed and given the title of Mangaraja which he bears for life, it is believed that the person knows the ins and outs of the rules of norms, provisions, and laws that apply in Batak customs whose function is to inform, direct how to implement a particular custom, its form, type and nature and which parties are involved in the customary circle. The selection of this leader takes into account the background of the prospective leader who is not only from education or other capital of a qualified leader candidate, but more to sociological aspects which in this aspect look at the factors of *sisuan bolu*, *raja huta*, surname raja and kinship system *dalihan Na Tolu* which can be a political tool for candidates where Usually these various factors are facilitated by the *punguan* (association) of clans (Harisan Boni Firmando, 2021).

Kinship between Toba Batak people can be defined as a unified group that has the same lineage or descendants derived from one ancestor where the Toba Batak people adhere to the paternal lineage system (Patrilineal) where descendants (children follow the surname of male parents) (J.C. Vergouwen, 1986). In every Bangso Batak Toba

child, both male and female, it is automatically attached to the surname of the male parent so that the boy and girl are included in the dongan sabutuha group (Simanjuntak, 2011). There is also a slight difference in the Toba Batak daughter, if the Toba Batak daughter marries, then the woman will get an additional surname from the man who becomes her husband then the woman is included in the clan group of her husband. This can be called a marriage case in the Toba Batak traditional community, where this Toba Batak custom has the principle of marrying outside its clan so that marriage with one clan is prohibited (L Elly AM Pandiangan, 2021). The division of roles between men and women in the culture of society is called *gender*, in this case it is not a matter of nature, God's provision or biological problems but cultural, man-made or the result of social construction involving division and distinction, behavior, mentality and respect between men by considering the male sex to be high compared to the female sex (Greecetinovitria Merliana B. B, 2020).

Marriage is one of the life cycles of a human being in this world, there is an assumption that an unmarried or married life is far from the perfection of his human identity, where marriage has the most important purpose of one's life because with marriage there will continue human offspring born from the fruit of human marriage (Harvinam dkk, 2017).

Umpasa is an expression that is often heard during Batak wedding customs When you want to give ulos accompanied by words of blessing (*pasu-pasu*)[2], if you hand over *ulos with a serious mimic and the recipient can live then it may be that his body and soul will get warmth because it does not contradict religion by mentioning* "ulos ni badan dan ulos ni tandi " which is the meaning of *tandi* is physical (Richard Sinaga, 2008). Toba Batak culture is rooted in the patrilineal kinship system and binds its members in a triadic relationship or better known as *Dalihan Na Tolu*, which is a relationship between descendants who feel from certain kinship groups in a clan (Sulistyowati Irianto, 2005). The role of men is considered greater than the role of women in the traditional culture of Toba Batak so that in the number of births of children.

Men are expected to be more, although in reality women have a greater role in life and have great responsibility for children, husbands, and even parents of both women and men (Sulistyowati Irianto, 2005).

[2] Fabrics that are useful in the official activities of the Batak community and there are two main things about ulos are: a. ulos is a cloth that is used as daily clothing or other purposes and does not have an important role in traditional ceremonies; b. ulos as a traditional cloth for official activities of the Batak People and traditional Batak ceremonies so that it also has its own meaning.

The highest decision-making lies with men, in other words women do not have the right to speak of make decisions; inheritance belongs to men, especially children and women are only limited to male applicants working outside the home while women are focused on domestic work inside the home / *huta*. In ceremonial ceremoies, there are usually discussion related to issues in the ceremony in the implementation of this discussion, men are more dominant in their role until women are not given the opportunity to even sit together to discuss the problem that the role of women in society is very limited and the position of women here to be silent and passive (T. M Sihombing, 2000).

Prehistoric times when humans still did not know writing, the position of women and men was the same as it was contained in the writings of Simon den Beauvoir in his book the second sex, quoted by Tobing as Women of that era had important roles such as giving birth, taking care of the family, and sewing clothes for their families while men had the duty to find food and protect the family from things outside (Wasti & Marentha, 2021). Batak people at this time have an agrarian lifestyle with an economic system that aims to meet basic needs, Batak people have a division of labor according to the process and type of production they have. For example, the division of roles on the basis of the location of work, namely those carried out in *huta* (villages) and those carried out in balian. Women do jobs in hutas such as weaving, cooking and childcare. Men worked in the rice fields and were located outside the village and also traded, in the sense of exchanging village production for other needed goods (Vergouwen, 1986).

The role of *Dalihan Na Tolu*, where *Dalihan* means a stove made of stone, *Na* means which, *Tolu* means three, so *Dalihan Na Tolu* (three pillars of the stove). This expression is explained as follows:

> *Dalihan is made of stones arranged in such a way that the shape becomes round, with one end blunt and the other end slightly rectangular, as the legs of the Dalihan. The three dalihan which are planted close to each other have a function as a furnace for cooking utensils in which the size of the dalihan must be made equal and planted in such a way that the distance is symmetrical to one another and the height is the same and harmonious. Then it also means that not always pots or pots as cooking utensils are suitable for placing over the stove, maybe the cooking utensils are too small so that the cooking utensils do not slip or slide down, you have to be assisted with small flat stones which are suitable for dalihan so that the cooking utensils can be placed. as the supporting stones can be called as symbols* (Greecetinovitria Merliana B.B, 2020).

Thus, the three stones have the meaning that there are three elements in Batak kinship that must be built harmoniously so that they are not unequal to each other, none of the supporting stones have a more important position because their nature is parallel, so that *hula-hula*, *dongan tubu* and *boru* are all parallel, in other words, *dalihan Na Tolu* is a democratic kinship system that contains universal elements even though it is still local[3]. These three kinship elements will also always have responsibility for their position in certain activities so that their kinship position either as dongan tubu, as hula-hula or as boru will change according to their position and location of their authority at certain traditional parties / activities, not based on influence or no influence, not based on social status, so that someone can become hula-huka at one traditional party and become boru at another traditional party (Gundar & Banjarnahor, 2000).

Dalihan Na Tolu is something that cannot be separated in the life of society, especially in marriage, where Batak marriage is an institution that connects three clan groups. Actually, the clan here is more accurately interpreted as lineage (Koentjaraningrat calls it a small clan), or people who are sa-ompu (one common ancestor, usually up to 3-5 generations), who can still be clearly identified lineage, this small clan is in a large kinship group known as Batak women since adolescence were guided by their mothers (*parsonduk bolon*) how to be good wives, such as obeying their husbands and families, until boru ni raja behavior was formed in order to give honor to their fathers and brothers. Once a woman is married, there are three positions she has, namely, as Parsonduk Bolon, second mother to her husband's sister, Paniaran (mother to the clan community. So meaningful are women to the indigenous Batak people that parents who understand the customs and manners of *Dalihan Na Tolu*, have prepared their daughters in advance to be close to the standard of behavior considered ideal called 'boru ni raja' (Helmi Suryana dan Fatmariza, 2021). The position of women in the *Dalihan Na Tolu* custom, along with the times, inferior women began to change, this was marked by cultural shifts, including social status, livelihood systems, religious systems and education. In Toba custom, women are seen as children who are second in line while sons

[3] Hula-hula is a group of wife clans, starting from our wives, mother clan groups (father's wives), opung wife clan groups, and several generations; the child wife clan group, the grandson wife clan group, the brother wife clan group and so on from the dongan tubu group. Hula-hula is suspected as a source of blessing. Hulahula as a source of hagabeon/offspring. Offspring was obtained from a wife who came from the hulahula. Without a hulahula there is no wife, without a wife there are no descendants.

are first and are considered kings. The position of women is considered important, but it can be said that in one family they experience disability if they do not have sons so that this has no influence on families that do not have daughters (Wasti & Marentha, 2021).

3.2.2. Adat's Toba Inheritance

Inheritance according to T.M. Sihombing explains that inheritance or tean-teanan is all types of property such as rice fields, fields and gardens even ponds, livestock, cloth, gold, apkaiaan and so on. Customary inheritance provisions have an imbalance between the authority and rights of women and men. The Inheritance Provision in this case has a difference with BW (*Burgelijk Wetboek*), which when the heir is still alive and in general when the heir is old (no longer able to work) then his inheritance can be transferred or transferred or transferred to those who are entitled to receive it according to law (Whila, 2023). The patrilineal kinship system of the Toba Batak indigenous community, the son and daughter have different responsibilities to their clan, the son where throughout his life the boy will know his father's clan *while the daughter will have 2 (two) clans, namely from the father's clan and her husband's clan*.

The privilege of sons in the inheritance of tanag in the Toba Batak family, has caused a debate over the rights of girls regarding the inheritance of land ownership from their parents today, because in essence both boys and girls have the same rights in the same way. Even though women are a family and there is no distinction whatsoever. (Whila, 2023). Toba Batak Customary Law in the case of a woman who is not an heir, she gets part of her parents' property such as the gift of the father to the daughter when she was young, there is a congenital property or (pauseang) when she married or when she was prayed, there is a gift that is given after before she marries or gives the necessities of her life, in this case of course pay attention to that the father or kalua he died His eldest son is always ready to reaching out to his daughter or sister Women and children called adat ni Boru is an obligation that must be fulfilled by hula-hula to Borunya (Dian Kemala Dewi, 2020). In this case it can be understood that the father's inheritance of the daughter is the father's responsibility in his personal life, but if the property is insufficient and also the daughter is married then there is no need to be given life from the property. This woman is referred to as Boru Batak.[4]

[4] Setiap perempuan Batak yang sudah kawin maupun yang belum kawin

Tabel 1.1. Comparative table of inheritance receipts to Boru Batak in Toba Batak Customs before Supreme Court Decision Number 179 K / SIP / 1961

Num.	Batak women as a daughter	The widow of the deceased husband	Conclusion
1.	Boru na dung marsaripe i.e. the daughter of a married father	Widows who have one or more sons (soripada na mangka buluhon ama na gabe) are entitled to all control of the estate her husband, until her children become adults. The right is on her through the intercession of her son-men besides their right to the necessities of life. So the relics must be used for the purposes of his life and his children	a. A woman who will be given indirect rights to her father;s property so that she is seen as inappropriate to claim her share actively and they appeal only through the intercession of a brother or because provided by the party. Her father's family is for her benefit in the husband's family environent. Thus it is concluded that as a form of gift or as a memento b. The widow is always entitled to control all the property left by her husband, for the needs of her life along with her immature children and unmarried daughters, so the widow has the same position as a widow who has no sons or woman.
2.	Boru na so marsaripe, yaitu anak perempuan dari seorang bapak yang belum kawin ataupun yang sudah kawin	Widows who have no sons or daughters (soripada na mangkubaluhon ama na purpur) is	The right of a woman to the properrty of her unmarried parents is given direct rights for the necessities of life.

		only entitled to property The legacy of her husband is as much as the necessities of her life. If her livelihood property (arta na pinaiduk-iduk nagida) the widow with her husband is not sufficient for the needs of the life of the widow, then he can.	

The explanation of *holong ni ate* (*peuseang*) is a gift from a father to a daughter when his daughter marries, where this daughter is held in high esteem in her husband's family or called (asa-very ibana). The gift mainly consists of household utensils, jewelry which is a form of property belonging to women in marriage. The second is *Abit na so ra bad*, which means that if the father dies then the daughter who has been married, gives her inheritance in the form of *tona* (message) from her father before death and usually also in the form of agricultural land that can be used while she lives with a note that no transfer of rights can be made (Dian Kemala Dewi, 2020). The object of *Boru na dung marsaripe* , the daughter of a married father, in Supreme Court Decision No. 179 K / SIP / 1961, has stated that:

> *Girl also have the right to inherit from their parents, this is based on a sense of humanity and general justice, where the daughter and son of a departor are jointly entitled to inheritance, in other words, the son's share is the same as that of the daughter*

Thus, based on the decision also that customary inheritance law must have been changed, as the consideration is that a change in law is carried out based on considerations where the old law is no longer in accordance / no longer applies to the feelings of the community where the law applies but instead it is expected that with the time of the change in law in which the law that is still alive in accordance with the feelings

of the Batak Toba community is changed and replaced with a new law accordingly with a sense of justice in that Society.

Education

The Toba Batak community that adheres to the patriarchal system means that men are prioritized so that men have the right to education. The reason for education here, according to Gomar Gultom in the journal Grecetinovitria, is that a man is more prioritized than a woman in education, this has been made and read the story in the Citra Radio program as follows:

> *It was a family with two children, a boy and a girl. This family, due to economic limitations, could only afford to send one child to school. Without much consideration, the family decided to send a boy to school, even though in fact, the woman was smarter and diligent in studying. The boy travels to the city to study at university, while itonya, the woman, lives in the village. He went down to the rice fields, to help his parents, to be able to send the ito to school in the city. Year after year passed. The boy studied and studied in college and had a bright future in the city; While his sister is only able to wrestle in the fields, and that's the school, that's the world. Then the boy finished college, worked and started a family in the city. The future is really cheerful for him. And finally, the rice field, where the woman's daughter worked day by day helping with her Ito school fees, had to also fall into the hands of the man.* (Greecetinovitria Merliana B.B, 2020).

Based on this story, the perception of Batak people in this case still prioritizes men over women even though not all Batak people have such perceptions. One of the reasons for discrimination in this field It is considered that women are not very important for high school, because they will take care of the kitchen and be taken away by the husband after marriage (Bnd Listiani, 2002). Based on this presentation, gender injustice and discriminatory actions must certainly be fought, where women's empowerment must be together or even the start of understanding, dismantling and eliminating gender injustice. The differentiation of roles, status, territory and nature results in women not being autonomous, women do not have the freedom to choose and make decisions both for themselves and the environment because of these differences that create various forms of injustice towards women in terms of subordination, marginalization, stereotypes, double burdens and violence against women (Dwi Ambarsari, 2002).

3.2.3. The Existence of Women and Children's Right role in National and *Adat Recht*

Customary law will always be interpreted close to social order in a community, where each community certainly has its own characteristics in terms of norms, ethics, and associations as well as limits in social interaction, besides that the characteristics will distinguish one community from another depending on the region or lineage pattern. Quoting Soepomo's opinion in Jaja, customary law is a non-statute law which is mostly customary law rooted in traditional culture and a small part of Islamic law, this law also includes law based on the decisions of judges containing principles in the environment in which he decides cases (Jaja Ahmad Jayus, 2019). According to Soekanto, quoted from various circles, the origin of customary law can be categorized into 3 (three) groups, namely:

a. Customary law originates from the community itself as *Soepomo* and *Logemann* view, the effect of customary law is not dependent on the number of actions but on something that shoulf be obeyed by the community;
b. Customary law is based on judges facing the fact that the rules of conduct of the community and the general feeling that they should be maintained by law officials (as *Vollenhoven* and *Holleman* see it).

Customary law includes all regulations that are incarnated in the decisions of legal officials who have authority and influence and in their implementation apply immediately and are obeyed wholeheartedly by those governed by the decree or in other words, customary law arises from the decisions of the community members who adopt Ter Haar's opinion with the concept of *beslissingenleer* (Soekanto & Soekanto, 1972).

Where the earth is footed, where the sky is upheld, is a proverb that is often echoed by the people of Indonesia. This is advice that has a deep meaning that basically each region has a different legal system that must be obeyed by everyone in the region. The above proverb reflects the existence of a law that lives in society, awareness of the law that is continuously carried out until it becomes a national law of the nation and can be a characteristic of a nation (Susylawati, 2013). Indonesia certainly has a characteristic law that was born and grew in the midst of people's lives, namely customary law. Customary law is born in each region in Indonesia, with different rules, according to the pattern of life that occurs in its territory. This means that customary law grows and develops in harmony and along with the life of the community. So that customary law is a collection of social norms in society, the truth of which has been recognized by the community

(Susylawati, 2013). According to hadikusuma divides the characteristics of customary law consisting of trafisiomal. Religious, mutual, concrete and visual, open and simple can change and adjust developments, uncodified, deliberation and consensus (Hadikusuma, 2003).

Through Article 18B paragraph (2) the Constitution has recognized the existence of Society customary law and traditional rights in it ((UUD NRI Pasal 18B Ayat (2), n.d.). This means that the constitution through the Article has opened guarantees to indigenous peoples, to continue to exist. According to Ahcmad Arfi Buhanudin, recognition of the unity of indigenous peoples automatically recognizes their customary law (Achmad Asfi Burhanudin, 2021). The existence of customary law does not depend on policy makers, but is the will of the constitution (Achmad Asfi Burhanudin, 2021). According to Ilham Yuli Isdiyanto, the existence of customary law is important because:

a. Written law will not be able to accommodate the interest of all Indonesian people in fulfilling the needs of the community;
b. Development and change are quite rapid, making the function of customary law more strengthened than written law;
c. Customary law comes about because of the need for a sense of justice;
d. The variety of cultures owned makes customary law has its own throne;
e. A form of customary law can be used to organize written law (Isdiyanto, 2018)

The role of women and children in law has been regulated by various laws and regulations, women and children have rights that should be protected as stated in Article 28 C, the phrase everyone here is applicable to anyone or the subject of the law is a person (human) both male and female. Referring to Toba custom which views that education takes precedence over women and it is considered that for women with higher education will eventually also become housewives and have jobs in the kitchen, this includes a form of discrimination as this discrimination is a difference in treatment, as according to Theodorson in the ILRC book is unequal treatment of groups or groups, based on something, usually categorical, or distinctive attributes such as based on race, ethnicity, religion, or membership of social classes (ILRC, 2009). Thus this discrimination can be described as an act on the part of the **dominant majority in relation to the weak minority**. Further rules are also contained in Article 12 of Law Number 39 of 1999 concerning Human Rights which states that:

Everyone has the right to protection for development his person to obtain education, educate himself, and improve his quality of life in order to become a human being who believes, is devout, responsible, has noble character, is happy and prosperous in accordance with human rights.

Based on the article, the phrase "Educating himself" as this is a right that is held and must be sought to fulfill his education, especially for women and girls. The article also explains that it falls within the scope of human rights which is a series of rights inherent in the essence and existence of man as a creature of God Almighty and is His gift that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of dignity and dignity (Undang- Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia, n.d.). With the hope that later it will be able to make a great contribution to the progress of the nation, especially in terms of protection of the rights and obligations that have been owned by every Indonesian citizen.

Article 28C of the 1945 Constitution consist of two paragraphs namely:

Article 28C paragraph (1):
Everyone has the right to develop himself through meeting his basic needs, has the right to get education and to benefit from science and technology, arts and culture, in order to improve his quality of life and for the welfare of mankind.

Article 28C paragraph (2):
Everyone has the right to advance himself in fighting for his rights collectively to develop his society, nation, and state.

Article 26 paragraph (1) of the UDHR:
Everyone has the right to education. Education should be free, at least for primary school and primary education. Lower education should be mandatory. Technical and vocational education in general should be open to all, on an appropriate basis.

Then the secial rules are Article 13 paragraph (2) which states: States Parties to the present Covenant recognize that in order to pursue the full realization of that right:

a. Primary education should be compulsory and freely available to all; further education in its various forms, including technical secondary

and vocational education in general, sshall be available and open to all by all reasonable means, and especially through the gradual provision of free education;

b. Higher education shall be available to all equally on the basis of ability by all reasonable means, and in particular through the gradual provision of free education;
c. Primary education should be encouraged or strengthened wherever possible for those who have not received or have not completed their primary education;
d. The construction of a school system at all levels should be actively pursued, an adequate scholarship system should be established, and the material conditions of the teaching staff should be continously improved

According to Suprijonom (2012) education and teaching according to Suprijono is an integral part of social life in the global era must be able to provide and facilitate the growth and development of intellectual, social, and personal skills and teaching is a form of process, action and way of teaching. Education is an important basis for improving the quality of life both from the quality of reason, thinking, behavior to economics. The position of women also needs to be protected in terms of marriage and inheritance.

Article 27 paragraph (1) 1945:
All citizen are simultaneously in the realm of law and government and are obliged to uphold that law and government with no exception

In the previous Toba Batak Custom, it was said that even wives could not sit together in discussions or discuss discussions about traditional ceremonies, even though in its implementation it also requires a wife as a greeter and the successful implementation of the event, this is very contrary to the regulation of rights possessed in terms of freedom of opinion in Article 28 E paragraph (3). In addition, as protected by the scope of marriage, the position of women as managers in family life and considered reasonable although this cannot be considered easy, for example in terms of financial management, it is necessary to make decisions and meet the needs of each family and it is considered that women as good family managers with the principle that always controls household finances (Sriwening, 1995). In addition, it is also necessary for women's independence so that they do not depend on other people or husbands in terms of economic affairs and improving family living standards, with the existence of independent women they

will be able to be more empowered both in the family and society, of course, in terms of independence this is inseparable from matters of education as well and family support. The third discussion in this case, concerns inheritance to women, as explained earlier a married daughter will not own or inherit inheritance from both parents and husband's property (which in the case of the husband's property will later be given to his brother and his nature will later be requested). However, referring to the Supreme Court decision No. 179 K / SIP / 1961 dated October 23, 1961, there has been a shift regarding the inheritance rights of daughters, namely the position of sons and daughters having the same position and in heirs and entitled to get an equal share of the inheritance property left by their parents. As in the case of inheritance according to the Civil Code, it can be done in two ways, namely:

a. In ab intestate (heirs according to law), in this provision who are entitled to receive the share of inheritance are blood relatives, both legal and extramarital and husband and wife who live in stabbing and divided into four groups, each of which is the heir of the first, second, third, and fourth groups.
b. *Tertamentair*, namely by means appointed in the will / testament.

Meanwhile, Batak customary law is divided into three, namely:

a. *Sigokii jabui nii halaki doi ianggoi borui* (*anaki perempuani* is to fill people's homes).
b. *Mangni tuhori niborui (*daughter's daughter is considered to be traded merchandise).
c. *Holani anaki doi sijaloi* teanteanani (*zamani precede adai* demands to put male children first and explore clans, so that male children have the right to have, participate in talking about *ikatani adati* by law) (Whila, 2023).

4. Conclusion

The Toba Batak community adheres to a patrilineal family system, namely the lineage drawn from the father, it can be said that the position of sons is higher thatn the position of women, especially in terms of marriage and inheritance. Women do not have the right to participate in traditional ceremonies in which they have a hand in the implementation of activites and also in terms of inheritance distribution that discriminates against the position of women and children. However with the development of the times and influenced by economic, political and science and technology developments, there has been a shift in distribution, especially inheritance for the Toba Batak Community even though in achieving it is still and in the process towards fulfilling proper

rights. Legal tools that have a function to overcome problems faced by the community such as in writing research on inheritance, so with the existence of regulations that can be enforced does not tule out the possibility of what are their rights and obligations, it can sue. In this case the legal apparatus is the Suppreme Court, which can be enforced if it does not contradict legal norms that can give direction to the formation of the aspired national inheritance law.

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Principle "Leaving No One Behind" of the United Nations SDGs 2030 in Mainstreaming Indigenous Peoples in Indonesia

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Abstract

The principle of "Leaving No One Behind", not directly derived from the SDGs, has become a general principle adopted by the United Nations (the UN's) and the international community as part of efforts to achieve sustainable development. This principle emphasizes the importance of ensuring that no particular individual or group is marginalized in development. Although not stipulated in one specific document, this principle reflects the spirit of equality, justice, and inclusive in global efforts to achieve sustainable development by ensuring that all components of society have equal access and are not marginalized on the journey towards a better future. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not explicitly include the "Leaving No One Behind" Principle. As is known, UNDRIP aims to recognize, protect, and promote the rights of indigenous peoples as a whole. However, the spirit embodied in the "Leaving No One Behind" Principle is reflected in the values promoted by UNDRIP. UNDRIP has several provisions for mainstreaming indigenous peoples and ensuring they are not left behind and marginalized. This essay explores the significance of Indonesia's compliance with "Leaving No One Behind," shedding light on its transformative potential in unlocking marginalized communities' untapped potential and forging a path towards a more just and harmonious nation. Moreover, this writing explores how the "Leaving No One Behind" principle of the SDGs aligns with and supports the efforts to mainstream indigenous people, addressing their unique challenges and contributions while fostering a more inclusive, just, and sustainable global society. By delving into the intersection of these two critical components, we can envision a future where indigenous peoples are active agents of change and vital partners in shaping a world that works for all.

1. Introduction

The Sustainable Development Goals (SDGs) for 2030, a comprehensive global framework for achieving a more sustainable and equitable future, hold a fundamental principle: "Leaving No One Behind." This principle emphasizes the commitment to ensuring that no individual or community is excluded from the benefits of development and progress. Indigenous peoples are a vital focus of attention among the many marginalized groups seeking inclusion within this agenda. As custodians of unique cultures, invaluable traditional knowledge, and a

deep connection to the environment, mainstreaming indigenous people's issues is crucial for achieving the broader objectives of the SDGs.

Indigenous people need to be mainstreamed in modern society due to the historical and systemic marginalization they have endured for centuries. Throughout history, indigenous communities have faced forced displacement, cultural suppression, and loss of traditional lands and resources. The legacies of colonization, land grabs, and discriminatory policies have perpetuated poverty and limited access to these communities' education, healthcare, and economic opportunities.

By mainstreaming indigenous people into modern society, we can address the deep-rooted inequalities they face and promote social justice. Embracing and respecting their unique cultural heritage, languages, and traditional knowledge can enrich the broader society with diverse perspectives and solution to contemporary challenges. Moreover, integrating indigenous voices in decision-making ensures that policies and initiatives consider the needs and aspirations of these marginalized communities, fostering a more inclusive and equitable society for everyone.

In addition to the moral imperative, mainstreaming indigenous people in modern society is essential for sustainable development and environmental conservation. Indigenous communities have often been the custodians of fragile ecosystems and biodiversity-rich regions. Their profound connection to nature and sustainable practices can offer valuable insights and solutions to address climate change and environmental degradation. We can work towards more sustainable resource management and conservation efforts by recognizing and empowering their role as environmental stewards. Failure to include indigenous people in these efforts may lead to losing vital knowledge and practices, hindering the world's ability to confront pressing ecological challenges. Therefore, integrating indigenous perspectives and practices into modern society is a matter of social justice and a crucial step towards building a more resilient and sustainable future for the entire planet.

The protection of indigenous people is regulated through a combination of national laws, international agreements, and specific institutions dedicated to upholding their rights. At the national level, many countries have laws that recognize and safeguard the rights of indigenous communities. These laws often address land tenure, cultural heritage, language preservation, and self-governance issues. Additionally, international agreements such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provide a

comprehensive framework for protecting and promoting the rights of Indigenous people worldwide. UNDRIP sets out principles related to self-determination, land rights, cultural preservation, and the right to participate in decision-making processes that concern them.

Institutions protecting indigenous people's rights vary from country to country and may include government bodies, human rights commissions, and non-governmental organizations. For example, some countries have specific government agencies or departments dedicated to indigenous affairs responsible for implementing policies and programs that support indigenous communities. Human rights commissions may play a vital role in monitoring and advocating for indigenous people's rights, investigating complaints of violations, and raising awareness about their unique challenges. Non-governmental organizations often work alongside indigenous communities, providing support, resources, and legal representation to protect their rights and promote well-being.

The aims of these laws and institutions are multi-faceted. They seek to address the historical injustices and discrimination that indigenous people have faced, working towards reconciliation and healing. The protection of their land rights and cultural heritage aims to preserve their unique identities and ways of life in the face of assimilation and globalization. Empowering indigenous communities to participate in decision-making processes is crucial for ensuring that policies and initiatives take into account their perspectives and interests. Overall, the ultimate goal is to create a more equitable and inclusive society where indigenous people can thrive and contribute their valuable knowledge and wisdom to the broader community.

These theories support the need to mainstream indigenous people in modern society, emphasizing the importance of social justice, cultural diversity, and sustainable development:

1.1. Social Justice Theory

Social justice theory asserts that all individuals and communities should have equal rights, opportunities, and resource access. Mainstreaming indigenous people aligns with this theory by addressing the historical and ongoing injustices they have faced, such as colonization, land dispossession, and cultural suppression. Society can move towards a more just and inclusive framework by recognizing and respecting their rights to self-determination, cultural expression, and equitable access to resources and opportunities.

Many scholars have supported the application of Social Justice Theory in the context of indigenous people's issues. One notable scholar

is Dr Linda Tuhiwai Smith, a prominent Māori researcher and academic from New Zealand. In her seminal work "Decolonizing Methodologies: Research and Indigenous Peoples," she delves into the importance of social justice for indigenous communities and the impact of colonialism on their knowledge systems and identities.

In "Decolonizing Methodologies," Dr Linda Tuhiwai Smith critiques the Western-centric research paradigms that have often silenced and marginalized indigenous voices. She argues that research methodologies should be decolonized to recognize indigenous people's unique experiences and perspectives, fostering a more just and equitable research process. Her work emphasizes the need to engage in collaborative research with indigenous communities, respecting their self-determination and knowledge systems.

Furthermore, Dr. Smith stressed the importance of acknowledging historical injustices and ongoing colonial practices that have affected indigenous communities' land rights, cultural heritage, and socioeconomic well-being. She highlights the relevance of social justice in dismantling these oppressive structures and fostering positive change for indigenous peoples.

Dr Linda Tuhiwai Smith's contributions have been influential in promoting the incorporation of Social Justice Theory in academic research, policymaking, and advocacy related to indigenous issues. Her work has helped shape a more inclusive and respectful approach to understanding and addressing the unique challenges indigenous communities face worldwide.

1.2. Cultural Diversity Theory

Cultural diversity theory highlights the value of different cultures and the enrichment they bring to society. Indigenous communities possess unique cultural knowledge, practices, and perspectives that can contribute to the richness and diversity of modern society. Mainstreaming indigenous people involves acknowledging and celebrating their cultural heritage, languages, and traditions rather than assimilating them into dominant cultures. This recognition fosters a more pluralistic and vibrant society that benefits from diverse ways of thinking and problem-solving.

One of the scholars who supports Cultural Diversity Theory in the context of indigenous people's issues is Professor S. James Anaya. Anaya is an internationally renowned legal scholar and expert on indigenous rights. He served as the United Nations Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014, during which

he played a crucial role in advocating for the rights and well-being of Indigenous communities globally.

In his work, particularly his book "Indigenous Peoples in International Law," Anaya emphasizes the significance of cultural diversity and the protection of indigenous peoples' artistic rights. He argues that cultural diversity is a fundamental human right and an essential aspect of human dignity. The preservation and promotion of indigenous cultures, languages, and traditional practices are crucial for the well-being and identity of indigenous communities and contribute to the broader richness and diversity of the world's cultural heritage.

Anaya's scholarship highlights the need for cultural diversity to be recognized and respected in international law and policymaking. He underscores the importance of moving away from assimilationist approaches that have historically suppressed indigenous cultures and instead embracing pluralism and inclusivity in societal structures. Anaya advocates for policies and initiatives that protect indigenous peoples' rights to practice and transmit their cultural knowledge to future generations, safeguarding their distinct identities and contributions to global cultural heritage. Through his academic work and advocacy, Professor S. James Anaya has been instrumental in advancing Cultural Diversity Theory in the context of indigenous people's issues, promoting a deeper understanding of the value of indigenous cultures and advocating for their recognition and protection in the global arena.

1.3. Sustainable Development Theory

Sustainable development theory emphasizes the need to meet the present needs without compromising the ability of future generations to meet their needs. Mainstreaming indigenous people is crucial for sustainable development because they often possess traditional knowledge and practices that promote harmonious relationships with the environment. Incorporating their ecological wisdom into modern resource management and conservation approaches can lead to more sustainable and resilient practices. By protecting their ancestral lands and involving them in decision-making, we can ensure the preservation of vital ecosystems for the benefit of all humanity.

One scholar who supports Sustainable Development Theory in the context of indigenous people's issues is Dr Victoria Tauli-Corpuz. Dr Tauli-Corpuz is an indigenous Igorot woman from the Philippines and a prominent advocate for indigenous rights and sustainable development. She served as the United Nations Special Rapporteur on the Rights of Indigenous Peoples from 2014 to 2020, during which she

focused on the intersection of indigenous rights and sustainable development.

Dr Tauli-Corpuz has extensively written and spoken about integrating indigenous knowledge and practices into sustainable development efforts. She argues that indigenous peoples have traditionally lived harmoniously with their natural surroundings, practising sustainable resource management and conservation. Their traditional ecological knowledge, she emphasizes, holds valuable lessons for the modern world in addressing pressing environmental challenges such as climate change and biodiversity loss.

Furthermore, Dr Tauli-Corpuz highlights that sustainable development that respects indigenous rights and cultural practices is vital for indigenous communities' well-being and critical for global sustainability. By recognizing indigenous land rights and involving them in decision-making, sustainable development initiatives can better protect essential ecosystems and contribute to the broader environmental conservation goals.

Dr Victoria Tauli-Corpuz's scholarship and advocacy shed light on the interconnectedness of indigenous rights, sustainable development, and environmental stewardship. Her work emphasizes the need for inclusive, culturally sensitive, and participatory approaches that integrate indigenous perspectives and knowledge into sustainable development strategies to benefit both indigenous and global communities.

1.4. Intersectionally Theory

Intersectionality theory recognizes that individuals and communities can experience multiple forms of oppression and discrimination simultaneously. Indigenous people often face intersectional challenges due to race, ethnicity, gender, and economic status. Mainstreaming indigenous people involves acknowledging these intersecting identities and addressing the specific barriers and disadvantages they encounter. By adopting an intersectional approach, society can work towards a more comprehensive and equitable solution to empower indigenous communities and ensure their full participation in modern life.

One of the scholars who supports Intersectionality Theory in the context of indigenous people's issues is Professor Aileen Moreton-Robinson, an Aboriginal Australian scholar and activist. She is well-known for her work on intersectionality, critical race theory, and indigenous feminism.

In her book "The White Possessive: Property, Power, and Indigenous Sovereignty," Moreton-Robinson delves into the

complexities of Indigenous experiences and identities in the context of colonialism and white supremacy. She examines how intersecting power systems, including race, gender, class, and colonialism, shape the experiences of Indigenous peoples in Australia.

Moreton-Robinson critiques the concept of "the possessive logic of whiteness," which she argues underpins the colonial project and the subjugation of Indigenous peoples. This possessive logic sees Indigenous peoples as objects to be controlled and assimilated, erasing their sovereignty and self-determination.

Through the lens of intersectionality, Moreton-Robinson emphasizes that Indigenous peoples' experiences cannot be reduced to a singular identity marker. Instead, their struggles are shaped by the interconnectedness of various forms of oppression and discrimination. She argues for an understanding of Indigenous issues that considers the complexity of their lived realities, acknowledging the interplay of colonialism, racism, patriarchy, and other systems of oppression that intersect to create unique and multifaceted experiences.

Professor Aileen Moreton-Robinson's scholarship challenges the dominant narratives that often oversimplify Indigenous issues and experiences. Her work advocates for a more nuanced and inclusive approach that recognizes and respects the complexity of Indigenous identities and their diverse struggles. By centring intersectionality in her analysis, she contributes to a deeper understanding of the interlocking systems of power and privilege that shape Indigenous people's lives and calls for meaningful efforts towards justice and empowerment.

In summary, the theories supporting the need to mainstream indigenous people converge on principles of social justice, cultural diversity, sustainability, and intersectionality. By integrating indigenous voices, knowledge, and rights into the fabric of modern society, we can foster a more inclusive, respectful, and sustainable world for everyone.

The gap between what is regulated, the implementation, and the reality regarding the effort to mainstream indigenous people is significant and poses significant challenges to achieving genuine inclusion and empowerment.

a. **Regulation vs Implementation:** While there are numerous international and national laws, conventions, and declarations that aim to protect and promote the rights of indigenous people, the actual implementation of these regulations often falls short. Governments may adopt progressive policies on paper, but translating them into practical actions and meaningful change can be slow and ineffective. Lack of political will, bureaucratic hurdles, and

competing interests often hinder the effective implementation of laws designed to empower indigenous communities.

b. **Land and Resource Rights:** One of the most critical issues faced by indigenous people is the recognition and protection of their land and resource rights. Despite regulations that affirm their rights to ancestral lands, many indigenous communities continue to face land disputes and encroachment by powerful interests, including governments, corporations, and private individuals. The reality on the ground is often characterized by land grabbing, deforestation, and environmental degradation, leading to the displacement of indigenous populations and the loss of their cultural heritage.
c. **Lack of Consultation and Consent:** The principle of Prior and Informed Consent (PIC) is meant to ensure that indigenous communities have a say in decisions that impact their lands and resources. However, in practice, meaningful consultation and consent processes are frequently inadequate or completely ignored. Development projects, such as infrastructure, mining, or industrial activities, are often undertaken without genuinely consulting indigenous communities, leading to harmful consequences on their livelihoods and ways of life.
d. **Cultural Preservation and Education:** While international law recognizes the importance of preserving indigenous cultures and knowledge, the reality is that many indigenous languages, customs, and practices are at risk of extinction. Mainstream education systems often fail to incorporate indigenous knowledge or histories, leading to cultural assimilation and the erosion of identity. Inadequate access to quality education further perpetuates cycles of poverty and inequality.
e. **Social and Economic Marginalization:** Despite efforts to promote social justice and equality, indigenous communities continue to face socio-economic marginalization. They often lack access to basic services such as healthcare, education, and clean water, exacerbating disparities between indigenous and non-indigenous populations. Discrimination and prejudice against indigenous people further hinder their ability to fully participate in and benefit from mainstream society.

Addressing these gaps requires genuine commitment from governments, institutions, and societies to respect indigenous rights, engage in meaningful consultation and collaboration, and promote inclusive policies that recognize and value the unique contributions of indigenous communities.

With its rich cultural diversity, vibrant communities, and abundant natural resources, Indonesia stands at a crucial juncture in its developmental journey. As the nation strives to achieve the Sustainable Development Goals (SDGs) and embrace the principle of "Leaving No One Behind," a profound commitment to inclusivity and equitable progress becomes imperative. Within this diverse archipelago, indigenous communities and marginalized groups have long faced historical injustices, unequal access to resources, and limited opportunities.

To uphold the spirit of the SDGs and create a more inclusive and sustainable society, Indonesia must prioritize efforts to comply with the "Leaving No One Behind" principle, ensuring that the voices, needs, and aspirations of all its citizens, including indigenous peoples, are heard, recognized, and actively integrated into the nation's developmental agenda. This essay explores the significance of Indonesia's compliance with "Leaving No One Behind," shedding light on its transformative potential in unlocking marginalized communities' untapped potential and forging a path towards a more just and harmonious nation. Moreover, this writing explores how the "Leaving No One Behind" principle of the SDGs aligns with and supports the efforts to mainstream indigenous people, addressing their unique challenges and contributions while fostering a more inclusive, just, and sustainable global society. By delving into the intersection of these two critical components, we can envision a future where indigenous peoples are active agents of change and vital partners in shaping a world that works for all.

2. Findings and Discussions

The principle of "Leaving No One Behind" is a fundamental tenet at the heart of the global sustainable development agenda. Originating from the United Nations' Sustainable Development Goals (SDGs) in 2015, this principle represents a shared commitment by the international community to ensure that progress and development are inclusive and equitable, leaving no individual or community behind.

Developed as a response to the myriad challenges faced by marginalized and vulnerable groups worldwide, the principle emphasizes the need to address historical injustices, reduce inequalities, and uplift the most disadvantaged populations to build a more just, sustainable, and prosperous world for all. This essay explores the origins and development of the "Leaving No One Behind" principle, examining its significance and transformative potential in advancing social, economic, and environmental justice on a global scale.

The principle of "Leaving No One Behind" is a cornerstone of the Sustainable Development Goals (SDGs) and holds profound relevance and resonance with the unique challenges indigenous peoples face worldwide. As custodians of diverse cultural heritage, traditional knowledge, and a deep connection to their lands, indigenous communities have historically experienced marginalization, discrimination, and exclusion from mainstream development efforts. The "Leaving No One Behind" principle is a call to action that intersects directly with the struggles of indigenous peoples, emphasizing the urgent need to address their specific issues and ensure their inclusion in the global developmental agenda.

This part delves into the profound relevance and relation between the "Leaving No One Behind" principle and the challenges faced by indigenous communities, exploring how its implementation can pave the way towards greater empowerment, cultural preservation, and sustainable development for these vital stakeholders in our collective journey towards a more equitable and harmonious world.

2.1. Findings

"Leaving No One Behind" is a phrase that often refers to the principle of ensuring that no individual or group is excluded or marginalized in the pursuit of development, progress, or social initiatives. It emphasizes the importance of inclusivity and equality, aiming to provide equal opportunities and support to all members of society.

When it comes to indigenous people, the concept of "Leaving No One Behind" is particularly relevant. Historically, indigenous communities have often experienced marginalization, discrimination, and exclusion from mainstream societies. Their land rights, culture, languages, and traditional ways of life have been threatened, leading to significant disparities in access to education, healthcare, and economic opportunities. The principle of "Leaving No One Behind" can be applied in various ways to address the issues faced by indigenous people:

a. **Recognition of Rights:** Ensuring the recognition and protection of indigenous peoples' rights to their ancestral lands, resources, and traditional knowledge. It involves acknowledging their unique cultural identities and promoting self-determination.
b. **Equitable Access to Services:** Working to bridge the gaps in healthcare, education, and other essential services between indigenous and non-indigenous populations. This means investing in infrastructure and services tailored to the needs of indigenous communities.

c. **Preserving Indigenous Language and Cultures:** Supporting efforts to preserve and revitalize indigenous languages, cultures, and traditions, which are invaluable aspects of human heritage.
d. **Consultation and Participation**: Involving indigenous communities in decision-making processes that affect their lives and territories. This includes consulting with them on development projects, environmental issues, and policies that might impact their communities.
e. **Land Rights and Environmental Conservation:** Upholding and respecting indigenous land rights not only protects their cultural heritage but also contributes to environmental conservation, as many indigenous communities have sustainable practices and profound knowledge of their ecosystems.
f. **Empowerment and Economic Opportunities:** Providing opportunities for economic empowerment and entrepreneurship within indigenous communities, supporting them in accessing resources to improve their livelihoods.
g. **Combating Discrimination and Stereotypes:** Raising awareness about discrimination and stereotypes faced by indigenous people, and promoting a more inclusive and respectful society.
h. **Reconciliation and Healing:** Addressing historical injustices and fostering reconciliation efforts to build bridges between indigenous and non-indigenous communities.

Overall, the principle of "Leaving No One Behind" is essential in recognizing the unique challenges faced by indigenous people and working towards a more just and inclusive society that respects their rights, cultures, and contributions. It requires collaborative efforts from governments, organizations, and society as a whole to create positive change and ensure the well-being of indigenous communities.

The place of indigenous people in modern life varies depending on the region, country, and the specific circumstances of each indigenous community. In many parts of the world, indigenous people have faced historical and ongoing challenges due to colonization, marginalization, and discrimination. However, in the modern era, there have been increasing efforts to recognize and respect the rights and contributions of indigenous people. Here are some aspects of their place in modern life:

a. **Land and Territories:** Indigenous people often have ancestral lands and territories that they consider as their home. In some cases, these lands have been officially recognized, and efforts are made to protect their rights to these territories. However, there are still many instances of land disputes and struggles for land rights.

b. **Cultural Preservation:** Indigenous communities strive to preserve and promote their unique cultures, languages, and traditions in the face of globalization. Efforts are made to maintain traditional practices, ceremonies, art, and knowledge, passing them on to younger generations.
c. **Political Representation:** In some countries, indigenous people have gained political representation and have a say in decision-making processes at various levels of governance. They advocate for their rights and needs through participation in local, regional, and national political systems.
d. **Education and Awareness:** Efforts are made to raise awareness about indigenous cultures and histories, both locally and globally. Schools and educational institutions may incorporate indigenous perspectives and knowledge into their curricula.
e. **Economic Inclusion:** Many indigenous people are actively involved in various economic activities, such as agriculture, crafts, tourism, and traditional trades. Efforts are made to ensure their inclusion in economic development while respecting their traditional ways of life.
f. **Environmental Stewardship:** Indigenous communities often have a close relationship with the natural environment and contribute to environmental conservation through traditional knowledge and sustainable practices.
g. **Human Rghts and Advocacy:** Indigenous people continue to advocate for their human rights, seeking recognition, and protection from discrimination, land grabbing, and cultural appropriation. Many indigenous rights movements work to address historical injustices and promote self-determination.
h. **Collaboration and Partnership:** In some cases, governments, NGOs, and international organizations collaborate with indigenous communities on projects that impact their territories and livelihoods. These collaborations aim to ensure that projects are carried out with respect for indigenous rights and needs.

When considering the needs of indigenous people to adapt to the modern era, it's essential to approach this topic with cultural sensitivity and respect for their unique identities and values. Here are some key aspects that can support indigenous communities in adopting and thriving in the modern world:

a. **Education and Skill Development:** Access to quality education is crucial for indigenous communities to gain the knowledge and skills needed to participate in modern economic activities. Education

programs should be culturally sensitive and preserve indigenous languages and traditions.

b. **Healthcare and Social Services:** Ensuring access to adequate healthcare and social services is vital for improving the well-being and quality of life of indigenous people. Efforts should be made to provide culturally appropriate healthcare and support systems.
c. **Sustainable Development Opportunities:** Promoting sustainable economic opportunities within indigenous territories can provide viable sources of income while respecting their connection to the land and traditional practices.
d. **Land Rights and Ownership:** Securing and recognizing indigenous land rights is essential to protect their territories from encroachment and ensure their autonomy in decision-making related to land use.
e. **Preservation of Cultural Heritage:** Supporting initiatives to preserve and promote indigenous languages, cultural practices, arts, and traditions is crucial for maintaining their unique identities in the face of globalization.
f. **Technology and Connectivity:** Providing access to modern technologies and the internet can enhance communication, access to information, and economic opportunities for indigenous communities.
g. **Participation in Decision-making:** Including indigenous representatives in decision-making processes, especially concerning policies that affect their lives and territories, ensures their voices are heard and respected.
h. **Legal Protections:** Strengthening legal protections for indigenous rights, cultural heritage, and land ownership is necessary to safeguard their interests and prevent exploitation.
i. **Cultural Exchange and Understanding:** Fostering cultural exchange and understanding between indigenous communities and the wider society helps to break down stereotypes and build mutual respect.
j. **Climate Resilience and Adaptation:** Supporting indigenous knowledge and practices related to climate resilience and adaptation can contribute valuable insights to address climate change challenges.
k. **Advocacy and Human Rights:** Supporting indigenous rights movements and human rights organizations can help raise awareness of their issues and promote social justice.

l. **Economic Empowerment:** Empowering indigenous entrepreneurs and businesses through training, financial support, and market access can enhance economic self-sufficiency.
m. **Reconciliation and Healing:** Acknowledging historical injustices and supporting reconciliation efforts can contribute to building trust and understanding between indigenous communities and the wider society.

It's essential to remember that each indigenous community has its own unique needs and aspirations. The process of adaptation to the modern era should be led by the communities themselves, with their values and cultural identity at the forefront. Collaboration, respect, and partnerships with governments, NGOs, and the private sector are crucial in supporting indigenous people on their journey toward a sustainable and empowered future.

The ideal formula for including indigenous people in the current life revolves around principles of respect, recognition, empowerment, and cultural sensitivity. It requires collaborative efforts from governments, civil society, and indigenous communities themselves. Here are some key elements of this formula:

a. **Recognition of Indigenous Rights:** Governments should officially recognize and respect the collective and individual rights of indigenous people, including land rights, self- determination, and cultural preservation.
b. **Cultural Sensitivity:** Any initiatives or policies should be designed with a deep understanding of the indigenous communities' cultural values, traditions, and ways of life. Cultural sensitivity ensures that proposals align with their aspirations and do not undermine their cultural identity.
c. **Inclusive Decision-making:** Indigenous communities should be actively involved in the decision-making process concerning policies, projects, and programs that affect their lives and territories.
d. **Education and Language Preservation:** Ensuring access to quality education that is culturally sensitive and preserves indigenous languages and knowledge is vital for the empowerment of younger generations.
e. **Economic Opportunities:** Supporting sustainable economic opportunities within indigenous territories can promote economic self-sufficiency while preserving their connection to the land.
f. **Healthcare and Social Services:** Ensuring access to quality healthcare and social services that are culturally appropriate helps improve the well-being of indigenous communities.

g. **Environmental Stewardship:** Recognizing and supporting indigenous communities as environmental stewards can lead to more effective conservation efforts and sustainable land management.
h. **Reconciliation and Healing:** Acknowledging historical injustices and supporting reconciliation efforts between indigenous and non-indigenous communities can foster understanding and mutual respect.
i. **Representation and Political Participation:** Indigenous people should have adequate representation in political structures to influence policies that impact their communities.
j. **Legal Protections:** Strengthening legal protections for indigenous rights and cultural heritage is essential to safeguard their interests and prevent exploitation.
k. **Technology and Connectivity:** Providing access to modern technologies and the internet can enhance communication, information access, and economic opportunities for indigenous communities.
l. **Advocacy and Awareness:** Promoting awareness and advocacy for indigenous rights and issues can garner support from the wider society and the international community.
m. **Collaboration and Partnerships:** Building partnerships between governments, NGOs, private sector, and indigenous communities can lead to more effective and culturally sensitive initiatives.
n. **Climate Resilience and Adaptation:** Recognizing and supporting indigenous knowledge related to climate resilience and adaptation can contribute valuable insights to address climate change challenges.

The formula for including indigenous people in the current life should be flexible and adaptable to different cultural contexts and regional challenges. The ultimate goal is to foster an inclusive society where indigenous communities are empowered to participate fully in the economic, social, and political aspects of modern life while preserving their cultural heritage and values.

2.2. Discussions

The principle of "Leaving No One Behind" and efforts to mainstream indigenous peoples in Indonesia are closely related in the context of inclusive and sustainable development. Let us explain in more detail the relationship between the two:

a. **The Principle of "Leaving No One Behind"**
"Leaving No One Behind" is the underlying principle of the Sustainable Development Goals (SDGs) set by the United Nations

(UN). This principle emphasizes the importance of ensuring that all people, regardless of background, social status, or geography, should be able to access the benefits of
sustainable development. No one should be sidelined or left behind in the quest for inclusive, equitable and sustainable development.

b. Mainstreaming Indigenous Peoples in Indonesia

Customary law communities in Indonesia consist of groups of people who have locally recognized legal systems, cultures, and traditions that predate modern national law. Despite challenges and changes, indigenous peoples are essential in preserving the natural environment, biodiversity, and local wisdom.

Mainstreaming indigenous peoples in Indonesia, there are several links with the principle of "Leaving No One Behind":

a. **Inclusivity and Equality:** Mainstreaming indigenous peoples means recognizing their rights and interests fairly and equally. In practice, strengthening and protecting indigenous peoples must ensure they are supported in national development.
b. **Participation and Involvement:** The "Leaving No One Behind" principle emphasizes the importance of involving all parties in the development process. In the context of indigenous peoples, their participation and involvement in decision-making about territories and resources related to their traditions and customs must be respected and recognized.
c. **Social Justice and Poverty Alleviation**: Mainstreaming indigenous peoples can help address social inequality and poverty alleviation. Indigenous peoples are often located in remote and vulnerable areas, so inclusive development for these communities can help reduce inequality and ensure that development benefits reach all levels of society.
d. **Environmental Conservation and Local Wisdom:** Indigenous peoples often have knowledge and experience in environmental and biodiversity conservation. By recognizing and respecting their rights to land and natural resources, mainstreaming indigenous peoples can assist in preserving the environment that is essential to the common good.

It is important to note that mainstreaming indigenous peoples in Indonesia also involves challenges and complexities, such as legal issues, regulations, and conflicts of interest. However, by promoting the principle of "Leaving No One Behind" and the spirit of justice and equality, it is hoped that these efforts can positively impact indigenous peoples and sustainable development in Indonesia.

The positioning of indigenous peoples as the mainstream in state development in Indonesia can provide several significant benefits, both for indigenous peoples themselves and for the country's overall development. Here are some identifiable advantages:

a. **Preservation of Local Wisdom and Cultural Diversity:** Indigenous peoples have rich local wisdom and traditional knowledge on protecting the natural environment, preserving natural resources, and maintaining cultural diversity. By positioning them as the mainstream in development, this wisdom and diversity can be maintained and utilized sustainably, thus respecting their human rights and enriching the nation's cultural identity.
b. **Sustainable Environmental Management:** Indigenous peoples often have a deep connection to the natural environment around them. Considering their traditional knowledge of sustainable practices in managing natural resources, development based on indigenous peoples can help protect natural ecosystems essential for environmental balance and planetary sustainability.
c. **Strengthening Community Participation and Involvement:** Prioritizing indigenous peoples in development means encouraging participation and active involvement in decision-making processes relating to their territories and resources. This will strengthen their right to participation and enable them to contribute more effectively to the planning and execution of developments that affect their lives.
d. **Reduction of Social Inequality and Poverty:** Indigenous peoples often live in remote and marginal areas prone to social inequality and poverty. Social inequality can be reduced by prioritizing development in these areas and strengthening indigenous peoples, and efforts to alleviate poverty can be more effectively implemented.
e. **Alignment with Sustainable Development Principles:** Prioritizing indigenous peoples in development is a step in line with the principles of Sustainable Development Goals (SDGs) that promote inclusivity, equality, environmental sustainability, and community empowerment. In this way, development becomes more balanced and comprehensive.
f. **Social Conflict Prevention:** Many social conflicts in Indonesia are related to conflicts over natural resources and land between indigenous peoples and other parties, including the government or companies. Positioning indigenous peoples as the mainstream in development can help reduce tensions and conflicts, as their rights are recognized and protected relatively.

It is important to note that positioning indigenous peoples as mainstream in development also demands total commitment and support from the government, other stakeholders, and society.

Mainstreaming indigenous peoples in Indonesia involves several regulatory challenges. Some of these challenges include:

a. **Regulatory Non-Conformity:** Existing regulations may not be aligned with customary rights and the needs of indigenous peoples. Many government laws and regulations need to be revised in recognizing and protecting the rights of indigenous peoples, particularly concerning their land, natural resources, and cultural rights.
b. **Land Tenure and Agrarian Conflicts:** Many customary law communities still need land titles or official recognition of their customary land ownership. Customary lands are often targeted for significant investments or development projects, causing serious agrarian conflicts between indigenous peoples, governments, and companies.
c. **Development Deviations:** In some cases, implementing major development projects may lead to deviations from the customary rights of indigenous peoples. Inadequate planning and consultation processes with indigenous peoples can negatively impact their lives and the natural environment.
d. **Overlapping Laws:** The legal system in Indonesia can have overlaps between customary law, national law, and international law that recognizes customary rights. The balancing and coordination between these laws can be complex and challenging.
e. **Awareness and Education:** Another challenge is the need for more awareness and understanding of indigenous rights among government officials, the private sector, and the general public. More education and training on indigenous rights and the benefits of mainstreaming indigenous peoples are needed to create broader understanding and support.
f. **Conflict of Interest:** There is a conflict of interest among various parties, including companies, governments, and indigenous peoples. When economic and commercial interests take precedence over customary rights, indigenous peoples can face the risk of discrimination and marginalization.
g. **Implementation and Supervision**: Although there are regulations that recognize customary rights, their implementation and monitoring remain an issue. In some cases, the protection of customary rights occurs only on paper and needs to be implemented effectively on the ground.

To address these challenges, the Indonesian government needs to make serious efforts to revise existing regulations, strengthen the protection of customary rights in law, increase the involvement and participation of indigenous peoples in decision-making processes, and ensure effective implementation of these regulations. It also requires cooperation between the government, indigenous peoples, civil society organizations, and the private sector to achieve sustainable results in mainstreaming indigenous peoples in Indonesia.

The concept of proper inclusiveness for indigenous peoples in Indonesia includes several essential aspects that need attention. It should recognize and respect their customary rights, empower indigenous people, and ensure their participation in decision-making that affects their lives and territories. Here are some elements that reflect the concept of inclusiveness that is appropriate for indigenous peoples in Indonesia:

a. **Recognition of Indigenous Rights:** The concept of inclusiveness should underlie the recognition of indigenous rights as human rights that cannot be ignored. This recognition includes rights to land, natural resources, culture, education, health, and participation in decision-making regarding their lives and territories.
b. **Strengthening Cultural Identify and Traditional Tenure:** Inclusiveness should ensure indigenous peoples can maintain and develop their cultural identity freely without discrimination or threats. Traditional possessions such as language, customs, and other cultural practices should be respected and recognized as essential to Indonesia's cultural diversity.
c. **Active Participation in Decision Making:** Inclusiveness should allow indigenous peoples to participate in decision-making processes affecting their territories and livelihoods actively. This participation should go beyond formal consultation and ensure that indigenous peoples' opinions and aspirations are valued and accommodated in decision-making.
d. **Protection of Land and Natural Resources Rights:** Inclusiveness should ensure indigenous peoples' protection of land and natural resource rights. They must have fair and secure access to their customary lands, and their interests in preserving the environment and natural resources must come first.
e. **Access to Public Services and Development:** The concept of inclusiveness should ensure that indigenous peoples have equal access to public services, such as education, health, infrastructure, and others. Development should focus on empowering and improving the welfare of indigenous peoples.

f. **Capacity Building and Local Autonomy:** Inclusiveness should include strengthening local capacity and autonomy for indigenous peoples. They should be encouraged to manage their territories and resources sustainably and under their needs and values.
g. **Conflict Prevention and Dispute Resolution:** Inclusiveness should also mean conflict prevention and dispute resolution fairly and transparently. Conflicts involving indigenous peoples must be resolved by respecting their customary rights and finding solutions based on dialogue and deliberation.

It is vital to involve indigenous peoples, stakeholders, and other actors in the formation of this concept of inclusiveness. Governments, civil society organizations, and the private sector must collaborate to implement this concept of inclusiveness in various development policies, programs, and projects. Thus, Indonesia can achieve inclusive, equitable, and sustainable development for all its citizens, including indigenous peoples.

3. Conclusion

It is important to remember that indigenous peoples' attitudes towards their mainstreaming may change over time and a more intensive process of dialogue and participation. Efforts to mainstream indigenous peoples must consider the diversity of attitudes and aspirations of different indigenous groups and create open and inclusive dialogue and collaboration spaces.

The concept of proper inclusiveness for indigenous peoples in Indonesia includes several essential aspects that need attention. It should recognize and respect their customary rights, empower indigenous people, and ensure their participation in decision-making that affects their lives and territories. Mainstreaming indigenous peoples in Indonesia through law is a commitment to achieving inclusive and sustainable development. Laws that recognize and protect their customary rights become the foundation for indigenous peoples to maintain their cultural identity and strengthen their role in the country's development.

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Restoration of the Rights of Indigenous and Local Communities in the IKN Nusantara Region[5]

R. Yando Zakaria
Lingkar Pembaruan Desa dan Agraria (KARSA) dan Pusat Kajian Etnografi Komunitas Adat (PUSTAKA)

Abstract

State capital of Nusantara (IKN) area is a former operational landscape with a number of acute social, economic, cultural and environmental problems (Swara 2023). Following three waves of development (Kusumawardhani, 2022), the area is physically no longer a natural forest. The indigenous population has become a minority as well as marginalized. Knowledge relating to the management of forest resources that were once the main source of community needs has also been degraded to say nothing of completely lost. The weak legal framework for the rights of indigenous peoples has resulted in a number of overlapping claims between parties (BAPPENAS and University of Indonesia Sociology Laboratory, 2019). The IKN Nusantara is designed as a 'forest city'. Of the IKN Nusantara area of approximately 256,000 ha, 65% will be forested areas; 25% will be built-up areas; and 10% will be food supply areas. (BAPPENAS, 2020). Given that the majority of the IKN area today is monoculture forests and oil palm plantations, one of the major programmes going forward is a reforestation programme. This paper discusses the possibility of social forestry programmes and the protection of local wisdom as future options because both programmes are believed to be able to simultaneously solve the long-standing social, economic and environmental problems in the area.

Abstrak

Kawasan yang kini dijadikan Ibukota Nusantara (IKN) adalah bekas lansekap operasional dengan sejumlah persoalan sosial, ekonomi, budaya, dan lingkungan yang akut (Swara 2023). Melalui tiga gelombang pembangunan yang pernah terjadi (Kusumawardhani, 2022), membuat kawasan itu secara fisik kawasan itu tidak lagi berupa hutan alam. Penduduk asli telah menjadi minoritas sekaligus marjinal. Pengetahuan yang berkaitan dengan pengelolaan sumber daya hutan yang semula adalah sumber utama kebutuhan masyarakat juga sudah terdegradasi untuk tidak mengatakannya telah hilang sama sekali. Lemahnya kerangka pengkuan hukum atas hak-hak masyarakat adat mengakibatkan sejumlah tumpang-tindih klaim antar pihak (BAPPENAS dan Laboratorium Sosiologi Universitas Indonesia, 2019). Dalam pada itu, IKN dirancang sebagai 'kota hutan'. Dari luas IKN Nusantara sekitar 256.000

[5] Presented at the APHA Indonesia International Conference themed "Recognition, Respect and Protection of the Constitutional Rights of Indigenous Peoples in National and International Perspectives". Jakarta, 7 - 8 August 2023.

ha, 65% akan merupakan Kawasan berhutan; 25% menjadi Kawasan terbangun; dan 10% sebagai Kawasan penyedia bahan pangan. (BAPPENAS, 2020). Mengingat mayoritas Kawasan IKN hari ini merupakan hutan monokultur dan perkebunan sawit maka salah satu program besar ke depan adalah program penghutanan kembali. Makalah ini mendiskusikan peluang program perhutanan sosial dan perlindungan kearifan lokal sebagai pilihan-pilihan ke depan karena kedua program ini dipercaya sekaligus dapat menyelesaian masalah-masalah sosial, ekonomi, dan lingkungan yang telah berlangsung lama di Kawasan itu.

1. Introduction

Swara (2023) said that the area designated as the IKN Nusantara region is the operational landscape of the urbanisation process that has occurred decades earlier. As a result, the region has a number of acute social, economic, cultural and environmental problems.

Kusumawardhani (2022) explains that these problems arise as a result of three waves of development. Firstly, the designation of the area as a State Forest Area followed by the granting of forest utilisation permits to private parties (1960s - 1970s); secondly, the designation of part of the forest area as an allocation for other uses (APL) for the transmigration programme (mainly from Java) (19780s - 1980s); and thirdly, the entry of timber plantation businesses (industrial timber plantations), oil palm plantations, and later also mining activities (1990s - present).

Physically, the area is no longer natural forest. Instead, it is in the form of industrial plantation forests, oil palm plantations (companies and communities), mining, and rubber plantations and other food crops (communities).

Demographically, the indigenous population has become a minority as well as marginalised. Knowledge related to the management of forest resources, which used to be the main source of community needs, especially those in the Government Office Core Area (KIPP), has been degraded.

A study by BAPPENAS and the Sociology Laboratory of the University of Indonesia (2019) noted that there are three issues that concern the community and need attention in future project implementation: (a) the fading cultural identity of the local community; overlapping land rights claims that need to be resolved; and employment and business opportunities (which should prioritise local residents).

IKN was designed as a 'forest city'. From an area of about 256,000 ha, 65% will be forested areas; 25% will be built-up areas; and 10% as food supply areas. (BAPPENAS, 2020).

This paper will discuss the reforestation programme that should be carried out in the future. The reforestation programme should also address past problems that haunt the IKN Nusantara today and in the future.

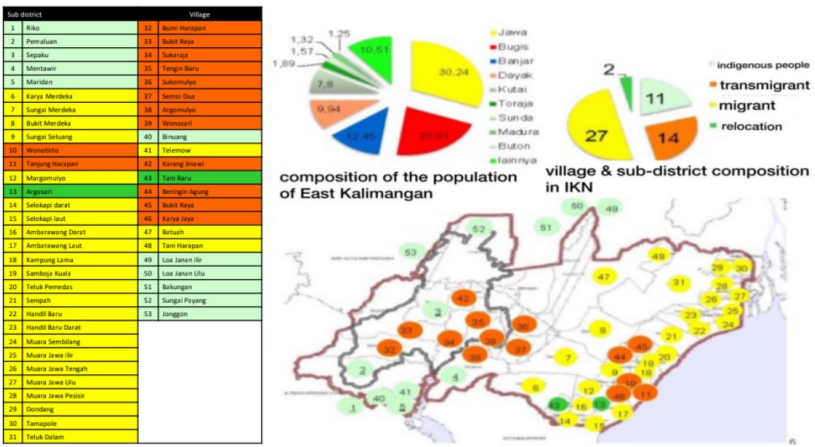
This paper is based on primary and secondary data, and uses qualitative analysis. In relation to policy, the content analysis method was used.[6]

2. Findings

2.1. The origin of Sepaku residence

Administration-wise, we know that the IKN area covers 53 villages and/or sub-districts spread across 6 (six) sub-districts within the IKN area, where there are people from diverse ethnics. Each is an ethnic group of (1) Paser; (2) Kutai; (3) Dayak Basap; (4) Dayak Kenyah; (5) Dayak Benuaq; (6) Dayak Tunjung. In addition to the 6 (six) ethnic group(s) categorised as indigenous, there are also 7 (seven) ethnic group(s) categorised as migrants. These are (1) Bajau; (2) Javanese (who generally came to the area through the transmigration programme in the 1980s); (3) Bugis; (4) Banjar; (5) Toraja; (6) Sundanese; and (7) Madurese. These migrants have been present in the area for two to three generations. In this situation, the migrants no longer know, or have no connection to, the areas of origin of their predecessors (BAPPENAS, 2019; and BAPPENAS, 2020).

Figure 1



Sub district		Village	
1	Riko	32	Bumi Harapan
2	Pemaluan	33	Bukit Raya
3	Sepaku	34	Sukaraja
4	Mentawir	35	Tengin Baru
5	Maridan	36	Sukomulyo
6	Karya Merdeka	37	Semoi Dua
7	Sungai Merdeka	38	Argomulyo
8	Bukit Merdeka	39	Wonosari
9	Sungai Seluang	40	Binuang
10	Wonotirto	41	Telemow
11	Tanjung Harapan	42	Karang Jinawi
12	Margomulyo	43	Tani Baru
13	Argosari	44	Beringin Agung
14	Selokapi darat	45	Bukit Raya
15	Selokapi laut	46	Karya Jaya
16	Amborawang Darat	47	Batuah
17	Amborawang Laut	48	Tani Harapan
18	Kampung Lama	49	Loa Janan Ilir
19	Samboja Kuala	50	Loa Janan Ulu
20	Teluk Pemedas	51	Bakungan
21	Senipah	52	Sungai Payang
22	Handil Baru	53	Jonggon
23	Handil Baru Darat		
24	Muara Sembilang		
25	Muara Jawa Ilir		
26	Muara Jawa Tengah		
27	Muara Jawa Ulu		
28	Muara Jawa Pesisir		
29	Dondang		
30	Tamajoole		
31	Teluk Dalam		

Source: Akhmad Wijaya, 2022. "Aspek Tenurial dan Keberadaan Masyarakat (Hukum) Adat di IKN". *Handout* yang disampaikan saat FGD bertajuk "masalah Pertanahan dan Masyarakat adat di IKN Nusantara". Diselenggarakan oleh BAPPENAS, tanggal 25 April 2022.

[6] Over the past year, the author has conducted a series of field research activities. The activities materialised into three field visits. Each of them was about 2 weeks.

Figure 1 above shows that the majority of villages/*kelurahan* are villages with a majority of migrants and transmigrants. Only around 20% of the villages/*kelurahan* are inhabited by (the majority of) indigenous people. Only two villages in KIPP, Kelurahan Pamaluan and Desa Binuang, have a majority of Balik ethnic group, which is the original inhabitants of the area.[7]

In the other two villages, Kelurahan Sepaku dan Kelurahan Mentawir, which are the home villages of the Balik people, they are already a minority. They make up less than 10 per cent of the total population in those two villages.[8]

According to several resource persons, the entire area of Sepaku Sub-district was originally 4 *Kelurahan* (villages). They were Kelurahan Mentawir, Kelurahan Meridan, Kelurahan Pemaluan, and Kelurahan Sepaku. Although the socio-demographic characteristics of the four *kelurahan* clearly showed rural characteristics, the status of "*kelurahan*" was given because the area was originally part of the Balikpapan Municipality (*Kota Madya*). In accordance with the policy at that time, the entire area of the City was divided into a number of *Kecamatan* and *Kelurahan*. For this reason, Mentawir, Meridan, Pemaluan and Sepaku (villages) had the status of *Kelurahan* of Balikpapan Seberang Sub-district.

In 1986, Balikpapan Seberang Sub-district was included into the administrative area of the Paser District. Its name was changed to Panajam Sub-district. Along with the issuance of Law No. 7 of 2022 on the New Autonomous Region of Penajam Paser Utara District, Kecamatan Panajam was divided into 4 sub-districts. These are Kecamatan Panajam, Waru, Babulu, and Sepaku. Sepaku Sub-district consists of Kelurahan Mentawir, Meridan, Pamaluan, and Sepaku.

According to several indigenous community leaders who claim to be direct descendants of the predecessors who opened the settlement

[7] Desa Binuang is an expansion of *Kelurahan* Meridan, which was originally the settlement centre of the Balik Tribe. However, because the immigrant population was increasingly dominant in the centre of the settlement in Meridan Village, the Balik Tribe asked for Meridan Village to be extended into two administrative areas. Namely *Kelurahan* Meridan Village and Desa Binuang.

[8] In the Indonesian government system, the lowest unit of government is divided into two categories. They are *Kelurahan* and Desa. *Kelurahan* are found in urban areas and/or sub-district (government) centres in rural areas. Meanwhile, Desa are found in rural areas. Although currently, based on the Village Law No. 6/2014, it is possible to have a Desa Adat government in urban areas.

and cultivation areas (in the local language called *Sentuwon*), [9] Kelurahan Mentawir, Meridan, Pamaluan, and Sepaku are claimed to be the 'customary territory' or *labenstraum*[10] of the four communities that currently claim to be part of the Balik ethnic groups. Some activist who concern to indigenous people's rights in IKN area called that those 4 (four) *Kelurahan* as 'historical customary territory' of the the Balik tribe.

The changes in the status of administrative areas that have occurred in the last 40 years (1986-2022) have not changed the status of those four *Kelurahan* while they are surrounded by several other settlements with *Desa* status. This is because, in line with the Government's transmigration programme, based on Governor's Decree No. 57/TH-Pem/1968 on the Conveyance of 30,000 Ha of Land located in Sepaku and Kampung Semoy, the Central Government removed the 30,000 Ha area from the forest zone and became an area with other use allocation title (APL) which was then used for the transmigration programme. However, the settlement and cultivation centres in the four *Kelurahan* were not included in the forest area that was released from the designated forest area long before (around the mid-1960s) (Kusumawardhani, 2022).

Achmad Widjaja from Bioma Foundation said that the transmigration programme has changed the spatial structure based on the government administration system in Sepaku Sub-district from 4 *Kelurahan* to be 15 *Kelurahan* and *Desa* as shown in Figure 2.[11]

[9] According to Murlianti (2023), the Sentuwon are residents of the Balik ethnic group who were displaced from their original land around Balikpapan (City) due to rapid development in Balikpapan, especially since the discovery of oil and gas resources.
[10] The use of the term 'customary territory' clearly shows the influence of interaction with the outside world. Presumably it has been used since the lands that are part of their daily lives were annexed through a government policy that designated the area as a forest area. Technically what is called 'customary territory' is not what is meant by the term ulayat (land/right) in the Basic Agrarian Law Number 5 of 1960, which is a category of land/right recognised in the Indonesian regulatory system.
[11] Personal communication on January 25, 2023. Wijaya's notes are based on field observations and interviews over 25 years of working in the Sepaku region (primary data).

Figure 2

Village Expansion/*Kelurahan* after1979

The transmigration programme has also changed the demographic composition, at least in terms of ethnic group origin, of each *Kelurahan* and *Desa*. The population in each *Kelurahan* and *Desa* in Sepaku Sub-district can be grouped into at least four categories. These are (1) those from the Balik ethnic group whose ancestors were the openers of settlements and farms in the area; (2) other ethnic groups from Kalimantan, respectively the Balik ethnic group from other regions; (Dayak) Paser; (Dayak) Kutai; Javanese (mostly from the transmigration programme); and from other ethnic groups (migrants who came voluntarily to the area) as shown at Figure 3.

Figure 3

characteristics of villages/*Kelurahan*

Some resource persons said that people from Dayak ethnic groups (from other parts of the region), such as Paser, Kutai, and other Dayak sub-ethnic groups, are generally brought in by the transmigration programme as well. The transmigration programme always required people who were referred to as 'local transmigrants', those who came from the transmigration site itself. In addition, although not in large

numbers, there are also people from other Dayak sub-ethnic groups who arrived in the area through the tradition of 'expansion of living space.'

Presumably, which needs to be verified with formal population data, that the composition of the population based on the four categories is that Balik ethnic goup is dominant only in Binuang and Pemaluan Village. In other areas of origin, Mentawir, Sepaku, and Maridan Village, people from Balik ethnic group are relatively in a minority. Even when compared to non-Balik natives alone. The reason why Balik people are minority in their home areas is because these urban centres have long been the centre of new economic activities entering the area.

Binuang Village is dominated by Balik ethnic group because during the expansion of Kelurahan Maridan, it was intended to accommodate the aspirations of the native Balik and the non-Balik ethnic group to become a separate village from Kelurahan Maridan. Kelurahan Maridan was already heterogeneous and dominated by the migrants after the arrival of ITCI Company workers. While in Pemaluan Village, the dominance of the indigenous Balik ethnic group is still intact because there is no transmigration settlement or migrant workers. Even if there are migrants, they are solitary and not collective.

In other traditional settlements of Balik ethnic group, that is Mentawir and Sepaku, Balik ethnic group became a minority apart from the arrival of transmigrants, as well as the presence of migrants who settled in groups such as in company basecamps and collective workers who made new settlements adjacent to the native settlements. For example, settlements of timber and mining company workers in Mentawir Village, and also settlements of HTI companies and informal workers in Sepaku Village.

The establishment of companies and transmigration settlements in Mentawir, Sepaku and Maridan Village, which created new economic centres, led to a rapid increase in population growth. To facilitate the administration of these traditional settlements, they were eventually divided into several new villages, for example, Kelurahan Mentawir, which originally included part of the Semoi River, Argomulyo Village (ex UPT Semoi 1), Semoi Dua Village (ex UPT Semoi II), Sukomulyo Village (ex UPT Semoi III), and Wonosari Village (ex UPT Semoi IV). Kelurahan Sepaku formed several villages, namely Bukit Raya Village (ex UPT Sepaku I), Sukaraja Village (ex UPT Sepaku II), Tengin Baru

Village (ex UPT Sepaku III), Bumi Harapan Village (ex Sepaku IV), and Karang Jinawi Village (ex UPT Trans HTI). Meanwhile, Kelurahan Maridan developed into two new villages, namely Binuang Village to accommodate the majority of indigenous settlements (Balik

and Paser), and Telemow Village for the settlement of company workers.

The problem, especially since the Government's decision to make Sepaku Sub-district a KIPP, is that the areas that were the centre of settlements and farms, and are now plantation areas, in each village in Sepaku Sub-district are still forest areas. This is in contrast to the surrounding villages, which have other use allocation (APL) status. Therefore, many of the lands in these villages have legal status in the form of certificates of ownership (SHM). This is not the case for land in the *Kelurahans*. Many do not have any legal title at all, except for a history of ownership.

While this has not been a source of open dispute, it has quietly fueled jealousy. During the process of land acquisition for the IKN project, where a lot of land held by residents had to be relinquished because it would be used by the IKN project, this jealousy manifested itself in explicit statements. The problem is that differences in the basis of rights will determine the value of acceptable compensation. At least in non-open discussions. As said by several Balik leaders and/or customary leaders in several interviews. In fact, the BRIN report (2022) noted that, along with the land acquisition process for IKN projects, the tension between the different ethnic groups has increased.

The claim of the existence of Balik ethnic group came later. This is marked by the absence of their presence in planning documents that have involved experts - as well as activists - who have experience working in the area. However, Murlianti (2023) noted that the existence of the Balik people was mentioned in the document of F. Valentijn (1724), who mentioned that there was an area in the upstream of a river in a bay about three miles from the coast, and the village was called Bilipapan. According to Murlianti, originally the Balik ethnic group was under the care of the Sultanate of Pasir. However, due to a dispute, the Balik people then asked for asylum to the Sultan of Kutai. Therefore, in the dominant public discourse, the Balik people is part of the Paser and/or the Kutai ethnic groups.

Murliati further explained that when a Dutch oil company started exploring for oil in Balikpapan, the Balik tribe chose to move back inland. The Balik community chose to retreat, because if the place is too crowded it is difficult for them to find food, wild animals usually do not like noisy places. They moved backwards along the river. The branches of the river that they recall include Sepaku, Pemaluan, and Rico Sotek. The villages of Pemaluan (formerly Maridan) and Binuang (formerly Belalang) were opened by the Balik people after they moved from Balikpapan.

Currently, according to AMAN KALTIM data quoted by Murlianti, it is estimated that the Balik ethnic group that still lives in the Sepaku sub-district area is only around 150 to 200 families. This is the largest part of the overall Balik ethnic group in East Kalimantan, which according to records is around 350 families. So few that many Sepaku residents today no longer recognize/hear that there are Balik people in the area. Some also estimate that the indigenous people of the Balik people living in the Sepaku sub-district area, scattered in Bumi Harapan Village, as well as Sepaku and Pemaluan Village, which are included in the IKN Nusantara KIPP area, are about 200 families.[12]

In the future, this marginalising of the Balik people, at least in terms of numbers, and the weak basis of rights to the lands they effectively control today, in addition to the neglect of their claims to lands once cultivated by their ancestors that are now part of forest areas and HGUs, will potentially trigger conflict. This will be discussed in the following section. Even if it does not lead to conflict, it can cause a negative image of the Government's good intentions to move the capital city. Therefore, this issue needs to be seriously considered.

2.2. The dynamics of economic life

The (main) economic activities have become part of the market/global economic chain. In general, the daily livelihoods of the people who now inhabit the IKN area are land- based. Many natives still farm and collect forest products. Some also have oil palm plantations. Meanwhile, migrants generally farm fields and oil palm plantations (mainly Javanese) and trade (mainly Bugis people).

Those living around the lakes of Central Mahakam are mostly river and lake fishermen. During the dry season they will burn the dried-up swamp scrub and peat to plant crops or to open access to new locations that are considered to be rich in fish.

In addition, some families still hunt traditionally, and others have entered the commercial timber sector. Making shingles (roofs made from ironwood or other hardwoods) is a distinctive skill of the Kutai people. Due to a shortage of raw materials, this occupation has been abandoned in favour of commercial timber industries such as '*belambangan*' or wood from illegal logging in forest areas, waste wood from land clearing of oil palm and HTI plantations, and *sengon* and eucalyptus logs for veneer and plywood mills (BAPPENAS, 2019: 10-11).

[12] https://kaltim.antaranews.com/berita/170917/melindungi-suku-balik-di-ibu-kota-negara-indonesia-baru

In addition, the Balikpapan Bay area is a source of livelihood for 3000 traditional fishermen in Penajam Paser Utara District and Balikpapan City. Social, economic and cultural changes due to the relocation of IKN and government activities need to be anticipated so that local communities are not excluded (KLHK, 2019).

The Government's decision to move the national capital to the IKN area now, and the commencement of the necessary basic infrastructure works, such as roads and reservoirs for example, has made economic activity in the area more dynamic. There are positive effects, but there are also negative ones.

Meanwhile, local residents have directly experienced some negative effects, including increasing costs of living in the villages around IKN. Whereas the income is still relatively the same. Apart from the workforce, the flow of travelers, both official and tourist, continues to increase. Transport flows have also increased. The rate of traffic accidents has increased as well. The air pollution around settlements, especially those on the highway, has worsened due to dust. Moreover, many vehicles are travelling at a fast pace.

There is also concern about wildlife threats. There have been cases of labourers being eaten by crocodiles. This happens mainly because of two things: wildlife being forced to leave their nests; and the lack of knowledge of residents, especially migrants, about the wildlife situation in the area. There needs to be a public awareness initiative on this issue.

2.3. Land tenure issues and customary land claim

The BAPPENAS report (2019: 44 onwards) noted that land issues in East Kalimantan have been prevalent for a long time and have not been resolved to date. Claims from indigenous peoples, overlapping economic development permits through Forest Concession Rights (HPH), Industrial Park Forests (HTI), and Mining Business Use Rights

(HGU), customary land and shifting cultivation patterns, the status of the Great Forest Park (Tahura) area, and transmigration activities are problems that have impacts not only on the economy, but also on the environment. In addition to those mentioned above, land use for the mining sector leaves various land and environmental problems, and has an impact on people's lifestyles. Interestingly, at the end of its report, BAPPENAS (2019) also recommends that the IKN development plan could be a momentum to resolve various land issues that have occurred since decades ago. On the other hand, the community has hopes that there will be a synergy of land regulations between the

central and regional governments so that land overlaps can be resolved completely and land ownership becomes clear.

The rise of severe land problems occurred through the process of exclusion of community groups who had previously settled in the area that is currently the IKN area, and also the process of inclusion of other community groups into the area, which happened in 3 (three) stages (Kusumawardhani, 2022). The first wave occurred in the early years after the New Order regime came to power. At that time, through the enactment of Law No. 5/1967 on Forestry, the government designated what is now the IKN area as a state forest. This made land tenure by communities in the area illegal. Along with this policy, forest concession permits (HPH), industrial plantation forests (HTI), and business use rights (HGU) were granted in the state forest area. Around the 1980s, a transmigration programme was implemented in the area. Later, in the early 2000s, large-scale oil palm plantations were also established in the area. Various large-scale business activities have displaced smallholders, both from local ethnic groups and other smallholders.

Of course, the biggest victims are the indigenous and migrant populations living in the four Kelurahan, which are the parent villages of Kecamatan Sepaku (Sub-district). This is because, as mentioned earlier, the status of the land in these four villages is still a forest area. In contrast to the status of the land in the ex-transmigration settlement units, the status of the land in the new villages has been removed from its status as a forest area. Therefore, it has been and can be certified. According to a senior researcher at the National Research and Innovation Agency (BRIN), IKN will foster tenurial conflicts that are already rife in the area.[13]

In more detail, the current types of land ownership in the IKN area are land certificates of ownership (SHM); land information letter/seal (*Surat Keterangan Tanah, girik*); and '*tanam tumbuh*' or any plants that grows on the land (BAPPENAS, 2020). Referring to the strength of legality SHM are the highest while tenure on the basis of '*tanam tumbuh*' is the lowest.

This difference in the status of the right base has a direct effect on the way compensation is calculated when there is a process of relinquishing rights. In the case of land with SHM and/or seal/*girik*/SKT, in addition to calculating compensation for land, the

[13] https://betahita.id/news/detail/7160/memupuk-konflik-tenurial-di-kawasan-ikn.html?v=1645410378?utm_source=Social%20Media&utm_medium=Facebook&utm_campaign=Agraria_my. See also Badan Riset dan Inovasi Nasional, 2021.

price of land with SHM is certainly higher than land with seal/*girik*/SKT, and will also take into account the '*tanam tumbuh*' or the plants that grow on it. If linked to the category of origin, it is clear that residents who come from the local indigenous ethnic group, who are generally still in their original settlements that still have the forest status, are the most disadvantaged parties. Already their existence is not recognised, the compensation they can receive, even if they are willing, will be much smaller than residents from other categories of origin.

Referring to some descriptions of the origins of Balik ethnicity, the use of language that is different from other ethnic groups, the land tenure system, and the leadership system that exists in Balik ethnic group, they may be said to be an indigenous community. At least in the sense of being, regarding Indonesia Constitution, a traditional society (Zakaria, 2020).

We can also see them as indigenous from the various traditions they still carry out today (Murlianti, 2023). Such as the implementation of the *irau/belian irau* tradition, which is a healing ritual, similar to the *belian* tradition of other Dayak communities. The difference is that the *belian* of Balik people seems to be under the influence of the spirit (and there is a scene where a cut tongue is held to heal); the graves of their ancestors in Balikpapan are marked with *plutukung*. Old people who go to the farm still carry a *lanjong* (lunch box) which in Kutai is called *langu* or in Dayak Basap language is called *anjat*. Today, the Balik people also recognise a traditional art form called ronggeng.

This means that these adat-controlled lands (so called since their rights have not yet been transferred to formal rights) are private customary lands. In that area exist the land that was once cultivated by the predecessors of the Balik people which is now in the forest area and HGU. However, the existence of the former location of the life and livelihood of the Balik tribe which has become artefacts (objects and/or traces of material culture from the past) according to several informants can still be found.[14]

It is rather difficult to say that the Balik ethnic group has known a territorial-based common life arrangement that operates a common life arrangement called *beschikkingrecht*, a system of customary law that shows the presence of a management of collective life that is customary law governance. The territorial unity of the Balik people seems to be formed more by the existence of state policies in organising

[14] According to Soemardjono (2019), customary rights range from those with a public-private dimension at one end to those that are only private at the other. Along with that, the form of rights recognised on customary land also covers a broad spectrum ranging from communal to individual.

government administration. Some figures and/or customary elders/leaders seem difficult explaining how the customary governance system was before the village government system was present in the area. As a result, data/information about the existence of a customary governance system has not been clearly identified. This is understandable given that the age of the customary leaders and elders who were consulted in this study are relatively "young" (under 70 years old) compared to the history of the customary governance system they are trying to trace. Mr. Sibukdin -- one of the leaders -- himself claimed to have been born in 1963.[15]

The territorial unity formed through the policy of establishing kelurahan-level government units does not necessarily make the Kelurahan area the *ulayat* of the community concerned. It seems that the area that is now the IKN area characterises itself more as an open access area rather than common property. This can be seen in the following explanation from Mr Sibukdin: "Balik people usually meet Dayak or Paser people in the forest, they never have problems with the division of farming locations, they already know each other. From Buru Parung to Tembinus on the border of Kutai Kartanegara, that used to be the community's cultivation area."[16]

But it is not easy to resolve the remaining problems of the past (land legacy) in the area if it is based on claims as customary law communities as made possible by various existing laws and regulations. It needs a legal breakthrough as enabled by the Law on IKN itself.[17]

2.4. Anthropogenic forest in IKN

The various ethnic groups currently residing in IKN are accustomed to interacting with forest resources to fulfil their daily needs. Although due to various contributing factors, the pattern of interaction has begun to change. Some have started to fade and almost disappeared.
Table 1 below shows the various traditional spatial arrangements recognised by indigenous communities in IKN today.

Table 1. Some land use model in some indigenous communities around IKN

Land Use	Paser	Balik	Kutai	Dayak Basap	Dayak Benuaq	Dayak Tunjung
Settlement	Kampung	Kampung	Kampung	Kampung	Kampukng	Kampung

[15] In an interview with Najwa Shihab, Mr. Sibukdin said that his parents started living in Sepaku village in 1967. See https://www.youtube.com/watch?v=gM8PlLp4xXQ
[16] Quoted from Murliati, 2022.
[17] Compare it to Muhammad Arman, 2022.

Former Settlement	Lou	Luq	Bekas kampung	Laouq	Lou	Luuq
Fields	Umo	Umo	Huma	Ume	Uma	Umaq
Former young fields	Lati bura	Orop, Lati buroq	Belukar muda	Lati ura	Uraat batekng	Urat batekng
Former old fields	Lati tuha	Lati tuha	Belukar tuha	Lati opo tuha	Uraat Tuha, Balik batekng, Bengkar bengkaletn	Urat tuhaq
Garden	Kebon	Kabun	Kebun	Rundung	Kebotn Dukuh	Kebon
Traditional fruit orchard	Sipung	Sipung	Rondong / Perondongan	Rundung bua	Simpukng	Munaan
Protected/Sacred forest	Alaas Nareng' Alaas Mori	Lawang mori	Himba Adat	Lawang mori	Bengkar Adet	Bengkar Adet
Forest to generate income	Alaas Senaken	Lawang Senaken	Himba	Lawang ulayat	Simpukng Berhaatn	Simpukng Berhaatn
Extensive forest	Alaas keroroyan	Lawang	Himba	Lawang Lebat	Bengkar Mentun	Bengkar Mentun

Traditional settlements of the Paser community can be found in Mentawir Village, Sepaku Village, Pemaluan Village, Maridan Village, Binuang and Riko Village. In some transmigrant settlements there are also Paser people who have settled through local transmigrants or marriage. The Paser Balik community is supposedly the first Paser subtribe as the indigenous population in the IKN area.

Traditionally, the Paser community recognises several categories of forest and land for various purposes. Paser communities in Riko and Mentawir see this categorisation of forest and land as a form of spatial management in the landscape management of village customary areas. They are:

a. Fishing areas, found along rivers, especially in deep areas because there are generally many fish. catching fish is done traditionally such as meyundak, melunta and merengge.
b. *Tana' awa umo*, farming areas both in the form of active fields and former fields
c. *Tana' Strat*, a residential area with village roads.
d. *Tana' lou lati*; an area of former villages in which there are many fruits
e. *Tana' sipukng*; an orchard area
f. *Tana' lati*; a former farming area that has been abandoned in the form of bushes
g. *Tana' lati piara*; a former cultivation area that is maintained by planting rattan, fruit and plantation crops (rubber, candlenut, etc.)

h. *Tana Alas*; forest areas that are maintained because they contain many timber and non-timber forest products, categories include:
   - *Alas Nareng*; forest reserves that may be utilised but must be subject to consultation (sempekat)
   - *Alas Tuo*; primary forest that has never been cultivated, usually it cannot be cultivated because the location is infertile or too far away
   - *Alas Mori*; a sacred forest that cannot be disturbed or cultivated due to taboos.
   - *Alas adat*; forest that is protected because it is closely related to history but can be utilised based on the results of deliberation (sempekat).
   - *Alas Pengumo*; forest reserved for farming áreas
   - *Alas Senaken*; forest area for business or cash income generation

i. *Tana mori'*; areas that are prohibited by custom
j. *Tana lowong*; area designated for cemeteries
k. *Tana' ekang*; the territorial boundary area of customary land

In contrast to other Paser tribes, the Paser Balik sub-tribe in Pemaluan and Sepaku has its own designation for forest categorisation, namely:[18]

a. *Lawang*: a term used to refer to the forest in general.
b. *Bero lawang*: a term for sacred forest
c. *Umo*; field
d. *Orop*; a term used to refer to a former field that has been abandoned for 1-2 years
e. *Lati buroq*; a term for young scrub forest or former fields that have been abandoned for 3-5 years
f. *Lati tuhaq*; a term for old scrub forest or former fields that have been abandoned for more than 5 years.

Traditional settlements of Kutai people in IKN can be found in Sungai Payang Village, Bakungan Village, Loa Duri Ulu Village and Loa Loa Duri Ilir Village. The settlements are located outside the IKN area. Only some of the gardens and forests in the area of these villages are within the IKN area.

The livelihoods of the Kutai people, especially those who live around the forest area, are generally farming, making shingles and

[18] In several interactions with the Balik community, they mentioned that Balik is different from Paser. But in daily life, due to acculturation, it is difficult to distinguish the culture between Balik and Paser people.

collecting forest products. Meanwhile, many who live around lakes and rivers are also fishermen.

In addition to farming and being river and lake fishermen, Kutai people used to be famous as shingle makers (roofs made of Ulin wood and other hardwoods) as a skill as well as a cash characteristic of Kutai people. Due to the shortage of raw materials, many of these jobs have been abandoned and switched to commercial timber industries such as

'*belambangan*' timber in forest areas, 'waste' timber in the former land clearing of oil palm and HTI plantations, and *sengon* and eucalyptus logs for raw materials for veneer and plywood factories.

In land use, there are several categorizations of forest and land, namely:

a. *Kampong*: a general term for a settlement.
b. *Huma*: term for an area of cultivation
c. *Belukar muda*; A term used to refer to former fields that have been abandoned for 1-3 years.
d. *Belukar tuha*; A term used to refer to former fields that have been abandoned for more than 5 years
e. *Rondong* or *perondongan*: A term used to refer to traditional fruit orchards. *Rondong* are usually privately owned and planted in the beks of fields or former villages.
f. *Himba*: term used to refer to the jungle.

Meanwhile, the main livelihood of the Dayak Tunjung and Dayak Benuaq communities is farming. The land used for farming activities can be in the form of shrubs, secondary forests or jungles. In secondary forests, farming activities usually revolve around land that has been cultivated for 10 to 20 years. However, if there is a rattan plantation on the land, the fallow period can be even longer, above 20 years.

According to the type of land and its use, the forms of land use in the Tunjung and Benuaq communities include settlements (*kampokng*), former *kampokng*, orchards (*simpukng munaan*), plantations (*kebotn*), fields (*umaq*), former fields (*kurat*) and forests (*bengkar*).

An important form of land use/type in the Tunjung and Benuaq communities is commercial plantations, commonly called *kebotn*. In the Tunjung and Benuaq Dayak concept, *kebotn* is a collection of several specific tree species that are very heterogeneous, deliberately planted and maintained. The term *kebotn* is articulated from one type of plant that dominates and is deliberately cultivated. For example, *kebotn* we (rattan plantation), *kebotn karet* (rubber plantation), *kebotn keminting/perijak* (candlenut plantation) and *Kebotn dukuh* (planted orchard).

Based on the type of land and the year of land clearing at the time of farming, several types of fields are known, namely:

a. *Umaq/ume'*, which is the first year's land clearing or new land clearing for farming by clearing land from secondary forest (*bengkar bengkaletn* or *kurat*) or primary forest (*bengkar*).
b. *Baber/bowaq*, which is the second year of land clearing following on from *umaq/ume'*. Land is cleared by slashing. In the Benuaq Asli community in Muara Ponak Village, this second year of land clearing is called *Baber*, while in the Tuayan community in Jontai Village it is called *bowaq*.
c. *Kelewako*, which is the third year of land clearing continuing the *baber/bowaq* land if the land is still considered good and fertile to continue farming. In the communities in both study villages, this land term is called *Kelewako*.
d. *Keleweo*, which is the fourth year of land clearing to continue the *kelewako* land if the land is still considered good/fertile or because there is no other option to open new land. In addition to being known as keleweo, it is also called *baliknng batekng* (inverted trunk) because the stumps or logs at the location of the field are usually rotten or jabuk and fall down. After this *keleweo* field, the land is abandoned (not continued) because it is generally no longer fertile.

In some villages inhabited by the Benuaq people, there are still customary forests or *bengkar adet*, which are groups of forests that, for reasons of content, function and history, are protected by the community as protected forest areas or as reserve forests.

The designation of a forest as *bengkar adet* is usually determined, agreed and known by all members of the community who inhabit the area. Forest areas designated as *bengkar adet* generally have special specifications such as a place to feed various types of birds (*okan pepulut*), a place to look for house herbs (*ruyaq belai*), a place to look for coffins (*lungun*), a place to look for medicinal plants and traditional rituals (*beliatn*), hunting locations (*nyuar/ngasu*), sacred locations (graves or oaths).

The utilisation and management of customary forests is regulated by customary institutions, and no member of the community may carelessly take or utilise what is in the *bengkar adet* without the permission of the customary chief. The process of taking or utilising *bengkar adet* is carried out through customary procedures regulated by the customary institution. For example, the time and method of collection, conditions and limits on utilisation, permits and others.

Among the Benuaq people, forest ownership and utilisation is currently divided based on descendants of heirs.

In the Benuaq Dayak community, forest and land are often united as one term, namely *lati tana* (forest and land). In the concept of lati tana, the Benuaq Dayak people in Muara Ponak Village recognise several categories of forest and land classification based on their location, designation function and utilisation, namely:

a. *Lati tana*; a large area of forest within the village area that is open to anyone and not yet owned/cultivated by the community. It functions as a reserve for various purposes for the entire community within the customary territory of the village.
b. *Simpukng*; a specific group of forests that have been owned/cultivated by the community and function for certain purposes. Proof of claim or 'certificate' of ownership is usually in the form of signs of cultivation or fruit trees (orchards) within the area. There are several types of *simpukng*, namely:
    - *Simpukng Brahatn*; a category of forest group intended as a place for business such as the collection of non-timber forest products, game and other forest products to obtain cash or subsistence income;
    - *Simpukng Ramuq*; a category of forest group intended for the supply of house building materials and shelter.
    - *Simpukng Umaq Taotn*: a category of forest group whose land is intended as a reserve or supply for future cultivation.
    - *Simpukng Lou*; a category of forest group whose location is near a settlement or village.
    - *Simpukng Belai*: a category of forest group located near a single house or resembling a house yard.
    - *Simpukng Lalaq*; category of forest groups located along village roads, farms or certain places commonly travelled by villagers;
    - *Simpukng Munaan*; a category of forest groups containing fruits or fruit-forest orchards (*lembo*);
    - *Simpukng Tempelaq*; a category of forest groups located around springs or sacred sites;
    - *Simpukng Luuq*; a category of forest groups located around longhouses (*lamin*) or old secondary forests growing on the site of old village houses.
c. *Kebotn Dukuh*; plantation areas planted with cash crops such as rubber, coffee, candlenut, banana and cacao.

d. *Umaq*; active cultivation areas that have been cleared from primary and secondary forests and planted with field crops (rice, secondary crops). Based on the location and type of forest cleared for cultivation, the Dayak Tunjung Linggang community recognises several categories of cultivated land, namely:
   - *Umaq payaq*; fields on swampy or wet land
   - *Umaq hemaq*; fields in primary forest land (bengkar)
   - *Umaq bataknq*; fields in secondary forest land
   - *Umaq uraat-bataknq*; fields in the youngest secondary forest land
   - *Umaq hamiq*; field in the former field of the previous year (*umaq babar*).

Another Dayak community also found in the IKN area is the Dayak Basap community. Generally, they farm fields and collect forest products. Field farming is carried out in small areas and is slightly different from most other Dayak tribes in East Kalimantan.

The main activity in the past, which was more oriented towards collecting forest products such as bird's nests and hunting animals, was an important factor in why Basap people's swidden agriculture was less developed due to the limited availability of male labour. Before bird's nests became a valuable commercial commodity, most swallow's nest caves were discovered and owned by the Basap people. However, due to their lack of literacy and subsistence lifestyle, most of these caves were transferred to outsider owners with little compensation or low price.

The pattern of life in the past, which was still mobile according to conditions, access and availability of natural resources, caused the Basap people to recognise former villages that were claimed as customary or sacred areas.

Some locations are sometimes close or still in the same river flow as the current settlement, but some other locations are sometimes tens of kilometres away from the village. Nevertheless, the Basap people still recognise and maintain access to these former villages.

In the IKN area, the Dayak Basap community can be found in Jonggon and Kedang Ipil villages. The Dayak Basap indigenous community, also known as Kutai Lawas, still upholds traditions and customs. There are several traditional ceremonies related to the life cycle and annual cycle. Life cycles include birth, initiation, marriage, divorce and death. While the annual cycle includes customs in farming, festivals (*Erau*) such as *Erau Pelaas taun* or *gugu taun* and *Erau Tepung Tawar*.

In terms of land use, the Basap people recognise several categorisations for land use, namely:

a. *Kampong*: a term used to refer to villages or settlements.
b. *Louq*: a term used to refer to former settlements
c. *Ume*: a term referring to cultivated land
d. *Lati ura*: a term used to refer to fields that have been abandoned for 1-4 years.
e. *Lati opo tuha*: A term used to refer to former fields that have been abandoned for more than 5 years or can be reopened for farming
f. *Rundung*: a term used to refer to traditional fruit orchards that are maintained.
g. *Lawang*: a term used to refer to forests in general
h. *Lawang mori*: a term for a sacred forest that should not be disturbed
i. *Lawang ulaya*t: a term used to refer to forests that are owned by indigenous people.
j. *Lawang Lebat*: a term used to refer to a large area of forest that is still a jungle.

3. Discussion

Government Regulation No. 27 of 2023 on the Special Authority of the Nusantara Capital Authority (IKN Law) states that one of the authorities of the Authority in the field of environment is to have the power to determine the recognition of indigenous peoples, local wisdom, or traditional knowledge related to environmental protection and management. It also has the authority to increase the capacity of indigenous peoples in organising environmental management and protection activities.

Previously, Article 18 paragraph (3) of the IKN Law also stated that environmental protection and management as referred to in paragraph (1), among others, is through "the establishment of green areas that support environmental balance and biodiversity".

Similarly, Article 21 of the Law also states that "Spatial planning, land and land transfer, the environment, disaster management, and defence and security as referred to in Articles 15 to 20 shall be implemented by paying attention to and providing protection for individual rights or communal rights of indigenous peoples and cultural values that reflect local wisdom".

The participation of local communities has also been guaranteed in Article 37 of the Law which stipulates that: (1) "The community can participate in the process of preparation, development, relocation, and management of the National Capital City; (2) Community participation

as referred to in paragraph (1), can be carried out in the form of (a) public consultation; b. deliberation; c. partnership; d. delivery of aspirations; and / or e. other involvement in accordance with the provisions of laws and regulations."

The 4 (four) legal provisions cited above conclude that there is room to design a reforestation and conservation programme that directly involves communities in the IKN Area. Both indigenous communities and other local communities.

Such a strategy is necessary given what is being said by Otero (2023), that the success of a massive reforestation – and conservation -- program needs to involve the communities in the reforestation and conservation area. Based on his experience, there are at least 7 (seven) factors that will determine the success of the program. Each of them is (1) Seeing is believing; (2) increased incomes and improved livelihoods; (3) farmers benefit from consistent technical support; (4) early stage involvement and stewardship; (5) cultivate leaders; (6) community empowerment and decision making; and (7) government concessions.

This means, firstly, that future reforestation programmes - as well as conservation in IKN - need to ensure sustainable community involvement. In the context of current forest and conservation area management policies in Indonesia, the sustainability of community involvement programmes, both indigenous communities and other local communities, can be achieved through 2 (two) models of programme implementation. Namely, reforestation and conservation by the people; and reforestation and conservation with the people.

In the first model, communities are given assets or access to manage a forest management unit within an area that is expected to be well managed. While in the second category, in contrast to the first model, the main implementers of the programme at the field level are the government, companies, or external environmental agencies (such as the Borneo Orang Utan Foundation/BOSF in Samboja Hill).

The implementation of the first model programme has been regulated through regulations on (1) social forestry programmes; and (2) the establishment of local wisdom management and protection areas as discussed further in the following section. In the context of this proposal, OIKN can act as the Ministry of Environment and Forestry.

However, in contrast to its implementation so far, in the future the implementation of these two programmes should not rely solely on the response of the community to existing policies but rather make it a programme that OIKN actively organises. This means that it needs

special efforts to discuss the possibility of implementing these two programmes with the relevant community groups.

3.1. Social forestry

The social forestry programme was launched by the government in 1999. The 2014-2019 government's agenda opens access to forest communities to be directly involved in managing and utilising forest areas in a big house called "Social Forestry". This social forestry scheme is expected to encourage the realisation of community welfare around forest areas and ensure the integrity of forest ecosystems.

The provisions that serve as an umbrella for the implementation of the social forestry programme are contained in several laws and regulations including Law No. 11 of 2020 on Job Creation, Government Regulation No. 23 of 2021 on the Implementation of Forestry, and Minister of Environment and Forestry Regulation No. 9 of 2021 on Social Forestry Management.

Article 1 point 1 of Minister of Environment and Forestry Regulation No. 9 of 2021 on Social Forestry Management has provided a complete definition of Social Forestry, namely: "a sustainable forest management system implemented in the state forest area or Customary Forest/Rights Forest implemented by Local Communities or Customary Law Communities as the main actors to improve their welfare, environmental balance and socio-cultural dynamics in the form of Village Forest, Community Forest, Community Plantation Forest, Customary Forest, and Forestry partnership". Thus, social forestry is a forest management system implemented by local communities.

Based on this regulation, social forestry is divided into 5 types, namely: Village Forest (HD), Community Forest (HKm), Community Plantation Forest (HTR), Customary Forest (HA) and Forestry Partnership (KK). The five types of social forestry can be distinguished in the comparison as shown in Annex 1.

The comparison table of social forestry types above explains that the flow of management application procedures for the five types of social forestry are relatively no difference. Except for Forestry Partnership. The most prominent difference between the five types of social forestry lies in customary forests. Indigenous forest has no time period after its management approval is issued by the Minister while other types of social forestry have a time period.

If associated with social conditions in IKN, there are 3 (three) social forestry programme schemes that are relevant to be implemented in the future. They are (a) customary forests, which can be implemented in the context of involving local indigenous communities; (b) village

forests, which can be implemented in the context of involving local communities; and (c) forestry partnerships, which can be implemented in the context of protected forests and/or conservation areas.

A brief note on three cases of social forestry project implementation in Indonesia can be seen in Figure 4.

Figure 4

Meanwhile, to accelerate the implementation of social forestry programme, as stipulated in Article 193, it is necessary to develop an integrated regional development programme based on social forestry. The focus of this social forestry-based integrated regional development programme is to (a) accelerate the distribution of access to relief; social forestry objects; (b) accelerate social forestry business development; and (c) optimise social forestry programme assistance.

For such acceleration, the parties, consisting of the Government (Ministries and/or Institutions, Provincial Government and District Government); community, academics, business actors, and media need to establish cooperation. In such a way, it will be possible to (a) harmonise policies and regulations across sectors; (b) allocate budget for Social Forestry; (c) address the needs of local governments in improving the local economy; and (d) integrate Social Forestry into national and local development planning documents.

With such cooperation, it is expected that there will be (a) synergy of Programmes and Activities across Ministries and Institutions (K/L); (b) budget support and activities by local government organisations in Social Forestry; (c) support from the Business World/Private Sector through utilisation cooperation and CSR for companies with Gold and Green Proper ratings; (d) research with Universities in the development of Research and Development; and (e) the inclusion of the Merdeka Campus programme which can eventually

give birth to innovations for diversification of social forestry commodity products.

In accordance with its institutional structure and main tasks and functions, this integrated regional development approach based on social forestry can certainly be played by OIKN.

3.2. Managing and protecting local wisdom

In Indonesian legislation, the issue of environmental protection and management is rooted in Law Number 32 Year 2009 on Environmental Protection and Management (PPLH). According to the PPLH Law, "local wisdom is the noble values that apply in the community life system to, among others, protect and manage the environment sustainably." Local wisdom is one of the principles in environmental protection and management.

The regulation of local wisdom recognition is also found in the protection of biodiversity in the Convention on Biodiversity (CBD). One of the derivatives of this Convention is an international agreement called the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation to the Convention on Biological Diversity. The CBD Convention and the Nagoya Protocol have been ratified by the Government of Indonesia through Law Number 5 of 1994 for the CBD and Law Number 11 of 2013 on the Ratification of the Nagoya Protocol.

In order for the provisions in the CBD and the Nagoya Protocol to work, the Minister of Environment and Forestry issued Ministerial Regulation No. P.34/MENLHK/SETJEN/KUM.1/5/2017 on the Recognition and Protection of Local Wisdom in the Management of Natural Resources and the Environment.[19] Meanwhile, the Minister of Law and Human Rights also issued Ministerial Regulation No. 13/2017 on Communal Intellectual Property Data.

In the Indonesian legal framework, the regulation of local wisdom is also related to its promotion. This is regulated in Law No. 5/2017 on the Promotion of Culture. In its implementation, the promotion of culture must pay attention to the characteristics of natural resources, ecosystems, geographical conditions, local community culture, and local wisdom.

Related to efforts to carry out the task of protecting and managing the environment, as well as helping to solve other problems faced,

[19] However, so far there has only been one case that has utilised this scheme. Namely, the Decree of the Regent of East Luwu No. 286/X/Year 2019 dated 11 October 2019 on the Recognition and Protection of the Local Wisdom of the To Cerekeng Customary Law Community.

OIKN is currently initiating the establishment of the "OIKN Head Regulation on Recognition of Local Wisdom in Environmental Protection & Management in the Capital Region of the Nusantara".

As explained in the Academic Paper "Draft Regulation of the Head of OIKN on the Recognition of Local Wisdom in Environmental Protection & Management in the Capital Region of the Nusantara", "the recognition and protection of local wisdom and traditional knowledge is one form of embodiment of the involvement of indigenous and local communities in environmental protection. Not only in relation to the development of forest cities, recognition of local wisdom is also part of the socio-cultural development strategy in the Capital City of the Nusantara. In the details of the Nusantara Capital City Master Plan, one of the strategies is to maintain assets that have significant cultural values and are accessible to the local community. This kind of social development strategy is closely related to the principle of building the Capital of the Nusantara in harmony with nature. Protection, preservation and regeneration of natural resources need to go hand in hand with socio-cultural protection of indigenous peoples in the archipelego" (p. 2).

OIKN has taken the the right step. It is just a matter of the accuracy of the formulation of the policy content and the design and determination process, which should be inclusive.

4. Conclusion

Available data shows that the area designated as IKN has a number of acute social, economic, cultural and environmental problems. The intensive development process has caused, physically, the area is no longer a natural forest. Instead, it is in the form of industrial plantation forests, oil palm plantations (companies and communities), mining, and rubber plantations and other food crops (communities).

Demographically, the indigenous population has become a minority as well as marginalised. Knowledge related to the management of forest resources, which was originally the main source of community needs, especially those in the KIPP area, has been degraded.

There are also a number of issues that concern the community. Such as (a) the fading of the cultural identity of local communities; the occurrence of overlapping claims to land rights that need to be resolved immediately; and community expectations to be able to take advantage of the employment and business opportunities that open up along with the presence of IKN.

In order to realise IKN as a forest city, it is hoped that future reforestation and conservation programmes can simultaneously solve the social, economic and environmental problems that have occurred for a long time.

In accordance with the available policies, at least social forestry programmes and the recognition and protection of local wisdom can be an option. Regarding the social forestry programme, there are 3 (three) social forestry programme schemes that are relevant to be implemented in the future. They are (a) customary forests, which can be implemented in the context of involving local indigenous communities; (b) village forests, which can be implemented in the context of involving local communities; and (c) forestry partnerships, which can be implemented in the context of protected forests and/or conservation areas.

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Annex

Types of social forestry	Definition	Duration/ Approval area	Category of area	Procedure
Village Forest	Applicable in unlicensed forest areas. Managed by the village and utilised for the welfare of villagers.	Duration: 35 years and renewable. Approval Area: ≤ 5,000 Ha per management unit	Protection Forest and Production Forest	Formation of Team/Working Group - Application - Administrative Verification - Technical/Field Verification - Approval/Rejection - Utilisation
Community Forest	Forest areas whose main utilisation is to empower communities	Duration: 35 years and renewable. Approval Area: ≤ 15 ha per household and ≤ 5,000 ha per management unit.	Protection Forest and Production Forest	Formation of Team/Working Group - Application - Administrative Verification - Technical/Field Verification - Approval/Rejection - Utilisation
Community Plantation Forest	Plantation forests in Production Forests established by Community groups to improve the potential and quality of Production Forests by applying silviculture systems in order to ensure the sustainability of forest resources.	Duration: 35 years and renewable. Approval Area: ≤ 15 ha per household and ≤ 5,000 per management unit.	Not specified	Formation of Team/Working Group - Application - Administrative Verification - Technical/Field Verification - Approval/Rejection - Utilisation
Customary Forest	Forests located within the territory of Customary Law Community (Masyarakat Hukum Adat/MHA) and managed by the community are no longer part of the state forest. As subjects of rights, MHA must first be	Forever	Issued from State Forest (conservation forest; protection forest; production forest) and Non-State Forest (customary land)	Formation of Team/Working Group - Application - Administrative Verification - Technical/Field Verification - Approval/Rejection - Utilisation

	established through regional regulations.			
Forestry Partnership	Partnership agreement granted to Forest Utilisation Business Licence Holders or Forest Area Use Approval Holders with partners/communities to utilise forests in Protected Forest areas or Production Forest areas.	Time period: Adjusted to the validity period of the Forest Utilisation business licence and the validity period of the forest area use approval. Approval Area: a. In the working area of the forest utilisation business licence or forest area use approval holder ≤ 5 ha for each family. b. In the event that the local community partners to collect non-timber forest products or forest environmental services, the area as referred to in the point above does not apply, given according to the ability and mutual agreement of the parties and attach a zoning map.	Production forest and/or protected forest areas that already have forest utilisation business licences, production forest and/or protected forest areas that have been given forest area use agreements, and conservation forest areas.	- The formation of partner groups is facilitated by forest utilisation business licence holders, forest area use approval holders, conservation forest managers, PPS Working Groups, and facilitators. - Application - Administrative Verification - Technical/Field Verification - Approval/Rejection - Utilisation

Optimizing the Legal Protection of Indigenous Peoples' Geographical Indication Rights for the Local People Welfare

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Abstract

This study aimed to determine the urgency of the legal protection of traditional property rights in the form of geographical indication (GI) rights of indigenous peoples. It also examined the need to optimize the legal protection of indigenous peoples' GI for local people's welfare. The socio-legal research approach was used, while data were collected through literature studies, observations, and interviews with sources selected by purposive sampling. The study also conducted a normative examination using a statute approach and analyzed the legal data and materials qualitatively using futuristic and hermeneutic interpretation methods. The findings showed that the urgency of protecting the GI rights of indigenous peoples has five arguments: a) Indigenous peoples have great potential to produce unique GI based on local wisdom but have not been registered; b) GI has high economic value that needs protection against exploitation by irresponsible outsiders; c) There is a need to increase the competitiveness of GI commodities; d) It is important to ease reaching the international market because it has a reputation and quality assurance; e) Legal protection rewards and incentivises indigenous peoples to produce GI. The GI protection of indigenous peoples is optimized in three ways, including: a) Re-formulating regulations to fulfil the requirements for GI protection; b) Tripartite institutional strengthening between central and local governments and indigenous peoples; c) Changing the indigenous people's legal culture and mindset on the importance of GI registration to protect collective intellectual property.

Keywords: legal protection, geographical indication rights, indigenous peoples, people welfare.

Abstrak

Penelitian ini bertujuan menemukan urgensi perlindungan hukum hak kekyaan tradisional berupa hak indikasi geografis (IG) masyarakat adat, dan optimalisasi perlindungan hukum IG masyarakat adat untuk kesejahteraan masyarakat lokal. Penelitian ini menggunakan pendekatan socio legal research dengan istrumen pengumpul data berupa studi pustaka, observasi dan wawancara dengan narasumber terpilih (purposive sampling). Penelitian ini dilengkapi dengan kajian normatif menggunakan pendekatan perundang-undangan (statute approach). Analisis data dan bahan hukum dilakukan secara kualitatif menggunakan metode interpretasi

futuristik (futuristic interpretation), dan interpretasi hermeneutic. Dari hasil penelitian disimpulkan urgensi perlindungan hukum hak IG masyarakat adat memilikilima argumen: a. Masyarakat Adat berpotensi besar menghasilkan IG yang memiliki keunikan berbasiskearifan lokal namun belum terdaftar; b. IG tersebut memiliki nilai ekonomi tinggi yang harus dilindungi agar tidak dieksploitasi pihak luar yang tidak bertanggung jawab; c. untuk meningkatkan daya saing (competitiveness) komoditas IG; d. agar lebih mudah menjangkau pasar Internasional karena memiliki reputasi dan jaminan kualitas.; e). sebagai penghargaan dan insentif kepada masyarakat adat untuk menghasilkan indikaasi geografis. Optimalisasi Perlindungan IG masyarakat adat dilakukan dengan tiga hal : a. Merumuskan kembali regulasi untuk memberi kemudahan persyaratanpemenuhan perlindungan Indikasi Geografis; b. Penguatan Kelembagaan Tripartit Antara Pemerintah Pusat, Pemerintah Daerah dan masyarakat adat; c. Mengubah budaya hukum dan mind set masyarakat adat akan pentingnya pendaftaran IG untuk melindungi kekayaan intelektual kolektif.

Kata kunci: perlindungan hukum, hak indikasi geografis, masyarakat adat, kesejahteraan masyarakat.

1. Introduction

Indigenous peoples in Indonesia are wealthy in natural products, beautiful and exotic local traditions, and culture. Regarding natural products, each region and localpeople own diverse plant varieties, such as Sweet Potato Cilembu, Salak Pondoh, and Arabica Coffee Kintamani Bali. Furthermore, many goods and local arts are based on local wisdom, such as Balinese Gringsing Weaving, Jepara Carved Furniture, and Mandar Silk Weaving. Many natural and processed products with distinctive characteristics also become commodities in international trade. Such products are usually only found or come from a certain region or country, especially exclusive properties.

This exclusive product attracts much attention and special treatment in Intellectual Property (IP), known as Geographical Indication (GI) or Indication of Origin. Article 23 of the TRIPs Agreement has agreed to protect all raw and processedproducts through a GI protection system or a sign of goods' origin (Almusawir et al., 2022).

GI is an intellectual property right that has received less attention (Yessiningrum,2015). This indicates the origin of an item or product with certain characteristics dueto geographical factors [Article 1 (6) of Law No. 20 of 2016 concerning Trademarks and Geographical Indications].

GI is part of the Intellectual Property regime as well as Copyrights, Patents, Trade Secrets, and other intellectual property. It

reflects an item's area of origin, whichincludes natural and human factors, giving certain product characteristics (Wiranata & Indrawati, 2014). Also, it consists of the name of a product and its area of origin (Adhi, 2019).

GI registration and certificates give a unique and typical quality to the goods orproducts produced by indigenous peoples (Isnani et al., 2019). According to previousstudies, the certificate protects goods or products from being claimed by other regions or large companies (Siddiq, 2018).

Law Number 20 of 2016 concerning Trademarks and Geographical Indicationsstates that GI is an exclusive right granted by the state to registered holders. This applies, provided the reputation, quality, and characteristics that form the basis for the protection exist. Some rights prevent third parties use when the products do not comply with applicable standards. Legal protection has relevance to people's welfare because it is a local communal property with economic value.

The GI of indigenous peoples in Indonesia has abundant potential, but only a few are registered (Eno & Yusa, 2019). Data from the Directorate General ofIntellectual Property of the Ministry of Law and Human Rights showed that Indonesiaonly has 65 products of regional specialties with IG certification. This amount has been collected since the issuance of Government Regulation No. 51 of 2007 concerning Geographical Indications.[20] Of the many registered GIs, the indigenous peoplesown only Adan Krayan Rice from the Association of Indigenous Peoples for the Protection of Adan Krayan Rice.[21]

In Bali, there are only eights products have GI certificates, through the region isrich in traditional village community products (Pakraman) with high and unique artisticvalues. In fact, in the Province of Bali there are many potential products based on Communal Intellectual Property (including Geographical Indications) that have the potential to be registered and need to be protected as regional Intellectual Property assets.[22]

2. Methods

This study used the legal constructivism paradigm (Wignjosoebroto,

[20] (https://kliklegal.com/berikut-65-indicate-geografis-yang-terserta-di-djki)
[21](http://www.Libraborneo.org/berita/seputar-desa/mengenal-beras-adan-rice-organic-from-crayan.html#gsc.tab=0)
[22] Interview with Alexander Palti, Head of KanwilkemenkumHam Propinsi Bali, Denpasar, 13 July 2022

2017) in theprovince of Bali, where indigenous peoples are rich in GI potential products. The method uses a socio-legal approach in the form of field research. Data were collected through literature reviews, observations, and interviews with sources selected using purposive sampling. Furthermore, data were collected using Focus Group Discussions (FGD) with stakeholders from the government, indigenous peoples, andrelevant experts. This study was also equipped with a normative examination using astatute approach. Data were analyzed qualitatively using the futuristic and hermeneutic interpretation by synchronizing the relevant laws and regulations (Hamidi, 2019).

3. Findings and Discussions

3.1. Findings

This research is located in the Province of Bali which has a very large potential for geographical indications of customary law community products. Bali currently has1,493 traditional villages spread across all regencies and cities. There are many natural products and hand-processed products that have the potential to obtain geographical indication protection considering that Indonesia has abundant natural wealth from a geographical perspective.

The Province of Bali has a lot of potential for Communal Intellectual Property. Based on data in the Province of Bali, there are 65 (sixty five) Communal Intellectual Property which have been registered in the database of the National Data Center forCommunal Intellectual Property of the Ministry of Law and Human Rights, namely 49(forty nine) Traditional Cultural Expressions, 7 (seven) Traditional Knowledge, and 8(eight) Geographical Indications.

The eight products include Kopi Arabika Kintamani, Mete Kubu Bali, Garam Amed Bali, Tenun Gringsing, Kopi Robusta Puputan, Salak Sibetan Karangasem, Garan Kusamba, Kerajinan Perak Celuk Gianyar. Karangasem Regency has a GI called Arak Sidemen submitted for registration to obtain legal protection and provideeconomic progress to local people.[23] Furthermore, indigenous peoples in Jembrana Regency, Bali, have at least four GIs with great potential to be registered. They include Garam Gumbrih, Endek Jembrana, Jegog, Lawar Klungah, and Dupa Gaharu. However, the Central and Regional Governments have not reached this potential for registration (Interview with I Ketut Widia, an indigenous people

[23] (https://bali.kemenkumham.go.id/berita-kanwil/berita-utama/ 3891-meeting-assistance-registration-geographical-indication-arak-sidemen-dan-arak-api-merita)

leader inJembarana, 15 July 2022).

3.2. Discussions

The Urgency of Legal Protection for the Geographical Indication Rights of Indigenous Peoples for the Local People's Welfare

Indigenous peoples have the potential to produce intellectual works with traditional nuances as the shared community. The creation of traditional intellectual property works was initially associated with ritual needs and sacred nuances, and overriding economic value. In today's global development, traditional intellectual properties have developed into unique products with high economic value. In line with this, the government must protect the traditional intellectual property owned for the indigenous people's welfare and prosperity.

Protection would ensure that others do not use these traditional products for economic gain by ignoring the real owner's rights (Medeiros et al., 2019). Violation of the law by other parties is economically detrimental and damages traditional and sacred values. This applies especially to GI-certified local products, Indonesian citizens, and foreign nationals because local varieties are tied to their geographical area. The protection ensures that these products are only used in certain areas. For instance, coffee must be grown in the Kintamani area of Bali because GI protection for local varieties depends on the region. This is because a product is associated withits geographical area's reputation, quality, and character. Therefore, growing the plant outside its geographical area would damage its quality and character (Crescenzi et al., 2022).

Indonesia is an archipelagic country with 17,504 islands, as well as various natural resources and biodiversity. It has many commodities and products with the potential to be protected using the GI rights regime. This is seen in the many local products in the international trade due to their high economic value, such as Java Coffee, Gayo Coffee, Toraja Coffee, Deli Tobacco, and Muntok White Pepper. The products need legal protection from unfair competitive practices in global trade. An adequate GI protection system is necessary due to Indonesia's geographical location as an archipelagic country rich in the potential for traditional knowledge, traditions, and culture. Optimal protection would help maintain environmental sustainability andmaximize the empowerment of local natural resources.

GI protection is part of intellectual property with economic value. GI labels or marks illustrate the quality of goods a particular

region produces, adding to a product's economic value. According to Sophie Reviro and quoted (Djualeka, 2014),

> "E*conomic value is the development engine. Commercial performance related to consumers' acknowledgement of superior quality and typicity is the first objective of GI construction. However, most GI has the potential to create positive social and environmental aleffects to the benefit of the rural development."*

From the international trade perspective, using GI to indicate an item's origin increases a commodity's competitiveness and marketing. International economic actors encourage countries to provide legal protection for such products by making multilateral international agreements. The unique products of indigenous peoples have the potential to receive GI protection. This added value provides increased welfare and benefits for local people (Yessiningrum, 2015).

A product that includes GI gets legal protection after being registered at the Directorate General of Intellectual Property. In Indonesia, GI registration uses a constitutive system with exclusive rights obtained by the first registrant, while subsequent registrants do not receive legal protection.

The registration is preventive legal protection from the government against the local community's potential GI to avoid disputes in the future. Registering a product provides legal protection or certainty to the quality of the potential product. This is in line with the Reward Theory of Robert M. Sherwood that creators must be appreciated with legal protection for their creation (Wibowo, 2015). The government gives a certificate as an appreciation and legal protection for creating products with the GI character.

Registration of potential IG is also consistent with Sherwood's (2018) Recovery Theory that a creator deserves recovery for the hard work, time, energy, and moneyspent while creating. As potential owners, the community and local government getrecovery when the GI product is registered and marketed with higher economic value.

This is consistent with Sherwood's Incentive Theory that creators receive incentives to produce better products. The incentives constitute protection andmotivation for indigenous peoples to create potential geographical indications ofbetter quality. Creators must be given an award for every work or creation produced. The award could be individual or collective for the producing community by registering the potential product of its geographical indication.

One goal of registering potential GI products is to improve the

local community'seconomy. The economic value arises because GI labels on a product description thequality that gives a good reputation in the community. This indirectly adds to the economic value of registered GI products and guarantees legal certainty when later claimed by other parties (Kurnianingrum, 2016). The registration of GI rights implies an increase in economic value, which provides positive results, including:

a. The increasing number of producers or producing communities directly involved in creating GI potential products. For instance, the number of Sumbawa honey collectors has increased five times.
b. Several potential GI products have been registered with an increase in premiumprices. For instance, there has been a 40% increase in prices for Sumbawa honey in the five years since registering the product.

Registering potential GI increases exports of local products. As an illustration, the export value of Gayo Arabica Coffee to the US has increased sharply sincethe product was registered.

GI is important in improving the local community's economy in the area of origin. This supports the public benefit theory that traditional intellectual property develops and improves the indigenous peoples' economy. Therefore, registration is a marketing tool to raise a product's economic value in the market.

The economic welfare of GI producers could be improved by maintaining the related reputation. Indigenous peoples and local governments with geographical indications must maintain and preserve the quality and characteristics where the registration is granted. This would produce a good reputation from the consumer's perspective and increase the market price. Furthermore, the reputation built on a geographically indicated product becomes a marketing tool to sustainably improve the producer's economic welfare.

Some examples of regions in Indonesia with registered GI potential areKintamani Bali Arabica Coffee, Bali Kubu Cashew, Bali Amed Salt, Bali Tunun Gringsing, and Pupuan Bali Robusta Coffee in Bali. North Sumatra has Lintong/Mandailing Arabica Coffee, while Lampung has Lampung Robusta Coffe and Lampung Black Pepper. This potential has a high economic value in the market. For instance, coffee exports from North Sumatra reached 71.68 million US dollarsfrom 21,969 tons annually. Lampung also exports 83,070 tons of Lampung Arabicacoffee, with sales reaching

around 301,643 million US dollars annually.[24]

The significant economic value indicates the state should take inventory and registration of GI potentials to prevent claims by outsiders. This is because similar incidents happened when outsiders claimed Indonesian GI products. The same could recur with other potentials when the government does not conduct inventory on the GI potentials. Regarding the modern economic system, which tends to ignoreethics, these potentials must be protected from exploitation by irresponsible outsiders

Protection against GI has several economic benefits, including (Idris, 2019): (a). GI is an immaterial property protected by law regarding certain products' good reputation and distinctive quality. (b) It could be a superior product with high economic value. (c) Collectively, a GI product benefits weak producers because they cannot finance marketing activities. (d) When a reputation is owned, small GI producers benefit from protection associated with obtaining a niche market.

GI is an identifier for goods from a certain region or the name of goods produced from a certain region and cannot be used for similar products from other areas. It could also indicate quality informing consumers that the goods are produced from a certain location. In this case, the influence of the surrounding environment produces quality goods with certain characteristics maintained by reputation. Furthermore, GI could be a business strategy that provides added commercial value because it cannot be produced in other regions.

Optimization of Legal Protection Through Registration of Geographical Indication Rights for the Local People's Welfare

GI legal protection through registration refers to working in an intellectual property legal system. This system comprises three components of legal sub-systems as supporters that interact and are functionally related. The three components are legal substance, structure, and culture (Friedman, 2015), described as follows.

a. **Re-formulated regulation to fulfill requirements for protecting Geographical Indications**

   Many registered GIs are influenced by regulations related to their registration. In Indonesia, it is currently regulated in Law Number 20 of 2016 concerning Trademarks and Geographical

[24] (https://ojs.unud.ac.id/index.php/kerthasemaya/article/download/51917/30807/).

Indications. Moreover, GI indicates an item's area of origin due to geographical and environmental factors, including natural and human factors that give reputation, quality, and certain characteristics.

GI is the main benchmark for whether a sign could be protected, especially in Indonesia, where awareness of the importance of protecting intellectual property rights (IPR) is still relatively low. This implies that Indonesia has become a priority watchlist due to piracy in the IPR sector. Regardless of the awareness from indigenous peoples and the local government, the GI registration requirements are crucial and deserve attention. As an agricultural country that has just been introduced to IPR, this would be a decisive factor.

In Law Number 20 of 2016 concerning Trademarks and GI, the difficulty in formulating regulations lies in the norm, which uses the word "and". The word "and" could imply cumulative, indicating that these requirements must fulfil all elements of reputation, quality, and characteristics. A further elaboration shows that the three elements are absent in the article or explanation of the Trademark Law and GI. The formulation is meant as a cumulative requirement, making it difficult to be protected because it must fulfil and show all the individual elements.

As a reference for GI protection provisions for countries ratified in the GATT/WTO, TRIPs provide concessions regarding reputation, quality, and characteristic elements. Article 22 Paragraph (1) of the TRIPs Agreements states that:

> *Geographical indications are, for this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or another characteristic of the good is essentially attributable to its geographical origin.*

The formulation states that the elements characterizing a GI use the word "or", meaning alternative or the peculiarities of these characteristics could select one.

The requirements for fulfilling GI protection are difficult because they are cumulative. This is an obstacle for the community or local government in seeking GI registration in Indonesia. Several GIs should be registered and protected in Indonesia but are taken by other countries. This incident should

not recur when the existing regulations provide favorable requirements to protect the huge potential of GI. Consequently, the number of GI registered would increase because Indonesia is a tropical country with various biodiversity and GI products.

Another issue relates to protected objects in GI. The Trademark Law and GI No. 20 of 2016 have limited the objects to be protected on a special GI on goods or products and do not include services. These provisions are not different from the TRIPs Agreements, which state "indications of a good," signifying IG identifies an item's origin. This implies agricultural goods, such as Kintamani Coffee, Muntok White Pepper, Srinthil Tobacco, and handicrafts or industrial products, including Jepara Carved Furniture, Sikka Ikat Weaving, Tanibar Ikat Weaving, Celuk Silver Crafts, and Songket Weaving.

Services should be considered objects to be protected through the GI regime. This argument is strengthened by several aspects, such as Article 1 and TRIPs Agreements regarding member countries. The provisions in TRIPs strictly permit adding other objects, including GI in the service sector. Therefore, Indonesia should utilize this freedom by providing arrangements regarding GI protection in the service sector. For instance, Canada, Mexico, Japan, and Switzerland have used this opportunity to protect their GI on goods and services. It is reasonable to protect services before being taken by other countries when GI in the service sector has not been accommodated through international agreements (Masnun, 2021).

b. Tripartite Institutional Strengthening Between Central Government, Local Government and Indigebous Peoples

GI is the collective property of a group, community, or local government thatsubmits its registration. They are also obligated to protect the products' quality and reputation as required by laws and regulations and against fraudulent competition actors in trade. GI is a common property that must be maintained together, implying the possibility to cause problems in maintaining the products. These problems could come from owners or external parties, such as business people that distribute these products (Hananto et al., 2019).

Problems from external parties comprise business people that market GI products outside the region. Due to various factors, the products registered are mixed with other similar

products of lower quality, reducing the overall quality. This problem could easily occur in GI products where the marketing cannot be packaged intact, such as *duku, durian,* sweet potatoes, oranges, and other agricultural products. In such conditions, it is difficult to monitor and maintain the authenticity of the goods. Moreover, similar fraud could occur by community groups holding and marketing GI products in their area. Due to various factors, people mix the products with similar goods from other regions of lower quality. Frauds committed by traders and unscrupulous people holding GI rights are detrimental to indigenous peoples and also harm consumers by reducing their reputation. When the GI product's quality and reputation decrease or is not consistent with the conditions during registration, the right could be removed as stipulated in Article 66 of the Trademark and GI Law:

a. Geographical Indication is protected provided reputation, quality, andcharacteristics are the basis for providing GI protection to a product.
b. Geographical Indications may be deleted when:
    i. Non-fulfilment of the provisions in paragraph (1).
    ii. Violates the provisions in Article 56 paragraph (1) letter a.

Article 62 stipulates that the expert team and people could also analyze the reputation, quality, and characteristics of registered GI. When they are not appropriate or degraded, the report is submitted to the Director General of Intellectual Property Rights for the relevant GI to be deleted (Sasongko, 2018). The people referred to in this paragraph are not mentioned but comprise the harmed or consumers. When the consumer does not recognize the GI products, it greatly affects the economic value, while the registration aims to increase its value.

The institutional or legal structure authorized to manage GI is the Central Government (Ministry of Law and Human Rights, especially the Directorate General of Intellectual Property) and Regional Governments. They must be proactive and cooperate with indigenous peoples as owners to play an active role. This requires developing an appropriate mechanism for protection and utilization.The mechanism regulates licenses or arrangements regarding access benefit sharing. Furthermore, GI preservation indicates preserving traditional intellectualproperty, educating, and advocating for indigenous peoples to realize

welfare.

One important aspect of optimizing legal protection through GI registration is improving the indigenous peoples' technical capacity in managing and using formal legal protection instruments. Optimizing the protection of communal rights through GI requires tripartite cooperation. It also requires the right and effective legal instruments in implementing Law Number 20 of 2016 concerning Trademarks and Geographical Indications.

GI protection in the intellectual property legal system is an effort to guard thelocal communities' products. This is because the brands business people use to introduce products usually utilize place names or geographic locations that explainwhere the goods come from. Law Number 20 of 2016 concerning Trademarks and GI is the implementation of applicable international provisions. It is expected to provide legal certainty in developing potential with high economic value. Therefore, the law is expected to positively impact local economic development and encourage public awareness regarding its registration. Legal protection is important for central and local governments because GI rights create exclusive economic benefits for the holder. They also have the potential to improve local and national economies.

The next effort is supervision as regulated in Article 71 of the Law on Trademarks and Geographical Indications. It is carried out by the central and regional governments or the community. The goal is to ensure reputation, quality, and characteristics and prevent unauthorized use. Implementing supervision is not easy because it often causes problems. This is because it is a common property right involving many individuals with different characters and interests (Sasongko, 2018).

The central and local governments supervise GI according to their authority, but it could also be supervised by the community. The supervision results are submitted to the rights holder or the relevant Minister. The regulation on guidanceand supervision is important to GI protection management. This is because coaching is an effort, action, and activity through efficient and effective education and training to obtain better results.

The GI object is attached as a property with an economic value which is notan intellectual work produced by a person. It is produced due to geographical and environmental factors,

including natural and human elements. These factors givespecial characteristics to goods produced by an area. Drahos stated that propertyis a right that connects one person to many people and could be owned in groups.The concept of common property has a broad and varied spectrum that could beinfluenced by natural or internal structures. Such structures include social units with membership and territorial boundaries and common interests. Property couldalso be influenced by interactions among group members and the cultural normsforming their authority system (Drahos & Braithwaite: 2017)

c. Changing the indigenous peoples' legal culture and mindset on the importance of GI registration to protect collective intellectual property

In this globalization era, WTO member countries must carry out modern lawtransplantation, such as IPR. However, the transplant changes the legal culture and mindset of indigenous peoples in Indonesia. This is because the communal legal culture of Indonesians contradicts the individual capitalist values adopted bythe intellectual property law regime from developed countries.

This difference in legal culture relates to Indonesia's socio-cultural and natural conditions as an agrarian country with strong kinship values based on communal and non-commercial concepts. In contrast, developed countries based on competition and capitalism are in line with the individual character of their society. Watson (1993) coined the legal transplantation concept that transplantingthe law could enable all countries to accept and enforce modern laws, such as IPR, according to the WTO objectives.

Indigenous peoples do not realize that GI registration impacts the unprotected GI and the widespread piracy of traditional intellectual property. In this case, the property is a communal right of indigenous peoples. This incident happened in Shiseido, Balinese masks, Balinese silver folklore motifs, Gandrungdance, and other GI violations. In response, European Union countries have issued the Convention on Biological Diversity (CBD) ratified by Law Number 5 of1990 concerning the Ratification of the United Nations Convention on Biological Diversity. This convention recognizes the communal rights of indigenous peoplesin traditional intellectual works through the *sui generis* system regulated in Article 8 letter J CBD Law Number 5 1990. The article stipulates that the communal rightsof

indigenous peoples in traditional intellectual works depend on their respective national laws.

The legal protection of the GI rights of indigenous peoples is urgent becauseof the difference between the communal and individual rights of people in developed or industrialized countries. This difference occurs because manyfactors shape the values and development of a community group. The values are actualized into a culture embodying the philosophy of life, which is divided into thecharacter of an individualist and a collective society (Hofstede, 2005).

Protection through mapping, inventory, and registration in Indonesia has not been maximized. As owners or principals, indigenous peoples have not realized the importance of legal protection for GI. This is exacerbated by the absence of an active role of the Central and Regional governments and a lack of massive legal socialization or counselling. The involvement and role of local governmentsare needed to accelerate registration by issuing Regional Regulations. This would emphasize the duties and responsibilities of local governments in seeking GI legal protection in the respective regions.

In the era of global trade, indigenous peoples need to change their perception of the importance of GI registration to protect their cultural interests and economic resources. They should increase their understanding of traditional intellectual property and develop the products as economic resources and welfareprotected by law (Wander et al., 2020). Additionally, indigenous peoples need to realize the importance of intellectual property based on communal and individual rights.

4. Conclusion

This study made the following conclusions based on the results and discussions:

a. The urgency of the legal protection of the GI rights of indigenous peoples has five arguments: a) Customary law communities have the potential to produce unique GIproducts based on local wisdom, but very few have been registered; b) GI has high economic value needs protection against exploitation by irresponsible outsiders. This would ensure that its quality is maintained; c) legal protection is needed to increase the competitiveness of the commodity concerned; d) The protection would facilitate the products reaching the international market because they have a reputation and

quality assurance; e) Legal protection is a reward and incentive to indigenous peoples to create geographic indication products.

b. Optimizing the legal protection of the GI rights of indigenous peoples for their welfareis conducted in three ways: a) Re-formulating regulations to fulfil requirements for GI protection; b) Tripartite institutional strengthening between central and local governments and indigenous peoples; c) Changing the indigenous peoples' legal culture and mindset on the importance of GI registration to protect collective intellectual property.

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The Law of Dayak Indigenous People of West Kotawaringin District Against the Trading Robot Industry 5.0

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Abstract

Customary law is one of the laws that apply in Indonesia. The basic concept of customary law in Kota Waringin Barat in the Dayak Customary Institution in Central Kalimantan which has been included in the Central Kalimantan Provincial Regulation No. 16 of 2008, as well as the Central Kalimantan Governor Regulation No. 13 of 2009. It is clear that customary law is a unique legal system and therefore different from other legal systems, including the State legal system as part of the concept of the rule of law. Thus, it can be said that customary law is a legal system that is not compatible with the concept of the rule of law. This incompatibility can be seen from several differences, among others, that in the concept of the rule of law, the supremacy is state law, while customary law is not a state-made law, but a law born from the daily habits of the community. The results of this study indicate that the application of customary law in Central Kalimantan, especially in Teweh Tengah District, still exists today in the midst of the era of many Fintech platforms that offer investment products in financial assets, including one of which is Robot trading. Many illegal trading robots to commit criminal offences that harm investors. The purpose of this paper is to provide knowledge about legal protection for indigenous peoples regarding illegal trading robots by seizing assets belonging to the perpetrators of these criminal acts. This paper uses Qualitative research methods. The conclusion in this paper is that the absence of rules regarding the use of trading robots in digital trading investment schemes is used as a mode for the organizers of trading robots to gain profits by committing fraud on investors. Legal protection for Dayak indigenous people is carried out by punishing companies and service providers of Trading robots which must be done optimally and in ways that are in accordance with

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the laws and regulations. The suggestion is that law enforcers always establish coordination between institutions to deal with the problem of trading robots.
Keywords: Robot trading, Legal Protection, Customary law. Investment.

1. Introduction

Investment is part of everyone's efforts to increase income or wealth. Investment is an effort to place increased wealth with the intention of earning income in the future. Investment is also interpreted as a commitment to invest certain funds at a certain time with the intention of getting profit in the future. This means that investment is a commitment to sacrifice current consumption in the hope of supporting increased consumption in the future[28]. Sharpe, et al. suggest that investment is the sacrifice of wealth obtained at this time to obtain future wealth in a more significant amount.

Furthermore, Jones gives a definition that investment is the ability to invest wealth in one or more assets for several periods in the future. In addition, there is also another interpretation of investment in the form of, a form of investing wealth in increasing wealth, which is able to increase profits on returns both now and in the future. In general, investment is divided into 2 (two) forms, namely investment in financial assets and investment in real assets.Investment of funds in financial assets in the form of stocks, bonds, and so on, while investment in real assets is in the form of land, gold in the form of land, gold, machinery.

Investment in financial assets can be divided into 2 (two) ways, namely: 1) Direct Investment, which is a way of investing in the form of ownership of shares in a company. Shareholders have the authority to determine policies based on the amount of their share ownership; 2) Portfolio Investment, which is a way of investing by giving control of investment assets to companies in the financial system that have expertise in managing investors' investments, with the aim of providing a profitable return for the investors who own the shares. Investment in financial assets has changed in accordance with the times with the increasing modernisation of technology which is currently reaching the Industrial Revolution 5.0. The Industrial Revolution 5.0 centres its concerns on the development of information technology that continues to grow, supported by artificial intelligence technology commonly called AI (Artificial Intelligence), including in the financial industry

[28] Didit Herlianto, Manajemen Investasi Plus Jurus Mendeteksi Investasi Bodong (Yogyakarta: Gosyen Publishing, 2013,

sector or known as Financial Technology / Fintech(Financial Technology)[29].

Juridically based on Article 3 of POJK No. 13/POJK.02/2018 concerning Digital Financial Innovation in the Financial Services Sector (POJK IKD), fintech itself consists of various types according to the platform and products offered. In detail, fintech can be grouped according to its scope, namely: capital raising; transaction settlement; fund raising and disbursement; investment management; market support; insurance; other financial services activities; and/or other digital financial support.[30] As for the existence of Robot trading at this time, it is placed as part of the type of IKD Supporting the Financial Services Sector. as part of the type of IKD Supporting other digital finance. In Indonesia, many fintech platforms platforms that offer investment products investment products in financial assets, including one is Robot trading. When viewed from the types of fintech as mentioned above, This trading robot belongs to the fintech Robot Advice. A trading robot is software that functions to automate the activities of currency trading (forex),[31] stocks (stocks)[32], as well as cryptocurrencies.[33] Trading robots are trading support systems support systems that can innovate legitimate lines of legitimate lines of business and reinforce the rules of executive game rules into a computerised business model and computerised business frameworks that allow computers to run, replacing the role of humans in modern modern trading networks[34]. This new system This new system has the strongest traction with automated robot trading systems. They can eliminate some of the feelings and tensions of trade and business systems because these trades are placed after certain standards such as legal aspects, efficiency, and innovation in the age of digitalisation. Trading robots are believed

[29] Otoritas Jasa Keuangan, "Mengenal Lembaga Serta Produk Dan Jasa Keuangan, Sadari, Amati, IkutiPerkembanganFinancial Technology," diakses melalui <https://sikapiuangmu.ojk.go.id/FrontEnd/CMS/Article/10424>, (diakses 21 Mei 2022)

[30] Pasal 3 Peraturan Otoritas Jasa Keuangan Nomor 13/POJK.02/2018 tentang Inovasi Keuangan Digital di Sektor Jasa Keuangan (POJK IKD)

[31] Danang Arradian, "Apa Itu *Robot trading* dan Mengapa Anda Harus Waspada?," tekno.sindonews.com, 05 Maret 2022, diakses melalui: <https://tekno.sindonews.com/read/703603/207/apa-itu-robot tradingdan-mengapa-anda-harus-waspada-1646438610> (diakses 24 Mei 2022)

[32] Gunawan Sudjaja, "Public Understanding Of Robotic Trading In The Context Of Trading Law: Strengths And Weaknesses," Webology, 19, no. 1, (2022), 6879.

[33] Khalid Abouloula, dan Salahuddine Krit, "Using a Robot Trader for Automatic Trading," ACM International Conference Proceeding Series, 2018, 3.

[34] L. Edwards dan M. Veale, Slave to the algorithm: Why a right to an explanation is probably not the remedy you are looking for. (Durham: Duke L. & Tech, 2017), 16.

to help to create the right investment choices in order to support financial support for novice users. However, trading robots are also widely used in forex, stock and cryptocurrency investment scams and have become a new modus in investment fraud crimes[35].

Source:https://beritaplanet.com/3617/robot-trading-yang-terdaftar-di-ojk-terbaru.html accessed on 17 July 2023 at 12.30 pm[36]

The social realities of Indonesian society show that there is more than one legal system that effectively works to regulate people's lives, leading to the existence of a legal system outside the formal legal system enforced by the state, namely the existence of indigenous peoples with their customary legal systems. As part of Indonesia's social realism, the existence of this group of people called indigenous peoples clearly cannot be minimised, even then there is a tendency (a certain activist) that their existence must be defended and fought for to be more prominent as a result of the introduction of cultural rights (cultural rigths) as part of human rights, law no.39 of 1999 article 6 paragraph (2) states "the cultural identity of indigenous peoples, including rights to customary land.

Customary law is one form of law that still exists or exists in the lives of indigenous peoples in Indonesia. It should be noted that customary law is one form of law that applies in the life and legal culture of the Indonesian people which is still valid today. The existence of customary law can be seen to date through the existence of customary courts and customary legal instruments that are still maintained by indigenous peoples in Indonesia to resolve various disputes and

[35] T.C. Lin,. "The new market manipulation," Emory Law Journal, 66, (2016), 1253.
[36] https://beritaplanet.com/3617/robot-trading-yang-terdaftar-di-ojk-terbaru.html accessed on 17 July 2023 at 12.30 pm

offences that cannot be handled by the police, courts, and correctional institutions. Customary law is still maintained to this day by indigenous peoples because they believe that decisions issued through customary courts against an offence tried through them can provide satisfaction for a sense of justice, as well as a return to balance in the lives of indigenous peoples for spiritual shocks that occur due to the enactment of these customary offences.

The development of the 21st century has now entered the industrial revolution 5.0 which is essentially concentrated on the development of digitalization and the internet. It is our common challenge how to prepare Indonesian people without exception to be ready for such developments, including indigenous peoples who are often present only as objects in the administration of the state. The government's alignment must be able to present regulations that can accommodate all the interests of its people. Indigenous Peoples are a logical consequence of the unitary state concept. This means that customary law communities have an equal position in the life of the nation and state. The legitimization of their rights explicitly in the 1945 Constitution of the Republic of Indonesia certainly implies that the State is obliged to protect, develop and empower them just like the general public.

The type of research used in this paper is normative research. While the approach used in this research is descriptive by explaining the problems in accordance with the research title in regulatory analysis. The state must be able to create indigenous peoples not only as objects of the development of the industrial revolution 5.0 and robot tranding, but the presence of the state must be able to create indigenous peoples not only as objects but also subjects in the industrial revolution 5.0, thus indigenous peoples will be ready both to face the industrial revolution 5.0 and robot trading and demographic bonuses, if this can be utilized then Indonesia's ideals of realizing social justice for all its people will be achieved. Based on the background of the problem as described in the introduction, the problem can be formulated: Overview of Customary Law in Indonesia, Customary Law in Central Kalimantan, and the Existence of Dayak Customary Law in Central Kalimantan in the Era of Industrial Revolution 5.0 and Robot Trading.

2. Methodology

Qualitative research is a means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures. Data typically collected in the participant's setting. data analysis

inductively building from particulars to general themes. and the researcher making interpretations of the meaning of the data. The final written report has a flexible structure. Those who engage in this form of inquiry support a way of looking at research that honors an inductive style, a focus on individual meaning. and the importance of rendering the complexity of a situation (Creswell. 2013).

Informant :

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2. Head of West Kotawaringin Industry office.
3. ministry of law and human rights representative of central kalimantan regional office.

3. Research Results, and Research Discussion

3.1. Overview of Customary Law in Indonesia

The term Customary Law that we use today is a translation from Dutch, namely from Adatrecht, which was first used to name a system of social control. The system is something that grows from within the life of the Indonesian people. Prof Dr C. SnouckHungronje first coined the term in his 1894 book De Atjehen to name the system of social control in Indonesian society.Customary law was originally used for Indonesians and foreigners. It is law, has sanctions, hence the name "recht", and for the most part does not exist in statutory form, hence the name "adat". It is unwritten law and most of it is not written down.

According to Prof. Dr R. Soepomo, S.H: Customary law is non-statuary law which is mostly customary law and a small part of Islamic law. Customary law also covers the law based on the decisions of judges which contain the principles of law in the environment, where he decides the case. Customary law is a living law, because it embodies the real legal feelings of the people. In accordance with its own nature, customary law is continuously in a state of growth and development like life itself.According to Prof. Dr H.R. Orje Salman Soemadiningrat, S.H.: Customary law is part of the law derived from adatistiadat, namely social rules made and maintained by legal functionaries and applies and is intended to regulate legal relations in Indonesian society.

Customary law is a complex of norms that originate in the people's sense of justice that always develops and includes rules of human behavior in everyday life in society, mostly unwritten, always obeyed and respected by the people, because it has legal consequences.Customary law as an original Indonesian law is a law that always follows the soul of the Indonesian people, because it always grows and lives from the culture of the community where the law applies. And customary law is one of the manifestations of the

personality, soul and structure of the community / nation. This is in line with Von Savigny's opinion, which states that the content of the law is determined by the history of the society where the law applies[37].Since Indonesia's independence on 17 August 1945, the Indonesian nation is a free and independent nation in the political, economic, social and cultural fields. And with the enactment of the 1945 Constitution, the Indonesian State has the basics of a new legal order, which reflects the personality of the Indonesian nation. This is evident from the MPRS decree No. II/MPRS/1960, which states explicitly that the development of national law must pay attention to legal homogeneity by taking into account the facts that live in society and must be in accordance with the direction of the State and based on customary law that does not hinder the development of society.

In the National Customary Law seminar on 15-17 January 1975 organized by Gadjah Mada University and the National Law Development Agency, customary law was defined as "original Indonesian law that is not written in the form of legislation of the Republic of Indonesia, which here and there contains religious elements". The seminar formulated the concept of customary law in the context of legal development in Indonesia, among others: First, that the retrieval of materials from customary law basically uses legal conceptions and principles from customary law to be formulated in legal norms that meet the needs of society; second, the use of customary law institutions is modernized and adapted to the needs of the times; third, incorporating the concepts and principles of customary law into new legal institutions.[38] Thus customary law is still relevant today because the justice and truth that the law aims for, must be truth and justice that reflects the truth and justice that lives in the conscience of the people.If in the community there are some who argue that customary law has experienced a softening of its validity in this modern era, indeed this opinion exists.

This fact is supported by the fact that the legal system used in our country is the Continental European system. In the Continental European system, written law (legislation) has a greater function in the

[37] Von Savigny mengajarkan bahwa hukum mengikuti *volkgeist* (jiwa/semangat rakyat) dari masyarakat tempat hukum itu berlaku. Karena *volkgeist* masing-masing masyarakat berbeda, maka hukum masyarakat juga berbeda. Ajaran hokum ini lebih mengakui eksistensi masyarakat dari hokum yang timbul dari masyarakat, jika dibandingkan dengan hukum tertulis. Alasan utama yang mendasarinya hal tersebut, karena hokum tertulis tidak selalu mencerminkan hokum yang hidup di masyarakat. Ajaran Von Savigny ini merupakan pencerminan berlakunya hokum adat di Indonesia.
[38] Hilman Hadikusuma, *PengantarIlmu Hukum Adat,* Bandung: Mandar Maju, hlm. 32.

administration of the state and the regulation of society, when compared to unwritten law. With the Continental European system, the more dominant law is the written one, and the unwritten law (including customary law) is only referred to as a complement. As a result, as long as a problem has been regulated in the legislation and it turns out that the content is contrary/different to customary law, then formally juridically, the written law applies.

However, what needs to be remembered is that in practice in society sometimes written law is not always in line with developments in society, so that written rules cannot solve existing problems and sometimes do not reflect a sense of justice in society. If this happens, it means that there is a gap between the written law and the law that lives in the community. In such cases, it is the unwritten law (customary law) that will resolve the problem. This is evident from the mandate of Law No. 4/2004, which gives judges the freedom to understand, explore and follow the legal values that exist in the community.

Thus, the existence of customary law until now still has an important role, especially in the formation of future national laws, especially in the field of family law. Customary law will become one of the main sources of law in the formation of written law, so that the written rules are automatically a reflection of community law. And of course with the hope that when the written law has been enacted, in practice in the community there is no longer a gap with the Law in action.[39]

3.2. Customary Law in Central Kalimantan

In 1998, the Provincial Government of Central Kalimantan established Regional Regulation No. 14 of 1998 concerning Kedamangan in the Province of Central Kalimantan Level I, but because this Regional Regulation was considered no longer in accordance with the development and demands of the needs of the autonomous region, on 18 December 2008 the Regional Regulation was revoked and replaced with Regional Regulation of Central Kalimantan Province No. 16 of 2008 concerning "Dayak Customary Institutions in Central Kalimantan" which regulates Dayak Customary Institutions, Position, Duties and Functions of the DamangKepala Adat, including Authority, Term of Office and Dismissal, and Election of Customary Rights and Dayak Customary Law.4

[39] Abdurrahman, *Penegakkan Hukum Adat atauRevitalisasi Hukum Adat,* Makalah Pada PertemuanDamangKepala Adat se-Kalimantan Tengah di Palangka Raya 17 November 2005

Then on 25 June 2009, Central Kalimantan Governor Regulation No. 13 of 2009 on "Customary Land and Customary Rights to Land in Central Kalimantan Province" was enacted. This Governor Regulation stipulates in Article 1 point 12 that "Customary Land is land and its contents located in the kedamangan area and or village/kelurahan area controlled under Customary Law, both in the form of forests and non-forests with clear areas and boundaries, either individually owned or jointly owned whose existence is recognized by the DamangKepala Adat".

There are 2 (two) types of customary land recognized in this Governor Regulation, namely:

1. Commonly owned Customary Land, is land inherited from ancestors for generations that is managed and utilised jointly by the heirs as a community, in this case it can be aligned with the meaning of Hak Ulayat (Art. 1 point 13)
2. Customary Land owned by individuals is privately owned land obtained from forest clearing or farming, buying and selling, grants or inheritance by custom, which can be in the form of gardens or land with plants growing or empty land (Art. 1 point 14).

In addition to the two types of customary land mentioned above, there are also "customary rights on land, which are formulated as collective or individual rights to manage, collect and utilize natural resources and or their products, in or on different lands in the forest outside customary land" (Art. 1 point 15).

The Governor's Regulation sets out how the management of customary land should be carried out, including the authority of the kedamangan institution, which seems to have a fairly broad scope, including dealing with disputes or customary cases. It also regulates the procedure for obtaining a Land Certificate (SKT) on Customary Land and Customary Land Rights which are under the authority of customary consultative institutions at both sub-district and village levels.

Based on the description of the basic concept of Central Kalimantan customary law in the Dayak Customary Institution in Central Kalimantan which has been included in the Central Kalimantan Provincial Regulation No. 16 of 2008, as well as the Central Kalimantan Governor Regulation No. 13 of 2009. It is clear that customary law is a unique legal system and therefore different from other legal systems, including the State legal system as part of the concept of the rule of law. Thus, it can be said that customary law is a legal system that is not compatible with the concept of the rule of law. This incompatibility can be seen from several contrasting differences between the characteristics

of customary law and the general elements of the concept of the rule of law. These differences include:

1. That in the concept of the rule of law, the supremacy is the State Law, while Customary Law is not a State-made Law, but a Law born from the daily habits of the community.
2. That in the concept of the State of Law, the principle of legality, namely that the law must be clear, certain, and measurable and unchanging, is an absolute prerequisite, while in customary law the law is unwritten law, even if it is written, it remains flexible and dynamic so that every problem that arises is resolved according to the circumstances that exist in the family.
3. In its substantive category, one of the vital elements of the concept of the rule of law is the protection of individual rights and freedoms.

This shows that in the concept of the rule of law, individual rights are rights that are considered fundamental, as a consequence of liberalism in European culture as the womb of the birth of this concept, and at the same time as a manifestation of the purpose of the rule of law itself, namely to protect (safety and private property rights) of each citizen from arbitrary actions both by the State and fellow citizens. This is different from customary law, where the most important right is not the right of the individual, but the community. According to customary law, individual rights can be overridden if they conflict with the rights of the community.

The level of civilization and the modern way of life have not been able to eliminate the customs that live in the community, so what is seen in the process of progress is that custom adapts itself to the circumstances and the will of the times, so that custom becomes eternal and remains fresh.

3.3. The Existence of Dayak Customary Law in Central Kalimantan in the Era of Robot Tranding and Industrial Revolution 5.0

Humans who live in society in order to live together and truly constitute an orderly social life they must regulate the behavior of each person so that chaos does not occur, for this reason regulations are needed for behavior such as customary law. The customary laws that apply in society are mostly unwritten but are well understood and known by traditional leaders and youth leaders who say that, the customary laws that apply in West Kotawaringin exist from the ancestors and have not been made in writing, all based on agreement only in rembug, If they agree it is implemented, customary law has never been seen in writing.

For the indigenous people in the village of Kotawaringin Barat, the applicable customary law has not been made in writing, it is still valid from generation to generation based on the memories of the elders and figures entrusted with carrying out local customary law.

To regulate order and tranquility in indigenous communities, the applicable law is unwritten law. The unwritten law is basically known and understood by the leaders who have been practiced for generations and customary law is used as a law or rule that applies to the local community with the development of the times these rules began to be accompanied by written rules or laws.

According to Mr Jarman Kuwung as the head of the Kaharingan Hindu Religious Resort Council and former customary head (Damang) of Pendreh Village in an interview who said that:Customary law that applies in Pendreh Village, Teweh Tengah sub-district as a tradition that has been passed down from generation to generation which has many good sides concerning outside of human life, whether it concerns objects, concerning values including violations committed against the tradition, this customary law exists in the community mostly unwritten, because the tradition is known by the leaders and many community members know and until now it has not been made in writing. (Interview on 11 Mei 2023)

According to Kalteng Pos news published on Sunday 20 September 2015 on page 10 with the title Perda Adat Law Forms and Recognition which in essence the Regent of West Kotawaringin said the Government already has a Regional Regulation (Perda) Number 1 of 2002. But now there are improvements related to the regulation. The improvement of the regional regulation on customary law is a form of the North Barito Regency Government's efforts towards local wisdom so that its preservation can be created. "It is hoped that the executive, judiciary and the Alliance of Indigenous Peoples of the Archipelago (AMAN) can work together in developing government and society, and that cases of indigenous peoples can be resolved properly," said Ompie Herby when opening a seminar on Building Discourse on the Preparation of Initiative Regional Regulations on Indigenous Peoples as a Form of Recognition and Protection of the Rights of Indigenous Peoples in the city of West Waringin conducted by AMAN.

The existence of Customary Law in the midst of the community in Kota Waringin Barat Regency is very relevant considering that customary law is a traditional rule to regulate behavior derived from living habits carried out repeatedly, from generation to generation or it can be said that this Customary Law is a law that lives in a community that is respected and obeyed together. Customary law that applies as the

original law of the people / community which is a living law in unwritten form and contains original regional elements, namely the nature of society and kinship, which is based on balance and is covered by a religious atmosphere. According to MrSaidi Harjo as a Youth Leader said that he really respects the prevailing customary law, especially the leader of the Muara Teweh Indigenous Peoples Alliance of the Archipelago (AMAN), his younger brother Ardianto is fighting for the interests of customary law. In order to get recognition and protection of the rights of indigenous peoples containing local wisdom to be preserved and maintained.Based on Structural Functional Theory and Herbert Spencer who states that Structural Functionalism is a broad point of view in sociology and anthropology that seeks to interpret society as a structure with parts that are part of it.

The era of Industrial Revolution 5.0 and robotics is characterized by artificial intelligence, super computers, genetic engineering, nanotechnology, automated cars, and innovation. These changes are occurring at an exponential rate that will impact the economy, industry, government, and politics. In this era, the world has increasingly become a global village. Industry 4.0 is a term first coined in Germany in 2011 that is characterized by the digital revolution. This industry is a digitally connected industrial process that includes various types of technology, ranging from 3D printing to robotics which are believed to be able to increase productivity. The influence of the Industrial Revolution 5.0 era on indigenous peoples in Central Kalimantan is that indigenous peoples can benefit from the ongoing industrial revolution 5.0. In the midst of openness, they must also be aware of changes in mindset. Technological sophistication is not always positive. Everything depends on how we use and utilize it. Here, indigenous peoples must be vigilant. Do not let the existence of culture, culture, and traditional values that have been maintained and upheld be lost. The existence of culture, culture and traditional values must be a shield in the face of extreme change. The diversity of thought and the variety of elements of society is a wealth of Indonesia that must be cared for. This diversity must be seen as a beautiful harmony. All elements of society can coexist peacefully. Unity and integrity must be upheld. For a better Indonesia. For indigenous peoples whose existence is increasingly recognized[40].

Through trading robots, investors may also be at risk of loss, with the perpetrators engineering the mechanism of the trading robot to

[40] Saafroedin Bahar, Komisioner Masyarakat Hukum Adat KOMNAS HAM, dalam diskusi Perlindungan Negara Terhadap Hak Konstitusional Masyarakat Hukum Adat di Jakarta 2 Agustus 2006.

reap illegal profits from the transaction[41]. This is due to the absence of regulations set by the competent authority that specifically regulates the use of trading robots in the investment business outside the financial services sector, especially regarding licensing, operations, reporting, and supervision of trading robots. In Indonesia, empirically, the misuse of trading robots to gain illegal profits has occurred, among others, on the Fahrenheit robot trading platform. On the Fahrenheit robot trading platform, fraud is committed by the operator by making a customer transaction appear as if it is in the margin call (MC) category.

Margin call is a warning from the broker to the fund owner to increase the amount of funds to the fund owner's investment account. The situation arises when the capital value of the fund owner is almost exhausted due to a large loss on his account. This has the consequence of the need for the fund owner to add the amount of funds to his account. If this is not done, the the broker may close the account forcibly. Through the manipulation of margin calls manipulation causes the owner's funds in the account to be depleted. funds in the account are depleted[42]

Crimes with the mode of misuse of trading robots if handled only with a conventional case handling approach by alleging fraud articles only, then for victims who are investors in the trading robot platform it is feared that they will not get their funds back optimally. This is because the conventional method alone does not have a qualified asset tracing instrument.[43] The qualified asset tracing instrument can be applied by using the instruments in Law No. 8 of 2010 (hereinafter referred to as the "Anti-Money Laundering Law").[44] For this reason, the

[41] S.C. Morse, "Do Tax Compliance Robots Follow the Law?," Ohio St. Tech. Law Journal, 16, (2020), 278

[42] Agustinus Rangga Respati," Bagaimana *Robot trading* Fahrenheit Mengambil Uang dari Korbannya?," Kompas.com,26 Maret 2022, diakses melalui: <https://money.kompas.com/read/2022/03/26/202000326/bagaimana-robot-trading-fahrenheit-mengambiluang-dari-korbannya->, (diakses 24 Mei 2022)

[43] Rizki Zakariya, "Optimalisasi Penelusuran Aset Dalam Penegakan Hukum Pembalakan Liar Oleh Penyidik Pegawai Negeri Sipil Kementerian LingkunganHidup dan Kehutanan," Padjajaran Law Review, 8, no.1, (2020), 169. Zakariya menyatakan bahwa apabila terdapat keterbatasan penyidik dalam menelusuri aset, penyidik dapat meminta informasi atau LHA kepada PPATK.

[44] Instrumen-instrumen penelusuran aset yang tertuang di dalam UU TPPU yang tidak ditemukan dalam undang-undang lain adalah, sebagai berikut:
a. Permintaan dan ataupenyerahan Hasil Analis dan Pemeriksaandari PPATK (Pasal 44 huruf e dan l UU TPPU);
b. PenundaanTransaksi oleh Penyidik (Pasal 70 UU TPPU);
c. PemblokiranHartaKekayaan (Pasal 71 UU TPPU)

application of fraud articles in the Criminal Code is not enough, but must be accompanied by the application of articles that criminalize money laundering as crimes specified in the Anti-Money Laundering Law.[45] Maximum asset tracing of criminal proceeds will determine the success of the process of seizing assets resulting from the criminal act.

The procedure for implementing asset tracing in the context of seizing assets resulting from criminal acts of the perpetrators of misuse of trading robots cannot be done carelessly but must be carried out in accordance with the provisions in the applicable laws and regulations in Indonesia. applicable in Indonesia. It is expected that with seizure of assets resulting from criminal offences with the mode of misuse of trading robots, the losses of the victim can be recovered. Based on the background described above, the formulation of the problem that will be raised by the author are: (a) concept, regulation, and practice of abuse of Fintech Robot Trading; and (b) Legal protection of victims of fintech Robot Trading through legal protection of victims of fintech Robot Trading through asset forfeiture of its perpetrators.

The use of trading robots in investment activities in the financial system, especially the stock market, foreign exchange, and even crypto assets has increased significantly. The way Robot trading works provides convenience to fund owners in conducting their transactions because the settlement is carried out using robots. Robot trading is an investment system that allows fund owners to set specific conditions to manage their transaction traffic through computers automatically.

The fund owner can organize his transaction traffic into automated trading transactions whose settlement and monitoring of transactions are carried out by computers. Transaction traffic regulation can be done in a simple manner that eliminates the complex strategy of using specialized programming languages on the fund owner's platform. In simple terms, the outline of how Robot trading works is: 1) assessing fluctuations in stock or currency prices and markets; 2) Executing purchases and sales; 3) Managing security data.

Using a trading robot as a supporting application has the following advantages: (a) Work without stopping. Trading robots will do their job without ever stopping; (b) Emotionless. The robot performs its duties in accordance with a predetermined program and does not complain; (c) Move quickly when the opportunity arises; and (d) Work on several tasks simultaneously. In addition to the advantages possessed

d. PermintaanInformasiTransaksiKeuanganPengguna Jasa secaralangsung (Pasal 72 UU TPPU).

[45] Pathorang Halim,. "TindakPidanaPencucian Uang dan Penegakan Tindak Pidana Korupsi." Al-Qisth Law Review 1,no.2 (2018): 19.

by trading robots, of course there are disadvantages when traders use this trading robot application, namely as follows: a) Requires monitoring; b) Requires large capital; c) Still requires additional data.

From the description of how trading robots work above, it can be seen that trading robots are only a means or tools in the form of software that can make it easier for a trader to tradetools in the form of software that can facilitate a trader, especially novice traders, in trading investment activities both on the stock exchange, foreign exchange trading and in the form of crypto assets. With the artificial intelligence embedded in a trading robot, the trading robot becomes a smart machine that provides advice in the digital investment world as an Expert Adviser or Robo Adviser. But behind the tools, all actions and policy decisions about what actions will be executed by trading robots remain in the hands of humans. The Chairman of SWI (Investment Alert Task Force), stated that the characteristics of Robo Adviser are: Robot Advisors make transactions automatically and report these transactions to be known by the owner of the funds. Robo advisors can be used to assess the risk profile of investment fund owners with a digital system.

The robot advisor must be run by the fund owner. The fund owner is required to determine the product to be transacted with the price value determined by the fund owner. Robot trading as a Robot Adviser is actually included in the Fintech category as stipulated in the Explanation of Article 6 of OJK Regulation No.13/POJK.02/2018 concerning Digital Financial Innovation in the Financial Services Sector where the trading robot organizer must apply for the listing of its platform to the Financial Services Authority.The application for listing made by the Organizer is a condition for the Organizer to be able to follow the Regulatory Sandbox process. Regulatory Sandbox process. The end result of the Regulatory Sandbox is that the fintech organizer will be designated as a fintech requiring improvement, not recommended or recommended.

In the case of being designated as a fintech that requires improvement, the fintech is given a maximum of 6 (six) months from the date of determination of the status, to make improvements. In the case of being designated as a non-recommended fintech, the same fintech cannot be resubmitted. Meanwhile, if designated as a recommended fintech, the fintech is recommended to register based on its business field. Organizers of trading robots as robot advice that are recommended and thengiven permission by the Financial Services Authority can be said to be a legal organizer. However, the granting of licenses by the Financial Services AuthorityFinancial Services Authority's license to this type of only for the financial services sector,

such as the use of financial services sector such as, among others, the use of trading robots in the capital market and peer to peer lending. and peer to peer lending.

3.4. Legal Protection of Victims of Fintech Robot Trading.

The abuse of trading robots by offering many benefits to potential investors, namely fixed returns, commissions for members who succeed in attracting new investors and other bonuses, is very tempting for the community, especially Dayak people so that unknowingly many victims are trapped in a scheme that has been so engineered by the organizer. An illustration of a trading robot abuse scheme is as follows the organizer as a trading robot application provider offers a fixed profit of 1% per day through certain asset instruments, for example crypto assets, gold or foreign exchange. In fact, the prices of these assets can go up or down and do not necessarily bring profits even though using a robot application. As an organizer of trading robot applications, the perpetrator creates a mechanism commonly referred to as MLM (multi-level marketing). This MLM scheme is used by the organizer as a mode of fraud known as the Ponzi scheme.31 With the MLM scheme, the platform provider asks prospective investors, apart from being investors, to also become sales agents by recruiting new prospective investors (member get member) with the lure of various bonuses. The bonus will be given to the investor when the number of potential investors successfully recruited grows.

The platform provider will distribute various bonuses to the investor for the success achieved. As more investors are recruited and funds are deposited in the account, the Ponzi scheme begins to operate.

To make the investors look as if they are making a profit, the organizers manipulate the trading system within the app. The weapon is that the funds that are distributed as returns to the fund owners are most likely not the profit from the actual transaction, but are investments from new investors. If more and more customers make

If more and more customers make withdrawals together, then the organizer will have difficulty preparing funds because the funds deposited by investors at the beginning of registration have already been used by the parties involved in the implementation of this illegal trading robot to enrich themselves.3 If it is already illegal, then it will be difficult for the organizer to prepare funds. enrich themselves. If there are no more if there are no more potential investors who invest in the If there are no more potential investors to invest in the organizers, the Ponzi scheme will certainly collapse.

This is what causes the victims, namely the investors, to report to the authorities in the hope that the capital that has been invested can be requested back.

back. The legal protection provided to victims of fraud with the mode of using illegal trading robots is still using the old or conventional way. So that the hope of the victims that the money deposited as capital in the investment provided by the trading robot organizer, can be returned, will be far from reality if the handling of this criminal act still uses the paradigm of pursuing, arresting and punishing the perpetrators (follow the suspect).

If using this paradigm to conduct law enforcement on law enforcement on the abuse of trading robots with Ponzi scheme mode, then law enforcers will only impose Article 378. law enforcement will only impose Article 378 Criminal Code (fraud).

The imposition of Article 378 of the Criminal Code alone is not enough to provide a sense of justice for the victims, namely the investors. Firstly, in terms of punishment, which in Article 378 of the Criminal Code carries a maximum penalty of maximum of only 4 years, will not make the perpetrators and they will choose to put up body (accept prison sentence) because considered that the criminal threat is still light when compared to the results of the criminal offenceobtained by the perpetrators. Second, in terms of evidence of criminal proceeds that can be returned to the victims, it will not be optimal because the assets of the criminal act have been concealed or disguised by the perpetrators of the criminal act so that investigators will experience difficulties in tracking and confiscating the assets of the criminal act, coupled with a maximum detention period of 60 (sixty) days as in Article 24 of the Criminal Procedure Code.

Legal protection for victims of investment with the illegal trading robot mode will be effective and better fulfil the sense of justice of the victims by applying the provisions of articles related to the crime of fraud in the Criminal Code and articles related to money laundering crimes under the TPPU Law. The application of articles related to money laundering in disclosing crimes and criminals, the focus is more emphasized on following the money or the flow of funds from financial transactions. This approach is based on the idea that the proceeds of crime are "the blood that feeds the crime". Therefore, the proceeds of criminal offences require an asset management model that Therefore, a more modern model of asset management than the conventional approach is required, including asset forfeiture.

4. Conclusion

The conclusion that can be drawn by the author is that the existence or existence of customary law as a non-statutory law, in accordance with its nature, will continue to grow and develop in society. As a traditional law and original Indonesian law, customary law is classified as primitive law, so it is not uncommon for many parties to doubt its existence and utilization in this modern era. To be able to understand and be aware of customary law, one must dive into the basics of the natural thoughts that live in the community The conclusion that can be drawn by the author is the existence or existence of customary law as non-statutory law, in accordance with its nature will continue to grow and develop in society. As a traditional law and original Indonesian law, customary law is classified as primitive law, so it is not uncommon for many parties to doubt its existence and utilization in this modern era. To be able to understand and be aware of customary law, one must delve into the basics of the nature of thought that lives in society.

The suggestion that the author can give is that the competent authority immediately establishes rules that specifically regulate the use of trading robots in the investment business outside the financial services sector, especially regarding licensing, operations, reporting, and supervision of the trading robot.So that the legal protection of the community, especially prospective investors from the Dayak indigenous people in West Kotawaringin on the trading robot platform, can be guaranteed and the community can be protected. trading robot platform can be guaranteed and the public can avoid illegal investment with the use of trading robots.

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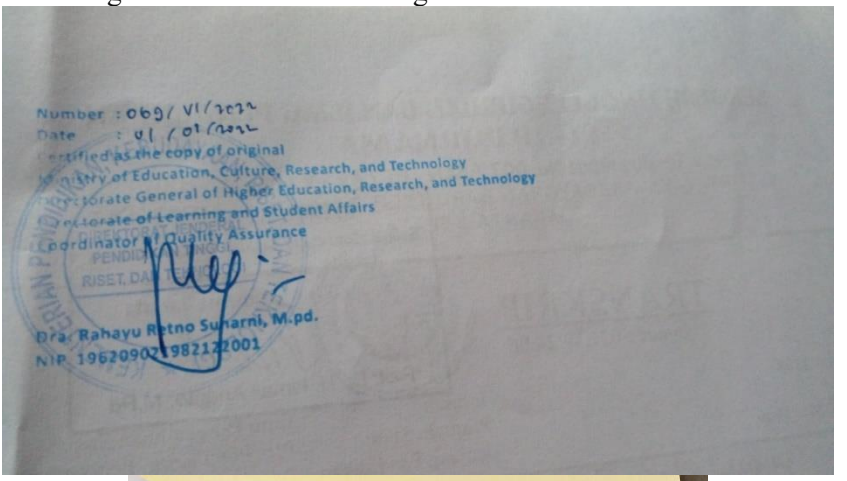

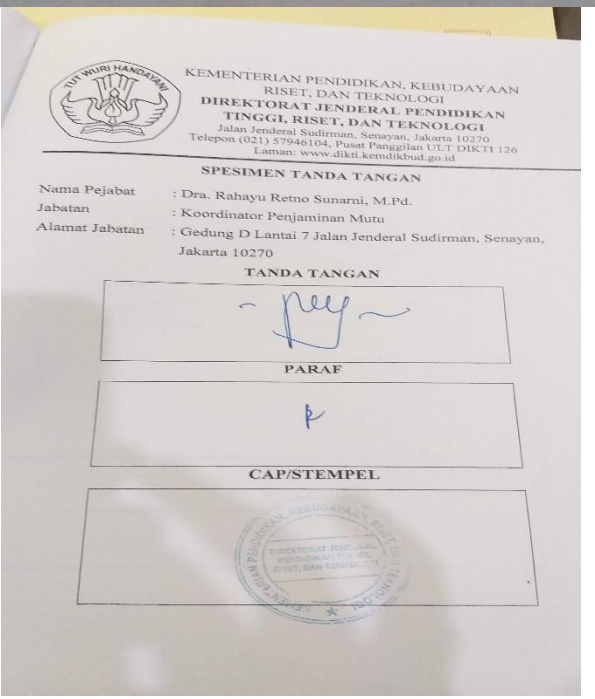

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Digital Law Of Micro, Small and Medium Enterprise (Umkm) Products in the Capital City of the Nusantara of the Republic of Indonesia the Economy of the Paser Dayak Tribe Community

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Abstract

To accelerate MSMEs going digital, education and legal assistance are needed, such as how licensing procedures, interaction agreements, credit, work contracts, rental of premises or land leases, and so on in the Paser Dayak tribe community. This research aims to find out how the Cooperatives, SMEs, Industry and Trade (Diskukmperindag) in Community Economic Empowerment in Penajam Paser Utara Regency. Community Economic Empowerment in Penajam Paser Utara Regency. This research used Qualitative research method. MSMEs are based on the law of Law number 20 of 2008, Now revitalized with the birth of Law number 11 of 2020 concerning Job Creation, the spirit aims to further empower MSMEs by promoting the interests of MSMEs as a priority, then providing convenience, protection in line with Cooperatives. Article 87 to Article 104 of the Job Creation Law and Regional Regulation (PERDA) of Penajam Paser Utara District Number 4 of 2017 concerning PROTECTION, DEVELOPMENT, AND FUNDING OF COOPERATIVES AND MICRO, SMALL, AND MEDIUM BUSINESSES. Results and Discussion A total of 1,250 Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara District (PPU). From the results of the research obtained, the overall picture that the Strategy of the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) in Community Economic Empowerment in Penajam Paser Utara Regency, especially in the digital law of MSMEs in Penajam Paser Utara Regency is still not maximally implemented. This can be seen from the many shortcomings that occur in MSMEs. This can be seen from the many shortcomings that occur in these MSMEs, both in terms of guidance in the form of training, financial and operational assistance, even supervision and the lack of promotion of products issued by MSMEs.

Keywords: *Industry, education, digital, law, protection, development*

1. Introduction

A total of 1,250 Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara Regency (PPU)[46]. MSMEs products that are highlighted include typical village food, Batik Tulis Sekar Buen and other MSMEs product exhibitions[47]. There are even theatre arts and fashion shows that will be performed, in order to introduce and encourage the advancement of the potential of local village products. Having a high number of reliable human resources with traditional and modern levels of creativity. So that the value of each creativity can be realized and developed digitally by MSMEs.

MSMEs are based on the law of Law number 20 of 2008, Now revitalized with the birth of Law number 11 of 2020 concerning Job Creation, the spirit aims to further empower MSMEs by promoting the interests of MSMEs as a priority, then providing convenience, protection in line with Cooperatives. Article 87 to Article 104 of the Job Creation Law and Regional Regulation (PERDA) of Penajam Paser Utara District Number 4 of 2017 concerning PROTECTION, DEVELOPMENT, AND FUNDING OF COOPERATIVES AND MICRO, SMALL, AND MEDIUM BUSINESSES[48]

Source: https://cahayaborneo.com/2023/02/21/pemda-ppu-siapkan-puluhan-stan-umkm-secara-gratis-sambut-hut-ke-21/

2. Theoretical Review

2.1. Law

Of the implementation of regional government as stipulated in the legal basis in the form of Law of the Republic of Indonesia Number 23 of

[46] https://penajamkab.go.id/?p=4308 accessed on 17 July 2023 at 12.30 pm
[47] https://penajamkab.go.id/?p=1995 accessed on 17 July 2023 at 12.30 pm
[48] https://peraturan.bpk.go.id/Home/Details/186420/perda-kab-penajam-paser-utara-no-4-tahun-2017 accessed on 17 July 2023 at 12.35 pm

2014 concerning Regional Government that has provided opportunities for elements of regional government administrators including regional heads (Governors / Regents / Mayors) together with the Regional People's Representative Council (DPRD) in each region to be able to carry out regional government affairs with the principle of regional autonomy in regulating and managing their own government affairs and the interests of local communities in the system of the Unitary State of the Republic of Indonesia. In addition, the implementation of regional government will also be directed to accelerate the realization of community welfare through improved services, empowerment and community participation, as well as increasing regional competitiveness by taking into account the principles of democracy, equity, justice, the distinctiveness of a region in the system of the Unitary State of the Republic of Indonesia.

Thus, through the Law of the Republic of Indonesia Number 23 of 2014 concerning Regional Government which is implemented with the principle of regional autonomy, it is expected to provide flexibility to the regions to create independent regions within the framework of the Unitary State of the Republic of Indonesia. By granting autonomous rights to each region as an effort to change and renew the approach to development in each region in Indonesia in particular. The choice of approach used is no longer Top Down and centralized, but rather prioritizes community participation (Bottom Up) and decentralization, along with increased participation and the high spirit of democratic life in society. In line with the mandate of Law of the Republic of Indonesia Number 23 of 2014 concerning Regional Government in the application of the principle of regional autonomy, which is also attached to the mandate of Article 33 paragraph 1 of the 1945 Constitution that the economy is structured as a joint effort based on the principle of kinship. Thus, the important point in Article 33 paragraph 1 clearly emphasizes that the prosperity of the community is prioritized, not the prosperity of individuals. Thus, the ideals sought from Article 33 paragraph 1 can be measured by the role of local governments through the performance of the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) which is a representation of the Indonesian people in national economic life, so it needs to be given high priority in national development.

For this reason, local governments need to develop community economic empowerment strategies that are in accordance with the main tasks and functions of the Office of Cooperatives, SMEs, Industry and Trade (Diskukmperindag) in Indonesia that are integrated, systematic and sustainable. The attention of researchers in this study to the many

Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara Regency that need attention and training so that the businesses run by the people of Penajam Paser Utara can develop and create competitiveness thereby realizing economic growth, equity and increasing people's income, creating jobs, and alleviating poverty. Through the role of the Office of Cooperatives, SMEs, Industry and Trade (Diskukmperindag) which was established in North Penajam Paser Regency on 16 October 2008 and at the time of the enactment of the North Penajam Paser Regency Regional Regulation Number 10 of 2008 concerning the Organization and Work Procedures of the Regional Offices of North Penajam Paser Regency, since in the period 2008-2017 the development of Micro, Small and Medium Enterprises (MSMEs) in North Penajam Paser Regency has fluctuated. Based on data from the Diskukmperindag of Penajam Paser Utara Regency regarding the number of Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara Regency, there were 1,776 business actors as of the 2017 period, most of which are still active but some are inactive for unknown reasons.

Reflecting on the number of MSMEs recorded above, it is clear that they will absorb productive labor so that they will reduce the unemployment rate in Penajam Paser Utara Regency. Although Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara Regency have promoted high entrepreneurial growth, the development of Micro, Small and Medium Enterprises (MSMEs) still faces various problems including, human resources and management. human resources and management which recorded that most of the small businesses grow traditionally so that the Human Resources who run human resources who run small businesses mostly have limitations both in terms of formal education and in terms of knowledge and skills. and in terms of knowledge and skills. Then the problem of capital, which is also one of the important needs needed to advance and develop micro and small enterprises.

MSMEs are based on the law of Law number 20 of 2008, Now revitalize with the birth of Law number 11 of 2020 concerning Job Creation, the spirit aims to further empower MSMEs by promoting the interests of MSMEs as a priority, then providing convenience, protection in line with Cooperatives. Article 87 to Article 104 of the Job Creation Law and Regional Regulation (PERDA) of Penajam Paser Utara District Number 4 of 2017 concerning PROTECTION,

DEVELOPMENT, AND FUNDING OF COOPERATIVES AND MICRO, SMALL, AND MEDIUM BUSINESSES[49].

2.2. Digital Marketing

Khan & Siddiqui in their journal cited from Purwana ES et al, that the concept of digital marketing comes from the internet and search engines on the site (Khan & Siddiqui, 2013). At the peak of internet usage in 2001, the market was dominated by Google and Yahoo as search engine optimization (SEO). And the use of internet search grew in 2006 and in 2007 the use of mobile devices increased dramatically which also increased the use of the internet in people from all over the world began to connect with each other through social media.

According to Ridwan Sanjaya and Josua Tarigan, digital marketing is a marketing activity including branding (brand recognition) that uses various web-based media such as blogs, websites, e-mail, adwords, social networks and of course digital marketing is not just talking about internet marketing but more than that (Tarigan & Sanjaya, 2013). Digital marketing is one of the media that is currently in great demand by the public as a support in daily activities (Saputra et al., 2020). Digital marketing according to the American Marketing Association (AMA) is an activity, institution, and process facilitated by digital technology in creating, communicating, and delivering values to consumers and other interested parties (Kannan & Li, 2017) Digital marketing describes the management and implementation of marketing using electronic media.

Dave said that digital business is how companies apply digital technology and media to improve the competitiveness of their organization through optimizing internal processes with online (Chaffey et al., 2015). So what is meant by digital marketing is the application of digital technology that forms online channels (online channels) to the market (websites, e-mail, databases, digital TV and through various other recent innovations including blogs, feeds, podcasts, and social networks) that contribute to marketing activities that aim to make a profit and build and develop relationships with customers besides developing an approach.

Digital marketing is an approach that is planned to increase knowledge about consumers (about the company, their behavior, values and level of loyalty to the product brand), then unite targeted communication with online services according to the needs of each

[49] https://peraturan.bpk.go.id/Home/Details/186420/perda-kab-penajam-paser-utara-no-4-tahun-2017 accessed on 17 July 2023 at 12.35 pm

individual or specific customer. In short, digital marketing is achieving marketing goals through the application of technology and digital media. Digital Media Channels There are many online communication techniques that marketers should review as part of a digital business communication strategy or as part of a company's online marketing campaign planning. Digital media channels are online communication techniques used to achieve the objectives of brand awareness, familiarity, fun, and to influence purchase intent by encouraging digital media users to visit websites to engage with brands or products and ultimately to purchase online or offline through media channels such as over the phone or in-store. There are six main channels of digital media channels (Chaffey et al., 2015), namely:

a. Search Engine Marketing (SEM)
   The use of online advertising on search engine results pages to help visitors find marketers' product websites. By placing messages on search engines to encourage click-throughs to websites when users type in certain keyword phrases. The two main search marketing techniques are: paid placement or sponsored links using pay per-click (PPC) systems, and placement in major listings using search engine optimization (SEO), a structured approach used to improve the position of a company or its products in search engine natural listing results (the main body of a search results page) for selected keywords or phrases.

   The website is the link to the digital world as a whole and perhaps the most important part of the overall digital marketing strategy, where online activities will be directed directly to potential customers. An important part of the website is searching engine optimization (SEO), or the process of organizing the content of the website so that it is easily found by internet users who are looking for relevant content on the website, and also presenting the content so that it can be easily found by search engines.

b. Online Public Relations
   Maximizing mentions and beneficial interactions with a company's brand, products or website using third-party sites such as social networks or blogs that the company's target audience happens to visit. It also includes responding to negative mentions and conducting public relations through sites via press center or blogs. This is closely related to social media marketing.

c. Online partnerships

Creating and managing long-term arrangements to promote the company's online services on third-party websites or through email communications. Different forms or partnerships include link building, affiliate marketing, aggregates such as price comparison sites, online sponsorship, and co-branding.

d. Interactive advertising
The use of online advertising such as banners and multimedia adverts to achieve brand awareness and drive clickthrough to target sites.

e. Opt-in email marketing
The use of internal lists for customer activation and retention. This method adds to the contact list in email marketing, through registered customers who have definitely agreed and know that they will get regular emails containing advertisements from marketers.

f. Social media marketing
Social media marketing is an important category of digital marketing that involves and encourages customer communication i the company's own website, or social presence such as Facebook or Twitter, Instagram, or publisher sites, blogs, and forums.

Maintaining existing consumers and building mutually beneficial cooperation with is one of the important elements of digital marketing activities. Utilization of Digital Marketing by MSMEs Players According to Stelzner quoted from Purwana,32 social media has the potential to assist MSMEs players in marketing their products. Social media applications are available ranging from instant messaging to social networking sites that offer users to interact, connect and communicate with each other. These applications intend to initiate and circulate online information about users' experiences in consuming products or brands, with the main goal of achieving people engagement. In a business context, people engagement can lead to profit creation. The business value of using social media (Stockdale et al., 2012) for MSMEs is as follows as follows:

a. Creation of sustainable marketing channels;
b. Increase in short-term revenue and long-term sales;
c. Decrease in advertising costs by up to 70%;
d. Reduction in overall marketing costs;
e. Creation of competitive advantage;
f. Ease of promotion across social media platforms;

g. Increased brand and product popularity;
h. Introduction of the organization or company to the public.

The socialization of digital marketing strategies in the form of social media utilization is very important because it can provide knowledge to MSMEs players regarding the ways and stages in expanding the consumer network through the use of social media in marketing their products so as to increase the competitive advantage for MSMEs themselves.

The use of digital marketing has provided a significant increase in business growth for MSMEs players. A lot of evidence has been felt by MSMEs players from the presence and utilization of digital marketing in the business being run. According to Pradiana, MSMEs players can communicate with customers and suppliers more intensively and effectively and efficiently, because communication through digital marketing can occur within 24 hours.

The transaction process also becomes easier and cheaper because it only capitalize on credit / quota to be able to communicate (Pradiani, 2018). The use of digital marketing makes it possible to provide various types of attractive promos such as discounts, cashback, and so on. Promotions such as discounts or rebates can increase sales because this strategy is very attractive to consumers (Afida & Zamzami, 2020). Likewise with discounts, cashback also plays an important role in attracting consumers to shop (Sari et al., 2021). Apart from the benefits in communication and promotional costs that are more affordable and more efficient, it turns out that digital marketing has also been proven to increase the closing selling of MSMEs players. According to Rozina in her research, the use of digital marketing has helped MSMEs players in marketing their products, expanding their market share and reducing the promotional costs they incur, as well as shortening the interaction distance between MSMEs and their consumers (Rozinah & Meiriki, 2020),

Digital Marketing is also very helpful in the process of growth and development of the business being run compared to relying solely on conventional or traditional systems (Irfani et al., 2020). In addition, digital marketing is also able to increase return buyers on marketed products (Sukma et al., 2020).

The evidence above shows that digital marketing is a very effective medium in improving all aspects of MSMEs. Digital marketing, both from the promotion process, communication with customers, time management, and so on to the process of increasing sales, has provided enormous benefits for MSMEs players.

3. Definition and Concept of Strategy

The term strategy comes from the Greek word "strategeia" (stratus = military; and ag = lead), which means the art or science of becoming a general. Strategy can also be interpreted as a plan for the division and distribution of resources. the use of military and material forces in specific areas to achieve specific goals. According to Stoner, Freeman, and Gilbert. Jr (2001: 5), that the concept of strategy can be defined based on 2 different perspectives, namely: (1) from the perspective of what an organization intends to do, and (2) from the perspective of what the organization eventually does.

Based on the first perspective, strategy can be defined as a program for determining and achieving an organization's goals and implementing its mission. This means that managers play an active, conscious and rational role in formulating the organization's strategy. Meanwhile, based on the second perspective, strategy is defined as a pattern of responses or organizational responses to its environment over time. In this definition, every organization must have a strategy, even if the strategy is never formulated explicitly. This view is applied to managers who are reactive, which only responds and adjusts to the environment passively when needed.

3.1. Levels and Types of Strategy

According to Tjiptono (2002: 4) that within a company there are 3 levels of strategy, namely the corporate level, the level of business units or lines of business, and the functional level, as follows;

1. Corporate Level Strategy, formulated by top management that regulates the activities and operations of organizations that have more than one line or business.
2. Business Unit Level Strategy, more directed at managing the activities and operations of a particular business.
3. Functional Level Strategy is a strategy within the framework of management functions that can support business unit level strategies

3.2. Strategy Management

Haryadi (2003: 3) states that "strategic management is a process systematically designed by management to formulate strategies, implement strategies and evaluate strategies in order to provide the best values for all customers to realize the organization's vision". John A. Pearce II and Richard B. Robinson quoted in Tunggal A. Widjaja's book (2004: 2) strategic management is "a collection of decisions and actions

that are the result of formulation and implementation, plans designed to achieve the goals of a company".

3.3. Community Economic Empowerment

There are 4 concepts of economic empowerment according to Sumodiningrat (1999) as cited by Mardi Y. Hutomo (2000: 6), which can be summarized as follows:

1. The people's economy is an economy organized by the people. The economy organized by the people is a national economy rooted in the potential and strength of the community at large to run their own economy.
2. People's economic empowerment is an effort to make the economy strong, large, modern, and highly competitive in the right market mechanism. Because the obstacles to the development of the people's economy are structural constraints, the empowerment of the people's economy must be done through structural changes.
3. The structural change in question is a change from a traditional economy to a modern economy, from a weak economy to a strong economy, from a subsistence economy to a market economy, from dependence to independence. The steps of the structural change process include: allocating resources; strengthening institutions; mastering technology; and empowering human resources.
4. Economic empowerment of the people is not enough to increase productivity, provide equal business opportunities, and only provide capital injections as a stimulant, but must ensure close cooperation and partnership between those who have developed with those who are still weak and undeveloped.

3.4. The Concept of Community Economic Empowerment

The concept of empowerment was born as an antithesis to the development model and industrialization model that is less favorable to the majority of people. This concept is built on the following logical framework:

1. That the process of concentration of power is built on the concentration of control of production factors
2. The concentration of power over production factors will give birth to a society of workers and a society of fringe entrepreneurs
3. Power will build a manipulative superstructure or knowledge system, political system, legal system, and ideology to strengthen and legitimize

4. Cooptation of knowledge systems, legal systems, political systems, and ideologies, will systematically create two groups of people, namely empowered people and helpless people.

Finally, what happens is a dichotomy according to Mardi Y. Hutomo (2000: 1-2), namely the powerful society and the people who are controlled, so that to free the situation of controlling and being controlled, liberation must be carried out through the process of empowerment for the controlled (empowerment of the powerless). e. Patterns of Community Economic Empowerment

In an effort to improve the standard of living of the community, a targeted pattern of empowerment is needed, the right form is to provide opportunities for the poor to plan and implement development programs that they have determined. In addition, the community is also given the power to manage their own funds, both from the government and amil zakat, this is what distinguishes between community participation and community empowerment. It is necessary to think about who exactly is the target of community empowerment, actually also has the power to build, with this good governance that has been hailed as an approach that is considered the most relevant, both in the government order at large and in carrying out development functions.

This coaching program to become an entrepreneur can be carried out through several stages of activity, including providing moral motivation assistance. This form of moral motivation is in the form of information about the functions, rights and obligations of humans in their lives, which in essence humans are required to believe, worship, work and make efforts with all their might while the final result is returned to the Almighty Creator. The forms of moral motivation are:

1. Business training
   Training should be given more actual, by testing the management of entrepreneurial life practices, either by those who are struggling in the business world, or concrete examples that occur in business practices. Through this kind of training, it is hoped that the participants will be able to recognize certain tips that they must follow, so that they can avoid failure in the development of their entrepreneurial activities as much as possible.

2. Capital
   Capital in the form of money is one of the most important factors in the development of entrepreneurial activities an important factor in the business world but not the most important to obtain financial

support either From banks or from grants channel through other business partnerships.

3.5. Micro, Small and Medium Enterprises (MSMEs)

Law No. 20/2008 explains several criteria regarding Micro, Small, and Medium Enterprises. These criteria include:

1. The criteria for Micro Enterprises are as follows:
   Having a net worth of at most Rp 50,000,000.00 (fifty million rupiah) excluding the land and building of the business premises. Having annual sales revenue of at most Rp 300,000,000.00 (three hundred million rupiah).

2. The criteria of a Small Business are as follows:
   Having a net worth of more than Rp 50,000,000.00 (fifty million rupiah) up to a maximum of Rp 500,000,000.00 (five hundred million rupiah) excluding land and building of the place of business; or B. Having annual sales revenue of more than Rp 300,000,000.00 (three hundred million rupiah) up to a maximum of Rp 2,500,000,000.00 (two billion five hundred million rupiah)

3. The criteria for medium-sized enterprises are as follows:
   Having a net worth of more than Rp 500,000,000,000.00 (five hundred million rupiah) up to a maximum of Rp 10,000,000,000.00 (ten billion rupiah) excluding land and building of the place of business; or having annual sales revenue of more than Rp 2,500,000,000.00 (two billion five hundred million rupiah) up to a maximum of Rp 50,000,000,000.00 (fifty billion rupiah).

Meanwhile, Law No. 20 Year 2008 explains that Micro, Small, and Medium Enterprises have the following principles:

1. Kinship
2. Economic democracy
3. Togetherness
4. Equitable efficiency
5. Sustainable
6. Environmentally sound
7. Self-reliance
8. Balance of progress, and
9. National economic unity.

Micro, Small and Medium Enterprises (MSMEs) aim to grow and develop their businesses in order to build a national economy based on equitable economic democracy.

4. Research Methods

In this study using descriptive qualitative research as according to Sukmadinata (2009: 18) states that "the use of qualitative-descriptive research aims to define a situation or phenomenon as it is". So in this type of descriptive qualitative research is carried out by adjusting to the researcher's observation and analysis of an ongoing situation or phenomenon as it is. In this study it is important for researchers to be able to determine the focus as according to Sugiyono (2007: 207) which states that "the problem boundaries in qualitative research are called focus, which contains general subject matter". So, the focus of this research is as follows:

1. Supervision of legal activities of digital MSMEs
2. Coaching to MSMEs
3. Supporting and inhibiting factors for the Office of Cooperatives, MSMEs, Industry and Trade of Penajam Paser Utara and Trade (Diskukmperindag) Penajam Paser Utara in the development of MSMEs. development of MSMEs.

5. Results and Discussion

Digital marketing has a significant influence on the income of Micro, Small and Medium Enterprises (MSMEs) in Penajam Paser Utara. The increase in income is due to the involvement of MSMEs actors in marketing their products in digital media. The response from respondents was very good regarding questions about: the use of digital marketing, digital marketing makes it easier for respondents in marketing, and digital marketing expands the reach of respondents' business customers. Even more 60% of respondents strongly agreed that the use of digital marketing is very helpful in all marketing activities carried out. The results of this study are in accordance with Pradiani (2018) that digital marketing facilitates the transaction process (Pradiani, 2018). This easy process ultimately has an impact on all activities in business activities which ultimately have an impact on increasing the income of MSMEs actors.

The MSMEs actors who were respondents in this study agreed that the costs that must be incurred for promotions and all other marketing activities through digital marketing are cheaper than the costs that would be incurred if done traditionally/conventionally. Rozina and

Meiriki's research also found that the use of digital marketing has helped MSMEs players in marketing their products, expanding their market share and reducing the promotional costs they incur (Rozinah & Meiriki, 2020). These results also confirm that digital marketing provides many advantages in the marketing process, including the convenience of an easy process and the costs that must be incurred are smaller than conventional/traditional businesses.

MSMEs players make extensive use of digital media in the form of social media and e-commerce in the business activities they carry out. Social media that are widely used are Facebook and Instagram Tokopedia shopee as a product catalogue, and WhatsApp business as the main chat media to communicate with customers. The utilization of digital marketing by MSMEs players is very necessary. Especially now that almost all aspects of life are digital-based. So that the use of digital media properly by MSMEs players will increase their competitive ability in the midst of current business competition. The results of this study can be evidence that digital marketing plays an important role in increasing the income of MSMEs players in Penajam Paser Utara.

5.1. Supervision of MSMEs Activities

Monitoring of MSMEs activities is the process of collecting information about what actually happens during the process of programs implementation. According to Marjuki and Suharto (1996: 118) monitoring is the continuous monitoring of the process of planning and implementing activities. Monitoring can be done by directly participating in activities or reading reports on the implementation of activities. The purpose of conducting supervision is to:

1. How implementation activities are carried out.
2. Find out how the inputs (inputs) of resources in the plan are incorporated.
3. Whether or not the implementation timeframe was met appropriately. Whether every aspect of planning and implementation went as expected.

With regard to this matter, the author conducted an interview with Secretary of the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara District H. Sabran S.Pd.i, who gave the following explanation gave the following explanation: "We at the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency routinely supervise the activities of MSMEs, although the programs planning is not yet optimal. This can be seen from we can see from as many as 852 MSMEs groups with a total of 1,782 business people (per person) in

Penajam Paser Utara Regency, only about 30% are active. North, only around 30% are active. The majority of MSMEs that are the majority of inactive MSMEs are constrained by the problem of lack of capital and the difficulty of raw materials in the MSMEs themselves.

This year 2017 the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara District did not provide assistance to MSMEs players, including provide assistance to MSME actors, not least the with the Bina Usaha KUBE MSMEs Group located on panglima betta street RT. 11 Penajam Village, Penajam Sub-district Penajam District, Penajam Paser Utara Regency, because it is constrained by a budget that is currently experiencing a deficit. budget which is currently experiencing a deficit. In addition, so far MSMEs that receive assistance from the government must be registered at the Penajam District Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara District, it's just that the assistance system is carried out in stages. the assistance system is carried out in stages.

And currently , the government's efforts to supervise MSMEs by monitoring and evaluation (Monev) to each UMKM per sub-district, District. So we usually organize field monitoring to find out which MSMEs are active and inactive, but, since the budget is in deficit, the monev is sometimes only a phone system. telephone system only. For the Bina Usaha KUBE MSMEs group in Penajam Village we also routinely monitor both in terms of activeness and development.

5.2. Coaching to MSMEs

Coaching is an activity of training and guidance to someone to gain new knowledge and skills so that they can be successful. Therefore, the main elements of coaching are attitudes and skills. So, coaching can be done by paying attention to their level of development and knowledge. their level of development and knowledge, besides that in fostering must complete any unfinished work, then carry out new work.

The purpose of coaching is so that they no longer feel inferior and can be useful to themselves. and can be useful for themselves, their families, and the nation and State, with the educational capital and skills acquired so that they can be independent and live reasonably. so that they can be independent and live reasonably. Therefore, the author conducted an interview with the Secretary of the Department of Cooperatives, MSMEs, Industry and Trade (Dinas of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency, H. S. Sullivan. Penajam Paser Utara Regency H. Sabran S.Pd.i who gave the following explanation as follows:

"The government is currently unable to provide guidance to KUBE Bina Usaha MSMEs Group and even to all s groups in Penajam Paser Utara Regency optimally as in previous years. maximally as in previous years due to the regional budget deficit that occurred in 2017 has impacted on the absence of training and mentoring for MSMEs actors as in previous years. In the past, we often provide guidance and trainings to improve MSMEs in Penajam Paser Utara Regency. However, since now the budget is limited, so training and guidance are also limited. Currently, with the financial conditions are not yet conducive, we at the Dinas Koperasi, UKM, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency only provides assistance and guidance.

Penajam Paser Utara Regency only provides assistance and support in every activity and activity of support in every activity and activity of MSMEs as activities as a form of our guidance to MSMEs players in Penajam Paser Utara Regency. (Interview 5 May 2023)

The results of the interview with the Secretary of the Department of Cooperatives, SMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency, it is known that the government has been quite good in providing guidance to MSMEs players in Penajam Paser Utara Regency. that the government is good enough in providing guidance to the Bina Usaha KUBE MSMEs group in Penajam Village and to all MSMEs in Penajam Paser Utara District.

MSMEs in Penajam Paser Utara Regency, although it can be said that it has not been maximized because it is constrained by financial conditions. constrained by regional financial conditions that are experiencing a deficit.

Furthermore, the author conducted an interview with the Head of the Industry, Cooperatives and MSMEs at the Office of Cooperatives, MSMEs Industry and Trade (Diskukmperindag) of Penajam Paser Utara District, Drs. Mappanyompa by providing the following explanation: "Regarding the development of the Bina Usaha KUBE MSMEs group in Penajam Village. Penajam Village, the Office of MSMEs Cooperatives, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency is currently still constrained by budget problems. currently still constrained by budget and promotion issues. It is known that the Bina Usaha KUBE MSMEs group in Penajam Village is engaged in processing crackers. Penajam is engaged in cracker processing and there are still many MSMEs in Penajam Paser Utara Regency that are engaged in the field of creative industries and home industries, but they are less exposed to the outside world due to out of the region because of constraints in promotion, especially the field of

promotion is still in the area of the Culture and Tourism (Disbudpar) of Penajam Paser Utara Regency. In addition, Office of MSMEs Cooperatives, Industry and Trade (Diskukmperindag) of Penajam Paser Utara District does not have a budget to bring the KUB UMKM group to the region.

Bina Usaha and other MSMEs groups to participate in exhibitions outside the region as a form of promoting regional MSMEs products. regional MSMEs products. In addition, MSMEs capital comes from Regency APBD funds in collaboration with Bank Ibadurrahman through people's credit with a small interest rate of around 4%. so that the Office of MSMEs Cooperatives, Industry and Trade (Diskukmperindag) will issue a certificate for MSMEs that need this capital for MSMEs that need this capital, and then the payment process is carried out by Bank Ibadurrahman then the payment process is carried out by Bank Ibadurrahman, including the determination of the amount of capital to be issued. including determining the amount of capital to be issued.

MSMEs capital loans at bank Ibadurrahman are currently still limited to the amount of credit for business actors, which is a maximum of Rp. 25,000,000, - "

5.3. Inhibiting Factors

Inhibiting Factors On average, Micro, Small and Medium Enterprises (MSMEs) have formal education in terms of both knowledge and (MSMEs) have formal education both in terms of knowledge and in terms of in terms of skills, as well as the large number of micro, small and medium business actors who without notifying or reporting the new address to the Office of Cooperatives, MSMEs, Industry and Trade. The Office of Cooperatives, MSMEs, Industry and Trade.

After the author conducted an interview with the Secretary of the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) Penajam District Paser Utara Regency H. Sabran S.Pd.i gave the following explanation: "I admit that one of the factors inhibiting the development of MSMEs groups in Penajam Paser Utara District is the lack of training to support the knowledge and knowledge of business and knowledge of business actors to be able to further improve their business. It is known that the trainings conducted by the Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency is still felt to be less than optimal to provide knowledge to business actors. Even now, we can only hope for training activities from the Province only". (Interview, 5 May 2023)

The results of the interview with the Secretary of the Department of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara District, it is known that training to MSMEs groups has not been running optimally and that training for MSMEs groups has not been running optimally and there are still There are still some MSMEs that lack knowledge and knowledge in the development of MSMEs.

From the results of an interview with the Head of the Industry, Cooperatives and UMKM at the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag) of Penajam Paser Utara Regency, it can be seen that the government is still unable to carry out the MSMEs development programs due to the lack of budget in the region.

1. That the strategy of the Office of Cooperatives, MSMEs, Industry and Trade in coaching and monitoring is still not running optimally. coaching and monitoring is still not running optimally. This can be seen, there are still several shortcomings in providing guidance namely in carrying out coaching cannot be said to be successful because the relevant agencies only provide guidance in the form of management only, which is not directly related to the business run by the perpetrators of the micro, small and medium enterprises, and the relevant Office only conducts coaching one time a year and in carrying out coaching activities can be seen the can be seen a decrease in the interest of micro, small and medium enterprises in follow the coaching carried out by the relevant Office.

2. Factors that support and hinder the Office of Cooperatives, MSMEs, Industry and Trade (Diskukmperindag): In conducting supervision of the Bina Usaha KUBE MSMEs group and other MSMEs groups, there are still shortcomings. Business and other MSMEs groups there are still shortcomings, Among other things, monitoring is only carried out on micro small and medium enterprises that are constrained in capital payment instalments managed by Bank Ibadurrahman so that the monitoring carried out is still not optimal, although the monitoring carried out is still not optimal monitoring is still not optimal even though the monitoring that is carried out is already running well then monitoring also uses the method via telephone so that monitoring is considered ineffective because it does not know the condition of the MSMEs.

Geographical conditions that are too large and inadequate infrastructure and the lack of knowledge of micro, small and medium enterprises about the business they are doing. As well as the number of small and medium business actors who change addresses without reporting the new address to the Office of Cooperatives, MSMEs, Industry and Trade, which makes it difficult for them to manage their business. Office of Cooperatives, MSMEs, Industry and Trade which makes it difficult for the The relevant agencies conduct coaching and monitoring and the unavailability of MSMEs centres that are useful for availability of MSMEs centres that are useful for accommodating the results of the products by small and medium enterprises to be marketed and recognized in the local market.

6. Conclusion

Digital marketing has a significant impact on increasing MSMEs revenue. MSMEs actors are greatly helped in all aspects of the business activities they carry out by utilizing digital marketing. Digital marketing is most widely used by MSMEs actors, namely e-commerce, Facebook and Instagram Tokopedia, Shopee as a product catalogue, while WhatsApp business as the main media for communication/chat with customers. The results of this study confirm the importance of digital marketing for MSMEs. In addition to increasing revenue, the costs incurred for business activities with digital marketing also tend to be cheaper. Based on the findings of this study, only 1.63% of the total MSMEs use digital marketing in their marketing. So it is advisable to make good use of digital media in the business / business being run. The government and academics must also play an active role in the socialization of MSMEs digital law through training activities, workshops, or other educational activities.

6.1. Suggestions

It is expected that the Office of Cooperatives, MSMEs, Industry and Trade in conducting the Department of Cooperatives, MSMEs, Industry and Trade in conducting guidance to micro, small and medium enterprises is not only done every year, but must routinely carry out coaching in the form of conducting training that is directly related to the expertise or business carried out by the expertise or business carried out by micro, small and medium enterprises that aim to train and provide knowledge to micro, small and medium enterprises. business actors who aim to train and provide knowledge to the micro, small and medium business actors because it is known that on average the micro, small and medium business actors have formal education both in terms

of knowledge and skills so that the importance of the related Dinas knowledge and skills so that the importance of the relevant Dinas to provide guidance to micro, small and medium business actors.

It is expected that the Office of Cooperatives, MSMEs, Industry and Trade in monitoring micro, small and medium enterprises is not monitoring micro, small and medium enterprises is not only those that are constrained in instalments of loaned capital payments, but all small and medium micro small and medium enterprises that are given capital loans are also monitored so that the capital lent is monitoring so that the capital that is loaned can be used as it should be. Thus, the capital loaned can be useful in develop the business that is managed so that it will lift the economy of the micro small and medium business actors.

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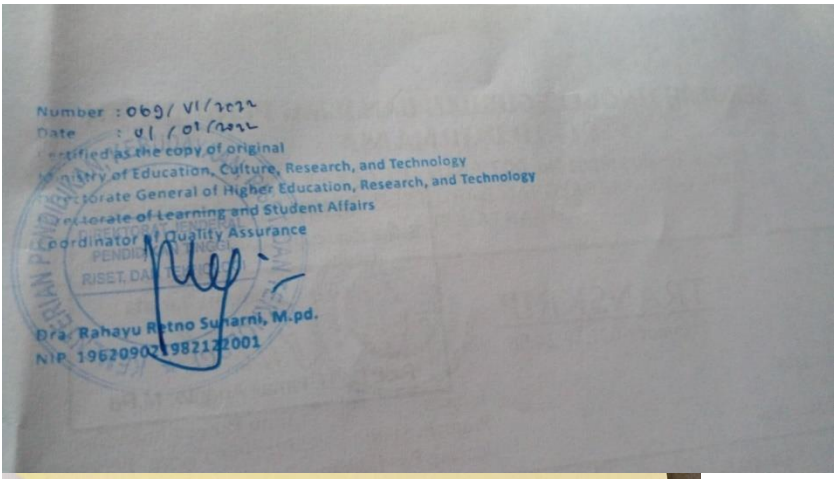

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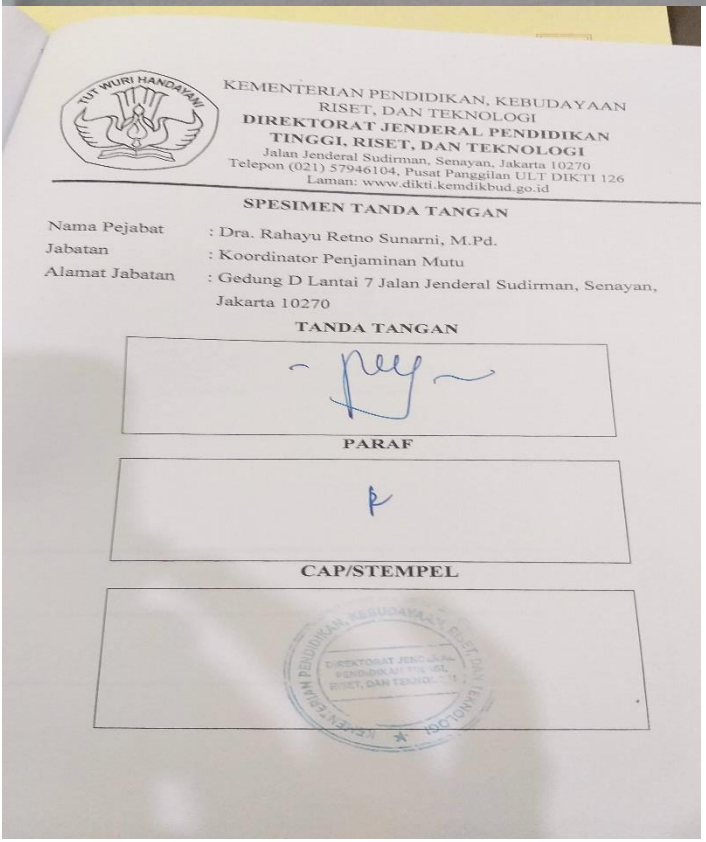

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Balinese Traditional Women as Ritual Guardians Symbols and Strengthening of Balinese Subak Tradition Values based on Holistic Legal Anthropological Approach

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Abstract

Balinese traditional women with their activities in the rituals of the Balinese subak tradition are the cultural roots of Balinese indigenous people traditional life to make Balinese traditional women meaningful and valued within the family, community, state and nation. Women role in customs and culture, especially regarding domestic traditions and ceremonies, should not be necessary to change society traditions that have existed from generation to generation which must be preserved. The Balinese Subak Tradition Ritual Guardian Symbol as a concrete thing to be implemented in traditional rituals carried out by the Balinese people in their care to complete their respects to the Creator to offer prayers for the lives of the indigenous people who have been given to process their natural resources and given an abundant harvest of the crops of the Balinese indigenous people in the Balinese Subak Tradition. Holistic Approach to Legal Anthropology examines that strengthening of Values Ritual traditions have a close relationship with their environment and are influenced by the religious magical/sacred mind. They believe in magical powers as a force that controls the universe and everything in a state of continuity. It is expected to provide reinforcement of indigenous peoples traditional rituals values in Perspective of Legal Anthropology. Indigenous peoples are ecological communities that have good relationship with nature as a value and moral message for the next generation, with the aim of respecting the lives of indigenous peoples who humanize environmental preservation, namely maintaining the Balinese Subak Ritual Tradition. So that Balinese Indigenous Women are an integral part of human life and have become the agreement of the community, traditional leaders, and community leaders by holding various rituals. If they make mistakes, indigenous people pray to express their regret and guilt for neglecting to maintain the Balinese Subak ritual tradition which they should preserve

Keywords: Balinese Traditional Women, Symbols of Ritual Guardians and Strengthening of Balinese Subak Tradition Values, Holistic Approach to Legal Anthropology

Abstrak

Perempuan Adat Bali dengan aktivitasnya dalam ritual tradisi subak Bali merupakan akar budaya kehidupan tradisional masyarakat adat Bali dalam rangka menjadikan perempuan adat Bali bermakna dan dihargai dalam lingkungan keluarga, masyarakat, negara dan bangsa. Peran perempuan dalam adat dan budaya khususnya yang menyangkut tradisi dan upacara yang bersifat domestic, seharusnya tidak perlu mengubah tradisi masyarakat yang sudah ada sejak turun temurun yang harus dijaga kelestariannya. Simbol Penjaga Ritual Tradisi Subak Bali sebagai hal yang konkrit untuk diwujudkan dalam pelaksanaan ritual adat yang dilakukan masyarakat Bali dalam penjagaannya untuk menyelesaikan penghormatannya kepada Sang Pencipta untuk memanjatkan doa atas kehidupan masyarakat adat yang telah diberikan untuk mengolah sumber daya alamnya dan diberikan panen yang melimpah atas hasil bumi masyarakat adat Bali dalam Tradisi Subak Bali. Pendekatan Holistik Antropologi Hukum mengkaji penguatan Nilai Tradisi ritual mempunyai hubungan yang erat dengan lingkungannya dan dipengaruhi oleh alam pikiran religious magis/sacral artinya percaya pada kekuatan magis sebagai suatu kekuatan yang menguasai alam semesta dan seisinya dalam keadaan kesinambungan, dan diharapkan dapat memberikan penguatan terhadap nilai tradisi ritual masyarakat adat dalam Perspektif Antropologi Hukum. Seperti yang kita pahami bahwa masyarakat adat merupakan komunitas ekologis yang berhubungan baik dengan alam sebagai nilai dan pesan moral sampai generasi berikutnya, dengan tujuan menghormati kehidupan masyarakat adat yang memanusiakan pelestarian lingkungan yakni menjaga Tradisi Ritual Subak Bali yang sangat penting untuk dilakukan. Sehingga Perempuan Adat Bali merupakan bagian integral dari kehidupan manusia dan sudah menjadi kesepakatan masyarakat, tokoh adat , tokoh masyarakat dengan mengadakan berbagai ritual dan apabila melakukan kesalahan , masyarakat adat berdoa untuk mengungkapkan penyesalan dan rasa bersalahnya karena lalai menjaga tradisi ritual Subak Bali yang sudah seharusnya mereka jaga kelestariannya.

Kata Kunci: Perempuan Adat Bali, Simbol Penjaga Ritual dan Penguatan Nilai Tradisi Subak Bali, Pendekatan Holistik Antropologi Hukum

1. Introduction

Balinese Traditional Women have an important role in maintaining the continuity of the Balinese Subak traditional ritual, Balinese Traditional Women with their activities in the Balinese subak rituals are the cultural roots of the Balinese indigenous people traditional life in order to make Balinese traditional women meaningful and valued within the family, community, state and nation. Women role in customs and culture, especially regarding domestic traditions and ceremonies, should not be necessary to change society traditions that have existed from generation to generation which must be preserved. The very high involvement of

women in ritual activities or religious ceremonial activities both in subak is to maintain the existence of the Balinese Subak tradition, so that the culture of creating agricultural sustainability in the Balinese Subak tradition can provide for the welfare of both male and female subak farmers based on TRI HITA KARANA.

Balinese Traditional Women as Symbols of Guardians of Balinese Subak Tradition Rituals. Women in preserving existing cultural values, local wisdom as a concrete thing to be realized in the implementation of traditional rituals carried out by the Balinese people in their care to complete their respect for the Creator. Balinese traditional women show that the preservation of tradition or culture in the context of managing the Balinese subak system does not have special requirements. It only needs the will to serve and preserve culture by saying a prayer/giving thanks to Sang Hyang Widi Wasa for the life of the indigenous people who have been given to process their natural resources and are given an abundant harvest of the crops of the Balinese indigenous people in the Balinese Subak Tradition.

2. Methods

Holistic Approach to Legal Anthropology examines Strengthening of Values Ritual traditions have a close relationship with their environment and are influenced by religious magical/sacred thoughts meaning that they believe in magical powers as a force that controls the universe and everything in it in a state of continuity, and are expected to provide reinforcement of the values of ritual traditions of indigenous peoples in the Perspective of Legal Anthropology. As we understand that indigenous peoples are ecological communities that have a good relationship with nature as a value and moral message for the next generation, with the aim of respecting the lives of indigenous peoples who humanize environmental preservation, namely maintaining the Balinese Subak Ritual Tradition. So that Balinese Indigenous Women are an integral part of human life and have become the agreement of the community, traditional leaders, and community leaders by holding various rituals. If they make mistakes, indigenous people pray to express their regret and guilt for neglecting to maintain the Balinese Subak ritual tradition which they should preserve.

3. Findings and Discussion

3.1. The Role of Balinese Traditional Women in the Rituals of the Balinese Subak Tradition

Concept of Ritual (Ceremony)

The teachings of Hinduism include three frameworks namely; Tattwa, Ethics and Ceremonies. In practice it is implemented by Hindus in an integrated and complete manner. However, in reality what stands out more often is the ceremonial part. This is because this part is a form of implementation with all its completeness. The ethics section underlies the implementation of ceremonial activities and the behavior of its people. Ethics is the teaching of good behavior and the development of a mental attitude in accordance with the norms of Hinduism. The Tattwa section provides a source of inspiration which is manifested symbolically in various ceremonies, as well as which is formulated in the conception of belief in Hindu teachings known as "sradha"[50]. (Krisnu, 1991).

This phenomenon also occurs in the implementation of Hindu religious teachings within the scope of Subak Wongaya Betan. The ceremony (ritual) carried out by subak members is very intense, because in their belief that by performing the ritual before the Creator, they feel that they are always protected and that their plantations will get maximum results. It has become a tradition for Hindus, including members of the Subak Wongaya Betan, every time they start a job or carry out a ceremony, in general they first start by calculating or looking for an auspicious day (pedewas) to carry out a ceremony. For example, during the implementation of one of the rituals in the Subak area, namely the Mendak Toya ritual[51].

This ritual is usually carried out as the beginning of agricultural activities in paddy fields. Subak members, before determining when the day of the ritual will be performed, will look for a day count either from calendar instructions (Balinese calendar), or ask for instructions from a sulinggih (priest). After the auspicious day is determined, the subak administrator will carry out the sangkep to discuss preparations for the ritual. After there is agreement both in terms of the readiness of the wives (women) to prepare for the ritual, as well as in terms of the availability of funds to carry out the ritual, the mendak toya ritual can be carried out.

In the understanding of Hindus, the implementation of the ceremony has certain aims and objectives as well as the understanding of the Subak Wongaya Betan members. Religious ceremonial offerings have certain meanings which are depicted symbolically through certain

[50] Sradha: rules

[51] "Mendak toya" : this ritual is performed at Ulun Danu Temple and at the water source owned by Subak. The location is usually upstream of the village. Before the ritual is carried out, usually the male subak members first clean the water source in mutual cooperation, only then the female subak members will carry out this ritual.

parts of the material, shape, form or color. The meaning of Nyasa or the symbolic meaning of each offering is also adjusted to the general intent and purpose of the ceremony being carried out. Like the mendak toya ritual that is offered before Lord Vishnu (God of Water), there are several offerings that must wear the color of Lord Vishnu, which is black, in addition to other symbols made of coconut leaves and colorful flowers.

This is stated in Krisnu's statement (1991) that in general offerings presented to the Creator have several meanings, namely:

(1) As an expression of angayubagia (happiness) or gratitude to be expressed before God (Ida Sang Hyang Widi Wasa), for all the gifts that have been enjoyed by humans,
(2) as a wish or request, for example a request for longevity,
(3) as an apology or request to be forgiven for all mistakes and oversights that have been committed, and
(4) as a symbolic form of God (Ida Sang Hyang Widi Wasa) who is worshiped during rituals (ceremonies).

In implementing all the hopes that are symbolized through rituals (ceremonies), in maturity (good days according to the Balinese Hindu calendar) every ceremony always refers to the philosophy of Tri Hita Karana (THK) which describes a balanced relationship between humans, humans and God, also humans and the environment. These three balance relationships will also be symbolized in different ceremonies. In the Subak Wongaya Betan community, different ceremonies will be symbolized by different offerings. This is the implementation of the three relationships in the philosophy of Tri Hita Karana.

To show the relationship with the Creator, for example, the ngusaba ritual is one example. This ritual has the intention of expressing gratitude to the members of the subak before Betara Sri or Dewi Sri because the rice plants in their fields are producing well. This ritual is carried out before harvest collectively by all subak members. While rituals related to relations with the environment, for example, is nailuk merana, which is mechanically eradicating rats (without the use of pesticides) so that it is hoped that the environment will not be polluted with pesticide poisons.

In addition to rituals related to subak activities, in general Balinese Hindus have maturity to perform ceremonies for gods who control fertility, such as the Plant God (believed to be the guardian of plants on agricultural land), Earth God (who is believed to maintain the fertility of agricultural land), Lord Vishnu (who is believed to be the guardian god of water sources). In connection with the ceremony for

the God of Plants known as Tumpek Uduh 3, Hindus in Bali, including members of Subak Wongaya Betan, carry out this ceremony every 6 months, namely every Saturday Kliwon, wuku Wariga. This ritual is usually carried out privately by each member of the subak in their rice fields, as well as in the family temple. This procession is to worship God Almighty in his manifestation as "God Sang Kara" (The Lord of Plants). The Tumpek Uduh ceremony is held in each household and also in agricultural areas.

The Pemangku (priest) of Pura Dalem explained that the people and himself did not really understand why the whole ceremony was being carried out. Their meaning is only limited to the view that the implementation of all these rituals will be able to increase the safety and success of their farming. The stakeholder's view was then dreamy remembering the time in 1974 when there was a very vicious attack by rats, which caused total crop failure in the area. Even though mechanical control efforts have been made, rat pests seem immune. So finally the subak decided to carry out the Nyimpen Merana ceremony[52].

This was confirmed by Pekaseh Subak, who added that after carrying out the ceremony, until now, Subak Wongaya Betan, including subaks in the Jatiluwih area, had never been attacked by rats. It is believed that krama subak is a result of the continuous and consistent implementation of rituals (ceremonies).

Women's Activities in the Balinese Subak Ritual

In the midst of the widening of the philosophy of Hinduism in Bali, there are differences in religious understanding between the younger generation and the older generation. Where there has been a change in view of the rituals performed by Hindus, especially among the younger generation. Meanwhile, on the other hand, the implementation of rituals by several groups including farmers (in the subak organization) is still something that is being carried out and taboo to be violated. As is the case with Subak Wongaya Betan who still carry out rituals related to their agriculture implementation in the field.

In one growing season, Subak Wongaya Betan performs collective rituals such as: (1) mapag toya (picking up water); (2) mesaba (ritual when harvesting), and pangluk merana. As for personal (independent) rituals, Subak members also still carry out rituals such

[52] Nyimpen merana is a ritual to return pests to their place of origin, by bringing Ida Cokorda Puri Gede Tabanan, who is carried on a stretcher to the rice fields. He then stuck the Puri Tabanan Heritage Keris as a symbolic sign to drive away rats. This ceremony is a fairly large ceremony involving all subak lanang (male) and wives (female) krama.

as: (1) ngendagin (starting land cultivation), (2) ngurit and mawiwit rhymes (sowing rice), (3) ngerasakin (starting preparation for planting), (4) nandur (when planting), (5) tutug kambuhan (ritual when rice is 42 dap), (6) nyungsung (ritual when rice is 2 months old), (7) mabiukungkung (ritual when rice is 82 dap), (8) maikuh lasan (when the rice begins to bear fruit), (9) niki kaki and niki manuh (during harvest and harvest), (10) mantenin (ritual when the rice is already in the barn), (11) mrelina dewa nini (melting dewa nini), (12) nyepi (no activities). Such as the construction of subak jineng (barns) and subak temples.

In connection with the preparation and implementation of this ritual, although in fact there has been a division of tasks and activities between male and female subak members, usually women will be more involved. This is because women will be involved starting from the preparation of the offerings and during the ritual implementation. In this chapter, the concept of ritual according to the Hindu community and members of the Subak Wongaya Betan will be explained. Next, we will explain the activities of women in carrying out subak rituals at Wongaya Betan.

Women and Subak Bali ritual

The results of interviews with the Head of Taro Village, Tegallalang District, Ubud Bali, stated that the rituals (ceremonies) that carried out were actually symbolic and still well maintained. Ritual is not work but ritual is creation, not work that makes money. So that in carrying out the ceremony we only have one goal, namely asking for safety from Ida Sang Hyang Widi Wasa for all the abundance of fortune and health. The ceremony does not have an economic goal, but more towards the spirit of life. The religious ritual for Balinese women is work (in Balinese "Alus Karya" or "gae" in ordinary Balinese). Although in a generic sense, work also means work, which in this case earns money. However, in the context of religion and custom, Madue Karya is often associated with religious ceremonies or other ceremonies related to custom and culture.

In simple terms, there are three ways to give the meaning of the word work or gae in the Hindu community, namely: career-related work, work related to the preparation of ceremonial activities and the implementation of the ceremony itself. In relation to ceremonies, women's activities will always be more numerous than men's activities, even though men's involvement is needed especially in jobs that require greater physical exertion. However, in general, women will require more involvement than men while carrying out the ceremony. So that

in the implementation of rituals there is actually a dominance of the women role, even though this is considered something normal and something that is natural by society.

Women have more obligations in the preparation and implementation of ceremonies. In the current difficult situation and the fact that more men are looking for work outside the village or neighborhood, women's jobs automatically increase in relation to doing daily work (domestic work) and work on agricultural land. It is not uncommon for women to even spend working hours managing paddy fields starting from seeding, planting, tending and even harvesting (Oedjoe, 2007). In relation to work in the paddy fields, women will also prepare offerings throughout the planting season and then immediately carry out the ceremony.

As sparked from the results of interviews with traditional farmers that as a family that has a son, work in the fields is usually done in mutual cooperation. Starting work in the fields such as plowing is certain to be carried out by traditional farmers together with their children, while his wife, a housewife, helps prepare food for them and their families. After that his wife will continue to work in the fields until the activities of mewinih (seeding), nandur (planting), mejukut (raising rice plants) and even up to the harvest. The job of shooing away birds while making offerings has become his wife's routine job. Ngusaba ceremony is a ceremony approaching the harvest.

In this ceremony, krama wives, including the wives of traditional farmers, will be involved from preparing the offerings to carrying out the rituals, then told how his wife was very busy preparing for the ngusaba ceremony performed by the subak. However, if we examine more deeply from the results of interviews with traditional farmers, the participation of women and men in carrying out rituals already has a division of tasks. For example, according to information from traditional farmers that women are responsible for making and carrying out rituals, while men are only in charge of decorating the ceremony site and preparing food for ceremonial purposes. The involvement of women and men in carrying out ceremonies is evidently not only in carrying out ceremonies in their nuclear family environment, but must also be involved in carrying out ceremonies in other environments such as in the extended family environment (Compound House), customary environment, other social work groups (e.g. banjar), and within agricultural work groups (e.g. Subak).

The female population of Bali is mostly farmers who live in rural areas. Besides being active in household activities, women are also active in agriculture and in the management of the Subak irrigation

system. Women's participation in the management of the Subak irrigation system is still relatively low, of all activities in the management of the Subak irrigation system, especially for Subak religious ceremony activities or ritual activities held by subak. Other physical activities such as sangkep (in making subak decisions), maintaining irrigation networks are completely dominated by male krama (krama subak muani). This condition illustrates that there is still a very prominent gender bias in the management of the Subak irrigation system.

Social construction affects the position of women, so that it also has implications for the opportunities and roles of women in society, including the role of women in preserving existing cultural values, even though culture or traditions sometimes discriminate and tend to be unequal in the position of women. However, this does not hinder the participation of women in social life. This shows that women are involved in various activities that contribute to the preservation of tradition or culture in Indonesia, even though women's participation is not really considered, they still have a contribution in instilling local cultural wisdom values. Like the role of women in subak activities, women who are involved in this activity do not have special requirements, they only have the will and interest to serve and preserve culture.

Traditional cultural values possessed by subak can be seen from one of the implementation of the Tri Hita Karana component of the relationship between humans and God Almighty, as an expression of gratitude and devotion to God Almighty, various ceremonial or ritual activities are carried out in subak, various types of religious ceremonies are carried out in sacred places or places of worship either jointly or individually owned. Various religious ceremonies, whether carried out collectively or individually, vary between subaks.

The form of the ritual, part of the Tri Hita Karana implementation in suba Beghawan kelod, is aimed at creating harmony with the Creator or parhyangan and is carried out from cultivating the land to harvesting in paddy fields can be seen as follows: The involvement of women which is very prominent is in ritual activities or religious ceremony activities involve women both for individual and group ceremonies (Pitana, 2004). Based on the results of the study, the involvement of female farmers in subak activities is very high. This involvement is due to their main job as farmers, in addition to the lack of employment opportunities outside agriculture, so that female farmers choose to work as farm laborers on land owned by other farmers if activities on their own agricultural land have been completed.

The high involvement of women in agricultural management activities is one of the basic capitals in creating agricultural sustainability. Sustainability of agriculture in existence maintains culture and agriculture itself, with optimal outpouring of labor. Income is an indicator to measure the welfare of a person or society, so that this community's income reflects the economic progress of a society. According to Sukirno (2000), individual income is income received by all households in the economy from payments for the use of their production factors and from other sources. According to Sukirno (2006) income is the amount of income received by residents for their work performance during a certain period, whether daily, weekly, monthly, or yearly, the business will eventually obtain income in the form of the value of money received from the sale of products minus the costs incurred. Soekartawi (2002) states that revenue is the product of the production obtained by the selling price. Mubyarto (1995); Pangandaeng (2012), states that income is revenue minus expenses incurred. A person's income basically depends on work in the service or production sector, as well as the time spent on working hours, the level of hourly income received.

Strengthening Traditional Ritual Values Based on Holistic Legal Anthropological Approach

The elements of the Balinese Subak traditional rituals in maintaining the tradition of sustainability of nature and the customary environment are very absolute, because strengthening the ritual tradition value contains religious elements of each local indigenous community.

The development of the religious life of indigenous peoples requires policy and wisdom in its use, on the other hand, religion states that the Balinese Subak tradition and its resources are God's creations which must be guarded, cared for in their utilization because they are entrusted by God and also inherited by future generations so that they are accounted for as a life support system and preservation of resources which can result in strengthening the values of traditional rituals with social values and norms that are able to manage and maintain the existence of traditions without destroying them.

Strengthening of Values Ritual traditions have a close relationship with their environment and are influenced by religious magical/sacred thoughts meaning that they believe in magical powers as a force that controls the universe and everything in it in a state of continuity.

Thus, customary rituals as local wisdom are expected to provide reinforcement of the ritual values of indigenous peoples' ritual

traditions in a Legal Anthropological Perspective, which cannot be separated because they are related to one another, so that local wisdom of indigenous peoples is an ecological community effort that relates well to nature as a value and moral message to the next generation, with the aim of respecting customary forests, because of the lives of indigenous peoples.

In other words, humanizing environmental preservation, namely protecting Subak Bali, is a very important thing to do, because Balinese Indigenous Women are an integral part of human life and it has become an agreement among the community, traditional leaders, and community leaders by holding various rituals. If they make mistakes, indigenous people pray to express their regret and guilt for neglecting to maintain the rituals of the Balinese Subak tradition, the Balinese indigenous people.

4. Conclusion

The role of Balinese traditional women is indispensable both carrying out daily activities in the process of planting rice and carrying out various things including traditional ceremonial activities, traditional rituals and carrying out traditional activities, women are not spared as roles that are very much needed without discrimination of women to make decisions on the use and yield of resources. So that Balinese Traditional Women are able to reflect on knowledge as control in building an understanding of equality and justice in the social life of the community in maintaining the rituals of the Balinese subak tradition.

Strengthening the value of traditional rituals based on the Holistic Anthropological Approach in Law, the reality of traditional rituals is closely related to religious elements. The role of ritual is very important in Subak Bali as an element of preserving agricultural culture, having a connection with local food security and local wisdom as a capital of religious wisdom and environmental wisdom. The values in the Balinese subak ritual are seen as a guide to action and the purpose of life itself. The existence of these rituals is the implementation of Tri Hita Karana which consists of a harmonious relationship between humans and God, fellow humans and the environment. Religious community as a symbolic meaning believes in God Almighty

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Potangara Nu'ada to Kaili Traditional Jurisdiction in Central Sulawesi

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Abstract

The State of Indonesia recognizes the existence of Indigenous Peoples (MHA) as this is regulated in Article 18 B of the 1945 Constitution, which states "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society. and the principles of the Unitary State of the Republic of Indonesia which are regulated by law". The Regional Government of Palu City in 2016 issued Regional Regulation Number 9 of 2016 concerning Kaili Traditional Institutions and Palu Mayor Regulation Number 38 of 2017 concerning Guidelines for Implementing Kaili Traditional Institutions. These two regulations aim to provide recognition to the Kaili customary law community in Palu City. With the appearance of a video circulating on social media, there is a contractor for a gold mining company in the Poboya Village, who does not recognize the existence of a king and customary land in Palu City, so they are considered to have insulted Kaili customs. Based on this, this paper describes the existence of the Potangara Nu'ada To Kaili court in Central Sulawesi. The research method used is empirical normative research. The analysis was carried out using a descriptive method.

Keywords: *Potangara Nu'ada To Kaili* , MHA Kaili, Indigenous Violations.

Abstrak

Negara Indonesia mengakui keberadaan Masyarakat Hukum Adat (MHA) sebagaimana hal ini diatur dalam Pasal 18 B Undang-undang Dasar 1945, yang menyebutkan "Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dengan Undang-undang". Pemerintah Daerah Kota Palu pada tahun 2016 menerbitkan Peraturan Daerah Nomor 9 Tahun 2016 tentang Kelembagaan Adat Kaili dan Peraturan Wali Kota Palu Nomor 38 Tahun 2017 tentang Pedoman Pelaksanaan Kelembagaan Adat Kaili. Kedua peraturan ini bertujuan untuk memberikan pengakuan terhadap masyarakat hukum adat Kaili di Kota Palu. Dengan munculnya sebuah video yang beredar di media sosial terdapat seorang kontraktor perusahaan karya pertambangan emas di Kelurahan Poboya, yang tidak mengakui adanya keberadaan raja dan tanah adat di Kota Palu, sehingga dianggap melecehkan adat Kaili. Berdasarkan hal tersebut, tulisan ini memaparkan tentang eksistensi peradilan Potangara Nu'ada To Kaili di

Sulawesi Tengah. Metode penelitian yang digunakan adalah penelitian normatif empiris. Analisis dilakukan dengan metode deskriptif.

Kata Kunci: *Potangara Nu'ada To Kaili*, MHA Kaili, Pelanggaran Adat.

1. Introduction

Indonesia is a constitutional state (*rechtsaat*)[53], where every applicable provision is always guided by a legal system that applies nationally. However, in addition to the enactment of national law in society, a legal system also grows and develops, which originates from the habits that exist in that community. This habit will later develop into a provision called customary law. Etymologically the term customary law consists of two words, namely law and custom [54]. Law is a collection of regulations consisting of norms and sanctions aimed at establishing order in human association so that security and order are maintained. While custom is a reflection of the personality of a nation, is one of the incarnations of the soul of the nation concerned from century to century. The definition of customary law according to Prof.Dr. Soepomo, SH is a law that is not written in legislative regulations including living regulations, even though they are not stipulated by these regulations, have the force of law.[55]

The existence of customary law as a legal form that is recognized for its existence in the life and legal culture of the Indonesian people is listed in the 1945 Constitution of the Republic of Indonesia, namely in article 18B paragraph (2) which determines "The state recognizes and respects customary law community units and their their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law". An explanation regarding the recognition of customary law by the State is also contained in article 27 paragraph (1) of the 1945 Constitution which stipulates "All citizens shall have the same position before law and government and are obliged to uphold the law and government without exception", which of the formulation of these provisions it can be concluded that both civilians and government officials without exception are obliged to uphold the laws that apply to the life and legal

[53] Soepomo. *Bab-bab tentang Hukum Adat*. (Jalarta : PT. Paradya, Paramitha, 1967), hlm. 5.
[54] https://istilahhukum.wordpress.com/2012/09/26/hukum-adat/ diakses tanggal 25 Juli 2023
[55] Soepomo , Op. City, p. 6 .

culture of Indonesian society, be it criminal law, civil law, or customary law.

One example of customary law that is recognized for its existence in the culture of Indonesian society is the customary law of kaili in Palu City, this is as regulated in Regional Government Regulation Number 9 of 2016 concerning Kaili Customary Institutions and Palu Mayor Regulation Number 38 of 2017 concerning Guidelines for Institutional Implementation Kaili custom.

In kaili customary law, dispute resolution or problems that occur in the community are resolved through customary courts or what is often referred to as *Potangara Nu'ada* , as in the case that occurred in Poboya Village, Mantikulore District, Palu City, Central Sulawesi. This case began with the emergence of a video circulating on social media in which there was a contractor for a gold mining company in the Poboya Village, who did not acknowledge the existence of a king and customary land in Palu City, so they were considered to have insulted Kaili customs. Therefore, the perpetrator is subject to witness (*givu*) by paying a fine:

1) Buffalo: 7 tails
2) Black male goat: 1 tail
3) Roosters with red feathers: 7 tails
4) Dulang: 7 pieces
5) Spear : 7 pieces
6) Custom plates: 15 pieces
7) Plain white cloth: 15 pcs
8) Plain white stone plates: 30 pieces

The payment of the fine may not be paid in cash. *the Potangara Nu'ada To Kaili* trial in Central Sulawesi is a fair trial?

2. Methods

This research is descriptive in nature, is a research that describes field facts by using normative-empirical analysis so that these facts have a connection and meaning to the problem to be studied. The data used in this study are primary data and secondary data. Primary data is data obtained or collected from data sources directly. Therefore, primary data is often referred to as original data. Secondary data is data obtained from library and document research, which is the result of research and management of other people which are usually already formed in books or documents which are usually available in libraries or privately owned. Data collection techniques were carried out through library research and field studies. The data analysis used is data analysis which is a process of simplifying data into a form that is easier to read and

easier to interpret. The data that has been collected is analyzed qualitatively using the deductive method. The deductive method is drawing conclusions by starting from general knowledge and then directed into conclusions that are more specific.

3. Findings and Discussion

Talking about customary justice and its existence in the legal system, it is necessary to first discuss the existence of indigenous peoples and their laws in the Indonesian state system.

As previously explained that Indonesian society is a society that is synonymous with custom. Before the Indonesian state was formed, in the archipelago there were already groups of people and even kingdoms with a system of customs according to that area. Communities with these customary units live according to the provisions of customary law which they agree on in groups and for generations. In such a way that they are subject to customary law, so even during the colonial era the existence of customary law was still recognized, even the existence of customary justice institutions was recognized until the issuance of Emergency Law number 1 of 1951.[56]

If we look at the provisions contained in the fourth amendment to the 1945 Constitution, Article 18B states "The state recognizes and respects the units of indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia which are regulated in the law. -law". This means that the existence of indigenous peoples along with their laws is recognized and protected by the constitution, so that everything that is the right of indigenous peoples must be given as much as possible.

Apart from being protected by the constitution, the existence of indigenous peoples is also protected by Law number 39 of 1999 concerning Human Rights as regulated in article 6 paragraph (1) and paragraph (2) which states: "In the framework of upholding human rights differences and needs, in customary law communities must be considered and protected by law, society and the government … The cultural identity of indigenous and tribal peoples including rights to customary land is protected, in line with the times."

In Article 2 paragraph (1) of the Criminal Code it is explained " The provisions referred to in Article 1 paragraph (1) do not reduce the

[56] Adeb Davega Prasna, 'Tinjauan Lembaga Peradilan Adat Minangkabau Dalam Sistem Peradilan Di Indonesia (Kajian Terhadap Peraturan Daerah Nomor 7 Tahun 2018 Tentang Nagari Di Provinsi Sumatera Barat)', *Jurnal Ilmiah Multi Disiplin Indonesia,* Vol. 2, No. 2. Februari 2022.

validity of the law that lives in society which determines that a person should be punished even though the act is not regulated in this Law", and in paragraph (2) explained "The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the Constitution of the Republic of Indonesia Year 1945, human rights and general legal principles recognized by civilized society. What is meant by "the law that lives in society that determines that a person deserves to be punished" is customary criminal law. The law that lives in the community in this article relates to the law that is still valid and developing in people's lives in Indonesia. In certain areas in Indonesia there are still unwritten legal provisions that live in society and apply as law in that area, which determines that a person should be punished. In order to provide a legal basis regarding the application of customary criminal law (adat offense), it needs to be confirmed and compiled by the government originating from the regional regulations of each place where customary criminal law applies. This compilation contains laws that live in society that qualify as customary crimes. Such a situation will not rule out and still guarantee the implementation of the principle of legality and the prohibition of analogy adhered to in this Law. Then, what is meant by "applicable in a place where the law lives" is applicable to everyone who commits customary crimes in that area. This paragraph contains guidelines in establishing customary criminal law whose validity is recognized by this law.

Furthermore, the Constitutional Court through its decision number 35/PUU-X/2012 which was read on May 16 2013 acknowledges the existence and existence of indigenous peoples as a unit whose rights are recognized and protected and guaranteed. This means that indigenous peoples and their laws must be guaranteed for their existence and sustainability by the state because they are an inseparable part of the state.

Customary justice, both in its simple form and in a solidly institutionalized form, is a means of resolving various disputes/conflicts and problems due to violations of code of conduct, both among communities and with nature and the surrounding environment.

The Kaili customary court is one of the customary courts whose existence is recognized by laws and regulations, this is as stipulated in Palu Mayor Regulation Number 38 of 2017 concerning Guidelines for the Implementation of Kaili Traditional Institutions, in Article 1 number (14) it states "Kaili Traditional Court which hereinafter referred to as

Potangara Nuada, is an institution authorized to resolve customary violations based on Kaili customary law.

The Kaili customary court is a peace trial through deliberation for consensus led by traditional stakeholders and assisted by community/religious leaders (*passipi*). The substance of the Kaili Customary Court contains the following meanings:[57]

1. Adat Kaili is a rule that has become a habit or a form of cultural ideas consisting of culture, norms , laws and rules that are related to one another to form a single system.
2. Kaili Customs are good and living habits or traditions in a society that are always followed, practiced and obeyed and obeyed

In terms of the authority or competence possessed by the customary court in Tanah Kaili, of course it is not the same as the competence possessed by the state court. Like customary law, the customary courts of the Kaili community do not strictly distinguish between civil and criminal cases. Previously, the authority of the Kaili customary court had a broad scope and could not be limited in its application with the aim of regulating the lives of fellow Kaili people and other tribes. [58] This was reaffirmed by local traditional leaders, " *there is ta to Kaili hi ledo ma mala rabatasi riara katuvua ntodea* , *is there ta hi dako gagulunamo mbaaturu katuvuata to kaili ante gera dako ri savalikuna ante mbaaturu kita mboto* " (actually our custom (adat kaili) cannot be limited to its use in social life, because this custom has long been governing the life of the Kaili people with other tribes and governing our own lives). Competence under customary justice, among other things, includes issues of *sala kana, sala baba* and *sala mbivi*).[59]

1. Sala Kana/Nakaputu Tambolo

Salah kana is a type of law that is given/imposed to someone who violates customary norms relating to words, actions and behavior in the severe category. In the case of sala kana there are several types of customary sanctions (*givu*) that apply, including:

[57] Pemerintah Daerah Kota Palu, "Peraturan Walikota Nomor 38 Tahun 2017 Tentang Pedoman Pelaksanaan Kelembagaan Adat Kaili". http://jdih.palukota.go.id/file/doc (29 Desember 2020).

[58] Tasrip J. Tanggugade, Tokoh Adat Kelurahan Birobuli Utara, wawancara oleh penulis di Birobuli Utara, 17 Juni 2021.

[59] Asni M. Ladjaru, Ketua Lembaga Adat Kel. Birobuli Utara, wawancara oleh penulis di Birobuli Utara, 22 Juni 2021

a. *Nilabu*, is a customary sanction against violation of customary law *sala kana*, which is imposed on someone by drowning in the sea;
b. *Nipali*, is a customary sanction for violating *sala kana customary law*, which is imposed on a person/family by being exiled or expelled from the village;
c. *Nibeko*, is a customary sanction for violations of *sala kana customary law* imposed on a person/family by being ostracized from social life;
d. *Bangu mate, is a customary sanction for violations of sala kana* customary law which is imposed on a person/family by replacing /paying a fine in the form of a large animal and other customary equipment in accordance with applicable regulations.[60]

2. *Sala Baba* / *Sala Mpale*
Sala baba / *sala mpale* is a type of law that is given/imposed to someone who violates customary norms relating to speech, actions and behavior in the moderate category. *Givu* (traditional sanction) *sala baba* / *sala mpale,* the form of sanction is only one category, namely the *bangu mate sanctio*. The *bangu mate* sanction is a customary sanction for violating *sala customary law baba* / *sala pale* which is imposed on a person/family by replacing /paying a fine in the form of a minimum of 2 small animals (goats) and other customary equipment in accordance with the provisions.[61]

3. *Sala Mbivi*
Sala mbivi is a sanction imposed on someone who violates customary norms relating to words, actions and behavior in the mild category. For granting customary *givu (sanctions) against violations of sala customary law mbivi* is only one category, namely the *bangu sanction mate*. *Bangu mate* is a violation of customary law imposed on a person/family by replacing/paying a fine in the form of a small animal (goat) of at least 1 tail and other customary equipment in accordance with the provisions.[62]

In this context, the types of violations (*vaya*) of customary law (*nu any*) others that may be subject to customary sanctions (*givu nuad*),

[60] Ibid.
[61] Ibid.
[62] Ibid.

which used to be (now no longer valid) under the authority of the Kaili customary court.[63]

1. *Nosimpogau santina*, is an act of adultery in blood relations, namely adultery of father and biological child or mother and biological child, brother and sister, in-laws and in-laws, grandchildren and grandmothers, in-laws of siblings and husband or wife. All of these violations are sala kana violations and are subject to *givu* (sanctions) by way of *nilabu* or *nipali*. *Nilabu* means to be sunk into the sea by having your feet tied to a large rock. As for *nipali,* it means being exiled from the village which is the locus of crime.
2. *Nopogau ante samsuvu numadika* is adultery with the empress or the royal family which is subject to *nilabu* or *nipali sanctions* ;
3. *Nobualo* is the adultery of a woman who has a legal husband with another man at the whim/temptation of women. These actions include *sala right bangumat*, subject to *givu* (sanctions), namely:
   a. *Sampoava bengga* (a big male buffalo)
   b. *Sanggau gandi* (a set of white cloth)
   c. *Samata guma* (one traditional machete)
   d. *Santonga dula* (one dulang)
   e. *Santonga tubu* mputi (white ceramic bowl)
   f. *Sudakana* (dowry) 11 to 99 rials.
   g. *Suraya posanga* (traditional plates with *pinekaso motifs* , *tava kelo*) with a total of 15-17 pieces.
4. *Nebualos* , is a form of adultery of a man who has a legal wife with another woman at the temptation/desires of men. The customary (*givu*) sanction for this offense is the same as for a *nebualo offence*;
5. *Nopangadi*, is the adultery of a woman who has a legal husband with another man at the whim/temptation of the man. The customary sanctions (*givu*) for this violation are the same as those for violators) *nebualo* and *nebualosi* ;
6. *Nepeneki* , is the act of a man deliberately visiting the house of a woman, a widow, or a married woman without a third person who is believed to be doing something indecent. If the woman objects/screams, the act is a *sala violation kana* and sanctioned *samomava proud*, but if the woman doesn't scream, but there are people who witness it then the act is a violation of *sala baba* and subject to *samoresi sanctions tovau* ;

[63] Ibid.

7. *Nolipa stop by ante thanks ntona*, is the act of a man going hand in hand with a woman who is already married without a third person and is believed to have bad intentions, and there are witnesses who see her and the woman's family object. This act is a violation of *sala kana* and sanctioned *samomava proud* ;
8. *Netatopo* / *netadil*, is the act of a man intentionally peeking at women bathing, women sleeping, women who are changing clothes and peeking at husband and wife who are in the bathroom, this action is a violation of one *of bab*, and subjected to *rash punishment tovau* ;
9. *Nosinggarau njammboko*, is a fight in the household by committing abuse and damaging household appliances/furniture or the like. This action is a violation of sala baba, the offender is subject to the tovau rashoresi sanction;
10. *Nosimmpalaisaka* is the act of a man deliberately carrying away a woman of their mutual will. This act is a violation of *sala kana* is imposed on men by the sanction *of samomava proud* ;
11. *Nosintutu*, the act of deliberately spreading false or disgraceful news to other people even though it is true, which can defame a person or group. This act is a violation of *sala mbivi* and for the perpetrators are subject to *samoresi sanctions tovau* ; And
12. *Nedavai*, is an act of lying to others that causes harm to others. This act is subject to the sanction *of samoresi tovau* .

Sanctions (*givu*) are fines (*sompoh*) that have been determined and imposed on perpetrators in customary sessions that must be paid to the customary treasurer (*polisa*). If fines (*sompoh*) are customary sanctions *salakana bangumate*, *salababa*, and *sala the mbivi* that had been set when the customary session was not paid on time, the customary institution gave warnings to the perpetrators in stages. At the maturity date and the offender has not yet paid the fine (*sompoh*), the offender concerned is subject to the *salakana sanction nipali* or banished or exiled from his place of residence.[64]

Giving fines (*sompoh*) to perpetrators still considers all aspects, starting from the economic situation of the perpetrators, the gravity of the actions committed, the willingness of the victims to forgive the perpetrators' mistakes, as well as aspects related to the survival of the perpetrator's family.[65]

In the judicial process *potangara nu'ada to Kaili* starts from:

[64] Ibid.
[65] Ibid.

1. The victim came to the place of trial (*potangara nuada*) accompanied by family or RT from where he is domiciled. The administrators of the customary institutions invite them to sit in the positions that have been determined;
2. The administrators of the customary institution had previously arranged the positions of the litigants and other invitees to anticipate things that were not desirable to happen. The victim's sitting position (*to loss*) on the left and suspect (*to sala*) on the right, and the head of the assembly (*balengga potangara*) is in the middle of the two;
3. The chairman of the trial (*balenga potangara*) examine the completeness of adat, in the form of adat sambulu and the readiness of members of other customary institutions to whom their respective duties have been assigned;
4. Before the *potangara assembly* is opened, the traditional *sambulu* that has been prepared is placed on the traditional tray, then the tray is held by all those present in the *potangara* (session) room in turn. The *Sambulu* custom is a traditional instrument consisting of betel, areca nut , gambir, betel lime and tobacco as a symbol of the nobility of the Kaili custom which becomes the validity of carrying out traditional rituals. The use of a tray to place the traditional sambulu is symbolized as a form of openness of the Kaili people in carrying out the traditional assembly (*potangara nuada*);
5. The chairman of the trial (*balenga potangara*) opened *the potangara* by asking "*Tabe*, *mamalamo rapamulata potangara, naganamo? Nagopamo* ? (Can we start this customary meeting, is that enough? Are you ready?, Then the session participants were greeted with the answer *naganamo, nagopamo* , which means that it is enough and it is ready);
6. The chairman of the trial (*balenga potangara*) then opened the session by greeting and reciting blessings on the Prophet Muhammad, followed by explaining in detail the circumstances behind the trial (*potangara*). Starting with the victim report (*to loss*) until the determination of the trial time;
7. The chairman of the trial (*balenga potangara*) asked the perpetrator (*to sala*) regarding his attitude towards the allegations against him;
8. Perpetrator (*to sala*) is given the opportunity to speak to express his version of the problem (if he thinks something is different from what was explained by the head of the trial (balengga potangara) beforehand. If he feels guilty and the suspicions

charged against him are true, then the perpetrator (to sala) usually immediately admits this followed by guilt for his actions.In this process, if the perpetrator (to sala) categorically denies and defends himself against the allegation, the chairman of the trial (balengga potangara) asks one by one the chronology of the incident and matches it with the victim's report (to loss);

9. After listening in detail to the explanation of the perpetrator (to sala), then the chairman of the trial (balengga potangara) invited the victim (to loss) to provide an additional explanation of the case. In the customary assembly (*potangara nuada*) there is nothing to cover up or not explain even if it is a disgrace. This is intended so that the traditional elders (*totua nuada*) in imposing sanctions is not wrong and does not harm any party;
10. After hearing explanations from both parties, the chairman of the trial (*balengga potangara*) examined and heard the witnesses who were present along with the available evidence. After this was done, the head of the trial (*balengga potangara*) along with traditional elders (*totua nuada*) who were present held deliberations to determine the sanction (*givu*) and the amount of the fine (*sompoh*);
11. To bind the parties, at the end of the session (*potangara*), the disputing parties forgive each other for the events that have occurred before the traditional elders (*totua nuada*). This indicates that the problem has been resolved in the customary assembly (*potangara nuada*).
12. Traditional assembly (*potangara nuada*) closed with a prayer for safety led by representatives of the religious leaders present.

In relation to the *Potangara judiciary Nu'ada To Kaili* that this trial does not conflict with statutory regulations, this is because the existence of the Kaili customary law court has been recognized by law.

Judging from the cultural and local wisdom aspects of the Kaili customary law community, customary law and sanctions have noble values and are still upheld and obeyed. Judging from the history of the development of civilization and culture, the Kaili ethnic community, which inhabits almost half of the area of Central Sulawesi Province, used to have their own customary rules as contained in the Rule of Law . *There is* (a set of customary laws). The rules contained in *the Rules Nu There* was previously used as a guideline to regulate all the behavior of the people of Kaili who live in the area concerned.

The function and role of the customary rules is to regulate the Kaili community in the area of custom. This means that every

indigenous community in the Kaili region has an autonomous position, that is, each indigenous community is independent according to the *Rule of Law* . *Nu Some* have been formulated, implemented, and used as guidelines for action for all members of society who live in a certain area. if there is a violation of these customary rules, residents may be subject to action or sanctions (*givu*) carried out by the adat council. Some of these customary sanctions are in the form of fines and some are psychological in nature, such as being excluded from the community, not being consulted, not being included in community activities, and can even be expelled from the area concerned.

Atura Nu There is a set of verbal rules that govern the behavior of the Kaili people from the aspects of *posumba* (speech), *ampena* (behavior), and *kainggua* (action). The rules were passed down from one generation to the next. These customary rules are formulated, implemented, and used as a guideline for action for community members who are in the Kaili community area. The purpose of this custom is to instill moral education for the residents and create norms so that residents do not act arbitrarily towards other residents or towards nature. So, the enactment of these customary rules is intended to create harmony in community life so that the people in the Kaili region can live in peace, peace and justice.

The determination of sanctions (*givu*) on the Kaili community is still in accordance with the conditions set by the traditional leaders, except for *sanctions bang mate* (death penalty) that has been removed from *givu* (sanctions). The determination of *givu* is highly respected by traditional community groups, it is not uncommon for traditional elders to help / assist perpetrators who are given sanctions (*givu*) because of the difficulty in fulfilling the fines given, for example a fine for a wild boar that must be fulfilled. The participation of traditional parents in fulfilling these fines aims to set an example for victims and perpetrators, and can raise awareness in victims and perpetrators, that every crime can be handled with conscience, so that relationships that have been damaged can be repaired. repair it again so that a calm, peaceful and prosperous atmosphere can be continued by the next generations.

4. Conclusion

Determination of fines (*givu*) in the *Potangara trial Nu'ada To Kaili* in positive law can be said to be fair, this is due to the existence of the *Potangara* judiciary *Nu'ada To Kaili* is recognized by the State based on Article 18B paragraph (2) of the 1945 Constitution which reads "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with

the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Constitution".

Potangara Court *Nu'ada To Kaili* in determining sanctions (*givu*) uses the family system, in order to create harmony in society so that it remains peaceful, peaceful, prosperous and just. As when the perpetrators find it difficult to fulfill the sanctions, traditional parents can help the perpetrators to make it easier to fulfill the sanctions imposed.

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Considering Non-Legal Aspects in the Settlement of Customary Land Disputes in Bali for the Sake of Justice

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Abstract

Customary land disputes in Bali seem to need serious attention from stakeholders. If this matter is not immediately resolved carefully and precisely, it can certainly disrupt the social cohesion that has been established. The settlement of customary land disputes in Bali, based on formal justice in State Court sessions, seems to have to be reconsidered. Often the settlement ignores non-legal aspects (outside positive law), which are important to consider for the sake of justice. The problems raised are: What is the basis for thinking about non-legal aspects to consider in resolving customary land disputes in Bali? And what is the form of these non-legal aspects? This paper puts forward a socio-legal approach to discuss the importance of legally considering non-legal aspects in resolving customary land disputes in Bali. It describes the non-legal aspects in question descriptively. Using this approach, this paper delivers answers to the problems that arise. The basis for considering non-legal aspects in resolving customary land disputes in Bali theoretically and juridically has its place. In the current efforts to develop national law, it is important to put forward a legal pluralism approach to realize substantive justice. The form of non-legal aspects that deserve to be considered can at least be classified into religious and socio-cultural aspects that are intertwined in the social life of the customary law community in Bali.

Keywords: Customary Land Disputes; Justice

Abstrak

Sengketa tanah adat di Bali nampaknya perlu mendapatkan perhatian yang cukup serius dari pemangku kepentingan. Jika hal tersebut tidak segera diselesaikan secara cermat dan tepat, tentu dapat menggangu kohesi sosial yang telah terjalin. Penyelesaian sengketa tanah adat di Bali yang berbasis pada keadilan formal dalam sidang-sidang Pengadilan Negara, nampaknya harus dipertimbangkan kembali. Acapkali penyelesaiannya mengabaikan aspek-aspek non hukum (di luar hukum positif) yang penting untuk dipertimbangkan menuju keadilan. Permasalahan yang dikemukakan, yaitu: Apa yang menjadi landasan berpikir aspek-aspek non hukum penting dipertimbangkan dalam penyelesaian sengketa tanah adat di Bali? dan apa wujud dari aspek-aspek non hukum tersebut? Makalah ini mengedepankan pendekatan sosio-legal untuk mendiskusikan pentingnya secara hukum mempertimbangkn aspek-aspek non hukum dalam penyelesaian sengketa

tanah adat di Bali dan menguraikan secara deskriptif aspek-aspek non hukum yang dimaksud. Menggunakan pendekatan tersebut, mengantarkan makalah ini menjawab permasalahan yang mengemuka. Landasan berpikir mempertimbangkan aspek-aspek non hukum dalam penyelesaian sengketa tanah adat di Bali secara teoretis dan yuridis mendapatkan tempatnya. Mengingat dalam upaya pembangunan hukum nasional saat ini, penting mengedepankan pendekatan pluralisme hukum dalam rangka untuk terwujudnya keadilan substantif. Wujud dari aspek-aspek non hukum yang patut untuk menjadi pertimbangan setidaknya dapat diklasifikasikan ke dalam aspek religi, dan socio-cultural yang berkelindan dalam kehidupan sosial masyarakat hukum adat di Bali.

Kata kunci: Sengketa Tanah adat, Keadilan

1. Introduction

This paper will discuss the importance of considering various non-legal aspects to achieve justice in resolving customary land disputes in Bali. In this context, customary land is land belonging to traditional villages in Bali, directly controlled by traditional villages and customary land with physical control handed over to traditional village members. Given how important the existence of customary land is for the local customary law community, it is always hoped that its existence will be maintained. It is widely known that traditional villages in Bali, which are a unit of customary law communities, are a manifestation of the existence of customary law communities in Bali.

The non-legal aspects referred to in this paper are the various aspects that determine the continuity of the relationship between the customary law community in Bali and their customary land-going beyond just considering formal juridical aspects in resolving disputes where the object is customary land. What underlies this thinking is how simple it would be if the settlement of customary land disputes is resolved by only considering one formal juridical perspective, especially considering that various aspects outside the formal juridical aspects surround customary land. The impact of the settlement only emphasizes the formal legal aspect is the realization of only procedural justice. Such justice can rule out the truth and even more substantive justice in the context of customary land tenure in Bali.

The need to consider non-legal aspects to achieve justice in resolving customary land disputes seems increasingly urgent. Based on the search results of this study, there have been various customary land disputes in Bali. Mistakes in the resolution steps can degrade the existence of the customary land and can certainly disrupt the balance and harmony of life within the traditional village. Constitutionally, it

impacts the disruption of the traditional rights of indigenous and tribal peoples, which are constitutional rights. As is the case with the dispute in the Banjaranyar Traditional Village in Tabanan Regency. It was reported that the dispute started because one of the customary lands, a *tanah ayahan desa* (customary land whose physical control is handed over to residents), was registered for certification by an unscrupulous person, then used as collateral for a debt to a bank. Consequently, as a legal step, the customary village filed a lawsuit over the certification. However, this attempt failed, so the bank seized the object of the dispute (Simabur, 2023).

Previously there was also a customary land issue that occurred in the customary village of Jro Kuta Pejeng. The dispute stems from differences in views between traditional village officials and one of the owners of the land certified in the Complete Systematic Land Registration program. Both parties have different views about the status of the land that is the object of the problem. Until now, this problem has not been resolved (Bali, 2022). Apart from these two issues of customary land disputes, many customary land disputes have occurred.

Referring to the cases above, there appears to be a gap between ideal customary land tenure and its implementation. In general, land tenure is strongly influenced by socio-religious aspects. Land, in this context, has an essential function in human life. Ismail once said that apart from being attached to sources of human welfare, land is also close to sacred values (Ismail, 2012). The religious communalistic conception of land tenure on a national basis shows the existence of religious values. Based on Harsono's point of view, it is explained that control of land rights that allow control to be carried out by individuals while still paying attention to social principles must be based on religious aspects (Harsono, 2005). Even historically, this conception originates from the conception contained in land tenure based on customary law.

This indicates that in the context of customary land tenure, it is not based on the economic aspect. This condition is very important to understand, considering that it is not uncommon for customary land disputes in Bali to be based on economic aspects. In a research conducted by Sirtha, it was explained that the problems that occur in customary land use are based on considerations of the economic value of the land, as well as being caused by a shift in the functionalization of land, which was originally attached to communal values to individual interests (Sirtha, 2008). The dominance of the economic aspect as a background for the emergence of land disputes, including customary land, more or less is also the impact of the orientation of national

development, which focuses on economic growth. Therefore, there is neglect and marginalization of customary law values and norms, traditions, and beliefs of the community, especially the rights of indigenous peoples over land tenure, through a security approach and a repressive approach (Nurjaya, 2014).

Formal-juridical approaches by prioritizing legal certainty do not necessarily negate the occurrence of customary land disputes. As explained in Law Number 5 of 1960 concerning Basic Agrarian Regulations, hereinafter referred to as the UUPA and its implementing regulations, land registration is carried out to guarantee legal certainty. Of course, in the registration process, various administrative steps need to be carried out procedurally. Ideally, with a certificate of land rights issued after the land registration process is carried out, it is hoped that it will be able to guarantee legal certainty for customary law communities. But ironically, implementing these laws causes disputes, such as in the customary village of Jro Kuta Pejeng-Gianyar Bali and various other cases.

Based on the background description above, one should consider the non-legal aspects in understanding customary land tenure affairs and settling disputes that may occur. Paradigm reorientation and legal development approach must be carried out by providing complete recognition and protection (genuine recognition and protection) to various legal institutions in people's lives other than state law (Nurjaya, 2014). One of the legal institutions referred to is customary law, a system of norms recognized and enforced by customary law communities. Customary law, in its implementation and development, is heavily influenced by various social, cultural, religious, and other aspects. The law in this context has a social basis. The social basis referred to in this paper is the social structure of the customary law community in Bali.

Satjipto Rahardjo explained that social structure is nothing but a form of organization of social life that can determine relations between institutions in society, how it arranges its social layers and how its rules are arranged, and so on. Social structure is described as a set of various values in people's lives, as well as attitudes and relationships among community members (Rahardjo, 1976). Therefore, when a customary land dispute occurs, ideally, it is very important to consider the customary law and the system and various aspects that influence its application.

Two problems are answered in this paper: What is the basis for thinking about non-legal aspects that are important to consider in resolving customary land disputes in Bali? and What are the

manifestations of these non-legal aspects? This paper puts forward a socio-legal approach to discuss the importance of legally considering non-legal aspects in the resolution of customary land disputes in Bali in a normative manner. It describes descriptively the non-legal aspects in question, which are cognitive aspects of customary land tenure in Bali.

2. Discussion

2.1. Rationale for Considering Non-Legal Aspects

The discourse on this matter should depart from the Indonesian rule of law concept. Article 1, paragraph (3) of the 1945 Constitution of the Unitary State of the Republic of Indonesia, hereinafter referred to as the 1945 Constitution, states that Indonesia is a country based on law. These provisions form the constitutional basis that all matters relating to the life of the nation and state are based on law. However, the law in these provisions is not properly interpreted in a limited way as state law concept of providing only legal certainty.

Mahfud MD (Mahfud, 2013) explained that the concept of the Indonesian legal state is a prismatic legal state that can accept and realize legal certainty and the principles of justice in its development and application. This includes making spiritual values which are no other than elements of religion, also become the basis for judging. If, then, it is felt that state law has not met expectations for the realization of a sense of justice, it is appropriate to question and even correct it. On this basis, implicitly becomes the basis for considering non-legal aspects in realizing justice.

Moving on to a higher level as a value system in law in Indonesia, Pancasila is a place to take important values embodied in law. Rahardjo once explained that developing law should always start from within the nation itself (development from within) (Rahardjo, 2009). This statement means that the development of national law should ideally depart from the basic philosophy of life within the Indonesian nation, namely Pancasila. Therefore, the legal state of Indonesia is certainly a legal state that is based on the values of Pancasila, which prioritize the values of religiosity, humanity, harmonious togetherness, and unity in the spirit of kinship to realize social justice.

Pancasila, in its position as the source of all legal sources and as a postulate, the values contained therein are valid (it is valid because it is presupposed to be valid) (Wiguna, 2021). The validity of the values contained in Pancasila should then ideologically functionally determine the validity of every law in Indonesia. In every legal development, it is impossible to ignore the purpose of the law, namely the realization of justice. Settlement of legal disputes is, of course, carried out to be able

to provide a sense of justice for the parties involved. If there is a denial of this, it indicates that *a contrario* law is no longer seen because it is not bound by justice (Paul Scholten, 1942).

Constructively, to achieve justice by considering various non-legal aspects in settling customary land disputes in Bali, it is described normatively in the substance of Indonesian law. The constitutional normative picture can also be known by understanding the provisions of Article 18B paragraph (2) of the 1945 Constitution. Legal recognition and protection of the existence of traditional villages in Bali, which are customary law community units along with their inherent traditional rights, are broken down in their normativity. It seems that the provisions regarding legal recognition and protection of customary law community units and their traditional rights follow a perspective that the constitution that truly lives in society is a living constitution. The 1945 Constitution, in this context, follows societal developments (Thontowi, 2013). This development strengthened after the reform. The reform wanted recognition of the autonomy possessed by indigenous peoples, especially with implications for the management of resources for the community's welfare.

The constitutionality of this recognition is an acknowledgment for indigenous and tribal peoples to confirm their existence and rights. Referring to the Constitutional Court Decision on case number 35/PUU-X/2012 regarding the review of Law Number 41 of 1999 concerning Forestry, the position of indigenous peoples is a legal subject with rights which is fundamentally connected to their customary territory as well as an innate right (Noer Fauzi Rachman dan Mia Siscawati, 2014). Ideally, if there is a dispute over customary land rights, all aspects of rights passed down from generation to generation should be explored and considered. Next, in the constitution, these traditional rights are also confirmed in the Chapter on human rights, namely the provisions of Article 28I paragraph (3).

Hierarchically, the MPR (People's Consultative Assembly) Decree 2001 provided an opportunity to consider cultural aspects of agrarian reform. TAP (Decree) MPR Number IX/MPR/2001 requires that in the context of agrarian reform and management of natural resources, it must be carried out with several principles. One is the principle in Article 4 letter j: "Recognize, respect, and protect the rights of indigenous peoples and the nation's cultural diversity over agrarian resources/natural resources." In these provisions, culture gets attention in efforts to enact agrarian reform.

Culture is a symbolic aspect of social life, including expressing what is good, right, and beautiful. This includes delineating ideas about

the supernatural, metaphysical, or even empirical nature of reality, including conceptions of what ought to be about right or wrong, religion, and others (Donald Black, 1976). Paying attention to culture as part of an agrarian reform effort is not wrong. Given that, in reality, culture can always influence or even become part of the values concretized into law. Esmi Warassih once explained that "law is a concretization of values formed from the culture of a society, so that every society produces culture, the law is always there in people's lives with the peculiarities displayed" (Esmi Warassih, 2005).

To achieve justice in settling customary land disputes in Bali, making the *irah-irah* (motto) in every court decision is appropriate as a guideline, "for the sake of Justice Based on Belief in the One and Only God," as written in the *irah-irah*. To achieve what is ideal in deciding a dispute, it should be realized by thinking beyond legal-formal thoughts. Borrowing from the provisions of judicial power, judges have an obligation to explore the values of law and justice that live in society. Every step of dispute resolution should also pay attention to various values and recognize living laws believed and practiced in the life of the customary law community in Bali.

Ignoring this can also be considered neglecting efforts to achieve justice. Emphasis on efforts to build law by prioritizing spiritual aspects and paying attention to sociological aspects was conveyed by Esmi Warassih. She explained that the development of national law, in socio-cultural and socio-religious aspects, has ties to the values of God in Pancasila (Esmi Warassih, 2016).

The various things that are attempted, of course, serve the steps that are not stuck on fulfilling the requirements of the rules alone. When the law created by the State is not yet, or even unable to create justice, more progressive efforts should be made. Breaking the rule could be an ideal progressive step that could be taken. There are at least three ways to break the rule (Suteki, 2018):

a. Using spiritual intelligence (spiritual quotient) to avoid the confines of regulations if they do not provide justice.
b. Providing a deeper meaning to the sound of the rules to avoid grammatically simple meanings.
c. Implementing the law compassionately by considering sides for the weak, poor, persecuted, or marginalized, not just judging logically.

Based on an international approach, which is the basis for considering various aspects outside of state law for the settlement of customary land disputes in Bali, the recognition of the rights of

indigenous people can be found in the elaboration of the following: International Convention on indigenous and tribal peoples, which later the concept was translated as indigenous peoples by the National Commission on Human Rights and the Constitutional Court. The convention was subsequently accepted by International Labour Organization (ILO). In the provisions of Article 13.1, it is stated: "... governments must respect the importance of the specific cultural and spiritual values of the indigenous peoples concerned concerning their relationship with the land or territory of authority, or both as applicable, which they occupy or if not, which they use, and especially, the collective aspects of this relationship".

Referring to the above, it can be clearly understood that land has a function that is quite vital for the continuity of culture and the existence of indigenous and tribal peoples. Even the land becomes a foothold in economic sustainability and spiritual well-being and becomes their cultural identity. The consequences of losing land for customary law communities, which incidentally are ancestral heritage, could threaten their continued existence as a society (International Labour Organization (ILO), 2003).

In addition to the convention mentioned above, the recognition of the existence of the relationship between customary law communities and their lands is also emphasized in the United Nations Declaration on The Rights of Indigenous Peoples (UNDRIP), which was adopted by the General Assembly of the United Nations on September 13, 2007. In the provisions of Article 23 paragraph (1), it is stated that "indigenous peoples have the right to the lands, territories, and resources they own or occupy traditionally or otherwise the lands, territories, and resources that have been used or acquired." Then regarding the recognition of this matter by the State mentioned in paragraph (3), "States will provide legal recognition and protection of these lands, territories, and resources. Such recognition must be made in line with respect for the indigenous people's customs, traditions, and land tenure systems.

So from that, theoretically, the basis for realizing justice by considering non-legal aspects in the settlement of customary land disputes in Bali, which was described earlier, departs from 4 (four) approaches, as follows: state law, living law (socio-legal), natural law (morals, ethics, and religion) and international law and human rights (Werner Menski, 2016). Menski used all of these approaches in designing his theory of legal pluralism. According to Sukirno, the theory put forward by Menski is very useful in building national law with a legal development paradigm that has a pluralistic nuance. This paradigm emphasizes complete and essential recognition and protection

against various laws outside of state law whose existence is recognized and enforced by society (Sukirno, 2018).

Based on this theoretical approach, the law used to settle customary land disputes in Bali is expected to create substantive justice. Suteki explains in his work, perfect justice could be realized with this theoretical approach, which can be equated with substantive justice (Suteki, 2018). Therefore, once again, it is necessary to remember that progressive thinking and steps are needed to realize justice in resolving customary land disputes in Bali. It is necessary to make legal breakthroughs by proportionally considering various non-legal aspects (outside state law). Pancasila should, of course, be used as a guide to provide value and become the soul of the outcome of the dispute resolution.

2.2. The Form of Non-Legal Aspects as Legal Considerations

As previously described, various non-legal aspects in resolving customary land disputes in Bali aim to provide a sense of justice for the customary law community in Bali. The customary law community in Bali, known as the *adat* village, is very attached to these non-legal aspects. These aspects also really influence the recognition and enforcement of customary law in the daily life of the people. For example, traditional villages in Bali are synonymous with religious values. This is reflected in the basic concept of a traditional village.

According to the Regional Regulation of the Province of Bali, Number 4 of 2019 concerning Traditional Villages in Bali, a traditional village is a "customary law community unit in Bali that has territory, position, original structure, traditional rights, own assets, traditions, manners association of community life from generation to generation in the bonds of sacred places (*kahyangan tiga* or *kahyangan desa*), with the duties and authorities as well as the right to regulate and manage their household. Referring to this concept, the element of attachment to a holy place in the form of *Kahyangan Tiga* Temple or *Kahyangan Desa* Temple in every traditional village in Bali is a manifestation of the main identity of the traditional village. At the same time, it is a characteristic that all customary activities are inseparable from religious values.

Apart from being synonymous with its religious aspects, traditional villages in Bali are also very strong with social ties, traditions, and culture. These aspects can be interpreted as basic aspects that provide identity and unique characteristics for traditional villages in Bali. So it is not wrong then that Tjokorda Raka Dherana conceptualized a traditional village in Bali as Hinduistic-religious social unity. This concept articulates a traditional village in Bali as a

unit of customary law community that functionally carries out social and religious functions, especially the teachings of Hinduism in its customary way of life (Wiana, 2004).

The existence of these aspects, which are said to have a major influence on the order of life of the people, also influences the concept and pattern of customary land tenure. Ideationally, customary land tenure in Bali is inseparable from the fact that customary land tenure in Bali is closely related to ritual, social, traditional, and cultural realities. On this basis, customary land is meaningful and plays an important role in maintaining balance and harmony in the community's life. Based on the concept, customary land in Bali belongs to a traditional village. In this context, the traditional village is legally positioned as a legal subject with rights.

Empirical facts regarding the position of traditional villages in Bali as legal subjects can be analyzed based on the provisions mandated in Article 18B, paragraph (2) of the 1945 Constitution. Furthermore, these provisions receive further explanation in the Constitutional Court Decision Case Number 31/PUU-V/2007 regarding the Review Law of the Republic of Indonesia Number 31 of 2007 concerning the Formation of the City of Tual in Maluku Province Against the 1945 Constitution (Mahkamah Konstitusi Republik Indonesia, 2007). In its practice, each traditional village in Bali has a traditional citizen called *krama desa*, bound with *Kahyangan Tiga Temple*, generally divided into *banjar-banjar adat* (smaller group of adat villages). In the context of having a group feeling, it is demonstrated by the implementation of *ayahan* (resposibility) which is done by each *krama desa* as a form of responsibility for the continuity of customs and traditions.

Then if measured from the existence of legal institutions and customary governance, of course, these two things are owned by the customary village. *Awig-awig* and *perarem* are customary law norms that are sources of law in managing the customary life, and *prajuru adat* (village officer) is a traditional administrator who runs the customary government. These customary law norms are made by *krama desa* through internal agreement of *paruman desa* (village meetings), which are organized based on the values of the teachings of Hinduism. Looking closely, *awig awig,* compiled in a traditional village, places Pancasila and the 1945 Constitution as the basis for its preparation. Furthermore, traditional villages in Bali also have a customary area called *palemahan* or *wewidangan desa* and have wealth completely separate from its manager's wealth.

This explanation is part of an effort to acknowledge the existence of indigenous peoples and their rights. In line with this, Since 1982, the

working group that focused on Indigenous Populations and became part of the Sub-Commission on the Protection of Human Rights of the United Nations has attempted to compile a document on the declaration of Indigenous Peoples' Rights. Rodolfo Stavenhagen explained that the cultural rights that stand out in the document are the right to be protected from genocide and cultural ethnocide. besides that, it is also the right to return cultural, intellectual, religious, and spiritual property taken without prior informed consent and full information that violates law, tradition, and the customs of these peoples (including the intellectual rights of indigenous peoples, which are their cultural heritage) (Stavenhagen, 2001).

In the context of national law terminology regarding rights owned by customary villages, it can be interpreted from Article II of the UUPA Conversion Provisions that states one of the land rights that can be converted is rights to *druwe desa*. The word *druwe,* based on the community of customary law in Bali, means something that is owned. Article 1, number 33 of the Regional Regulation on Traditional Villages in Bali, explains *druwe as pradruwen* (something that is owned) of the traditional village. Padruwmen of the Traditional village is interpreted as "all the assets of the traditional village, both immaterial and material." Referring to the aforementioned, in traditional village wealth, the land is the material wealth of traditional villages. However, in terms of physical mastery, it can be left to the community members. Physical control by residents, as described, is followed by a series of obligations for residents who gain control over customary land.

The obligations described above are commonly known as the *ngayah* concept. *Ngayah* is the activity of carrying out various obligations determined by *awig awig* (local customary rules) for the benefit of traditional villages. These obligations, if qualified, include activities of a public nature. The nature of this public can be understood from the functional relation of this obligation to public interests within the customary village communal sphere. Starting from this understanding, it can be seen that in a dispute over these customary lands, the law must also look at the social reality behind the concept of customary land. Tamanaha explained that law is a reflection of society. It was even further explained that every law is very closely related to the ideas, aims, and objectives of society. With almost the same meaning, the law reflects the intellectual, social, economic, and even political climate that influences the order of people's lives (Tamanaha, 2001).

Theoretically, this explanation provides an analysis that, ideally, in the context of law enforcement, including the law in customary land

dispute resolution, it should be able to reflect ideological ideas that have aims and objectives in the vision of the life of indigenous peoples in Bali. Concerning this way of thinking, the law should also pay attention to intellectuality, the social reality of the life of the customary law community in Bali, which is embodied in their local wisdom in developing the concept of customary land tenure.

Settlement of customary land disputes should be based on laws identified based on the concept of the people who recognize and practice it in their social environment as law. In this case, Tamanaha conceptualizes it as folk legal pluralism, which does not dichotomize the diversity of strong and weak laws that are recognized and practiced side by side in the social environment of society. Instead, the law must be understood in terms of coexistence and interrelatedness between state law, customary law, religious law, and others. Therefore law is not a single phenomenon defined theoretically as law (Tamanaha, 2021). Based on this theoretical basis, various non-legal aspects should be considered in resolving customary land disputes, at least classified into religious and social-cultural aspects.

2.2.1. Religious Aspects

Mastery of customary lands in Bali cannot be separated from the guidance of religious values that originate from the teachings of Hinduism. Some of these teachings are embodied in the reality of customary land tenure patterns in Bali, both in terms of physical control directly controlled by traditional villages and those controlled by indigenous peoples. *Tri Hita Karana* teachings become the basic concept of customary land tenure in Bali. *Tri Hita Karana* are three causes that can provide harmony and happiness in the order of life of the customary law community in Bali. There are three main elements in the concept of *Tri Hita Karana* these, namely: *Parhyangan*, namely the relationship between man and God, *pawongan* namely, the relationship that must be maintained well between fellow citizens; and *palemahan,* namely*,* the good relationship between humans and their environment.

These basic concepts, in pracatice, become the main elements in the formation of traditional villages in Bali. Wayan Windia said that traditional villages in Bali consist of elements contained in the teachings of *Tri Hita Karana*, that is, there is *Kahyangan Tiga* Temple or *Kahyangan Desa* as an embodiment of *parhyangan* elements, *pawongan* elements *person* are realized by the existence of harmony in the social system between members of the community and the existence of customary territories, which include customary land, as an embodiment of elements of *palemahani* (Windia, 2010).

If one looks closely, the teachings of *Tri Hita Karana* are, at the same time, a differentiator and characteristic of the customary law community in Bali. Brigitta Hauser Scahublin explains well that there are three characteristics possessed by traditional villages in Bali (Schäublin, 2013): "Three characteristics of the Balinese village are: the three village temple system (*kahyangan tiga* or *kahyangan desa*) and a village territory (*palemahan*). The villagers (*warga desa pakraman*) are also seen as those who have an inner and outer attachment to the temples and the ceremonies carried out there. Furthermore, *awig-awig* or village regulations are based on the Hindu Balinese concept of *Tri Hita Karana* (Three Causes Wellbeing) and are part of the village properties".

Based on this analysis, it can be understood that customary lands are part of the elements of *palemahan* in the teaching of *Tri Hita Karana* (Wiguna, 2016). In the settlement of customary disputes, this element is important to be considered. The basic reason is when customary land that is part of *palemahan* is damaged or even separated from part of the traditional village; it is feared that a condition of disharmony will occur. In accordance with the basic teachings of *Tri Hita Karana*, it is essential to balance the three elements in the teachings to achieve a condition of harmony. If one of these elements is disturbed, the other elements also become unbalanced.

Another important religious aspect to consider is related to the existence of customary land in Bali to maintain and even increase the *sraddha-bhakti* from community members. *Sradha* is the belief of human beings who are Hindus in the existence of God Almighty/*Ida Sang Hyang Widhi,* along with various forms of His holy light known as the Gods. To build trust or *sradha*, Hindus do *bhakti* through various work offerings done with sincerity as a form of full surrender to *Ida Sang Hyang Widhi* (Sukabawa, 2015). The concept of *sraddha-bhackti* \must be interpreted as a manifestation of the vertical relationship between the customary law community in Bali and *Ida Sang Hyang Widhi.*

Belief in the existence of *Ida Sang Hyang Widhi* and the Gods who are his holy rays is related to elements o *parhyangan* in *Tri Hita Karana*. There is a belief that these gods are placed in *Kahyangan Tiga* Temple in the Traditional Village. *Kahyangan Tiga* Temple is very close to the concept of *Tri Murti* in the teachings of Hinduism, which are conceptualized as three Gods, which are manifestations of *Ida Hyang Widhi Wasa* with their respective functions (Watra, 2018). This concept is implemented with *Pura Desa* which became the place of Lord Brahma with his function in the space of Creation *(utpetti)*, *Puseh*

Temple as a place of Lord Vishnu, who has a function as a preserver *(stiti),* and *Dalem* Temple, the place of Lord Shiva who is on duty as a smelter *(praline)*.

The temple (*pura*) is the center of various religious ritual activities. It is also the best place to do *sradha-bhakti* for the traditional villagers. The concept of physical customary land tenure by customary village residents, accompanied by a bond to carry out *ayahan* (obligations) by village residents, is one form of *sradha* and *bhakti.* The .*ayahan* carried out by traditional village residents is manifested in the context of being actively involved in holding religious rituals and developing and maintaining *Pura Kahyangan Tiga*. These various activities are, of course, carried out sincerely as a manifestation of the concept of *bhakti*.

Basically, the customary law community in Bali is taught about carrying out various religious and customary activities based on teachings of *yadnya*. The concept of *yadnya* can be said to be a basic concept in various social-religious interactions in Bali. This concept is interpreted as a sacred sacrifice carried out sincerely (Wiana, 2004). The concepts of *yadnya* and *bhakti* are strongly related. In principle, the concept of *yadnya* is not only aimed at carrying out religious rituals.*Yadnya* must be implemented in various activities based on sincerity. In the holy book Bhagavad Gita III.8 it is explained that *"Niyatam kuru karma tvam Karma jyayo hyakarmanah Sarira-yatrapi ca te na Prasidhyed akarmanah* (do your assigned duties because action is better than doing nothing; you cannot maintain your physical body alone without working). Then it was continued that the work must be done as a *yadnya*, Bhagawd Gita III.9 states:*"yajnarthat karmano nyatra loko yam karma-bandhanah, tad-artham karma kaunteya mukta-sangah samacara* (work performed as and for the holy sacrifice*(yajna)* must run. Therefore, O Kunti's Son (Arjuna), do your duty as a practice of *yajna*, so that by doing so it will remain free from bondage)".

Indeed, *yadnya* is not only done to *Ida Sang Hyang Widhi* with all his manifestations, but also to all his creations, humans, animals, and plants. Respecting, loving, and preserving his creation is also a form of respecting, loving, and preserving the relationship *with Ida Hyang Widhi Wasa*. The religious aspect is the basis for controlling customary land in Bali. Of course, the religious aspect becomes the basic guideline in implementing the traditional land control pattern in Bali. The settlement of customary land disputes in Bali that ignores these religious aspects seems to violate the main principle of controlling customary land in Bali.

2.2.2. Socio-Cultural Aspects

This aspect is closely related to the reality of the social life of indigenous peoples in Bali in relation to their customary lands. The existence of customary land in Bali is closely related to aspects of the status of indigenous people in the social order. The continued existence of customary lands in terms of lands that are physically controlled by the community individually plays an important role in determining the status of community members. Article 4 paragraph (1) of the *Awig awig* of the Traditional Village of Kawan in Bangli Regency emphasized that *krama desa* (villagers) are a Hindu and the master of the *karang desa* (customary land that residents physically control). Residents with customary land tenure are specifically classified as *krama ngarep,* citizens who have a duty to carry out *ayahan*, as a form of obligation attached to the customary land under their control. Likewise, in the Penglipuran Traditional Village, Article 6 of *Awig-Awig* of the Penglipuran Traditional Village states that one should occupy customary land to become a member of the main traditional village of Penglipuran Traditional Village.

Based on the research results conducted in this study in the Kawan Traditional Village and Penglipuran Traditional Village, the status of being a member of a traditional village will determine the rights and obligations carried and borne by the members of the traditional village. The main right obtained by indigenous village residents is to obtain control of customary land. The land tenure is utilized and used to occupy and construct residential buildings. Apart from that, indigenous village residents also have the right to receive services in social life for joy and sorrow. When one becomes *warga arep* (main villager), one has voting rights in customary meetings, including being elected and voting in customary management. In the context of carrying out religious rituals, which are carried out privately by residents, customary village residents also have the right to receive services, one of which is to ask for holy water for their religious rituals. In addition, the use of cemeteries is also permitted when there is a death ceremony among the residents' families.

In addition to the rights held by customary village residents, various obligations are inherent and must be carried out as customary citizens. Previously it was explained that obligations must be carried out, namely: *ngayah*. Various *ngayah* activities that must be carried out by customary village residents can be classified according to the teachings of *Tri Hita Karana*. Duty in the element of *parhyangan* in general, among others, is in the form of *pepeson* (fee required when

carrying out physical construction), which are incidental, and actively participates in the maintenance and implementation of various religious ceremonies in *Kahyangan Tiga* Temple.

The obligation to be done by the traditional villagers in the element of *pawongan* is to pay *patusan* (a fee in the form of rice or bereavement money when another resident experiences grief). In addition, other obligations are *suka-duka* (incidental), namely: *mepitulung* (assisting in the implementation of religious and traditional ceremonies held by other customary village residents), and in general, they are required to maintain harmonious relations in every interaction between traditional village residents. The obligation in the elements *of palemahan*, generally consists of carrying out mutual cooperation activities to maintain cleanliness in several holy places, such as maintaining the cleanliness of *Kahyangan Tiga* Temple, cemeteries, beaches, rivers, and others in the Traditional Village area.

In addition to the various rights and obligations owned by indigenous village residents, this discussion also cannot be separated from the authority of customary administrators regarding customary lands owned by traditional villages. The customary village has the authority to regulate the customary lands it owns. Some of the authority of the customary village is the authority to carry out supervision over the continuity of customary land tenure, both from the aspect of implementing obligations and the integrity of the land parcels, approving or disapproving (based on considerations) allotment, splitting or transfer of land based on customary meetings. Broadly speaking, this authority includes upholding the rights and obligations of villagers as parties who are given control over customary lands and also an authority in stages to supervise and control their implementation along with enforcement of sanctions in case of violations. Based on the description of the symbolic reality that is built up in the structure of position, status, and role of the actors involved in the reality of customary land tenure, it is illustrated that each actor has its own role, according to its position and status. Therefore, some patterns guide the actors to play their respective roles in this context.

The various descriptions of the socio-cultural aspects described above, if properly understood, contain some universal values in interactions between human beings. The values in question are equality and harmony to create unity and oneness, as contained in the Third Precept of Pancasila. This study finds that there is an obligation to carry out *ayahan* Periodically, customary village residents will gather to carry out their obligations in a series of religious ceremonies and other activities. This activity can also be interpreted as a medium of periodic

communication by indigenous village residents. In this activity, traditional village residents will greet each other and work together in the spirit of mutual cooperation in completing various *ngayah* obligations.

As a whole, customary land tenure in Bali has an important meaning in the order of life of the customary law community. Therefore, it is very difficult to understand it only in terms of positive law. A deeper understanding is needed to be able to provide a sense of justice. On this basis, in resolving customary land disputes, one should be able to understand this as a form of freedom for indigenous villagers in Bali to achieve justice and social welfare. This is in line with what Amartya Sen explained. He explained that this freedom was classified as a form of freedom from real opportunity aspects, namely, the ability to achieve something considered valuable is a form of capability. The capability to achieve something that is considered valuable as agency freedom is the ability to achieve or do something that is considered valuable or important (Sen, 2009). On this basis, in terms of constructing a construction of justice in resolving customary land disputes in Bali, the ideal is to be able to understand and also pay attention to the understanding of customary law communities and their culture. The understanding meant is none other than the understanding in constructing customary land tenure that has been internalized from generation to generation. In this case, the involvement of the role and participation of indigenous and tribal peoples is urgently needed in efforts to resolve these disputes.

3. Conclusion

Based on the description of the discussion above, a conclusion can be drawn that the rationale for considering non-legal aspects in resolving customary land disputes in Bali is based on juridical and theoretical foundations. Basically, the constitutionality of recognizing and protecting the existence of customary law community units and their traditional rights is the main foundation so that the settlement of customary land disputes in Bali is resolved fairly, especially for customary law communities. This constitutional basis successively opens opportunities to consider these non-legal aspects at the low formal juridical level. Another foundation that can be used as a basis for thinking about this is the theoretical foundation. Realizing substantive justice will not be possible if it is pursued only with state law as its main basis. Various other approaches are needed to understand better the position and function of customary land in Bali. The legal pluralism approach seems appropriate to approach it. Using a religious,

moral, and philosophical approach combined with a socio-legal approach, state law, and international law are expected to be able to realize this justice. This approach is used to understand the form of non-legal aspects in customary land tenure in Bali, which tend to be influenced by religious and socio-cultural aspects. The religious aspect is embodied in the pattern of customary land tenure in Bali, which is based on Hindu teachings, such as *Tri Hita Karana*, *Tri Murti,* and *yadnya*. Meanwhile, the socio-cultural aspect manifests itself in various social realities, namely the existence of *ngayah* obligations regarding *parhyangan*, *pawongan* and *palemahan* aspects, which is summed up in its philosophical aspect, namely to improve *sraddha-bhakti* and maintaining harmony, which leads to the creation of unity as stated in the Third Precept of Pancasila.

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Constitutional Analysis of the Need for the Tribal Peoples Bill: Initiatives to Establish a Fair Customary Court

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Abstract

The limited distribution of judicial institutions in Indonesia is generally the cause of access to justice problems, especially in areas that are still remote and far from urban centers. In certain traditional communities (indigenous people) it can also be found that state justice institutions do not meet their standards of justice. Traditional communities, whether in the form of customary law communities (Masyarakat Hukum Adat or Tribal Peoples) or those that do not yet have the status of tribal peoples, are indigenous to regions in Indonesia that often have their standards of justice. This research aims to examine the urgency of the ratification of the Tribal Peoples Bill based on the constitutional perspective, and how the Tribal Peoples Bill can realize a just indigenous justice. The writing of this article applies normative legal research methods using statutory and conceptual approaches. The results of the research show that the recognition of tribal peoples has been mandated by the framers of the constitution in Article 18 B paragraph (2) of the 1945 Constitution. Customary Courts are one of the solutions in providing access to justice to the community, especially tribal peoples. Customary Courts are organic institutions that are part of the customary law system. Because of its organic nature born from a customary system, accepting customary court decisions will be easier for tribal peoples to accept because it uses value standards of living in the local treasures. Sometimes there are relationships between individuals that eventually lead to violations of customary law. In these circumstances, customary courts step in to fill the state's inability to provide state access to justices in the territories of indigenous peoples.

Keywords: Customary Court, Justice, Tribal Peoples Bill

1. Introduction

With the presence of the state and constitution, political organizations are only positioned as states when they take the form of states. Political organizations that take the shape of ethnic groupings, kingdoms, or indigenous communities are not positioned as states (Yulianti, 2022). Furthermore, the custom of drafting a written constitution has become

one of the most significant documents in the construction of a state, rendering indigenous peoples' laws, which are often unwritten, unenforceable. This divide gives rise to a political term formed in colonial governments' colonies, called recognition (Jabalnur, 2020). A new socio-political unit can be deemed a state if it has acquired recognition from civilized countries. Indigenous laws are not regarded as legal since their presence has not been approved or acknowledged by the state in written law.

In terms of indigenous peoples' basic rights in state life, they likewise face difficult obstacles. Because constitutionalism necessitates the incorporation of human rights into constitutional norms as a sort of social contract, the rights of emerging indigenous peoples were also enshrined in constitutional texts at the time. Indigenous peoples' rights are inherent rights that are born of social processes and passed down from generation to generation. When indigenous peoples are protected by a state, the difficulty is to formalize their rights in a written constitution. According to HLA Hart, the positivization of human rights is an effort to strike a balance between the main laws that were established within the society and the secondary laws that are currently utilized to govern governmental affairs (Wiratraman, 2014). Although the positivization of human rights into written law is essentially necessary for the existence of human rights, the growth of state life, which depends on written law, makes the positivization of human rights a crucial issue.

Indigenous peoples have been in Indonesia for a very long time, and their customary rights have long been recognized under the country's legal system. Attempts were made by Indonesian legal intellectuals early in the republic to embrace customary law, which served as the basis for establishing customary rights that would later serve as the basis for the creation of national law. Because Indonesian society is made up of many different ethnic groups and has its legal locality, this is confronting a significant problem. National recognition of Indigenous Peoples is one of the results of amendments to the 1945 Constitution of the Republic of Indonesia, namely Article 18 B paragraph (2) and Article 28 I paragraph (3) which are related to the existence and rights of indigenous and tribal peoples. Article 18 paragraph (2):

> *"The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia which are regulated in law".*

Then further Article 28 I Paragraph (3):

"Cultural identity and traditional community rights are respected following the times and civilization developments".

The state is required to guarantee access to justice as one of the constitutional rights. Access to justice is a fundamental human right that the state must constantly uphold. It includes the right to receive justice as well as the assurance of an unbiased judicial system and services. Access to justice is the capacity of a person to use various legal and judicial services to seek out and secure a just settlement to legal disputes. These services consist of information on the law, counsel from attorneys and other legal professionals, formal proceedings (such as court proceedings), non-judicial conflict settlement, and enforcement mechanisms.

The main obstacles to access to justice typically include (i) issues with the operational system of the justice system (lack of cooperation between law enforcement agencies, ineffectiveness of legal aid organizations for poor justice seekers, lack of counseling before a problem is brought to court, and the high costs of the litigation process), and (ii) issues with the structural system of the justice system (elitism in the justice system, legal language that is too complex for ordinary people to understand, the problem of poverty, which makes things tough and unstable, and inadequate legal understanding among the people themselves) which are, of course, linked entangled (Abregu, 2001).

The issue of access to justice is typically brought on by Indonesia's uneven distribution of institutions of justice. Particularly in still-remote, outlying regions that are distant from the city core, this is a problem. It has also been observed that state judicial systems in some traditional cultures (of indigenous people) do not uphold their principles of justice. indigenous people, whether in the form of tribal peoples or those who do not yet have status as tribal peoples, are native inhabitants of regions in Indonesia, often having their standards of justice. Because of this standard of justice, there are frequently disputes within the region or traditional group.

Customary court is one option for ensuring society's access to justice, particularly for indigenous people. The Customary Court is a unit of the customary law system. Because it was created from a customary system, it will be simpler for indigenous people to accept customary court judgments because it applies conventional values that dwell in local treasures. This is consistent with Sicero's proverb, "*Ubi*

Societis Ibi Ius," which states that "wherever there is a society, there is law" (Mahakam, 2018). There are occasional ties between people that finally result in breaking customary law. Due to the state's incapacity to give the state access to justice in the lands of tribal peoples, thus the presence of customary court steps in to fill the gap in these cases.

Several previous studies related to this research include: **First,** research by Muhammad Dahlan in 2018 which entitled *"Rekognisi Hak Masyarakat Hukum Adat dalam Konstitusi"*. ***Second,*** research by *Vincentius P. Setyawan in 2019* which entitled *"Prospek Pemberlakuan Hukum Adat dalam Hukum Pidana Nasional"*. ***Third,*** research by Rizky Julranda et.al., in 2022 which entitled *"Penerapan Hukum Progresif sebagai Paradigma Pembangunan Hukum Nasional dalam Rancangan Undang-Undang Masyarakat Hukum Adat"*. The aforementioned three studies essentially look at the importance of recognizing tribal peoples from a variety of angles, including a constitutional review of their status, a look at the possibility of enforcing customary law from a criminal law perspective, and a look at the existence of the Tribal Peoples Bill from a progressive legal perspective. None of the three studies, however, have focused on the imperativeness of ratifying the Tribal Peoples Bill from the perspective of acknowledging customary justice, particularly in implementing fair customary justice.

As a result, the innovation presented by this research is to provide legal reasons for the necessity to ratify the Tribal Peoples Bill in a constitutional review while also recognizing customary court as a means of creating a feeling of fairness in society.

2. Methods

This paper was written using a normative research technique using a conceptual approach and a statutory approach. This conceptual approach is adopted because it differs from the beliefs, doctrines, or opinions developed in the science of law (Amiruddin & Asikin, 2006). As a result, to provide a thorough study, a study will be undertaken in this research based on legal notions such as the concept of constitutionalism to the concept of justice. While the statutory approach method examines the importance of recognizing customary justice in Indonesia, particularly via the study of the Republic of Indonesia's 1945 Constitution.

3. The Urgency of Ratifying the Tribal Peoples Bill from a Constitutional Perspective

The constitution described in this article is the Constitution in the

restricted sense, meaning that it falls under the purview of the 1945 Constitution of the Republic of Indonesia (Constitution in the written sense) (Strong, 1966). The Constitution is sometimes referred to as a charter of the country and is seen as an expression of a confession of faith that enshrines the national principles. As a result of this contention, it is intended that agreement would be reached between the government and society over each draft law that is created, serving as the primary foundation for their collaboration in attaining shared objectives. For the legal goods that are created to work in the social order of the country and state (positive law), the spirit of the nation *(volksgeist),* as defined by Von Savigny, must be appropriately accommodated in the law (Shidarta, 2006). New legislation is deemed to have accommodated what is the essence of the nation if it is in conformity with and harmony with the ideals enshrined in the Constitution (Fauzia et al., 2021).

The most important topic to consider while discussing the Constitution is its substance. In his dissertation, Bagir Manan argued the need for the Constitution to govern at least three content types, including:

a. Commitment to upholding people's and human rights;
b. The foundational legal framework of a nation; and
c. The division and limitation of constitutional tasks are also fundamental.

In practice, the guarantee of human rights in the Constitution which includes the Human Rights of Tribal Peoples certainly has different substances and systematics in various countries (Putri, 2017). For instance, India protects tribal peoples through its Constitution, which places a strong emphasis on upholding the social and political rights of tribal peoples and draws heavily from the International Labor Organization (ILO) Convention and the United Nations Declaration on the Rights of Tribal Peoples (UNDRIP) (Bijoy et al., 2010). On the one hand, Mexico is working to draft a Constitution that protects the rights of tribal peoples, with a focus on the right to self-determination, including the right to autonomy, education, infrastructure, and non-discrimination. This is because 56% of Mexico's population are tribal peoples, and the country has a sordid history of discrimination against indigenous women (*Constitution of Mexico*, 1917). Article 18B paragraph (2) of the Republic of Indonesia's 1945 Constitution (UUD NRI 1945), which regulates the recognition and protection of tribal peoples in the country, states simply that Indonesia respects the existence of tribal peoples as a sign of its awareness as a heterogeneous

nation.

The Constitution's acknowledgment and defense of tribal peoples is a reflection of the Modern State. A society governed by customary law has inherent rights that develop via social processes and intergenerational transmission (Zakaria, 2010). The ideal acknowledgment is free of cumbersome formalities and can satisfy all of the interests of the item to be recognized. The fact that indigenous peoples existed before the state, i.e., were organically developed via a variety of processes including social and political, is, as we all know, their defining trait (Julranda et al., 2022).

However, based on the laws in place at the time, the only regulation governing the process of recognizing indigenous peoples on a national level is the Tribal Peoples Bill and the Regulation of the Minister of Home Affairs Number 52 of 2004 concerning Guidelines for the Recognition and Protection of Tribal Peoples. While the Tribal Peoples Bill must be ratified as soon as possible, several aspects of its creation require revision, particularly with the proactive participation of the society, including the tribal peoples who will be impacted by the bill's presence.

In reality, it is still not ideal to be able to address issues and provide justice for indigenous peoples if we study the two recognition processes (the Tribal Peoples Bill and the Regulation of the Minister of Home Affairs Number 52 of 2004). Because it governs the recognition process, which entails the phases of identification, verification, validation, and decision from the community level to the ministry level, Article 5 of the 2020 revision of the Tribal Peoples Bill is still technocratic and bureaucratic. Regardless of whether the state recognizes the existence of indigenous peoples, it is vital in this situation to reform the system for recognizing and safeguarding those people since it will run afoul of bureaucratic processes that are rife with political interests from each stakeholder who makes recognition policies, as happened with ethnic groups Talang Mamak in Riau Province (Mongabay, 2019).

In light of the sociological perspective that may be taken on indigenous peoples in general, the proposed regulation that governs the critical review of people recognition must be rejected. Indigenous peoples will only be burdened by such a system's difficult administrative and procedural requirements, which the state would compel them to meet to maintain their position. Indigenous peoples are not organizations, NGOs, or other entities that will be dissolved or eliminated when they no longer fit the requirements. The process is adequate for the concerned indigenous peoples to proclaim their

extermination if an evaluation is required. Considering that they originated organically and must also die that way, perhaps not even at the state's hands.

Additionally, the Tribal Peoples Bill and other special agreements regarding tribal peoples' rights must be approved for the state to recognize and respect tribal people and their traditional rights as long as they are still alive and by societal advancement and the Unitary State of the Republic of Indonesia's legal principles. Even if there are currently several laws and the constitution that govern the rights of tribal peoples such as Law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 41 of 1999 concerning Forestry, and Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction, but in practice this provision has not been fulfilled. Many tribal peoples have lost their lands as a result of being incorporated into concession areas such as plantations and mines. Tribal peoples' rights are still under attack and have not received proper protection (DA, 2019).

Particularly following the adoption of Law Number 11 of 2020 Concerning Job Creation as amended by Law Number 6 of 2023 Concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 Concerning Job Creation to Become a Law, there are several findings based on research conducted by the Indonesian HuMa Association (Hidayat, 2020): **First**, there is non-uniform language in the Job Creation Law concerning tribal peoples' control and rights to their customary regions. In the context of legal matters, for example, there are expressions such as tribal peoples, indigenous peoples, local communities, and traditional communities. Meanwhile, terms such as customary rights, traditional rights, customary territories, places controlled by tribal peoples, traditional villages, and customary areas are used to regulate customary territory. **Second,** nothing has changed in terms of Tribal Peoples' regulation in this Job Creation Law with the many laws it seeks to amend. This condition maintains the current legal system, which is marked by sectoralism, disharmony, ambiguity, and half-hearted acknowledgment (conditional recognition). **Third**, the implicit premise behind the formulation of the Job Creation Law is that the rule of law governs, and if there is a law, then everyone will behave as the law intended. The preceding thought is on implementing arrangements, as well as impacted individuals and groups, as factors of effective rule of law implementation.

In other words, the Job Creation Law, which the government intends to resolve overlapping regulations does not resolve the sectoralism of regulation of tribal peoples and rights over customary

territories. This may be seen by examining the regulation's text respecting society with customary law in the Job Creation Law. The Job Creation Law also maintains the hazy distinction between tribal peoples and their customary lands, making them vulnerable to land grabs for commercial development. Additionally, it is unreasonable to expect that the Job Creation Law can help settle disputes over land ownership and resource management, which are ongoing issues for tribal peoples (HuMa Association, 2020).

The aforementioned explanation makes clear that, despite the necessity for the Tribal Peoples Bill to be approved right once, the drugs that are controlled must accurately represent the wishes of the tribal peoples. Tribal peoples are a hallmark of an agrarian country, not an industrial one when analyzed in light of their traits. This is the context for European nations without an explicit provision for tribal peoples' rights in their constitutions, including the UK, France, and the Netherlands. Private property, the cornerstone of industry and the source of individual freedom over contractual relationships was accepted in these nations. Industrialized nations will often support individual liberties to enhance the manufacturing process. As opposed to agricultural countries, which are characterized by tribal peoples that intersects with communal rights.

The existence and rights of tribal peoples are indisputable in Indonesia's background as an agricultural and ex-colonial nation (Nurtjahjo & Fuad, 2010). The founder of customary law, Van Vollenhoven, asserted that Indonesia's tribal peoples had practiced customary law, which is their legal system, since the beginning of time. Additionally, according to Snouck Hurgronje, customary law has a communal character that does not acknowledge a system of division, such as what is used in Western nations where the person is viewed as a unit apart from society. Due to the requirement that people submit to the rule of society, customary law embraces familial values (Soemadiningrat, 2008). It can be concluded as a reminder that Indonesia is a pluralistic nation where the majority of its citizens continue to uphold customary law as a source of daily law, despite constant attempts to industrialize the country. 120 million Indonesians, or 5-70 million, are estimated to be indigenous, according to figures provided by the Alliance of Indigenous Peoples of the Archipelago. These individuals have traditionally resided in Indonesia as indigenous people for centuries (Putri, 2017). F.D. Holleman in De Commune Trek in het Indonesia Rechtsleven argues that there are four special characteristics possessed by tribal peoples, namely religious magic, communal, concrete, and direct (Holleman in Hadikusuma, 2003).

Since the constitution contains a general understanding or consensus among the majority of the populace regarding the ideal structure for the state, it is imperative that the Tribal Peoples Bill be ratified constitutionally. It is because everything that is to be done in the context of administering the state must be based on the rule of law. games with shared rules (Fauzia & Hamdani, 2021). This widespread understanding serves as the foundation for including tribal peoples, whose rights the state must acknowledge. Therefore, to ratify the Tribal Peoples Bill, norms that might diminish the position and rights of indigenous peoples should be examined in light of the Constitution's principles.

4. Ratifying the Tribal Peoples Bill will Result in the Establishment of a Fair Customary Court

Early on after Indonesian independence, the concept of customary court or other phrases based on custom was acknowledged. However, once Emergency Law Number 1 of 1951 Concerning Temporary Measures to Organize the Unity of Composition, Powers, and Procedures of Civil Courts was published, the elimination of customary court and similar practices became apparent in Article 1 paragraph (2) letter b. In its evolution, particularly during the transitional era following the reformation, the implicit presence of customary court shows in several statutes that legally suggest the rebirth of the notion. The key determinant of this is the presence of disputes or issues in the social life of indigenous peoples, namely when there is an adat violation by certain persons or society.

Tribal peoples believe that a settlement based on applying and enforcing customary punishments against the offending party is the most perfect solution. Several rules indicate a tendency to promote the presence of customary court in Indonesia, even though there are no laws that officially control its existence. For instance, have a look at Letters d and e of Article 103 of Law Number 6 of 2014 Concerning Villages. The phrase *"traditional dispute resolution based on customary law in force in Traditional Villages in areas that are in line with human rights principles by prioritizing settlement by deliberation"* is found in letter d. *"Conducting the customary village court peace trial in accordance with the provisions of the legislation,"* it says in the letter e after that.

Numerous research on the customary court in diverse contexts has demonstrated the significance of peaceful communal conflict settlement processes. Both the civil and criminal judicial systems in Indonesia are seen to be affected by the prevalence of customary courts.

For remote or rural communities, the formal court is viewed as being out of reach due to the high costs involved and the complexity of the administration of the court that must be met by the people, in addition to the fact that access to justice is far from the villagers. According to sociological research, tribal peoples continue to practice and use the customary court, which is a component of the traditional rights of society units that unfortunately does not get recognition in the legal politics of judicial power (Amalia et al., 2018).

Since colonialism historically led to the dominance of European law in the legal systems of many formerly colonized nations, including Indonesia, the customary court sometimes clashes with formal law in practice. However, even though this institution lacks official recognition, it is a practical option that is frequently employed by those looking for justice, especially in cultures that continue to adhere to traditional ways of living and governing principles. Customary justice systems, which fall under the category of "informal justice" within the relevant legal system, can occasionally satisfy a feeling of justice that the formal legal system is unable to. Customary justice is a fact, according to I Ketut Suardana, because it is still in use and is used in actual human affairs. But state legislation, particularly those that deal with judicial problems, does not adequately acknowledge this fact. In addition to the geographical barriers that prevent some people from accessing the formal system as defined by laws and regulations (such as in rural communities), there are also normative reasons for the need for a customary court mechanism, such as the fact that settlement mechanisms and sanctions are occasionally not or cannot be deemed fair, not to mention the time-consuming procedures involved.

As a result, the existence of customary courts is regulated in Article 41 of the Tribal Peoples Bill, with the formula: "Disputes that occur as a result of violations of Customary Law in Customary Territories are resolved through customary court held by Customary Institutions." The acknowledgment of customary court in the tribal peoples does not imply that the state has abandoned its responsibility to protect public order. The existence of customary court recognition provides an incentive for tribal peoples, which improves the state's acknowledgment of tribal peoples. The state's acceptance of customary law is useless unless it is accompanied by a law enforcement apparatus directed by the customary law system. Therefore, it's crucial to consider the recognition of traditional justice from the standpoint of tribal peoples, who receives the judiciary's power. Additionally, if there is no customary law enforcement based on a system of customary court, then customary law will cease to exist since no one will be subject to it

anymore.

In the realm of theory, one of the foundations for the enactment of law sociologically in society is due to coercion from the authorities, regardless of whether or not the law is accepted by society (Mertokusumo, 2010). In addition to ensuring that tribal peoples follow customary law, the court serves as an institution that upholds the legitimacy of customary law. When the institution of customary court that protects customary law is not recognized by the state, it will be exceedingly difficult to retain the authority of customary law. Indigenous peoples who continue to live under customary law may experience legal ambiguity as a result of the state's failure to recognize the existence of customary courts. The rules of the tribal peoples serve as the law that is applicable in the setting of communities governed by customary law. Positive law regards consensual conjugal interactions between women and men who are not husband and wife as lawful behaviors, but such actions may be shameful and damage tribal peoples' norms and public order, therefore violators face punishment because it violates the social standards of tribal peoples. This is possible because tribal peoples' value standards are local and restricted in scope, making them more complicated than national legislation, which must accommodate all sorts of interests and norms.

Customary court judgments approved by the parties to the dispute, on the other hand, are occasionally ignored by government law enforcement personnel. This type of incident is more common in criminal situations. Cases such as murder, for example, have been settled by conventional judicial judgments. The police can still bring this case to court on the basis that the legislation that was broken was public law. In reality, both parties have accepted the verdict of the customary court. Things like these can make people nervous since the matter can be resubmitted to the state court at any moment, even though it has already been settled through the customary court procedure. To achieve legal certainty and justice in Indonesia, the state must recognize and offer a defined status to the customary court through the passage of the Tribal Peoples Bill.

The Tribal Peoples Bill makes explicit that access to justice is distributed equally throughout all regions, not only in some. This includes the unambiguous acknowledgment of customary law. There is a notion that is akin to or similar to the judiciary which has lasted up until now in numerous parts of Indonesia, for example, Bali, Aceh, Madura, and so on. Since traditional village customary institutions are unquestionably the "original composition" of tribal peoples, Village Law has developed a movement that views customary courts as a unit

with these institutions (Rahman, 2018).

Similarly, the Aceh customary court, has been enhanced by Article 6 of Law Number 44 of 1999 respecting the Privileges of the Special Province of Aceh and Article 98 of Law Number 11 of 2006 concerning the Government of Aceh. According to the two legal documents, customary institutions functioned and served as vehicles for community involvement in Aceh administration and district/city government in the areas of security, peace, harmony, and public order. However, the situation in Aceh Province is not representative of all locations in Indonesia where customary justice has not been recognized, resulting in legal confusion.

Thus, it is hoped that by ratifying the Tribal Peoples Bill, it will be possible to realize fair customary court throughout all of Indonesia, specifically in those areas where local values are still upheld, rather than just in particular areas. Because the Acehnese people feel that upholding traditions might help to keep society peaceful and in order. This is shown by Narit Maja Aceh, a proverb that has been believed by the Acehnese for many centuries and which reads, *"Ta pageu lampoeh ngon wire, ta pageu nanggroe ngon ada"*, this proverb is translated as follows "We use wire to secure the garden, and we use customs to secure the land" (Amalia et al., 2018). As a result, to implement customary law enforcement in dealing with various situations and conflicts that arise in the community, the ratification of the Indigenous Law Community Bill is required.

The customary court still has to be normalized from the perspective of constitutional law to be accepted in its use. The idea in the Bill on the Protection of Tribal Peoples that all cases committed by members of tribal peoples or in the customary territories concerned, from a criminal and private aspect, have the right to be tried, is ideal in terms of cases that can be handled or resolved by customary courts. That means even if the other party is a regular person who is not a member of that indigenous group, customary justice is still applicable here as long as the issue is still connected to custom.

In terms of institutionalization, this will adhere to the idea of customary law, which states that if indigenous peoples are recognized by the regional government as existing and having a right to exist, then customary justice can be established, with judges or other decision-makers chosen by the indigenous peoples themselves. Also outside of the other Supreme Court courtrooms, in a separate location, should be this institution of traditional justice. It will be extremely difficult to regulate the administrative procedure if it is placed under another judicial entity. Cassation and other appellate procedures cannot be used

in customary courts or be seen to be final and binding since the perspectives of judges in customary courts and Supreme Court justices are quite dissimilar and may not understand customary values. Likewise, the Supreme Court is not required to oversee the community's automatic execution of decisions rendered by customary courts, therefore this issue can be resolved without its involvement. But the Supreme Court can utilize its authority to compel the implementation of customary court rulings if they are not followed, particularly when affecting common people (Julranda et al., 2022).

5. Conclusion

The recognition and protection of indigenous peoples in Indonesia have been regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which simply states that Indonesia respects the existence of indigenous peoples. Although the constitution and several laws have regulated the rights of indigenous peoples, in practice these provisions have not been fulfilled. Many indigenous peoples' rights are still threatened and unprotected. The ratification of the Tribal Peoples Bill is constitutionally imperative because the constitution contains a general agreement or consensus among the majority of the people regarding the idealized building of the state, that whatever is to be done in the context of state administration must be based on the rules of the game that are determined together. The resolution that is considered the most ideal by indigenous peoples is through customary sanctions that are implemented and obeyed by the offending entity.

The existence of formal justice for rural communities is still considered difficult to reach, not only because access to justice is far from the village community, but also because of the high costs that must be incurred and the complexity of judicial administration that must be fulfilled by the community. The non-recognition of the existence of customary courts by the state can lead to legal uncertainty for indigenous peoples who remain steadfast in using customary law in their daily lives. Therefore, the ratification of the Tribal Peoples Bill is an effort to realize a fair Customary Court for indigenous peoples. However, the recognition of customary justice in tribal peoples does not mean that the state has been hands-off in its obligation to maintain public order, but the recognition is intensive to tribal peoples which strengthens the recognition of the state towards tribal peoples.

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The Role of Local Government in Developing Traditional Village Tourism Potential from the Perspective of Customary Law

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Abstract

Indonesia is a pluralistic country with various types of diversity, as well as cultural diversity and customs. the culture and customs of each region is one of the potentials that can be developed by the State and is one of the responsibilities of the state to preserve that culture. The government, in this case the regional government of Merauke district which is in the land border area of Indonesia, has the task of making regulations, facilitating and motivating and developing tourism potential in administrative villages and traditional villages. The role of the local government of Merauke Regency is to make traditional villages a tourism potential in Indonesia, many traditional villages in Merauke Regency can be used as tourism potentials based on customary law, this is where the role of the local government is to develop traditional tourism potential in traditional villages in the district Merauke. The aim of this research was to examine and analyze the role of local government in developing village tourism. the method used is Normative Juridical with a comparative approach. The results and discussion show that in efforts to develop the tourism potential of traditional villages in terms of the perspective of customary law the role of the government is very important as a regulator, facilitator and motivator to develop the tourism potential of the indigenous sector as well as in efforts to preserve the customs of indigenous and tribal peoples in Merauke district.

Keywords: Role, Local Government, Development, Traditional Village Tourism

1. Introduction

Indonesia as the largest archipelagic country in the world which has 17,508 islands with a coastline of 81,000 km, has enormous coastal and marine resource potential. Indonesia is also a country that has natural beauty and a very diverse culture. This is because Indonesia is

geographically located between two continents and two oceans, namely the continents of Australia and Asia, as well as the Indian and Pacific oceans. Indonesia's tourism potential in the form of 17,508 islands stretching as far as 5,120 km with a cool tropical climate both on land and on the coast and sea, from the eastern tip of Merauke to the western tip of Sabang, and from the northern tip of Miangas Island and the southern tip is on the island of Rote.

Tourism is a sector that is considered profitable and has the potential to be developed as one of the assets used as a source of income for a country. Natural and cultural wealth is an important component of tourism in Indonesia. The tourism sector is a sector that can be an alternative for community economic development. Based on Law Number 10 of 2009 concerning tourism, tourism is needed to encourage equal distribution of national business opportunities and to be able to face the challenges of local and global changes (Gusti, 2016).

In Law Number 23 of 2014 concerning Regional Government, the regions grant rights and authorities to regulate and manage their respective regions in accordance with the potential possessed by the regions to be developed, as a consequence of the implementation of regional autonomy. For this reason, local governments are expected to have the ability to identify and be able to manage the potentials that exist in their regions, to be utilized effectively and efficiently in order to carry out development activities in the framework of developing the quality of life of the people and their regions. Thus the regional government is obliged to consistently manage the potentials that can be developed, one of which is the development and management of the tourism sector, which is expected to increase regional income and improve the welfare of the community, nation and state.

So the development of tourism is essentially part of the national development effort to achieve physical and mental well-being for all Indonesian people, so that the wealth of the archipelago as capital and land for the development of the nation's culture as a whole can be enjoyed by the community.

Tourism is one of the potential non-oil and gas export commodities, which is capable of bringing in a sizeable foreign exchange for the welfare of society. For this reason, full concentration from the central government is needed, in order to support regional development financing, especially in areas that have tourism potential, so that it can be managed as optimally as possible. Thus, the tourism sector is one of the businesses that can increase the income of a region, especially in the context of supporting government implementation and development implementation.

With the existence of various policies that support the world of tourism, it will certainly provide enormous opportunities to develop the world of tourism in Indonesia, especially for regions that have a number of tourism potentials, both natural tourism and cultural tourism. There is no doubt about the important role of tourism in economic development in various countries. Tourism which is an industry in the development of other small industrial sectors.

Merauke Regency as one of the Regencies in South Papua Province has a lot of potential that has not been optimally utilized and developed, one of which is the Wasur National Park. As development develops, Merauke Regency turns out to have great potential for the development of tourism activities. Its tourist attraction is a harmonious blend of natural, traditional and community life. A well-developed tourism industry will open up opportunities for business opportunities, entrepreneurship opportunities, and ample job opportunities for the local community, even people from outside the region.

Merauke Regency has great potential in developing Indigenous village-based tourism such as Lampu Satu Beach (Puparunud, 2019), Sinai Area (Innovillage, 2022), Nawali Tourism (Rmolpapua, 2021) and many more that have not been touched, but in reality the tourism sector has not received the attention serious and optimal empowerment, because it is still being developed and managed by the local community with all the limited facilities and costs used. Therefore it is highly expected that the role of the government will be to build and help develop tourism businesses in Merauke Regency.

In line with the description above, the author will analyze and explore the extent to which the role of local government is in developing the tourism potential of traditional villages in terms of the perspective of customary law to preserve the customs of indigenous peoples and increase the income of indigenous peoples who are expected to be able to help improve the Welfare of the District's customary law communities. Merauke.

2. Methods

This study uses a normative research method with a comparative research approach (Kalalo, 2018), which is a method used by comparing the issues discussed, then taken to support the discussion, for example a comparison between the opinions of legal experts. Materials that can be collected are then analyzed qualitatively, where the results are compiled in the form of scientific papers. The data collection technique uses library research (Kalalo, 2020), which is a method used by studying literature books, laws and regulations, court

decisions and legal studies, other materials in magazines and newspapers, which relate to the subject matter discussed. then used to support the discussion. Data analysis techniques use analytical descriptive analysis techniques.

3. Findings and Discussions

3.1. Findings

The role of the local government as a facilitator for both facilities and infrastructure is an effort to facilitate access for the public as well as foreign and domestic tourists who wish to visit traditional villages by shortening the travel time to reach tourist attractions. In maintaining the culture in the village so that it continues to run, the Government must provide funds and regional employees to see firsthand the routine events that are carried out in places that are made as traditional village destinations. (Azijah, 2022)

According to Yoeti (2002) that the success of a tourist spot until the achievement of a tourist area is highly dependent on 3A, namely attractions (Attraction), accessibility (Accessibilty), and facilities (Amenities).

According to Cooper et al (1993) that there are four components that a tourist destination must have, including: (1). Attractions or Attractions, such as attractive nature, captivating regional culture and the art shown, (2). Facilities or facilities, such as the availability of lodging, restaurants, and travel agents, (3). Accessibility, such as local transportation and the availability of car rental services, as well as the availability of terminals and airports to facilitate access to tourist sites. (4) Ancillary services, namely tourism organizations needed for tourism services such as destination marketing management organizations, conventional and visitor bureaus.

The role of the local government in the development of traditional village tourism potential is viewed from the perspective of customary law in Merauke Regency. Currently, tourism is often perceived as an economic driving engine or foreign exchange earner for economic development in a country, without exception in Indonesia and especially the Merauket district government. However, in reality, tourism has a broader spectrum of development fundamentals for a country or region.

The development of the tourism sector today continues to develop along with the increasing needs and desires of humans, these needs can be in the form of physical, psychological and intellectual. Ideally a tourist area, besides requiring accommodation, supporting facilities, and infrastructure (roads, air and communication) will be

referred to as a custom-based tourist destination if it has several characteristics including: panoramas and natural beauty. The development of tourist objects does not always have to be oriented towards foreign tourists, but instead, domestic tourists need to get more attention, several tourist objects that have been developed in accordance with the direction of tourism development in Merauke district.

1) Government as regulator
   The government's role as Regulator is the government's role in preparing directives to balance the implementation of development (issuing regulations in the framework of the effectiveness and orderly administration of development). The government's role as a Regulator is to prepare directives to balance the implementation of development through the issuance of regulations as a regulator. The government provides a basic reference to the community as an instrument to regulate all empowerment implementation activities. The role of the local government as a regulator is to offer a basic reference to the community as a tool to regulate all empowerment implementation activities. That is, in this case the Government of Meruake Regency provides basic references and guidelines to all stakeholders to regulate all village management and preservation activities through regulations on the issuance of adat and decrees.

2) Government as a Facilitator
   The role of the government as a facilitator is the role of the government in providing supporting facilities for the development of areas that have tourism potential.
   The government's role as a facilitator is to create conducive conditions for the implementation of development to bridge various kinds of community interests in optimizing regional development. As a facilitator, the government is engaged in assistance through training, education and skills improvement, as well as funding or capital funding through the provision of capital assistance to empowered communities.

3) Government as Motivator
   The government as a motivator is the government's role in providing tourism information, legal protection as well as security and safety for tourists, in addition to creating a conducive climate for the development of the tourism business which includes opening up equal opportunities in doing business and also providing a lot of guidance and counseling regarding tourism besides that. maintain,

develop. and the wealth of national assets that become tourist attractions and tourism potentials.

Motivator, in tourism development, the role of local government as a motivator is needed so that the tourism business continues. Investors, communities, and entrepreneurs in the tourism sector are the main targets that need to be continuously motivated so that tourism development can run well. It cannot be denied that the tourism development process cannot be separated from the support of investors, tourism entrepreneurs and the community. (Simamora, 2022)

It is hoped that the pattern for the development of Tourism Villages will contain the following principles (Ministry of Culture and Tourism, 2011; Dewi et al, 2021):

1) Does not conflict with the customs or culture of society. In a village where ethical procedures still dominate the pattern of community life, its development as a tourist attraction must be adapted to the procedures that apply in the village.

2) Physical development to improve the quality of the village environment by developing tourism in a village does not essentially change what is already in the village, but is rather an effort to change what is in the village and then package it in such a way that it is attractive to be used as a tourist attraction. Physical development carried out in the context of village development such as adding footpaths, providing toilets, providing clean water and sanitation facilities and infrastructure is more aimed at improving the quality of the existing environment so that the village can be visited and enjoyed by tourists.

3) Paying attention to local elements and the originality of building architecture, landscape patterns and materials used in construction must highlight the characteristics of a village, to reflect the locality and authenticity of the local area.

4) Empowering the tourism village community. The important thing in developing a tourism village is the involvement of the village community in every aspect of tourism in the village. The development of tourism villages as part of the concept of "Tourism of the People's Core" implies that the village community gets the maximum benefit from tourism development in the form of providing services and services whose results can increase people's

income outside of their daily activities.

5) Pay attention to carrying capacity and protect the environment. The principles of sustainable tourism (Sustainable Tourism) must underlie the development of tourist villages. Development that exceeds the carrying capacity will have a major impact not only on the natural environment but also on the socio-cultural life of the community which will ultimately reduce the attractiveness of the village. Several forms of community involvement include the provision of accommodation facilities in the form of homestays, the provision of consumption needs for tourists, tour guides, provision of local transportation, performing arts, and others.

3.2. Discussions

In Merauke there are 17 tribes. Its tribes include: Marind, Moraori, Kanum, Yei, Kimaam, Muyu, Mandobo, Jair, Kuruwai, Kombai, Citak, Mitak, Yaghai, Awyu, Asmat, Wiyagar and Yelmek. The development and development of tourism, especially the development of tourist areas or tourist objects in general, follow the flow or life cycle of tourism, which is better known as the Tourist Area Life Cycle (TLC) so that the position of tourism to be developed can be well known and further development, marketing and marketing programs can be determined. The goals of tourism development can be determined precisely.

Tourism potential is at the stage of finding and showing destinations that have the potential to be developed into tourist attractions or destinations because they are supported by unspoiled natural beauty, natural tourist attractions are still very original, on the other hand there have been small number of tourist visits and they are still freely able to meet and communicate and interact with local residents. These characteristics are sufficient to be used as reasons for the development of an area into a tourist destination or attraction.

The traditional village tourism area in Merauke district is very potential and has not yet been fully exposed. This traditional village tourism area has an attraction because it is a tourist object that is patterned towards the Customary Law Community and is very interesting to study the possibility of its development which is interpreted as preserving adat.

Merauke Regency as one of the regencies that has a variety of tourism objects that are rich and has the potential for tourism development, but with various limitations, therefore tourism development is not going well. Apart from having traditional village

tourism objects, there are other tourist objects that can be developed such as life-based beach tourism of the Indigenous Hulkum Community which can gradually try to develop tourism objects by providing various supporting facilities so that they can attract the number of tourist visits both from within and outside country.

The Regional Government is obliged to prepare all work programs and facilities and infrastructure for activities as should be carried out by the government in an effort to develop tourism potential based on traditional villages such as:

1) Natural Attractions

   Merauke is one of the eastern regions of Indonesia which is an area that extends directly to the State of Papua New Guinea, where the majority of the original population is the Marind or Marind-Anim tribe (Anim = people). Some argue that the original Merauke tribe is the Malind tribe, while the Marind tribe is a tribe that has been mixed with tribes from outside Merauke which has led to cross-marriage between them, while the Marind tribe is a group of Malind tribes that have been mixed with other tribes. Currently to find the Malind tribe is very difficult. The Malind or Marind tribe has 7 sub-tribes, namely Gebze, Mahuze, Ndiken, Kaie, Balagaize, Samkakai, and Basikbasik (Pusaka, 2013).

   The general state of the geography of Merauke. If viewed according to the altitude class, Merauke Regency is a lowland which has an altitude class between 0 – 60 meters above sea level. In general, the topography of Merauke Regency is flat and swampy along the coast, while the geographical condition is still relatively natural forest.

   By looking at the topographical condition of Merauke Regency, it is very good to develop natural forest potential based on traditional village tourism management, this is because the forest area in Merauke Regency is also a residential location or village inhabited by indigenous peoples.

2) Art Attractions

   The culture in Merauke City is very diverse. The diversity of cultural customs that exist in the city of Merauke makes its own beauty. Such as traditional dances, diverse cultural tribes and the customs of each indigenous tribe itself.

   The socio-cultural characteristics of the community in the Merauke Regency area, like other South Papuan communities, generally include the classification of a homogeneous society, which is characterized by the characteristics and character of a

developing community that generally have the same characteristics. Especially for the Merauke Regency area which has regional potential, most of it is still wilderness. Judging from the pattern of habits that are currently developing, the dominant pattern of community behavior is the nature of mutual cooperation, especially when the implementation of development activities is carried out together. One of the cultural characteristics that is still prominent in the Merauke Regency area is traditional ceremonies or also often called traditional rituals or traditional sitting, traditional dances and other rituals performed by traditional groups.

Art forms and traditions that develop and can become tourist attractions include: Traditional Dances, traditional dances in Merauke Regency, namely the Gatzi Dance. The Gatzi dance is danced when there are special events such as the birth of a child, a traditional party, and also as a welcome for the army. Men and women, adults and children can dance it. The Gatzi dancers wear special clothes made from sago leaf fiber and young coconut leaves. Their faces are also decorated with special motifs that reflect their clans.

In Gatzi style, the men play the tifa. It is the sound of the tifa that accompanies the footsteps of the guides who dance around in this circle. These tifa sounds are the accompanying music. There is no specific time limit for the Gatzi Dance. This dance can be danced for just a few minutes, or hours.

Each traditional village has potential that can be developed by the local government in an effort to preserve the dance culture of indigenous peoples and can also be a source of tourism potential that can be explored by the government.

3) Community Indigenous Rituals

Traditional ceremonies or traditional rituals that are a tourist attraction and are still often carried out by people in Merauke Regency, one of which is Tanam Sasi, a traditional death ceremony by the Marind Anim Tribe. or the Marind-Anim tribe. The Marind tribe resides in a large area in West Papua. The word anim in the naming of the Marind Anim tribe means male and the word anum means female. The population of this tribe is estimated at 5,000 to 7,000 people. The sasi planting ceremony is always carried out by the Marind tribe and has an impact on the results of typical Papuan wood carvings which are well known to foreign countries. The Papuan people who carry out the sasi planting ceremony believe that carvings on sasi wood have several special meanings, such as the

presence of ancestral spirits, a symbol of belief in living things and a symbol of beauty and works of art.

Traditional ceremonies or traditional rituals also need to be preserved because they can be an attraction for tourists visiting Merauke Regency, because traditional village people still often carry out traditional rituals, both Sasi traditional rituals and other traditional rituals.

4) Provision of Tourism and Marketing Information
Related to marketing, the image of tourism is very important. Therefore it is necessary to build self-identity and image which are the main theme of marketing tourism objects in Merauke Regency. The Merauke Regency Tourism Office is required to carry out promotions through social media and print media which contain the beauty of natural tourist objects in Merauke Regency with the aim of attracting tourists both from abroad and local tourists.

Based on the results of the discussion here, it can be seen that local governments have an important role in developing and managing traditional village-based tourism. Customary law which in the community has directly lived and developed as it exists in people's lives so it should be in the effort to develop this tourism potential to see from the existence of indigenous peoples who continue to maintain their culture, customs and continue to preserve their culture. The state, in this case the regional government, must immediately make a regulation for the development of traditional village-based tourism potential which still adheres to its customary law which has developed in accordance with the times, but its customary law is maintained and preserved in each of its descendants.

4. Conclusion

The role of local government in developing tourism potential of traditional villages in terms of the perspective of customary law, namely the local government must act as a regulator, facilitator and motivator in efforts to develop tourism potential for indigenous peoples. Local government in the development of natural tourism objects cannot be said to be effective, this is because the Management of Traditional Villages has not been managed in accordance with applicable laws and regulations. The government in developing the tourism potential of Traditional Villages can be said to be effective because the government as a facilitator provides facilities and infrastructure, accommodation, tourism support facilities, as well as

infrastructure in the form of access roads leading to tourist areas that are already good, but quality human resources who have tourism insights placed in every area. area is inadequate or not trained. The local government has not been effective in providing information about traditional village natural attractions and marketing them through print media, local radio electronic media, websites, social media on the internet), but they do provide guidance and counseling in the form of foreign language training and providing business assistance to local communities in Traditional Village tourist attraction in developing tourism supporting facilities.

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Keberadaan Hukum Adat dan Peradilan Adat Dalam Bingkai KUHP Nasional

(*The Existence of Customary Law and Customary Courts Within the Frame of the National Criminal Code*)

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Abstrak

Artikel ini bertujuan untuk menganalisis keberadaan 'Hukum Adat' dan 'Peradilan Adat' menurut KUHP Nasional. Konsep Hukum Adat memang terdapat dalam KUHP Nasional, tetapi membutuhkan kejelasan keberadaan dan implikasi hukumnya. Sedang konsep 'Peradilan Adat' secara eksplisit tidak diatur dalam KUHP Nasional. Meskipun demikian, terdapat beberapa konsep hukum terkait erat dengan entitas 'Peradilan Adat', sebagaimana diatur dalam Pasal 2 KUHP Nasional, yaitu: 'hukum yang hidup dalam masyarakat'; 'hukum adat'; 'tindak pidana adat'; 'hukum pidana adat'; 'seseorang patut dipidana, walaupun perbuatan tersebut tidak diatur dalam Undang-Undang'; serta 'berkaitan dengan 'hukum tidak tertulis yang masih berlaku dan berkembang dalam kehidupan masyarakat di Indonesia'. walaupun perbuatan tersebut tidak diatur dalam Undang-Undang'. Dikaitkan dengan ajaran 'Prinsip Realitas' dari Aristoteles, yaitu Prinsip Material ('causa materials') terkait dengan materi atau substansi dan Prinsip Formal ('causa formalis') terkait wadah dan tempat, dapat digunakan sebagai ikhtiar untuk menunjukkan keberadaan 'Peradilan Adat' beserta urgensinya. Kedua prinsip tersebut merupakan satu kesatuan utuh (two in one). Norma hukum adat sebagai substansi harus mempunyai 'Peradilan Adat' sebagai wadah. Isu hukum artikel ini adalah ketidaktegasan dan ketidaktuntasan aturan hukum terkait hukum adat dan 'Peradilan Adat'. Metode penelitian yang digunakan adalah penelitian teoritis (theoretical research), dengan menggunakan pendekatan konseptual dan analisis preskriptif, berupa argumentasi hukum tentang keberadaan Hukum Adat dan 'Peradilan Adat'.

Kata Kunci: *Keberadaan; Hukum Adat; Peradilan Adat; KUHP Nasional*

Abstract

This article analyzes the existence of Customary Law and Customary Court according to the National Criminal Code. Customary Law is contained in the National Criminal Code but requires clarification of its existence and legal implications. At the same time, the idea of a Customary Court is not regulated in the National Criminal Code. Nonetheless, there are several legal concepts closely related to the entity Customary Court, as stipulated in Article 2 of the National Criminal Code, namely: living law; customary law; customary crime; living criminal law; a person deserves to be punished, even though the act is not regulated in the law; as well as related to 'unwritten laws that are still valid and developing in people's lives in Indonesia. Even though the act is not regulated in the law, associated with the teachings of the Reality Principle from Aristotle, namely the Material Principle ('causa materials') related to matter or substance and the Formal Principle ('causa formalis') related to containers and places, can be used as an endeavor to show the existence of 'Customary Courts' along with the urgency. These two principles constitute a unified whole (two in one). Customary law norms as a substance must have a 'Customary Court' as a forum. The legal issue in this article is the indecisiveness and incompleteness of legal regulations related to 'Customary Law' and 'Customary Courts'. The research method used is theoretical research, using a conceptual approach and prescriptive analysis in the form of legal arguments about the existence of Customary Law and 'Customary Courts'.

Keywords: *Existence; Customary law; Customary Courts; National Criminal Code*

1. Introduction

The existence of Customary Law is regulated in the National Criminal Code. Article 2 paragraph (1) of the National Criminal Code stipulates: "The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in a society which determines that a person should be punished, even though the act is not regulated in this Law." Article 2 paragraph (2) of the National Criminal Code stipulates: "The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is by the values contained in Pancasila, the Law -The 1945 Constitution of the Republic of Indonesia, human rights, as well as the general legal principles recognized by the people of nations". While Article 2 paragraph (3) of the National Criminal Code stipulates: "Government Regulations regulate provisions regarding procedures and criteria for establishing laws that live in a society". Explanation of Article 2, paragraph (1) of the National Criminal Code: "What is meant by the law that lives in society is customary law which determines that a person who commits certain acts deserves punishment. The law in a

community in this article relates to unwritten laws that are still valid and developing in people's lives in Indonesia. To strengthen the enforceability of the law that lives in the community, regional regulations (Perda) regulate these customary crimes.

The elucidation of Article 2 paragraph (2) of the National Criminal Code states: "In this provision, what is meant by "applies where the law lives" applies to everyone who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law whose validity is recognized by this law.

The elucidation of Article 2 paragraph (3) of the National Criminal Code states: "Government Regulations in this provision are guidelines for regions in establishing laws that live in a society in Regional Regulations.

The essence of Article 2 of the National Criminal Code: (a) recognizes the existence of living laws in society (can be called 'living laws'); (b) 'living law' is the basis for criminal acts; (c) The need for a Government Regulation (PP) to regulate the procedures and criteria for establishing a 'living law'; (d) the 'living law' is 'customary law', in the form of 'unwritten law' which is still valid and developing in people's lives in Indonesia; (e) strengthening the enforcement of 'living law' by using regional regulations (Perda) to regulate 'customary crimes'; (f) the meaning of the phrase "applies in a place where the law lives" is applied to Everyone who commits customary crimes in that area; and (g) "Government Regulation (PP) in this provision is a guideline for regions in establishing 'living laws' in Regional Regulations. Related to the link between the phrases 'living law' and 'customary crime', it can be called 'living criminal law'.

The existence of the 'living criminal law' and the Customary Courts must be understood by linking the construction of Article 1 paragraph (1) of the National Criminal Code, which stipulates: “No action can be subject to criminal sanctions and/or actions, except for the force of criminal regulations contained in laws and regulations. - invitations that existed before the act was carried out.

The provisions of the article above are the embodiment of the Legality Principle. The principle of legality, whose key is law (lex), contains several meanings, namely: (a) lex temporis delicti (the obligation to apply criminal law at the time the act is committed); (b) Lex scripta (must be written or regulated in the Criminal Code); (c) Lex certa (Criminal provisions must be formulated in detail and carefully, the form and severity of the punishment must be clearly defined and distinguishable, so that the meaning is definite); (d) Lex praevia (the penal law is prohibited from being retroactive; the non-retroactive

principle); and (e) Lex stricta (criminal legislation must be strictly formulated, prohibition of sentencing based on analogy; principle of non-analogy). The provisions of this article clearly regulate criminal law (statute criminal law).

We compare it with the provisions of Article 2 paragraph (1) of the National Criminal Code, that "The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in a society which determines that a person should be punished even though the act is not regulated in this Law".

The phrase that needs to be considered is 'do not reduce the validity of the law that lives in society'. The interpretation of this phrase is that the existence of 'living criminal law' is recognized but is positioned as subordinate to 'statute criminal law'.

The position of customary law is in line with the construction of Article 18B paragraph (2) of the 1947 Constitution, which stipulates: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, regulated by law. The phrase 'as long as it is still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia' reinforces the inferiority of 'living law' compared to 'statute criminal law'.

The 'statute criminal law' is enforced through the 'criminal procedural law' (criminal procedural law) contained in the KUHAP (Book of Criminal Law). KUHAP is a collection of norms regarding 'criminal justice' implemented by a 'criminal court' (criminal court). What about 'customary law' and 'customary justice'. It is fully realized that the entity 'customary law' is a unified whole, which does not distinguish between 'criminal law', 'civil law', and other areas of law. But simply to compare the existence of 'statute criminal law' with customary law and customary criminal acts as unwritten laws that live in society, it is not too wrong to bring up the concept of 'living criminal law' in (customary law).

Another thing that needs to be analyzed is the existence of 'Customary justice and Court'. The phrase 'Customary Court' is not regulated in the National Criminal Code. The National Criminal Code only regulates 'customary law', a collection of living criminal law norms. There is no clarity about the existence of 'customary justice' and 'customary court'. The concept of 'customary criminal justice', carried out by the 'customary criminal court' is still at the level of legal ideas (legal idea/recht idee).

The existence of a 'customary justice' and a 'customary court' depends on the PP and Perda as stated in the following phrases: (a) the need for a Government Regulation (PP) to regulate the procedures and criteria for establishing a 'living law'; (b) strengthening the enforcement of the 'living law' by using Regional Regulations (Perda) to regulate 'Customary Criminal Acts'; and (c) Government Regulations (PP) are guidelines for regions in establishing 'living laws' in Regional Regulations.

The legal issue in this research is the indecisiveness and incompleteness of the regulation of 'living law' with its various aspects.

2. Methods

The research method used is theoretical research, using a conceptual approach and prescriptive analysis in the form of legal arguments about the existence of Customary Law and Customary Courts.

3. Findings and Discussions

3.1. Findings

The findings in this article are:

a. The ambiguity and incompleteness of customary law and customary justice as regulated in the National Criminal Code. Customary Law (in the aspect of 'living criminal law') has indeed been held in Article 2 of the National Criminal Code, but there are several aspects that need to be clarified and emphasized in these provisions;
b. The existence of customary law and judiciary must be positioned as a unified whole (two in one);
c. Bearing in mind that the existence of customary law and customary justice are only regulated by Government Regulations as a guideline for Regional Regulations to stipulate them, the legal material to be defined is also limited.

3.2. Discussions

3.2.1. The ambiguity and indecisiveness of several aspects in Article 2 of the National Criminal Code

Several legal concepts need explanation and confirmation in Article 2, paragraph (1) of the National Criminal Code. One of the phrases in the Elucidation of Article 2 paragraph (1) of the National Criminal Code is that: "What is meant by "law that lives in society" is customary law which determines that someone who commits specific actions deserves punishment.

The substantial question is whether the 'law that lives in society' is the same as customary law? Is there a considerable difference? If the

name and substance are the same, why not directly use the concept of Customary Law. There is no need to go around and around to explain all the living laws in society, but in the end, it all returned to the customary law nomenclature. Thus, it is necessary to change the formulation to: "Article 1 paragraph (1) does not reduce the application of customary law which determines that a person should be punished, even though the act is not regulated in this Law".

The Explanation of Article 2 paragraph (1) of the National Criminal Code also states: "The law that lives in a society in this article relates to unwritten laws that are still valid and developing in people's lives in Indonesia". 'Living law' is in the form of unwritten law and is still valid and developing in people's lives. Will the PP and Perda that regulate the unwritten 'living law' turn into a written law? We will discuss this at the end.

Another explanation in Article 2, paragraph (1) of the Criminal Code is: "To strengthen the enforcement of the law that lives in the community, the Regional Regulation regulates these Customary Crimes". The act that deserves to be punished is in the form of 'customary crime'. The focus of Article 2 of the Criminal Code is 'customary crime, which means that it belongs to the scope of 'customary criminal law', which can be called 'living/customary law'.

While in the Explanation of Article 2 paragraph (3) of the National Criminal Code: "Government Regulations in this provision are guidelines for regions in establishing laws that live in a society in Regional Regulations". We will discuss the existence and function of PP and Perda in the last section.

3.2.2. The Existence of Customary Law and Customary Courts Must Be Positioned as One Whole Unit

Customary law in Indonesia is essentially a norm or rule determining what citizens should (may or may not) do. The definition of norms, according to the Merriem-Webster Dictionary: (1) an authoritative standard: model, and (2) a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior[66]. Principles of correct behavior that bind group members and serve to guide, control, or regulate appropriate and acceptable behavior.

Another definition of norms is 'the rules or expectations that determine and regulate appropriate behavior within a culture, group, or

[66] https://www.merriam-webster.com/dictionary/norm

society'[67]. Principles of correct behavior bind group members and function to guide, control, or regulate appropriate and acceptable behavior.

Regarding norms, according to Bogdan Cristian Trandafirescu: "The norm, generally speaking, can be defined as "a model, a rule, a prescription that settles the behavior of individuals, groups, organizations, collectivities". The social order result from human behavior in conformity with the norms. That determines this conformity, the efficiency of the norm, is the sanction, an element common to all norms, irrespective of their nature (moral, legal, religious, etc.)[68]. Generally, norms can be defined as "models, rules, prescriptions that govern the behavior of individuals, groups, organizations, collectivities. Social order is the result of human behavior by the norms. What determines this suitability is the efficiency of norms, sanctions, and elements common to all norms, regardless of their nature (moral, legal, religious, etc.).

Legal norms (in this case, customary law) contain rules governing the behavior of (members) of society to create social order. In other words, the social order must be based on customary law norms (living law).

According to Syofyan Hadi, community, there are always norms that regulate relationships between individuals. Cicero emphasized the adage 'ubi societas ibi ius' (where there is society, there is the law), in every community, there are always laws that regulate people's legal behavior. Law is part of the cultural development of society. No wonder law is said a product of culture (law as a product of culture).[69]

Eugen Erlich first put forward the term 'the living law' was first put forward as a contrarian concept of 'state law' (law that was deliberately made by the state, called positive law)[70]. For Eugen Ehrlich, the development of law is centered on society itself, not on the formation of laws by the state, judges' decisions, or the development of the science of law. Eugen Ehrlich wants to convey that society is the primary source of law. The Law cannot be separated from society. On this basis, Eugen Ehrlich stated that the living law is a law that

[67] https://sociologydictionary.org/norm/#definition_of_norm
[68] *Trandafirescu, Bogdan Cristian,* The Juridical Norm and The Moral Norm*, The 6thInternational Conference of PhD students, University of Miskolc*, Hungary, 12-18 august 2007, Published by University of Miskolc, Inovation and Thechnology transfer centre, ISBN 978-963-661-783-7 Ö ISBN 978-963-661-782-0
[69] Hadi, Syofyan, Hukum Positif dan The Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat), *DiH Jurnal Ilmu Hukum*, Volume 13 Nomor 26, Agustus 2017, hal 259
[70] *Ibid*., hal 261

dominates life itself even though it has not been included in a legal proposition.[71]

According to Tolkah, "Customary law is defined as assets owned by the Indonesian nation and developing in society. However, the existence of customary laws is often questioned as to what extent these laws can be applied. In several criminal law cases in Indonesia, several regions still use the customary law system as an alternative to decisions because its role in law enforcement is quite dominant."[72] Customary law is a wealth owned by the Indonesian people and developed in society. The existence of customary law is often questioned to what extent such customary law can be applied. In several criminal law cases in Indonesia, several regions still use the customary law system as an alternative to decisions. This is due to the ruling because enforcement of the 'statute criminal law' is still dominant.

It was continued that: As part of the laws that live in society, customary criminal law is perceived as just law and, therefore, effective in restoring the balance (harmony) disturbed by a criminal act. Positive Law without customary law is like 'curry without salt'[73]. As part of the living law in society, customary criminal law is seen as a just and, therefore, effective law to restore balance (harmony) disturbed by a crime. Thus, 'the living law' is another name for 'customary law'.

The existence of 'living/customary law', especially customary criminal law (living/customary criminal law) is regulated in Article 2 of the National Criminal Code, with contains customary crimes. In Chapter XXXIV concerning Crimes Based on Laws Living in Society, Article 597 paragraph (1) of the National Criminal Code determines:

(1) Any person who commits an act which, according to the law living in society, is declared as a prohibited act shall be punished with a crime;
(2) The punishment, as referred to in paragraph (1) is in the form of fulfilling customary obligations as referred to in Article 66 paragraph (1) letter f.

The elucidation of Article 597 of the National Criminal Code states: "What is meant by "acts that according to the law living in

[71] *Ibid*.
[72] Tolkah, Customary Law Existency in The Modernization of Criminal Law in Indonesia, *Varia Justicia Vol. 17 No.1 (2021)* pp. 72-89 pISSN: 1907-3216|eISSN: 2579-5198, hal 72
[73] *Ibid.*, hal 80-81

society are declared as prohibited acts" refers to the provisions of Article 2 paragraph (1) of the National Criminal Code. The construction of the article substantially regulates customary crime, the sanction of which is 'fulfillment of customary obligations' as referred to in Article 66 paragraph (1) letter f.

The concept of criminal sanctions in the National Criminal Code is regulated in Article 64 of the National Criminal Code, which stipulates: "Criminal consists of (a) principal punishment; (b) additional punishment; and (c) crimes that are specific in nature for certain criminal acts specified in the law". Whereas Article 66 of the National Criminal Code stipulates: "Additional punishments as referred to in Article 64 letter b consist of (a) revocation of certain rights; (b) confiscation of certain goods and/or invoices; (c) announcement of the judge's decision; (d) payment of compensation; (e) revocation of certain permits; and (f) fulfillment of local customary obligations".

As a note, criminal law should be divided equally between 'statute criminal law' and 'living criminal law'. The Law must be understood as a unified whole, and it's just that there are 'written' and 'unwritten' forms. It is not necessarily that the 'unwritten' law is in a subordinate and inferior position. The difference between the two is an 'unscientific distinction'.

The distinction between written and unwritten… is not scientific. There is no constitution which is wholly written. Nor is there anything that is entirely unwritten. Every written and unwritten constitution has an unwritten element in it, and every unwritten constitution has a written component. There is no constitution (read: law) which is entirely written. Also, nothing is completely unwritten. Every written law has an unwritten element, in every unwritten law has a written element [74]. Written and unwritten laws are not in the concept of separation but division.

According to Faisal Arief et al., regarding the structure of 'customary law' that:

> *"The unstructured form of customary law exists because community organizations are not strong enough to support law's existence and operational capacity. This is because society is managed by people known as charismatic leaders who give the community an*

[74] https://lawaspect.com/written-law-unwritten-law/

impersonal organized structure. Thus, the implication is the absence of a certain value of unwritten law in traditional societies"[75].

The unstructured form of customary law occurs because community organizations are not strong enough to support the existence and ability to apply the law. This is because society is managed by charismatic leaders, who give the community an impersonally organized structure. Thus, the implication is that there is no particular value of unwritten law in traditional society.

'Customary law' and 'customary justice' can be explained as follows. Customary law consists of norms as 'legal ideas' and is already embodied in action formulas). There are 2 (two) ideas that need to be put forward, namely the opinions of Aristotle and Lawrence M. Friedman.

According to Aristotle, that: *"all reality is contained in two elements: matter (hyle) and form (morphe). This material is also referred to as potential. Matter is not something that has absolutely 'existed', but something that "may exist"*.[76]

He continued again, for practical purposes, Aristotle was the first to distinguish between matter (hypokeimenon or hyle) and form (eidos or morphe). He rejected the abstract Platonic notion of form and argued that every sensible object consists of matter and form, neither of which can exist without the other[77]. Aristotle was the first to distinguish between matter (hypokeimenon or hyle) and form (eidos or morphe). He rejected Plato's abstract notion of form. Aristotle argued that every object consists of matter and form (container). Neither can exist without the other (two in one)

Mark Sentecy argues, *"Thus, it is a movement that leads Aristotle to conclude that substance and form are energy and that unity of being is possible*[78]*. Aristotle concluded that substance and form are 'energeia' (Latin), and the unity of being is necessary"*.

Paul David Mannick argues: *"The argument exploits the distinction drawn by Aristotle on several occasions in the Metaphysics between the material substrata of a substance and the subjects of qualities"*. The development of the position hinges on an analysis of

[75] Arif, Faisal, Bernat Panjaitan, Nimrot Siahaan, Implementation of Unwritten Laws As A Breakthrough in Criminal Law Enforcement In Indonesia, *Journal of Social Research*, http://ijsr.internationaljournallabs.com/index.php/ijsr, hal 1312
[76] https://www.google.com/search?client=firefox-b-d&q=prinsip+realitas+Aristoteles
[77] https://www.google.com/search?client=firefox-b-d&q=hyle-morphe-aristotle
[78] Sentecy, Mark, Aristotle: Movement and the Structure of Being, Dissertation, Boston College University Libraries, 2012, hal 1

matter and forms in terms of the relations of potentiality and actuality conceived as contemporary modes of existence[79]. The story of places depends on the study of matter and formation in terms of the relationship of potentiality and actuality, understood as modes of existence.

Aristotle's ideas, when associated with customary law, as follows. Customary Law, in principle, consists of legal principles, legal norms and legal rules. Legal principles are material from legal norms as a container. Legal norms are material from legal rules (containers)[80]. Next, the rule of law is material from customary courts, and customary justice is material from customary courts.

Novian Widiadharma argues: *"Causality is a fundamental concept in philosophy because it is essential to understand how things work in the world"*. Causality refers to the relationship between something event (cause) and a second event (effect), where the second event is the result of the first. Philosophers are interested in causation because it helps them explain why things happen in the world and how we can predict what will happen next. Causality is also essential because it relates to other philosophical concepts such as time, space, and agency.[81]

Customary law contains legal ideas (*rechtidee*) as legal principles based on 'causa material' legal norms formed in prohibitions, obligations, and permissibility. Then, legal rules based on the 'formal causa', legal rules (unwritten) are created. 'Causa final' relates to purpose, something that must be addressed from customary law norms. As usual, law, including customary law, always aims to protect human's physical and existential aspects of humans in social life. 'Efficient causa' teaches about the functions that must be carried out to achieve legal objectives.

Next, we examine the ideas of Lawrence Friedman. According to Erma Rusdiana that:*"In his theory, Lawrence Friedman argues that the effectiveness and success of law enforcement depends on three elements of the legal system: the structure of law, the substance of law, and the legal culture. The legal structure includes law enforcement officers, legal substances include legislation, and legal culture is a living law*

[79] Mannick, Paul David, Aristotle's essences as subject and actuality, *Thesis,* University of St Andrews, 2012
[80] https://study.com/learn/lesson/aristotles-four-causes-summary-examples.html
[81] Widiadharma, Novian dkk, Teori Kausalitas Aristotalian, Living Islam: Journal of Islamic Discourses – ISSN: 2621-6582 (p); 2621-6590 (e) Vol. 6, No. 1 (Mei 2023), hlm. 71-87, doi: https://doi.org/10.14421/lijid.v6i1.4397, hal 72

practiced in a society. The three components of the legal system are interrelated".[82]

The success of Law enforcement depends on the legal structure, legal substance, and legal culture. The legal structure includes law enforcement officials, the legal substance includes statutory regulations, and the legal culture is a living law practiced in society. The three components of the legal system are interrelated.

The 'legal structure' is explained: *"In simple terms, the legal structure is related to institutional arrangement and performance along with its apparatus in implementing and enforcing the law. This includes how the law is implemented and enforced following its formal rules (concerning legal performance)"*[83]. The legal structure is related to the institutional arrangements and apparatus to implement and execute the law. This includes patterns of how laws are implemented and enforced about legal performance.

Regarding the substance of the law, it is stated:

> *"Legal substance ... is the actual rules, norms, and behavior patterns of people inside the system. The substance of this law includes principles and ethics, as well as court decisions. The Component of the substance of the law, therefore, comprises the whole legal law, both written (law books) and unwritten (living law), and court decisions followed by the society and government"*.[84]

The legal substance contains rules, norms, and behavior patterns of people in the system. The essence of this law includes principles and ethics, as well as court decisions. The legal substance component consists of all written and unwritten (living law), and court decisions followed by the community and the government.

The legal culture is: *"described as ... people's attitudes toward law and the legal system? Their beliefs, values, ideas, and expectations. In other words, the climate of social thought and social force determines how the law is used, avoided, or abused. Without legal culture, the legal system is inert. A dead fish lying in a basket, not a living fish swimming in its sea"*[85]. Legal culture is the attitude of society towards law and the legal system. Their beliefs, values, ideas, and

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[82] Rusdiana, Ema, *The Efectiveness of Law Enforcement in Combating Food Hoarding*, Proceedings of The International Conference of FoSSA, Jember, August 1st - 3rd, 2017, hal 56
[83] *Ibid*., hal 58
[84] *Ibid.*, hal 59
[85] *Ibid*., hal 60

expectations. Legal culture, in other words, is the climate of social thought and social forces that determine how law is used, avoided, or misused.

Priyo Hutomo conveyed a similar opinion that Friedman's legal ideas included aspects of structure (legal structure), namely institutions and apparatus, aspects of substance (legal substance), namely regulation of authority and procedures/mechanisms, and aspects of culture (legal culture).[86]

Implementation of Friedman's ideas about the Legal System, as follows. Legal principles, legal norms, and customary law rules are elements of legal substance. Customary law can be understood as a law that has become a tradition or habit of the people so that there are few problems with elements of legal culture. Aspects of customary law's legal structure related to institutional arrangements and performance, along with its apparatus to implement and enforce the law, for the sake of creating this legal performance that does not yet exist.

Additional notes on the existence of customary law from the perspective of Aristotle and Friedman's ideas. The soul and body are unified, like the concept of soul and body. Impossible to separate, but it can be divided to facilitate analysis. Both body and soul will naturally carry out essential functions to achieve reasonable goals, for example, to create mental and physical health.

Customary law will essentially form legal norms and rules basis on community culture, always aiming to harmonize life and people's lives. However, this goal will not be achieved if no legal structure regulates institutional arrangements, performance, and functions of law enforcement officials.

3.2.3. Existence of Government Regulations and Regional Regulations Concerning Customary Law and Customary Courts

The existence of customary law and customary court is highly dependent on the role of Government Regulations and Regional Regulations, regarding guidelines for procedures and criteria for establishing customary law, along with mechanisms for strengthening it.

It is necessary to analyze the role of Government Regulations and Regional Regulations related to procedures, criteria for stipulation, and the strengthening of customary law. The fundamental issue that must be answered: is the functions of government regulations and regional

[86] Hutomo, Priyo, Perspektif Teori Sistem Hukum Dalam Pembaharuan Pengaturan Sistem Pemasyarakatan Militer, *Legacy: Jurnal Hukum dan Perundang-undangan Vol 1 No 1 – Maret 2021,* hal 49

regulations enact customary law as a constitutive function or simply as a declarative function to state the existence of customary law as it is.

National criminal law material must also regulate the balance between public or state interests and individual interests, between the protection of perpetrators of criminal acts and victims of criminal acts, between elements of action and mental attitudes, between legal certainty and justice, between written law and the law that lives in society, and between national and universal values, human rights, and human obligations.

It is necessary to analyze the role of Government Regulations and Regional Regulations related to procedures, criteria for stipulation, and the strengthening of customary law. The fundamental issue that we must answer: is the functions of government regulations and regional regulations enact customary law as a constitutive function or simply as a declarative function to state the existence of customary law as it is. The Preamble to a letter (c) of the National Criminal Code confirms that:

The phrase balance between written law and living law in society emphasizes an equal position between the two, and there is no super-ordination and sub-ordination between the two. And what is certain is that the 'law that lives in society' in the form of 'unwritten' belongs to the community and develops according to the development of society.

The General Explanation of the National Criminal Code also emphasizes that:

> *This law also recognizes the existence of criminal acts based on the law that lives in society or previously known as customary crimes to fulfill better the sense of justice that lives in society. In several regions in Indonesia, there are still unwritten legal provisions that live and are recognized as law in the area concerned, which determine that law violations are subject to punishment. In this case, the judge can evaluate sanctions by fulfilling local customary obligations that perpetrators of criminal acts must carry out. This explanation implies that the standard value of criminal acts and norms in the local community are still protected to fulfill the sense of justice in a particular community. Such a situation will not shake and still guarantee the implementation of the principle of legality and the prohibition of analogy in this law.*

The phrase 'based on living law; 'to better fulfill the sense of justice that lives in society'; 'as the law in the area concerned, which determines that violations of the law deserve punishment'; and 'standard

values and norms that live in the local community are still protected to fulfill the sense of justice that lives in the community' confirms that customary law and customary criminal acts are 'unwritten law'. This entity must be maintained as the original law of Indonesia.

Crucial issues related to the role of Government Regulations and Regional Regulations in the context of the existence and application of customary (living/customary criminal law) laws need to be answered and resolved immediately. The elucidation of Article 2 paragraph (1) of the National Criminal Code states: "To strengthen the enforcement of the law that lives in the community, the Regional Regulation regulates these customary crimes." This provision emphasizes that the sole function and primary task of the said Regional Regulation is to 'strengthen' the existence and enforceability of the 'living/customary criminal law,' not to weaken it.

While in the Elucidation of Article 2 paragraph (3) of the National Criminal Code confirms: "Government Regulations in this provision are guidelines for regions in establishing laws that live in the society in Regional Regulations." The provisions of this article require that Government Regulations and Regional Regulations function to determine the 'living/customary criminal law' and strengthen it. Manfred O Hinz argues:

> *The Namibian approach to ascertaining customary law has become known as the self-statement of customary law. Self-stating customary law refers to a process of proving or conforming customary law by the owners of the law to be determined, namely the people and the traditional leaders as the custodians of customary law. The most crucial element in self-stating is that the result will be a product created in the community that must follow and apply the relevant law.*[87]

One way to resolve customary law issues is to use the 'Namibia Approach' approach. This approach is in the form of an 'affirmation statement' or 'conforming') that customary law is known as it is due to 'self-declaration'. Customary law that declares itself as customary law refers to a process of stipulating customary law by the defined legal owner, namely the community and traditional leaders, as custodians of

[87] Hinz, Manfred O., The ascertainment of customary law: What is ascertainment of customary law and what is it for? The experience of the Customary Law Ascertainment Project in Namibia, *Oñati Socio-Legal Series*, v. 2, n. 7 (2012) – Investigaciones – Investigations – Ikerlanak ISSN: 2079-5971, hal 85

customary law. The most crucial element in declaring oneself is that the result will be a product created in society that is required to follow and apply the law in question.

There is concern that the function of establishing customary law will change into 'positive law'. If as positive law, with the meaning 'In general, the term "positive law" connotes statutes, i.e., law that has been enacted by a duty authorized legislature', as positive law is connoted as law that has been promulgated by an authorized legislative body, then customary law which is an unwritten law, is determined and changed into positive law which is written. Gone is the essence of 'unwritten' in customary law.

The concept of customary law, which is an unwritten law, then changed into positive law, a written law that has created a 'contradictio in terminis' and a 'conceptual gap'. If this happens, it means that there has been castration of customary law.

Ontologically, customary law is an unwritten law. In that case, epistemologically, establishing customary law is only in the form of 'ascertaining' or 'conforming,' the process of affirming customary law as it is. Thus, the function of Government Regulations and Regional Regulations is only to declare the existence of customary law which already exists.

The final analysis is related to the existence of customary justice. Reflectively, it is necessary to understand the following narrative: "Customary law substantially forms the norms and rules of customary law, based on the local community's culture, aimed at harmonizing life and people's lives. However, this goal will not be achieved if there is no legal structure governing institutional arrangements, performance, and functions of law enforcement officials. Thus, problem-solving is focused on the 'legal structure'. A 'customary law structure' is necessary so we can apply customary law can and correctly.

In legal practice, there are at least 2 (two) legal efforts, namely the formation of law and application of law. We can explain the process and whereabouts of establishing customary law can be defined, but the construction of customary court needs to be carried out immediately and carefully.

We must still carry out the settlement of cases of the case of customary crimes. Based on the necessity to resolve customary law issues and the absence or absence of a customary justice system, the law must be applied. The essence of the application of the law is the interpretation of the law.

Regarding legal interpretation, there is an interesting opinion from David Dyzenhaus, who stated: 'My argument, in brief, is that even

in the absence of a written constitution (read: statute law)…, judges have to engage in interpretation of constitutional values if they are to make sense of the fact that we aspire to live under the regime of the rule of law[88]. Even though there is no statutory law, judges must be involved in interpreting legal values to understand that we aspire to live under a 'rule of law' regime.

The establishment of customary courts and the application of customary laws is a challenging process, a long and winding process. It is necessary to arrange other articles about these 2 (two) matters.

4. Conclusion

The conclusion of the discussion on legal issues is as follows:

1. It is necessary to emphasize that what is meant by 'living law' is customary law, so the phrase 'law that lives in society' must be replaced with 'customary law'. Thus, there must be a change in Article 1 paragraph (1) of the National Criminal Code to: "Article 1 paragraph (1) does not reduce the application of customary law which determines that a person should be punished, even though the act is not regulated in this Law.";
2. Criminal law, equally, should be divided into 'statute criminal law' and 'living/customary criminal law'. It must be understood as a unified whole, some of which are 'written' and 'unwritten'. The 'unwritten' law is in a subordinate and inferior position. Such a distinction is an 'unscientific distinction';
3. Customary law contains legal ideas (*rechtidee*) as legal principles based on 'causa material' legal norms created in prohibitions, obligations, and permissibility. The legal rules (unwritten) are formed based on the 'formal causa'. 'Causa final' relates to purpose, something that must address from customary law norms. As usual, law, including customary law, always aims to protect human's physical and existential aspects in social life. 'Causa efficient' teaches about legal functions that we must carry out to achieve legal goals;
4. Customary law, which substantially forms legal substance and norms based on legal culture, always aims to harmonize life and people's lives.
5. We will not achieve legal objectives if no legal structure regulates institutional arrangements, performance, and functions. A

[88] Dyzenhaus, David, *The Unwritten Constitution and the Rule of Law*, https://tspace.library.utoronto.ca/bitstream/1807/78155/1/Dyzenhaus%20-%20Unwritten%20Constitution.pdf, hal 383

'customary law structure' is necessary to apply customary law properly and correctly;

6. Ontologically, if customary law is an unwritten law, epistemologically, the process of establishing customary law is simply in the form of 'ascertaining' or 'conforming, the process of affirming customary law as it is. The function of Government Regulations and Regional Regulations is only to declare the existence of customary law, which already exists; and
7. The establishment of customary courts and the application of customary laws is a challenging process, a long and winding process.

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State Recognition of the Rights of Indigenous Peoples through the Certification of Ulayat Land

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Abstract

This research is based on the fact that customary law community units have not received full recognition of land ownership rights. The constitutional mandate is mandatory for the state to fulfill the rights of indigenous and tribal peoples. Birth of Law No. 11 of 2020 concerning Job Creation which has the potential to seize customary lands of indigenous and tribal peoples, especially in the land acquisition cluster for development in the public interest. Ulayat land/customary land appears in the new formulation which includes the object of land acquisition, even though customary law communities who are entitled to compensation/compensation are customary law communities that have been stipulated by regional regulations. This logic is also adhered to by the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of BPN Number 18 of 2019 concerning Procedures for Administration of Customary Law Community Unitary Land. As a consequence, the relinquishment of indigenous peoples' customary rights over their land is getting bigger because not all of them have been stipulated in regional regulations. The customary law community in Bali is regulated in Regional Regulation no. 4 of 2019 concerning Traditional Villages in Bali and Decree of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 575/SK-HR.01/X/2019 concerning Amendments to the Decree of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 276/KEP- 19.2/X/2017 Concerning the Appointment of Pakraman Village in the Province of Bali as a Subject of Joint (Communal) Ownership of Land as the legal basis for certifying customary land in Bali

Abstrak

Penelitian ini didasari pada fakta keberadaan kesatuan masyarakat hukum adat belum mendapat pengakuan kepemilikan hak atas tanah secara penuh. Amanah konstitusi, wajib bagi negara untuk memenuhi hak-hak masyarakat hukum adat. Lahirnya UU No. 11 Tahun 2020 tentang Cipta Kerja yang berpotensi merampas tanah ulayat masyarakat hukum adat khususnya dalam klaster pengadaan tanah bagi pembangunan untuk kepentingan umum. Tanah ulayat/tanah adat muncul dalam rumusan baru yang termasuk objek pengadaan tanah, padahal Masyarakat hukum adat yang berhak memperoleh ganti rugi/kompensasi adalah masyarakat hukum adat yang sudah ditetapkan dengan peraturan daerah. Logika ini juga dianut oleh Peraturan Menteri

Agraria dan Tata Ruang/Kepala BPN Nomor 18 Tahun 2019 tentang Tata Cara Penatausahaan Tanah Ulayat Kesatuan Masyarakat Hukum Adat. Konsekuensinya, pelepasan hak ulayat masyarakat adat atas tanahnya semakin besar sebab belum semua telah ditetapkan dengan Perda. Masyarakat hokum Adat di Bali diatur dalam Perda No. 4 Tahun 2019 tentang Desa Adat Di Bali dan Keputusan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Nomor 575/SK-HR.01/X/2019 Tentang Perubahan Atas Keputusan Menteri Agraria Dan TataRuang/Kepala Badan Pertanahan Nasional Nomor 276/KEP-19.2/X/2017 Tentang Penunjukan Desa Pakraman Di Provinsi Bali Sebagai Subjek Pemilikan Bersama (Komunal) Atas Tanah sebagai dasar hokum pensertifikatan tanah adat di Bali.

1. Introduction

State recognition of the rights of indigenous and tribal peoples is a Constitutional order that must be realized. Article 18B paragraph (2) of the 1945 Constitution stipulates that "The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law" (N. Nugroho, 2018). The implication, constitutionally, is that it is mandatory for the state to fulfill the rights of indigenous and tribal peoples (Rahmatullah, 2021).

One of the government's policies to fulfill the constitutional mandate is through customary (ulayat) land certificates. In fact, President Joko Widodo handed over 41,657 customary land certificates and 845 temple land certificates to 182 Pakraman (adat) villages in Bali. Submission of certificates for Pakraman customary villages and temples is the first time in Indonesia (Kabar24 Bisnis.Com, 23/02/2018). The Provincial Government of Bali has issued Regional Regulation No. 4 of 2019 concerning Traditional Villages in Bali and stipulates 1,493 customary villages (Adnyani et al., 2020).

However, problems began to emerge after the enactment of Law no. 11 of 2020 concerning Job Creation which has the potential to seize customary lands of indigenous and tribal peoples (Sari, 2021). The Job Creation Law is an investment-friendly omnibus law but instead becomes a threat to the customary lands of indigenous and tribal peoples (Antari, 2021). In Article 123 of Law no. 11 of 2020 Part Two Land Acquisition for Development for Public Interest appears a new formulation which includes Land Procurement Objects including "village treasury land, waqf land, ulayat land/customary land". As a consequence, the Job Creation Law emphasizes that ulayat/customary land is one of the objects of land acquisition (Wardhani, 2020).

The implication is that the formality of determining MHA as a subject must exist before there is recognition of the object of rights (conditional and gradual recognition) which is detrimental to the rights of indigenous peoples who have the specificity of traditional Balinese customary villages as a cultural identity that is integrated into social life (Jiwa Utama, 2020). In addition, the potential for not receiving compensation (compensation) when ulayat land is used as the object of land acquisition for development, so that legal certainty is needed regarding the ownership rights to ulayat land of customary law communities in Pakraman Village (Dana et al., 2021).

There needs to be legal politics to strengthen state recognition of the rights of indigenous and tribal peoples. Moreover, the Constitutional Court through decision Number 91/PUU-XVIII/2020, November 25 2021, stated Law No. 11 of 2020 is conditionally unconstitutional (Muhshi, 2020; Nurmayani & Farida, 2021). The specific objective of the research is to formulate a model for strengthening state recognition of the rights of indigenous and tribal peoples through certifying customary village customary land based on prescriptive evaluative studies of customary land as the object of land acquisition based on Law no. 11 of 2020 concerning Job Creation

The urgency of this research is the fact that customary village customary land as a customary law community's right has been guaranteed by the Constitution. When the government started certifying customary village land ownership rights in Bali, it was actually affected by the enactment of Law no. 11 of 2020 concerning Job Creation, which finally through the Constitutional Court Decision Number 91/PUU-XVIII/2020 was declared conditionally unconstitutional, so it became urgent for more in-depth research to fulfill the constitutional rights of indigenous peoples in Balinese traditional villages.

The State of Indonesia is one of the countries that supports and signs the United Nations Declaration On The Rights Of Indigenous People (UNDRIP). The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on 13 September 2007. The UNDRIP is the result of a discourse that fights for the rights of indigenous peoples in countries around the world. In the preamble of UNDRIP, Article 26 of UNDRIP emphasized the principle that indigenous peoples have rights over land, territories and resources, while the State will provide legal recognition and protection for these lands, territories and resources. This principle should be a reference in drafting laws in Indonesia by granting land rights to indigenous peoples. The State of Indonesia must be present as an

initiative in providing legal recognition and protection of indigenous peoples' lands.

The existence of customary rights arrangements was affected by the issuance of Law no. 11 of 2020 concerning Job Creation, especially in the land cluster. The Job Creation Law currently adheres to the theory of domain verklaring which was adhered to during the Dutch colonial era, this theory says that at that time basically all land was owned by the government except for the land someone could prove that he was the owner of the land. Historically, this concept was created by the Dutch colonial government to remove the concept of domain verklaring which was applied by the colonial government to seize land controlled by indigenous peoples. This problem is related to Article 2 of the UUPA regarding the Right to Control the State which has become a new disaster for Indigenous Peoples.

The position of ulayat land in national development planning is closely related to the ulayat rights of customary law communities. Ulayat rights are the highest tenure rights owned by customary law communities over all land within a certain area. The current high level of national development planning makes indigenous and tribal peoples uneasy, because the need for land for national development continues to increase. Seeing the condition of the need for land that continues to increase, customary rights need to be maintained so that they get more attention, especially from the government.

2. Methods

The socio-legal method is used in this research. The socio-legal method was developed in an interdisciplinary manner to explain legal phenomena in social, political and cultural contexts (Irianto and Shidarta, 2009). The socio-legal research method is a combination of normative legal research methods and empirical legal research methods (Masyhar, 2015). The legal materials used in this study consist of primary legal materials and secondary legal materials. Primary legal material is legal material that has binding legal force. Secondary legal material is legal material that is already available obtained from the results of a literature review related to research material (Dewata and Ahmad, 2010). The research approach uses a statutory approach and a conceptual approach. Data analysis with hermeneutic interpretation which translates legal texts not only from the formal legal aspect based on the sound of the text, but also from the background factors, social, political and cultural aspects (Hamidi, 2011).

3. Findings and Discussions

3.1. Policy on the Existence of Ulayat Land for Customary Law Communities

The purpose of being a state can be interpreted that customary law communities as part of the Indonesian nation and have Indonesian bloodshed must receive protection, advance their welfare, educate their lives and get justice, like Indonesian society in general (Tokawa, 2016). The 1945 Constitution mandates that natural resources (Isnaeni, 2017). be used for the greatest prosperity of the people. As a consequence, regulations and legal norms are needed that are responsive to indigenous and tribal peoples (Vel et al., 2017).

Law No.11/2020 concerning Job Creation as an investment-friendly omnibus law is actually still a threat to various sectors including MHA. Of the approximately 30 (thirty) laws that regulate indigenous and tribal peoples, Law (UU) Number 11 of 2020 concerning Job Creation "rearranges" 12 (twelve) of them, even though these arrangements seem perfunctory (W. Nugroho & Syahruddin, 2021).

The influence of the Job Creation Law on legal norms governing the interests of indigenous peoples can be categorized into four things, namely: a. changes that are not significant/meaningless; b. significant changes; c. without changes in regulations that protect the interests of the community; and c. Legal norms that have hindered the process of recognizing indigenous peoples' rights have also persisted.

In the Job Creation Law there are at least two other laws that still use the phrase "as regulated by laws and regulations". For example, Article 22 paragraph (2) of Law Number 27 of 2007 concerning management of coastal areas and small islands in conjunction with Law Number 1 of 2014 concerning amendments to Law Number 27 of 2007 concerning Management of Coastal Areas and Islands Small.

The provisions of Article 9 paragraph 3 of Law Number 17 of 2019 concerning water resources which states that "Ulayant rights of Indigenous Peoples over Water Resources as referred to in paragraph (2) are still recognized as long as in fact they still exist and have been regulated by Regional Regulation". In fact, both Law 27/2007 and Law Number 1/2014 do not specifically regulate this procedure.With such a trend, several improvements/strengthening regulatory norms related to indigenous peoples' rights, for example in Article 22 paragraph (1) of Law 22 of 2019 concerning sustainable agricultural cultivation system, will not have the leverage of change at the field level.

Unfortunately, Law No. 41 of 1999 concerning Forestry, legal norms that have hindered the process of recognizing indigenous

peoples' rights are also maintained. The Job Creation Law still maintains Article 67 (2) of the Forestry Law concerning the establishment of customary law communities through regional regulations. The provisions of this article have been the main obstacle in implementing the constitutional mandate to fulfill the original or traditional rights of indigenous and tribal peoples, namely the matter of recognition. Even though there has been a Constitutional Court Decision 35/2012 concerning customary forests (Sitta Nabilla Maisara Mulyono Putri*, 2017), legal reforms to recognize the rights of indigenous peoples in the forestry sector are not carried out in the Job Creation Law. As a result of maintaining these provisions, there is a perception among local governments. that it is they who have the power to turn on and off customary law communities. If the regions do not want to make regional regulations, then there will be no customary law communities.

Meanwhile, Article 8 of Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interests which originally read, "Entitled Parties and parties who control Land Procurement Objects for Public Interests must comply with the provisions in this Law". , Article without this paragraph is amended to become 4 (four) paragraphs.In paragraph (2) the formulation appears, "In the case of a Land Acquisition plan, there are Land Procurement Objects that are included in forest areas, village treasury land, waqf land, ulayat/customary land , and/or land assets of the Central Government, Regional Government, State-Owned Enterprises, or Regional-Owned Enterprises, the process of finalizing the status of the land must be carried out until the determination of the location".

In Presidential Decree No. 71 of 2012 concerning the Implementation of Land Procurement for Development for Public Interest, as stipulated in Article 22 paragraph (2), that customary law communities who are entitled to receive compensation/compensation are customary law communities that have been stipulated by regional regulations. This logic is also adhered to by the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of BPN Number 18 of 2019 concerning Procedures for Administration of Customary Law Community Unitary Land. As a consequence, the relinquishment of indigenous peoples' customary rights over their land is getting bigger, moreover customary law communities will become victims of policies that have the potential to not receive compensation or compensation when customary land is used as the object of land procurement for development. This potential loss can also occur in the customary village of Pakraman Bali (Ramstedt, 2014). As a traditional

village, Desa Pakraman in Bali is a customary law community with special characteristics related to the Hindu philosophical foundation that animates the life of the customary law community in Bali, known as the philosophical values of Tri Hita Karana (Roth & Sedana, 2015). Tri Hita Karana is a significant factor for the realization of a harmonious relationship between humans and humans, humans and nature and humans and their God. Human relations with nature are realized by harmonious management of customary land (Wardana, 2020).

3.2. Recognition of Ulayat Land for Indigenous Peoples

It should be underlined that these Ulayat Rights do not immediately get an acknowledgment, because in order to form legal recognition of Ulayat Rights, several conditions or procedures must be met according to Article 3 of the UUPA, including the following. First, insofar as the reality is that customary law communities still exist. The meaning of this sentence is that in an area where there was originally customary land rights, but in subsequent developments, individual property rights became stronger, causing the loss of customary land rights, the customary land rights will not be revived, the same applies to areas where customary rights are If customary rights land has never been formed, then a new customary rights land will never be born. Second, the requirements for implementation are in accordance with national and state interests which are based on national unity and are prohibited from conflicting with laws and other higher regulations.

In customary law the highest land tenure rights are ulayat rights, which contain 2 (two) elements of civil law and public law aspects. The subject of customary rights is the customary law community, both territorial and genealogic, as a collective form of its citizens. Ulayat rights land is shared land of the members of the customary law community concerned. Under ulayat rights are the rights of the customary head and the customary elders, who as customary law community officers have the authority to manage, regulate and lead the allotment, control, use and maintenance of the shared land. The task of this authority is only in the aspect of public law. Then there are various rights to land that are controlled by members of the customary law community concerned, all of which are directly or indirectly sourced from customary rights as shared rights. Thus the arrangement and hierarchy of land tenure rights in customary law are: (1) Ulayat rights of customary law communities, as the highest tenure rights, have aspects of civil law and public law; (2) The rights of customary heads and customary elders, which are based on customary rights and have only public legal aspects; (3) Land rights as individual rights which are

directly or indirectly sourced from customary rights and have aspects of civil law.

The basis for setting customary rights is stated in Article 2 paragraph (4) of Law no. 5 of 1960 concerning the Basic Agrarian Regulations states that the exercise of control rights from the state can be delegated to autonomous regions and customary law communities if necessary and does not conflict with national interests and provisions of government regulations. The requirements that must be met by customary rights according to Article 3 of the UUPA are:

1. Insofar as the reality is that customary law communities still exist.
   Regarding this matter, according to the Elucidation of Article 67 paragraph (1) of Law Number 41 of 1999 concerning Forestry, a customary law community is recognized, if in reality it fulfills the following elements: (a) The community is still in the form of a community (rechtsgemeenschap); (b) There is an institution in the form of a customary ruler; (c) There is a clear customary law area; (d) There are legal institutions and instruments, especially customary justice, which are still being obeyed; and (e) Still collecting forest products in the surrounding forest area to fulfill daily needs.
2. In accordance with national and state interests.
   The statement "in accordance with national and state interests, based on national unity" is an a priori which contains suspicion from the government towards indigenous and tribal peoples. This statement shows as if the customary law community is not a part of nationality, statehood and nationhood. So because the statement "in accordance with the interests of the state" can lead to multiple interpretations and is full of political interests. It will be difficult for us to be able to determine whether the existence of a particular customary law community fulfills this requirement or not, without knowing which customary law community is meant.
3. Does not conflict with higher laws and regulations.
   This last requirement, according to Kurnia Warman, is not too much of a worrying obstacle to the existence of customary rights, because the 1945 Constitution has firmly recognized the existence of traditional community rights in Indonesia. Article 18B paragraph (2) of the 1945 Constitution states that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia. So, if there is a law that does not recognize the

existence of the traditional rights of indigenous peoples, then it is clearly contrary to the 1945 Constitution.

The government has issued regulations as the basis for structuring customary land. Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 18 of 2019 concerning Procedures for Administration of Ulayat Land for Customary Law Community Units is still valid as the basis for managing customary land. Candy No. 18 of 2019 has revoked the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 10 of 2016 concerning Procedures for Determining Communal Rights over Land of Customary Law Communities and Communities Residing in Certain Areas. A customary law community unit is a group of people who have the same cultural identity, live for generations in a certain geographic area based on ties of ancestral origins and/or similarity of residence, have shared assets and/or customary objects as well as a value system that determines customary institutions. and customary law norms as long as they are still in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.

In Permen No. 18 of 2019 distinguished between customary rights and customary land. The Ulayat Rights of the Customary Law Community Unit or similar are the communal rights of the Customary Law Community Unit to control, manage and/or utilize and preserve their customary territory in accordance with the prevailing values and customary law. Indigenous People's Unitary Land is communal land that is in the territory of customary law communities which, in reality, still exists. The implementation of customary rights of customary law community units over land in their territory as long as in fact they still exist, is carried out by the customary law community unit concerned according to local customary law provisions.

The administrative activities of the Customary Law Community Unitary Land throughout the territory of the Republic of Indonesia are carried out to ensure legal certainty. The administration of the customary land of the Customary Law Community Unit is carried out based on the determination of the recognition and protection of the Customary Law Community Unit. Procedures for an application for the administration of the Customary Law Community Unitary Land shall be submitted to the Head of the local Land Office.

3.3. Customary Land Certification as Property Rights for Customary Law Communities in Bali

Article 5 Law no. 5 of 1960 concerning Basic Agrarian Regulations (UUPA), stipulates that the agrarian law that applies to earth, water and space is customary law, as long as it does not conflict with national and state interests. Regarding customary rights explicitly regulated in Article 3 of the UUPA that the implementation of customary rights and similar rights is from customary law communities, insofar as this is in fact. still exist, must be such that it is in accordance with national and state interests, which are based on national unity and may not conflict with laws and other higher regulations. Furthermore, Article 4 of the UUPA provides criteria that various kinds of land rights can be granted and owned by people, either alone or together with other people and legal entities. This means that land rights can be owned, individually, jointly and legally.

There are requirements for parties who can own property rights as stipulated in Article 21 of the BAL, namely only Indonesian citizens can have property rights. Foreigners who, after the enactment of this law, obtain ownership rights due to inheritance without a will or a mixture of assets due to marriage, lose their nationality, must relinquish their rights. Apart from individuals, the Government determines legal entities that can have property rights if they meet the conditions.

The regulation of legal entities is listed in the Government issued Government Regulation Number 38 of 1963 Designating Legal Entities That Can Have Ownership Rights over Land. Article 1 PP No. 38 of 1963 stipulates legal entities that can own land with ownership rights, including: (a) state banks; (b) agricultural cooperative associations; (c) religious bodies appointed by the Minister of Agriculture/Agrarian Affairs, after hearing the Minister of Religion; and (c) social agencies appointed by the Minister of Agriculture/Agrarian Affairs, after hearing the Minister of Social Welfare.

In the context of a legal entity with the right to own land, it is interesting to answer that Desa Pakraman as a customary law community unit in the Province of Bali is legally entitled to have customary land rights. Even though it has traditionally been recognized historically, juridically and sociologically, that Pakraman Village is a legal entity that can own land, it is recognized by the Regional Regulation of the Province of Bali Number 3 of 2001 – but until 2017 Pakraman Village has not been appointed as a legal entity that can own land with ownership rights so that during that time the status of rights to village lands was unclear (Sudantra, 2018).

Efforts to fight for Pakraman village as a legal entity that fulfills the requirements as a subject can own land with ownership rights continue to be carried out by the government and the Balinese

customary law community. Finally, on October 23, 2017, the Decree of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia was issued Number 276/KEP-19.2/X/2017 concerning the Appointment of Pakraman Village in the Province of Bali as the Subject of Common (Communal) Ownership Rights over Land. In consideration, number 1 is based on the letter from the governor of the province of Bali dated January 4 2007 Number 590/70/B.Tapem regarding the results of the coordination meeting for the process of proposing Pakraman Village as the subject of land ownership rights and the Letter of the Head of the Regional Office of the National Defense Agency for the Province of Bali dated 25 September 2017 number 1329/8-51/IX/2017 concerning the Proposal to Appoint Pakraman as the Subject of Land Ownership Rights.

Contents of Ministerial Decree ATR/Ka. BPN No 276/KEP-19.2/X/2017 namely designating Pakraman village in Bali Province as the subject of shared ownership (communal rights) of land accompanied by the requirements, that: (a) there are members of the community who are still in the form of a community; (b) there are institutions and instruments for customary control; (c) there is land with communal ownership rights with clear boundaries; and (d) there are legal institutions and instruments that are still being complied with. In addition, the land rights of the Pakraman Village that are used for the purposes of the Pakraman customary village can be registered based on the recognition of the government and the local community in accordance with applicable regulations. Regarding the joint (communal) ownership rights granted to Desa Pakraman that have been registered as referred to in the second dictum, it can be cooperated with third parties in accordance with the agreement of the parties as stipulated in statutory provisions.

The concept of communal rights to land referred to in the Ministerial Decree ATR/Ka. BPN No 276/KEP-19.2/X/2017 refers to the concept stated in the Ministerial Regulation ATR/Ka. BPN Number 10 of 2016 concerning Procedures for Determining Communal Rights over Land of Customary Law Communities and Communities Residing in Certain Areas (hereinafter referred to as the Minister of Communal Rights Regulation 2016). This Ministerial Regulation replaces the previous regulation, namely the ATR/Ka Ministerial Regulation. BPN Number 9 of 2015. Based on Article 1 of the Ministerial Regulation on Communal Rights 2016 it is determined that: "Communal rights to land, hereinafter referred to as communal rights, are joint ownership rights to the land of a customary law community or joint ownership rights to land

granted to people who are in certain areas" (Article 1 point 1). Certain areas referred to in this Ministerial Regulation on Communal Rights are forest or plantation areas (Article 1 number 2).

From this formulation, it appears that the concept of communal rights is different from the concept of customary rights recognized under Article 3 of the UUPA. At least, these differences can be seen in two ways, namely differences in the subject of rights and differences in the character of rights. The subject of communal rights is not only KMHA, but also includes communities living in certain areas, in this case forest or plantation areas. The second difference is that customary rights have both a public and private dimension, while communal rights only have a private dimension; while communal rights have a more private (civil) dimension. The public dimension of customary rights can be seen from the authority of KMHA to: (1) regulate the use and maintenance of land/territories as their living space; (2) regulate the legal relationship between customary law communities and their land; (3) regulate legal actions related to customary land. The private dimension of customary rights can be seen from the manifestation of customary rights as shared property. Ulayat rights cannot be categorized as land rights as referred to in Article 4 in conjunction with Article 16 of the UUPA, instead communal rights can be interpreted as ownership rights over land for which certificates can be issued (Nurhakim et al., 2018).

The certificate is a letter of proof of rights which is valid as a strong means of proof regarding the physical data and juridical data contained therein, insofar as the data are physical. The following dynamics resulted in the birth of the Bali Provincial Regulation Number 4 of 2019 concerning Traditional Villages in Bali which was set on May 28 2019. Regional Regulation No. 4 of 2019 revokes Regional Regulation No. 3 of 2001 concerning Pakraman Village. Article 1 point 8 Regional Regulation No. 4 of 2019 defines a Traditional Village as a customary law community unit in Bali which has territory, position, original composition, traditional rights, own assets, traditions, social manners for social life of the community from generation to generation in the bonds of sacred places (kahyangan tiga or kahyangan village), duties and authorities as well as rights to regulate and manage their own household.

With land ownership for the Customary Law Community (Customary Village) in Bali, potential losses regarding the Implementation of Land Procurement for Development for Public Interests can be anticipated. Customary law communities who are entitled to compensation/compensation are customary law communities

that have been stipulated by regional regulations. This logic is also adhered to by the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of BPN Number 18 of 2019 concerning Procedures for Administration of Customary Law Community Unitary Land. As a consequence, the relinquishment of indigenous peoples' customary rights to their land is getting bigger, moreover MHA will become victims of policies that have the potential to not receive compensation or compensation when customary land is used as the object of land procurement for development. This potential loss can also occur in Pakraman customary villages in Bali, especially those that have not registered customary village property rights certificates

4. Conclusion

1. The constitution mandates that natural resources be used for the greatest possible prosperity of the people. The constitutional mandate must become a legal political policy that must be followed by statutory regulations related to the recognition, protection and empowerment of the rights of indigenous and tribal peoples. Policies that are responsive to the existence of customary lands of customary law communities are needed
2. Recognition of customary land for customary law communities is not immediately given. Legal recognition of Ulayat Rights must meet several requirements, namely as long as the customary law community still exists, the conditions for its implementation are in accordance with national interests and are prohibited from conflicting with laws and other higher regulations. The administrative activities of customary land units of customary law communities throughout the territory of the Republic of Indonesia are carried out to guarantee legal certainty;
3. A certificate is a letter of proof of rights which is valid as a strong means of proof regarding the physical data and juridical data contained therein, as long as the data is physical. With land ownership for the Customary Law Community (Customary Village) in Bali, potential losses regarding the Implementation of Land Procurement for Development for Public Interests can be anticipated. Customary law communities who are entitled to compensation/compensation are customary law communities that have been stipulated by regional regulations.

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Imposition of Customary Sanctions in Disciplining the Implementation of the Health Protocols in Tackling Pandemic

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Abstract

Disciplinary action against the use of the Health protocol in the context of tackling pandemic on the people in the Bangkalan area has passed, but there are some notes on the implementation of these rules. Enforcement against health protocol violations is not running optimally. One of the reasons for the lack of enforcement is the indiscipline of the community towards the implementation of the health protocol rules. Violation or disciplinary action against health protocol rules is resolved by local authorities through imposition of customary sanctions by cleaning the parks and tombs around to restore the balance that has been disturbed due to violations of health protocol rules. The purpose of this study is to conduct an in-depth study of the imposition of customary sanctions on violations of health protocol rules by cleaning the tombs and parks around. The imposition of customary sanctions is a form of follow-up action on the implementation of Bangkalan Regent Regulation Number 63 of 2020 as an effort to discipline the implementation of the Health Protocol in tackling the pandemic. In this study, a normative approach is used with the statutory and conceptual approaches. The results of the study show that the application of customary sanctions for violating health protocols as disciplinary efforts by the Regional Government of Bangkalan to prevent the spread of a pandemic is quite effective. However, the use of customary sanctions raises the question of whether it is possible to impose customary sanctions based on violations of the Regent Regulations

Keywords: customary sanctions, disciplining, violations, regent regulation

Abstrak

Penindakan pendisiplinan terhadap penggunaan protokol Kesehatan dalam rangka penanggulangan pandemi terhadap masyarakat di daerah Bangkalan telah berlalu, namun ada beberapa catatan terhadap pelaksanaan aturan tersebut. Penindakan terhadap pelanggaran protokol Kesehatan kurang berjalan maksimal. Salah satu sebab tidak maksimalnya penindakan adalah ketidakdisiplinan masyarakat terhadap pelaksanaan aturan protokol Kesehatan tersebut. Pelanggaran atau pendisiplinan terhadap aturan protokol Kesehatan diselesaikan oleh penguasa setempat melalui penjatuhkan sanksi

adat dengan cara membersihkan taman dan makam yang ada di sekitar dengan tujuan untuk mengembalikan keseimbangan yang telah terganggu akibat pelanggaran aturan protokol Kesehatan. Tujuan penelitian ini adalah untuk melakukan kajian yang mendalam tentang pemberian sanksi adat terhadap pelanggaran aturan protokol kesehatan yang dilakukan dengan membersihkan makam dan taman yang ada disekitarnya. Pemberian sanksi adat tersebut merupakan bentuk tindakan lanjut atas penerapan dari Peraturan Bupati Bangkalan Nomor 63 Tahun 2020 sebagai upaya pendisiplinan pelaksanaan Protokol Kesehatan dalam menanggulangi pendemi. Dalam penelitian ini menggunakan pendekatan normatif dengan pendekatan peraturan perundang-undangan dan pendekatan konsep. Hasil penelitian menunjukkan penerapan sanksi adat terhadap pelanggaran protokol Kesehatan sebagai upaya pendisiplinan yang dilakukan Pemda Bangkalan dalam rangka pencegahan penyebaran pandemi cukup efektif. Namun penggunaan sanksi adat ini menimbukan persaoalan apakah dapat menjatuhkan sanksi adat dengan mendasarkan pada pelanggaran Peraturan Bupati

Kata kunci: sanksi adat, pendisiplinan, pelanggaran, Perbub

1. Introduction

In the era when the Covid-19 pandemic hitting areas throughout Indonesia, especially the Bangkalan area, there was a sharp increase in the spread of the pandemic so many residents were infected with the coronavirus. One of the reasons for the spread of the virus is the indiscipline of the community members regarding health protocol rules, especially the use of masks as outlined in Governor Regulation Number 53 of 2020 concerning the Implementation of Health Protocols in the Prevention and Control of Coronavirus Disease 2019. As a follow-up to this rule, the Bangkalan Local Government issued a Regent Regulation related to the application of social work sanctions for violators of the Health Protocol, including Bangkalan Regent Regulation Number 46 of 2020 concerning the Acceleration of Prevention and Handling of Coronavirus Disease 2019 (Covid-19) in Bangkalan Regency. This regulation was later amended by Bangkalan Regent Regulation Number 63 of 2020 concerning Amendments to Bangkalan Regent Regulation Number 46 of 2020 concerning the Acceleration of Prevention and Handling of Coronavirus Disease 2019 (Covid-19) in Bangkalan Regency.

Concerning the tackling of the pandemic, the Local Government of Bangkalan has made every effort to make the Bangkalan people aware of the intent and purpose of the health protocol rules being enforced. Community behavior towards understanding health protocol rules has not been maximized due to a lack of understanding about the

dangers of the coronavirus which has resulted in indiscipline and disobedience to health protocol rules, especially the use of masks. The efforts made by the Local Government of Bangkalan Regency in tackling the spread of the pandemic and saving the community from the pandemic have also not been maximized because they are constrained by people's behavior on understanding and interpretation of health protocol rules.

In the pandemic era that occurred in the Bangkalan area, many residents did not implement health protocols, especially the use of masks as stated in Governor Regulation Number 53 of 2020 which was further regulated in Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020. In both regulations it is emphasized the importance of implementing health protocols as an effort to prevent a pandemic as a form of public protection. The weakness in monitoring and enforcing disciplinary action against health protocol rules rests with local authorities. Weaknesses in monitoring and taking action against health protocol violations, especially the use of masks in areas, can lead to neglect due to weak law enforcement. The implementation of the Health Protocol is an effort to prevent a pandemic as a form of protection for the public the importance of using masks as a prevention of a pandemic which in reality has not gone well yet in the Bangkalan area.

There are 60 (sixty) violations of health protocols in Bangkalan daily, especially mask users who have been disciplined. Therefore, raids were carried out in all places and those affected by the raids were disciplined by using customary sanctions that is cleaning the tombs and parks around the city. Regarding the enforcement, the legal questions that can be asked are: "Can it be possible to impose customary sanctions on cleaning the parks and tombs based on a violation of Bangkalan Regent Regulation Number 46 of 2020 and whether it does not conflict with the principle of legality, considering that the principle of legality is the main principle that is used as a basis in every sanction. Therefore, it is necessary to study whether the imposition of customary sanctions is a form of follow-up action on the application of Regent Regulation Number 46 of 2020, is it not contrary to the principle of legality? According to Nur Basuki Minarno, "The government can only take legal action if it has legality or is based on a law which is the embodiment of citizens' aspirations. In a democratic country, government actions must obtain legitimacy from the people which is

formally stated in the law.[89]

Based on the explanation above, the central issue in this research is the implementation of customary sanctions to discipline health protocols, especially the use of masks. From this central issue, the following problems are raised, is it possible to impose customary sanctions based on violations of the Regent Regulations, is it possible to use of customary sanctions by cleaning parks and tombs in the Regent Regulations be categorized as a violation of the principle of legality? Considering that the Regent Regulation is not a product of legislation and law because according to Article 15 paragraph (1) of Law Number 12 of 2011 legislation products that can include criminal threats are laws and local regulations.

2. Methodology

In this research, the method used is normative research, using statute and conceptual approaches. The results of this study aim to provide a recommendation for the use of customary sanctions against violators of health protocol rules as stated in the Bangkalan Regent Regulation, so this research included in Law Reform Research[90]

3. Findings and Discussion

3.1 Customary Law, Customary Sanctions, and Application of Law in Courts

3.1.1. Customary law

The characteristics of the rule of law as a system of living norms, namely customary law is still maintained by a legal community which can be interpreted as an order that must be carried out and also a prohibition, which in its development becomes customary justice as an alternative for justice seekers in a certain area. As Oce Salman said, customary law is a legal norm, other social norms play a role and function as a means of social control.[91] In this regard, in customary law communities, the existence of customary justice is an integral part of customary law, so acceptance of customary court decisions and customary sanctions is more easily accepted by local communities because they use local value standards. Relationships between individuals give rise to violations of customary law so that customary

[89] Nur Basuki Minarno, Penyalahgunaan Wewenang Dalam Pengelolaan Keuangan Daerah Yang Berimplikasi Tindak Pidana Korupsi, Dissertation, Doctor of Law Program, Postgraduate Program, Airlangga University, Surabaya, 2006, p. 110-11.
[90] Tery Hutchinson, Researching and Writing in Law, Lawbook, Sydney, 2002, p.57
[91] Oce Salman, Kesadaran Hukum Masyarakat Terhadap Hukum Waris Adat, PT Alumni Bandung, 2007, p.21

courts step in to resolve the matter.

In addition, the sociological aspect of the application of law in society is due to sanctions from the authorities, whether these sanctions are effective or not is not the main problem. Indigenous peoples adhere to local customs because it is based on the functioning of customary justice institutions and also because they are authoritative. The question is that it is very difficult to maintain the authority of customary law when the customary justice institution that upholds customary law is not recognized by the state, bearing in mind that customary law is recognized as an institution if that law exists and lives in society. Obedience to customary law depends on each individual because customary law is local to certain groups of people so that it can be applied in an integrated manner to society in general.

Furthermore, Abdul Muis Mandra explained that the definition of law is a habit that has grown in a community group for generations.[92] In Law Number 1 of 2003 concerning the National Criminal Code, customary law is recognized and positioned as a fundamental principle because it is not only based on statutory regulations but is also based on living law in society, meaning that it gives place to customary law. Customary law according to Mr. C. Van Vollenhove is the overall rules of positive behavior in society that have sanctions that are not codified in a state. Furthermore, Soekanto, explained that customary law is the whole custom (which is not written and lives in society in the form of decency, custom, and prevalence) which has legal consequences.

In Law Number 1 of 2023 concerning the National Criminal Code there are several articles relating to the recognition of customary law, namely in Article 1, Article 2, Article 66, and Article 601 of the National Criminal Code,[93] this is considered contrary to the principle of legality. The inclusion of customary law sanctions must be based on the actions of the perpetrator and the consequences of the act and considerations of what is the background of the act being committed. This perspective will have an impact on the legal settlement of criminal acts. An act according to the law must be considered a criminal act in the Criminal Code with the same punishment as that action as stated in Article 5 paragraph (3) letter b of Emergency Law No. 1 of 1951.[94]

In the pandemic era a few years ago in the Bangkalan area, the local authorities, to overcome the pandemic, used traditional sanctions. Given that at that time the number of community members affected by Covid continued to increase so the Regent Regulation Number 46 of

[92] See Court Decision Number: 89/Pid.B/2008/PNM page 25.
[93] See Law Number 1 of 2023 concerning the National Criminal Code
[94] See Law Number 1 of 1951 concerning Emergency Laws

2020 jo. Regent Regulation Number 63 of 2020, for individuals, can be applied as follows:

1. verbal warning for 3x24 (three times twenty-four hours)
2. written warning for 3x24 (three times twenty-four hours) and/or
3. social work in the form of cleaning public facilities using work equipment[95].

In the Bangkalan Regent Regulation, the imposition of sanctions for individuals with the term social work in the form of cleaning public facilities using work equipment is a customary sanction. The term social work can be interpreted as customary sanctions, but in the Bangkalan Regent Regulation, the term social sanctions is used. In addition, in the Regent Regulation, it appears that the imposition of social work sanctions in the form of cleaning public facilities using work equipment is a term used in customary law. Sanctions for business actors, managers, organizers, or people in charge of places, and public facilities that violate health protocol rules will be subject to revocation of operational permits if verbal and written warnings are ignored.

Individual health protection is carried out by avoiding the entry of viruses through several actions including using protective equipment in the form of masks, washing hands, and keeping distance. In the Regent Regulations, it can be seen that the punishments given during the pandemic apart from fines were also imposed with social work sanctions and business closures in the framework of controlling the spread of the pandemic in returning a polluted environment.

The enactment of the Bangkalan Regent Regulation using customary law in the form of social work sanctions in the context of tackling the spread of the pandemic is very effective because the rate of violations of the Bangkalan Regent Regulation is still high with many residents were not discipline with health protocols. Therefore, action was taken in the form of imposing customary sanctions by cleaning the tombs and the parks around, this is an ideal reconstruction of customary law in tackling violations of health protocols during the pandemic in Bangkalan.

3.1.2. Customary Sanctions

Two years ago the Covid pandemic hit areas throughout Indonesia, in dealing with this, Bangkalan has made optimal efforts to deal with the pandemic by implementing health protocols, especially the use of masks. This indiscipline made the local authorities apply local

[95] See Article 58 of Bangkalan Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020

customary sanctions by cleaning parks and tombs and residents who were caught in the disciplinary operation were told to pray around the tombs of pandemic victims.

Customary sanctions are punishments for violators of rules whose sanctions are determined by local leaders. Concerning customary sanctions, this sanction can be given to individuals and business actors whose types of sanctions are different as stated in Article 58 of Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020. The use of customary sanctions in this regulation is expected that the community will be discipline in using masks. Disciplinary action was carried out in the context of tackling the pandemic which was applied to health protocol violators by cleaning the tombs and parks around them. This is an application of sanctions in Regent Regulation Number 63 of 2020. Violations of Health Protocol rules through the imposition of customary sanctions must be understood that the use of customary sanctions will result in disciplining the implementation of the Health Protocol in tackling the pandemic.

The existence of regulations on the use of customary law sanctions that are applied to residents for violations of wearing masks is quite effective as a disciplinary measure in implementing health protocols in tackling a pandemic. In connection with the implementation of the Health Protocol, several regulations related to the handling of Covid-19 have been issued, including East Java Governor Regulation Number 53 of 2020 concerning the Implementation of Health Protocols in the Prevention and Control of Coronavirus Disease 2019. Second, Bangkalan Regent Regulation Number 46 of 2020 jo, Bangkalan Regent Regulation Number 63 of 22020 concerning Amendments to Regent Regulation Number 46 of 2020 Concerning the Acceleration of Prevention and Handling of Coronavirus Disease 2019 (Covid-19) in Bangkalan Regency. Understanding various rules related to health protocols is a guarantee of the implementation of authority by state apparatus in the context of fulfilling a sense of justice so that it needs to be carried out for every community activity in areas that implement PSBB.

The use of masks is an effort to protect individual health to avoid the entry of viruses. Disciplinary action against the implementation of the health protocol has not been maximized because every day 60 (sixty) mask-wearing violators have been successfully disciplined in raids carried out in all places, then those affected by the raids are given customary sanctions by cleaning tombs and parks in the city of Bangkalan. Regarding the use of customary sanctions, Parwata stated that customary sanctions are always guided by basic religious values to

achieve peace and the imposition of customary sanctions aims to restore peace and security. The imposition of customary sanctions on the National Criminal Code is still recognized and positioned as a fundamental principle based on what lives in society. It is hoped that this will reduce the spread of the pandemic as a whole.

Types of customary sanctions as stated in Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020 which is given to violators who did not use masks varies, which is based on the violations committed. According to Lilik Mulyadi, the imposition of customary punishment aims to restore the balance of nature, magic, and restoration of the cosmos to return to the disturbed balance so that it becomes religious-magical again.[96] Therefore, the use of customary sanctions is very effective in reducing violations so that the violator accepts the decision and is willing to carry out the sanctions given by the local authorities.

The importance of complying with health protocols in the pandemic era to overcome the danger of pandemic transmission and provide an understanding of the impact of ignoring the use of health protocols. Ignoring this will be met with fines and customary sanctions as an effort to use masks. In addition, disciplinary action is an effort to accelerate the prevention and handling of viruses by carrying out disciplinary actions, and by empowering all available resources and elements.

The use of customary sanctions is very effective in providing deterrence against violating health protocols, bearing in mind that adherence to the implementation of health protocols, especially the use of masks in regions, is still not optimal, so customary sanctions need to be enforced.

3.1.3 Effect of Customary Sanctions on Increasing Discipline against the Enforcement of Health Protocols

To prevent the spread of the coronavirus which continues to increase sharply as the graph of the spread of the Coronavirus Disease 2019 (Covid-19) pandemic in 2020 showed an increasing trend and places Indonesia in rank 23 (twenty-three) in the world with a death ratio of 34 people per 1 (one) million inhabitants.[97] The distribution map as of September 14 2019 shows DKI Jakarta Province as the highest area

[96] Lilik Mulyadi, Eksistensi Pidana Adat di Indonesia, Pengkajian Asas, Teori, Norma, Praktik dan Prosedurnya, Center for Research and Development, Supreme Court, Jakarta, 2010, p.106

[97] https://covid19.go.id/p/berita/infografis-covid-19-16-september-2020, accessed on 17 September 2020 at 03.26 WIB.

with 55,099 cases (24.9%), followed by East Java Province with 38,431 cases (17.3%).[98] At the national level, East Java Province was in the red zone with a high risk of spreading.[99] The infocovid19 page, as of September 15, 2020, belonging to the East Java Provincial Government, showed a red zone with a high risk of spreading. There were 483 confirmed cases, 335 cases recovered and 62 people died. The average recovery rate was 69.3% and the average death rate was 12.9%.[100] Even though it has a moderate risk of spreading, East Java Province did not set a PSBB and chose to encourage residents to increase discipline in implementing health protocols.

Enforcement against violations of the health protocol by taking action to clean up parks and tombs in the city of Bangkalan. The imposition of these customary sanctions is the implementation of social work sanctions which give the position of customary law as a source of unwritten law. The provision of customary sanctions for violations of the discipline of using masks by cleaning the Paseban parks and tombs in Bangkalan Regency is a form of acceptance of customary sanctions as stated in the provisions of the Bangkalan Regent Regulation. Enforcement of Health protocol violators is following the provisions in Article 58 paragraph (2) of Bangkalan Regent Regulation Number 63 of 2020 states, sanctions for violating the implementation of the Health protocol in the prevention and control of Coronavirus Disease 2019.

However, in this implementation, you must coordinate with the Head of Police and Satapol PP regarding the sanctions contained in Article 58 paragraph 2 of Bangkalan Regent Regulation Number 63 of 2020. The use of customary sanctions by cleaning parks and tombs in Bangkalan for violations of wearing masks is an effort to suppress the pandemic in ways and according to the culture of each community. The local authorities must coordinate the implementation of the health protocol with the conditions and authorities of each region, and how should the community be directed to fulfill the demands of order and justice.[101]

4. Application of Customary Sanctions for Violations of Health Protocols

4.1. Use of Customary Sanctions in Forming Laws and Regulations.

[98] https://covid19.go.id/peta-sebaran, accessed on 17 September 2020 at 03.32 WIB.
[99] Op.cit.
[100] http://infocovid19.jatimprov.go.id/, accessed on 17 September 2020 at 04.06.
[101] Satjipto Rahardjo, Ilmu Hukum, Citra Aditya Bakti, 2012, p. 18-19.

The implementation of the Health Protocol rules as an effort to prevent pandemic and as a form of community protection at the implementation level in the Bangkalan area has not gone well yet, especially in terms of mask users who have been disciplined. Various ways of enforcement by using customary sanctions as the reason to restore the balance that has been disturbed due to violations of these rules

Several regulations related to the use of masks in the East Java Province area have developed which were initially only related to appeals, but to deal with this pandemic, social work sanctions are regulated starting from East Java Governor Regulation Number 53 of 2020 concerning the Implementation of Health Protocols in Prevention and Control Coronavirus Disease 2019. Furthermore, in the Bangkalan area, Bangkalan Regent Regulation Number 46 of 2020jo. Bangkalan Regent Regulation Number 46 of 2020 concerning Amendments to Regent Regulation Number 46 of 2020 Concerning the Acceleration of Prevention and Handling of Coronavirus Disease 2019 (Covid-19) in Bangkalan Regency. In addition to the designation of customary sanctions, customary law also has terms, namely legal alliances, small groups, and isolated residents whose existence often hinders the development [102] . Several designations for the customary law community unit because it has the power to enforce regulations in its community[103].

The existence of customary sanctions is an integral part of people's lives in general so customary law is always closely related to the common life of village communities. In this regard, Soepomo stated that the religious pattern is an inner unity so that people in a group feel one with the whole group, and the task of society is to maintain a balance between the group and the environment. Because if the balance is maintained properly then the happiness of society will be guaranteed

The validity of the living law in society determines that a person should be punished based on where the law lives and following the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, and the National Criminal Code which are still recognized and used. The law that is still valid and developing in people's lives, known as customary criminal law, in practice, is compiled in the form of a Presidential Regulation, and provisions relating to customary offenses themselves will be contained in Regional Regulations at both the provincial and district/city levels.

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[102] Fifik Wiryani, 2009, "Pengaturan Hak-hak masyarakat adat dalam Pengelolaan Sumber Daya Alam, Malang, Setara Press, 2009, p. 11

[103] Afdilah Ismi Chandra, Dekonstruksi Pengertian Kesatuan Masyarakat Hukum Adat dalam Unang Undang Dasar Negara Republik Indonesia Tahun 1945, 2008, p. 379

The customary sanctions imposed by the local authorities for violations of the Health Protocol rules by cleaning the tombs and parks around raises a conflict about whether it is permissible to give sorrow based on the regent rules, considering the existence of the principle of legality is the main principle that is used as the basis for any sanctions. Law Number 12 of 2011 concerning Formation of Laws and Regulations which was later amended by Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Formation of Laws and Regulations and then amended again by Law Number 13 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Laws and Regulation. In Article 15 of Law Number 12 of 2011, it is said that content material regarding criminal provisions can only be contained in a. Law, b. Provincial Regulation or c. Regency/City Local Regulation. Criminal provisions in regional regulations can be in the form of imprisonment for a maximum of 6 (six) months or a maximum fine of Rp. 50,000,000.00 (fifty million rupiah). Furthermore, Provincial Regulations and Regency/City Local Regulations may contain threats of imprisonment or fines in accordance with those regulated in other Laws and Regulations.

Based on the Law on Formation of Laws and Regulations, customary sanctions in the form of social work as stated in the Bangkalan Regent Regulation cannot be categorized as a Local Regulation, so the customary sanction in the form of cleaning parks and tombs violates the law because it is not permissible to impose criminal sanctions or sorrow based on the Regent Regulation so imposing customary sanctions based on violations of the Regent Regulations is not allowed.

Therefore, the use of customary sanctions which is a form of follow-up action on the implementation of Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020 is contrary to the principle of legality. The principle of legality in criminal law determines that someone can be punished based on the provisions of the legislation because the government can have legality based on the law in carrying out legal actions. Therefore, the imposition of customary sanctions by the authorities on health protocol violators by cleaning tombs and parks is part of further enforcement of the Bangkalan Regent Regulation so that violations of the Health Protocol rules through the imposition of customary sanctions must be understood as a form of disciplinary implementation of the Health Protocol in tackling the pandemic. Thus, imposing sanctions based on violations of Regent Regulations is inappropriate, because imposing customary sanctions based on

violations of Regent Regulations is inappropriate because Regent Regulations are not a product of legislation, in addition to laws.

The use of customary sanctions in carrying out acts of violating the Health Protocol is a form of balancing the situation and efforts to spread the pandemic. The existence of regulations on the use of customary law sanctions applied to residents for violations of wearing masks is quite effective as a disciplinary measure in implementing health protocols in tackling a pandemic on the one hand, but on the other hand, the use of customary sanctions is not appropriate because it is against the principle of legality and the Regent Regulation is not is a product of legislation.

4.2. The Influence of Customary Sanctions in Improving the Quality of Judicial Enforcement

The spread of the Covid-19 pandemic has ended, but the application of customary sanctions against violators of health protocol rules has caused a polemic for law enforcement. Notes related to the use of customary sanctions based on violations of Bangkalan Regent Regulation Number 46 of 2020 jo. Regent Regulation Number 63 of 2020. The use of customary sanctions based on the Regent Regulation is inappropriate because the Regent Regulation is not a product of legislation in addition to law. After all, according to Law Number 12 of 2011 concerning Formation of Laws and Regulations a product of legislation that can include criminal threats are laws and regulations.

In this regard, the Regional Government of Bangkalan issued regulations related to health protocols to suppress the rate of the virus spread by using customary sanctions. Traditional sanctions have legal consequences, or authoritative decisions from the heads of the people because, between custom which has legal consequences and which does not have legal consequences, there is no clear separation. Every habit that later becomes daily behavior is customary law.[104]

The existence of customary sanctions aims to provide fulfillment of a sense of justice in society and enforcement of the rules that are being enforced to provide a sense of justice. But in practice, it is difficult to enforce these rules.

Problems arise over the limitations of the judiciary, especially in areas that are still remote and far from the city center. In a traditional society, which is a native of the area, it has its own standard of justice which is internal to the traditional community. The development of

[104] Soerjono Soekamto,(I) Kedudukan dan Peranan Hukum Adat di Indonesia,Kurnia Esa, Jakarta, 1982,p.36.37

traditional society was initially regulated in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, but for now, traditional society is still recognized as a legal subject as stated in Article 1, Article 2, Article 66 and Article 601 of the National Criminal Code.

Traditional facilities are an integrated part of the universe. An integrated relationship is a harmonious relationship, to create peace between people within the customary law community [105] . Thus conceptually in indigenous peoples, the notion of law enforcement is a harmonious relationship which has the meaning of activities aligning the values contained in attitudes and actions to create peace.[106]

Evaluation of the use of customary sanctions for violations of health protocols must be carried out to find weaknesses in the policy formulation of the Regent Regulation regarding the use of customary sanctions against violators of health protocols. Weaknesses in the formulation of legal regulations will affect law enforcement policies and policies for dealing with violations of health protocols.

Discipline for violators who do not use masks that hit almost all areas, including the Bangkalan area, is a disregard for health protocol rules that are so strong in the context of social behavior. Therefore, the maximum effort for law enforcement in disciplining the use of masks is to use a customary approach, which is known as giving social work sanctions associated with law enforcement in the final process of disciplining the use of masks. Thus it is very difficult to determine the disciplinary direction for implementing health protocol rules so that the use of customary sanctions will improve the quality of law enforcement, therefore it is necessary to reconstruct norms so that there are no loopholes that can be exploited by health protocol violators.

The validity of the living law in society determines that a person should be punished based on where the law lives and following the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society. This is certainly contrary to the principle of legality of the violations of the use of masks that will be subject to fines. Because at the time of the pandemic, many members of the public lost their jobs, the application of fines was not effective enough because there was no money to pay the fines.

The existence of laws that live in society is to handle case that

[105] Taqwaddin, Aspek Hukum Kehutanan dan Masyarakat Hukum Adat di Indonesia, Intan Cendika, Yogyakarta, 2011, p.140
[106] Soerjono Soekamto,(II) Faktor-faktor Yang Mempengaruhi Penegakan Hukum, Raja Grafindo Persada, Jakarta, 2011, p.5

continues to increase. This will also have an impact on the role of investigators and prosecutors in customary matters where it is not clear about the elements of criminal acts that live in society. Criminal provisions can be in the form of fulfilling customary obligations, including offenses that do not have clear regulations on what actions are prohibited. This means that it opens opportunities for law enforcement officials such as police and prosecutors to participate in interfering in customary matters. Customary law is still a problem in itself in the criminal justice system in Indonesia. So the arrangement cannot be as simple as handing over all arrangements to each region. Customary criminal matters must be regulated according to their regulations. Therefore, the philosophy of pandemic recovery is for the sake of natural balance, so it is necessary to use customary sanctions in Regent Regulations Regarding Violations of Health Protocols.

5. Conclusions and Suggestions

5.1. Conclusions

1. Application of health protocols for community activities aims to prevent and control the coronavirus to prevent the impact of a larger disaster that threatens the safety of people's lives and health. In the framework of this prevention, the use of customary sanctions based on the viiolation of the health protocol in the Regent Regulation is inappropriate because the Regent Regulation on health protocols is not a product of legislation, in addition to the law, because, in Law Number 12 of 2011 a product of legislation that can include criminal threats is the Law and Local Regulation.
2. Health Protocol regulations that govern social work sanctions which in terms are equated with customary sanctions need to be balanced with socialization efforts so the implementation and application of customary sanctions or social work goes well. Understanding health protocol rules needs to be carried out in stages so that legal values and norms in society can be achieved, namely fulfilling a sense of justice.

5.2.Suggestions

1. Disciplinary action for the implementation of Health protocol rules by using social work sanctions up to now still growing and developing in the local indigenous community. In the use of customary sanctions, it is necessary to consider what is the background for the use of these customary sanctions for the Health protocol violations. Disciplinary action of health protocol rules aims to restore the balance that has been disrupted by disregard of these

rules.

2. The implementation of customary sanctions in the Bangkalan area is a form of disciplinary action of health protocol rules in the framework of tackling the pandemic which in its implementation is based on rule of laws and is linked to aspects of customary sanctions of social work. Neglecting the use of masks in the Bangkalan area does not only can be handled by local law but can go through local regulations, but usually, the community prefers settlement through customary law.

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Legal Responsibility in Credit Agreements Due to Breach Of Contract at Lembaga Perkreditan Desa (LPD) Mantring, Tampaksiring, Gianyar, Bali

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Abstract

Traditional village financial institutions in Bali, known as Lembaga Perkreditan Desa (LPD) are financial institutions belonging to traditional villages and domiciled in the customary village area. To establish LPD, a village must have awig-awig beforehand .This is because the village owned financial is a custom of course be subject to customary law that is in the customary village. Several provisions are regulated and subject to awig-awig, namely regarding the settlement of defaults and acts against the law, provisions regarding customary processions in the settlement of LPD, and provisions regarding village residents. In carrying out savings and loan activities, LPD Mantring has a credit agreement for its customers or debtors. LPD Mantring's compliance with the provisions of awig-awig can be seen through its letter of credit agreement which contains the use of problem solving with customary provisions based on the applicable awig-awig. The implementation of the customary settlement of default disputes in its implementation is completed by the management of the Mantring LPD and the Mantring Traditional Village Prajuru, which later the results of this customary meeting will be binding on debtors who break their promises.

Abstrak

Lembaga keuangan desa adat di Bali yang bernama Lembaga Perkreditan Desa (LPD) ialah lembaga keuangan milik desa adat dan berkedudukan di wilayah desa adat. Untuk mendirikan LPD, suatu desa wajib memiliki awig-awig terlebih dahulu. Hal ini disebabkan karena LPD merupakan lembaga keuangan milik desa adat yang tentunya harus tunduk pada hukum adat yang terdapat di desa adat tersebut. Beberapa ketentuan yang diatur dan tunduk pada awig-awig ialah tentang penyelesaian wanprestasi dan perbuatan melawan hukum, ketentuan mengenai prosesi adat dalam mendirikan LPD, dan ketentuan mengenai warga desa. Dalam melaksanakan kegiatan simpan pinjam, LPD Mantring memiliki perjanjian kredit bagi para nasabah atau debiturnya. Ketaatan LPD Mantring terhadap ketentuan awig-awig dapat dilihat melalui surat perjanjian kreditnya yang berisikan tentang penggunaan penyelesaian masalah dengan ketentuan adat berdasarkan awig-awig yang berlaku. Penerapan penyelesaian sengketa wanprestasi secara adat dalam pelaksanaannya diselesaikan oleh pengurus LPD Mantring dan Prajuru Desa Adat Mantring yang nantinya hasil dari rapat adat ini akan bersifat mengikat bagi debitur yang cidera janji.

1. Introduction

One of the provinces in Indonesia, namely Bali, is known by many nicknames one of them is Paradise on Earth or heaven on earth. Apart from being famous In terms of culture, Balinese people also have diverse customs and traditions interconnected and interdependent. Another uniqueness owned by The province of Bali is the existence of a dual system of village administration, namely the village adat or pakraman village and official village. The existence of two systems of government This has been around since the royal era and has become a tradition in people's lives Bali.[107] Desa pakraman has a special task in dealing with problems adat, while the official village carries out various organizational activities government or service.

Prior to 2019, village customary financing was not a part of government financing policies. At that time it was only limited to the village who accept the policy, even though the budget is needed by the village quite a lot of packages. The heavy burden borne by Pakraman Village and the amount of the budget that Pakraman Village has to spend in implementing it is this special task that demands the formation of good economic governance independently, so that the idea of establishing a Village Credit Institution was born. Idea regarding the establishment of the Village Credit Institution (LPD) originated from a visit The Governor of Bali Province at that time, namely Prof. Ida Bagus Mantra to West Sumatra in 1984 for a comparative study. There is a Barn Pitih Nagari, a customary owned financial institutions that are very well developed. A number of months after the visit to West Sumatra. Prof. Ida Bagus Mantra attended seminar related to Village Financial Institutions (LKD) or Village Credit Agency (BKD) in Semarang. From this incident, he was sure that the Province of Bali would be able to to form customary financial institutions like those in West Sumatra improve an independent and sustainable economy to sustain related customary activities, cultural life, religion and villagers through customary financial institutions engaged in the savings and loan business in each village in Bali. As a pilot material, in each district only one financial institution was established and a Decree was issued (SK) Governor No. 972 of 1984 regarding the Establishment of Village Credit Institutions (LPD) in the Province of the Level I Region Bali. Four years later the Bali Level I Regional Regulation No. 2 of 1988 regarding Village Credit Institutions issued after the results of observations show promising follow-up effects and are growing rapidly.

[107] I Gde Parimartha, Silang Pandang Desa Adat dan Desa Dinas di Bali (Denpasar: Udayana University Press, 2013, h. 22

Per In 2020 it is known that there are 1,436 Village Credit Institutions (LPD) in Bali scattered in a number of traditional villages in Bali, a total of 1,308 Credit Institutions Villages are still operating and 128 of them are listed as no longer operating.[108]

Definition of Village Credit Institutions (LPD) in Regional Regulations Bali Province No. 3 of 2017 Article 1 number 9 is " a financial institution belonging to *Pakraman Village* domiciled in *wewidangan* [109] *Pakraman Village.* Besides domiciled in authority, to be able to establish a Village Credit Institution a village must have an awig-awig first, as has been described earlier.

This is because the Village Credit Institution is Pakraman village or customary village financial institutions which of course must be subject to awig-awig provisions in the village in addition to statutory regulations other. Some examples of provisions that are subject to *awig-awig* are regarding settlement of defaults and acts against the law, provisions regarding customary procession in establishing Village Credit Institutions, and provisions regarding villagers. Provisions that are subject to regional laws and regulations is related to internal management and control issues, the establishment process Village Credit Institutions, field of business of Village Credit Institutions, provisions punishment for management, and others.

Business fields of Village Credit Institutions based on Regional Regulations Bali Province No. 3 of 2017 concerning Village Credit Institutions Article 7 paragraph (1) includes:

1. Receive or collect funds from Krama Desa in the form of dhana sepelan and dhana seselang;
2. Providing loans to Village and Village Krama;
3. LPD can provide loans to other Krama Desa with conditions there is cooperation between Villages (further stipulated in a Governor Regulation);
4. Receive loans from financial institutions a maximum of100% of the total capital, including reserves and retained earnings, except other limitations on the amount of the loan or support or financial assistance;

[108] Ni Putu Eka Wiratmini, 2020 Aset LPD di Bali Turun 3 Persen, Bali Bisnis, 10 Februari 2021, https://bali.bisnis.com/read/20210210/538/1354689/2020-aset-lpd-di-bali-turun-3-persen diakses pada 7 Januari 2022 pukul 23.37 WIB.
[109] Wewidangan adalah wilayah desa adat yang memiliki batas-batas tertentu (Pasal 1 angka 32 Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat di Bali).

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5. Store excess liquidity at the designated bank Competitive interest rewards and adequate service.

Village Credit Institutions selected for research is The Mantring Traditional Village Credit Institution, located on Jl. Arjun Banjar Mantring, Tampaksiring, Gianyar Regency. Manring Village Credit Institution classified as successful in fulfilling its goals for the welfare of the villagers local. Programs that benefit the community, especially residents Pakraman Mantring village that is :[110]

1. Social funds for mothers giving birth as one of the programs in the field of women's empowerment. Every mother giving birth will receive financial assistance of IDR. 500,000, - which was issued through a social fund post.
2. Social funds for sick customary villagers, both outpatients or hospitalization, IDR 500,000 which can only be received once in a year
3. Assistance in the form of goods for customary village residents who died, consisting of 20 kg of rice, 1 duck, 20 meters of cloth, 20 eggs, and 1 pack of incense.
4. A donation in the form of suckling pig as one of the internal facilities cremation ceremony activities. [111]

In carrying out savings and loan activities, the Village Credit Institution Mantring has credit agreements for its customers or debtors. The compliance of the Mantring Traditional Village Credit Institution with the awig-awig provisions can be seen in the form of the credit agreement which contains regarding the use of problem solving with customary provisions based on awig-awig applicable. This is clearly written in one of the articles of the agreement form Manring Village Credit Institution credit. This is clearly written in one of the articles of the agreement form Manring Village Credit Institution credit. In the event of default against credit agreement at the Mantring Traditional Village Institution, then it is in its completion can be chosen whether to be resolved through a dispute resolution process online adat (non-

[110] Wawancara dengan I Ketut Budiarta, Kepala Lembaga Perkreditan Desa Mantring, tanggal 24 Maret 2022.

[111] Ngaben adalah upacara (Pitra Yadnya) pembakaran jenazah umat Hindu khususnya di Bali yang bertujuan untuk mengembalikan roh leluhur ke tempat asalnya (Ernatip, Upacara Ngaben di Desa Rama Agung-Bengkulu Utara, Jurnal Penelitian Sejarah dan Budaya, Vol. 4, No. 2, 2018, h. 1116).

litigation) or through the courts (litigation). Solution application customary default disputes in practice are resolved by the management The Mantring Traditional Village Credit Institution and traditional prajuru (bendesa adat, kelian adat, sarikan and treasurer) which will be the result of the *Paruman* [112] this custom is binding for debtors who default. This is because the results of the blend have been was witnessed by many parties and the settlement through a settlement was acknowledged by awig-awig.

2. Methods

Hillway defines research as a method of study that is done a person through a careful and accurate examination of an incident, so that it will get the right solution to the problem. [113] Types of research methods The method used in the preparation of this scientific paper is empirical juridical. Empirical juridical research views law as a social phenomenon so it is necessary to study and analyze legal events, legal consequences, legal relations, legal subjects, legal objects, and rights and obligation. [114]

Approach used is approach qualitative, which according to Bogdan and Taylor is a research procedure which produces descriptive data in the form of written or spoken words from parties observable parties and behavior, which is then redirected to the background background and the individual holistically (whole). [115] Approach the problem with qualitative methods were developed to reveal social phenomena in life society, such as how the perception of society itself and of conditions themselves.

3. Finding And Discussion

Research conducted using qualitative methods certainly cannot be separated from the stages that must be carried out directly to obtain data in order to answer and analyze the problem formulation as part of the legal issues that are the subject matter. The research process carried out includes:

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[112] *Paruman* adalah permusyawaratan/permufakatan krama desa adat yang mempunyai kekuasaan tertinggi di dalam desa adat (Pasal 1 angka 8 Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2017 tentang Lembaga Perkreditan Desa).

[113] Hillway, Introduction to Research, dalam J. Supranto, Metode Penelitian Hukum dan Statistik (Jakarta: Rineka Cipta, 2003), h. 1.

[114] Amiruddin dan H. Zainal Asikin, Pengantar Metode Penelitian Hukum, Cetakan Kedelapan(Jakarta: RajaGrafindo Persada, 2014), h. 152..

[115] Lexy Moleong, Metode Penelitian Kualitatif, Cetakan Ketigabelas (Bandung: Remaja Rosdakarya, 2000), h. 3.

1. Preparation phase Is a series of activities carried out by prospective researchers before Carrying out research activities begins with the preparation stage. In general the preparatory stage begins with determining the problem, the purpose of the research, review literature, draw theoretical framework, formulate hypotheses (if any), as well determine research techniques that are adapted to the nature and type his research.[116]
2. Implementation stage this stage is the implementation of the preparation stage. At this stage it will the collection and assessment of the data that has been carried out collected and a list of questions to be asked source during the interview. Then conduct an interview with the informant used an interview guide that had been prepared previously.[117]
3. Completion Stage s the last stage of the research process is to prepare a report research that is described in a systematic and complete manner regarding the results of the research which has been done. [118]

The research was conducted using subjects who were the administrators of the Institute Village Credit (LPD), Prajuru Adat, and the community in the Mantring Traditional Village, Tampaksiring District, Gianyar Regency, Bali. Where the research period is carried out from February to April 2022 located at the Mantring Customary Village Credit Institution (LPD) on Jalan Arjuna Banjar Mantring, Tampaksiring District, Gianyar Regency, Bali.

Legal issues that arise become part of the problem formulation that must be answered by analyzing to find answers that can be accounted for academically. Where is the question about legal accountability at the Village Precredit Institution
Adat Mantring in case of default

3.1. Discussions

In February 1984, the Department of Home Affairs held a seminar regarding rural credit. The seminar became the beginning of the emergence of ideas from the Governor of Bali at that time, Prof. Dr. Ida Bagus Mantra, to establish Village Credit Institutions in Bali and subsequently the position of Credit Institutions Villages in Bali are strengthened by the Regional Regulation of the Province of Bali

[116] Ibid, h. 112.
[117] Ibid
[118] Elisabeth Nurhaini Butarbutar, op,cit, h. 132.

Number 8 Years 2002, [119] which has been updated to become a Regional Regulation of the Province of Bali Number 3 of 2017. The Village Credit Institution is a microfinance institution which was built for the benefit of community economic empowerment in traditional villages so that the Balinese people who are known to have strong cultural endurance will become stronger with a strong economic aspect. Credit Institution The village is conceptualized as a traditional village institution which is an operational unit as well as functioning as a container for traditional village wealth in the form of money or other securities. The direction and function is clear for improvement standard of living of villagers and in supporting the development of traditional villages. [120] nstitution Village Credit is part of the customary village institutions in Bali that were formed in accordance with the existing awig-awig in each traditional village. Awig-awig is required to regulate the relationship between humans and God (parahyangan), human-to-human relations (pawongan), and human-to-human relations nature (weakness). The Village Credit Institution is part of the awig-awig who entered the garage.[121]

Village Credit Institutions in Bali can be categorized as developing growing rapidly each time and the success is due to several important factor.[122] First, GRDP (Gross Regional Domestic Product) and Bali's economic growth continues to increase above the national average as well conducive government policies support its existence through issuance of legal instruments in the form of Regional Regulations. Second, granting credit based on a character that has traditional nuances because of the Village Credit Institution is a community-based credit institution that is owned, managed, and utilized by the Pakraman village community, so that the sense of ownership is high levels of its members support the development and progress of the Institute Village Credit. Third, the use of integrated social (customary) sanctions awig-awig forces customers to comply with their credit contracts with a distinctive and unique way but without default. Fourth, use employees of the Village Credit Institution from the local community who recruit them based on performance. Based on

[119] I Wayan Suartana, Arsitektur Pengelolaan Risiko pada Lembaga Perkreditan Desa (LPD) (Denpasar: Udayana University Press, 2009), h. 1.
[120] Wawancara dengan I Made Sudiarsana, S.H., Sekretaris Lembaga Perkreditan Desa Mantring, tanggal 24 Februari 2022.
[121] Wawancara dengan I Made Madja, Bendesa Adat Banjar Mantring, tanggal 26 Februari 2022.
[122] I Wayan Suartana, op.cit, h. 2-3

these factors, then the birth The Manring Village Credit Institution is also to align this function in Mantring traditional village.

The birth of the Mantring Traditional Village Credit Institution is inseparable from the role of the indigenous people. The Mantring Traditional Village Credit Institution was formed and founded by the people of the Manring Traditional Village in October 1991. In addition to the role of the village community, the establishment of the Traditional Village Credit Institution Mantring was also not spared from the role of the then Regent of Gianyar, Tjokorda Raka Dherana, which includes the Mantring Traditional Village Credit Institution in the Subsidy letter The Bottom Region (SDB) on January 13, 1992. A month later, to be precise on February 26, 1992, a Decree of the Chief Governor was issued Bali Level I Region Number 143 of 1992 concerning the Establishment of Institutions Village Credit in the Province of Bali in 1991/1992.

Village Credit Institutions can only be established if previously in a traditional village already had awig-awig.[123] Without awig- awig, then a traditional village area will not be able to form an Institution Village Credit. The placement of these conditions in the first point shows such a strong influence of awig-awig in the formation of credit institutions Village, then questions began to arise regarding the position of awig-awig in a village in Bali. The definition of awig-awig is regulated in Article 1 Number 29 of the Regulations Bali Province Number 4 of 2019 concerning Traditional Villages in Bali, namely "rules made by the Traditional Village and/or Banjar Adat which applies to Krama Desa Adat, Krama Tamiu[124] and Tamiu "[125] ccording to the University's Professor of Customary Law Udayana, I Wayan P. Windia, awig-awig is a series of governing rules order of life of one of the traditional Balinese communities, which is usually known with customary village.[126] In the past, many awig-awig were regulations not

[123] Pasal 5 huruf a Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2017 tentang Lembaga Perkreditan Desa.

[124] Krama Tamiu adalah warga masyarakat Bali beragama Hindu yang tidak Mipil, tetapi tercatat di Desa Adat setempat (Pasal 1 Angka 10 Peraturan Daerah Provinsi Bali Nomor 4 Tahun2019 tentang Desa Adat di Bali). Mipil adalah sistem registrasi keanggotaan Krama Desa Adat(Pasal 1 Angka 13 Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat di Bali)

[125] Tamiu adalah orang selain Krama Desa Adat dan Krama Tamiu yang berada di wewidangan Desa Adat untuk sementara atau bertempat tinggal dan tercatat di Desa Adat setempat (Pasal 1 Angka 11 Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat di Bali)..

[126] I Wayan P. Windia, Menyoal Awig-Awig Eksistensi Hukum Adat dan Desa di Bali(Denpasar: Lembaga Dokumentasi dan Publikasi FH UNUD, 2008), h. 11

written down, but now all awig-awig throughout Bali have been uniformed written form. The beginning of the Balinese people's attention to the importance of writing awig-awig took place starting in 1969 with the holding of awig-awig coaching seminars awig desa by the Faculty of Law, Udayana University. [127] Further steps to As a result of the seminar, an awig-awig coaching and writing project was held by the Provincial Government of Bali. Finally managed to form the Assembly Trustee of the Customary Institution in 1979, which in the process this institution participated in as well as assisting the development project process and writing awig-awig. Finally With this process, the awareness to write down awig-awig which was not originally written into a written form was successfully encouraged and made awig- awig is written in every village in Bali. Written awig-awig is considered important in the context of legal discovery, namely facilitating, finding, knowing, and understand the contents of customary law.[128]

The process of making awig-awig along with the provisions in it quite practical and democratic. Made in the traditional village Paruman where all Villagers are given the opportunity to participate in the collection process decision. This is an example of the practice of direct democracy on a local scale. Therefore awig-awig has another term, namely pasikian pasubaya(mutual agreement) village karma that is born and grows according to needs real villagers.[129] The juridical basis of awig-awig is the Law The 1945 Constitution of the Republic of Indonesia in Article 18A and Article18B which recognizes and respects the existence of pakraman villages and right. [130] In accordance with the order of the laws and regulations in Indonesia level of the Constitution of the Republic of Indonesia Year1945 is in the highest position compared to other regulations, then statutory regulations are not allowed to contradict The 1945 Constitution of the Republic of Indonesia so that there is none juridical obstacles to the implementation of awig-awig. [131] Even though in the Law Number 6 of 2014 concerning Villages does not specifically regulate this customary village or pakraman village in Bali and there is no law yet specifically regulates the application of awig-awig, but in regulations local

[127] Ibid, h. 6.
[128] Biro Hukum Sekretariat Daerah Provinsi Bali, Pedoman Penyusunan Awig-Awig dan Keputusan Desa Adat (Denpasar: Bahan Pembinaan, 2001), h. 1-
[129] A.A Gede Oka Parwata, Memahami Awig-Awig Desa Pakraman (Denpasar: Udayana University, 2010), h. 52.
[130] I bid, h. 56.
[131] Ibid, h. 57.

legislation, the juridical basis for the application of awig-awig is Bali Provincial Regulation Number 4 of 2019 concerning Traditional Villages in Bali.

If you look at the awig-awig function in a dynamic context, awig-awig has a role as a social control as well as a means community renewal. The function of awig-awig as a basis of social control from the assumption that awig-awig has the ability to control the behavior of a personcitizens and create a conformity in behavior them, both preventively and repressively. Preventively, the existence of awig- awig which has been known and understood by the villagers through the socialization process will guide the behavior of villagers towards the desired behavior together.[132] As a means of renewing society, even though awig- awig arises from the traditional provisions of an indigenous community in Bali however, awig-awig must be able to respond to the times. Even so, until now there is still a tradition of sacred texts native awig-awig in a village. This kind of action though on the one hand interesting and maintain local beliefs, but on the other hand become inconsistent with the times.

The awig-awig that can be read is the awig-awig that has been copied onto paper and typed neatly using two scripts (Balinese and Latin) and one language (Balinese) but actually the original awig-awig manuscript which sacred is the awig-awig which is written using leaves ejection with Balinese letters and language (according to Balinese spelling). Palm leaves which is dried will be written with liquid ink which is awig-awig in fact, where its existence is sacred and may not be used or removed from storage in a traditional village. Awig-awig this model is celebrated and given offerings every Hari Raya Saraswati, day the decline of science, which is believed by the Balinese Hindu community. This is the description of the awig-awig position because awig-awig itself is a part that is not can be separated from a Village Credit Institution.

Article 1 point 9 Regional Regulation of Bali Province Number 3 of 2017 regarding the Village Credit Institution defines the LPD as *"…an institution finance belonging to Pakraman Village which is domiciled in the Village authority Pakraman"*. The word property indicates that the institution is an institution formed and managed by Desa Pakraman for the benefit of Desa Pakraman, then it can be interpreted that the legal subject is the founder of the Village Credit Institution.[133] Article 3 Regional Regulation of the Province of Bali

[132] Ibid, h. 60

[133] I Nyoman Sukandia, Kedudukan Hukum dan Fungsi Lembaga Perktreditan Desa (LPD) sebagai Lembaga Perekonomian Komunitas dalam Masyarakat Hukum Adat di

Number 3 Years 2017 concerning Village Credit Institutions confirms the status and functions of the Institution Village Credit, namely as a financial institution owned by Pakraman Village carry out business operational activities in the village environment and for is pakrama village.

The legal status of the Village Credit Institution is a special form which is only a financial business entity.[134] In general, business entities in the field financial, namely the bank has a legal status in the form of a Limited Liability Company (PT), however specifically the Village Credit Institution is only in the form of a financial business entity belongs to the village. The legal basis for establishing a Village Credit Institution is awig-awig, pararem, and Perda LPD was not established based on legal instruments companies or banking legal instruments, namely notarial deeds. Article 21 of the Law Number 10 of 1998 concerning Amendments to Law Number 71992 concerning Banking stated that an alternative legal entity for banking companies are:

a. For Commercial Banks [135] :
   1) limited liability company ;
   2) Cooperative ;
   3) Regional Company.
b. For Rural Credit Banks [136] :
   1) Regional Company ;
   2) Koperasi ;
   3) limited liability company ;
   4) Other forms stipulated by Government Regulation.

In the case of a Limited Liability Company (PT), Article 7 Paragraph (1) of the Law Number 40 of 2007 concerning Limited Liability Companies stipulates that the company established by 2 (two) or more people with a notarial deed made in Indonesian. This provision shows two things: first, that the Company Limited (PT) established by individuals; and secondly, Limited Liability Company (PT) must be established by notarial deed. This provision is very different from circumstances and the fact that the Village Credit Institution which was established was not by individuals, but the community of indigenous

Bali, Disertasi (Malang: Program Doktor Ilmu Hukum Fakultas Hukum Universitas Brawijaya, 2012), h. 158.

[134] Wawancara dengan I Ketut Budiarta, Kepala Lembaga Perkreditan Desa Mantring, tanggal 24 Maret 2022.

[135] Pasal 21 Ayat (1) Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan atas Undang- Undang Nomor 7 Tahun 1992 tentang Perbankan

[136] Pasal 21 ayat (2) Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan.

peoples, and the legal basis the establishment is not a notarial deed but an awig-awig. Similar terms found in Article 7, Article 8, Article 9, and Article 13 of Law Number 17 of 2012 concerning Cooperatives. Article 7 Law Number 17 Years 2012 concerning Cooperatives stipulates that primary cooperatives be formed at least by 20 (twenty) people. Secondary cooperatives are formed at least by 3 (three) cooperatives. Article 8 and Article 9 stipulate that the formation of cooperatives is determined in the Articles of Association which is carried out by Cooperative Establishment Deed drawn up by a Notary in Indonesian. Chapter 13 stipulates that the Cooperative obtains approval as a legal entity after the Cooperative Establishment Deed is ratified by the Minister. Legal entity status Limited Liability Companies are also obtained after Limited Liability Company legal entities ratified by the Minister through a Ministerial Decree (Article 7 paragraph (4) of Law 40/2007 regarding Limited Liability Companies).

Similar provisions are also found in Law Number 20 Years 2008 concerning Micro, Small and Medium Enterprises (MSMEs). this law defines UKMK as a productive business owned by an individual.[137] Whole provisions in Law 20/2008 concerning UKMK regulate UKMK as a general business activity, both in the production of goods and services and distribution. This law does not specifically regulate financial ventures and also does not include community financial institutions culture. The sharp differences between MSMEs and LPD are: (a) MSMEs are business activities owned by individuals, while LPDs are not owned individual but belongs to the community of indigenous peoples; (b) MSME includes all business activities, while the LPD is only in the financial sector; and (c)

MSME is a business activity with a pure economic vision and is general in nature, while the LPD carries an economic and socio-cultural, even socio-religious vision magical, and is limited to the Pakraman village community environment. Difference This shows that the Village Credit Institution conceptually, vision, and its mission is not to qualify as UMKM. These terms are different with the fact that the Village Credit Institution, that the Village Credit Institution not founded by individuals, but the community of indigenous peoples. Likewise, the institutional status of the Village Credit Institution was not obtained based on the approval of the Government or the Minister, but based on

[137] Pasal 1 angka 1, angka 2, dan angka 3 Undang-Undang Nomor 20 Tahun 2008 tentang Usaha Mikro, Kecil, dan Menengah.

pararem. [138] This form of ratification is in accordance with the provisions of the Constitution which gives effect to the social system and the legal system indigenous peoples throughout the management of community life.

The Village Credit Institution was established with the aim of supporting carrying out the functions of pakraman village and not for profit profusely.[139] This fact is certainly different from the purpose of establishing a business. banking business, both in the form of a limited liability company (PT) and cooperatives which aims solely for business interests, namely the pursuit of profit or profits, both for its members and shareholders .[140] Difference between Village Credit Institutions and other financial institutions sharply visible in the institutional structure. The Village Credit Institution is difference between Village Credit Institutions and other financial institutions sharply visible in the institutional structure. [141]

Management of Village Credit Institutions is categorized into three, namely Head, Tata Asaha, and Cashier.[142] All administrators will be elected by the community customary village through the Paruman Prajuru or meetings of traditional village administrators like those required in this Governor Regulation. This provision is proof that Several local laws regulate Village Credit Institutions in which it confirms that the Village Credit Institution is owned village, and bound by the rules of a traditional village. Up to the selection stage management is also carried out by the indigenous village community concerned through the apparatus his village. The authority of the management is regulated in the Governor of Bali Regulation Number 16 of 2008 is contained in Article 4 which reads as follows:

1) Managers have the authority to appoint and dismiss employee.
2) Appointment and dismissal of the employee after previously received a recommendation from the supervisor.

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[138] Pararem adalah aturan/keputusan Paruman desa adat dan/atau Banjar adat yang berlaku bagi krama desa adat, krama tamiu dan tamiu. (Pasal 1 angka 30 Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat di Bali).

[139] Wawancara dengan I Made Sudiarsana, S.H., Sekretaris Lembaga Perkreditan Desa Mantring, tanggal 24 Februari 2022

[140] Niru Anita Sinaga, Hal-Hal Pokok Pendirian Perseroan Terbatas di Indonesia, Jurnal Ilmiah Hukum Dirgantara, Vol. 8, No. 2, 2018, h. 34-35

[141] Wawancara dengan I Made Sudiarsana, S.H., Sekretaris Lembaga Perkreditan Desa Mantring, tanggal 24 Februari 2022.

[142] Pasal 2 Peraturan Gubernur Bali Nomor 16 Tahun 2008 tentang Pengurus dan Pengawas Internal Lembaga Perkreditan Desa.

The Head of the Village Credit Institution as the administrator based on Article 6 Bali Governor Regulation Number 16 of 2008 concerning Management and Internal Supervisor of the Village Credit Institution has tasks consisting of (a) coordinating management LPDs; (b) is responsible in and out, that is, in responsible for the development of LPD management and exit responsible for representing the LPD both internally and externally court; (c) enter into agreements with customers or to third parties; (d) preparing a Work Plan (RK) and Revenue and Expenditure Budget Plan (RAPB); (e) determine the operational policy of the LPD; and (f) compose and submit activity reports.

Related to the problem of supervision, it is divided into two types supervision, namely external supervision and internal supervision. Related internal control of course has clarified the arrangements in the Regulations Governor of Bali Number 16 of 2008 concerning Management and Internal Supervisors Village Credit Institutions, but for external supervision it is still regulated in Bali Provincial Regulation Number 3 of 2017 concerning Credit Institutions Village in Article 19. Internal Supervisors consist of at least three people, namely one Chairman and two members [143] while the maximum number of members is not said in the Governor's Regulation. Furthermore, it is still in that article At the same time, the Head of Supervisors is held by Bendesa Adat and members of the Supervisory Board will be elected by the village community. For External Supervisors based on Article 19 Bali Province Regional Regulation Number 3 of 2017, the Governor will assign general guidance and supervision to the Provincial General Guidance Team and the Team Regency/Municipal General Trustees who form and structure membership This will be determined by the Governor.

Based on the provisions above, as a customary financial institution, the role Village officials are highly recognized and regulated in the Governor's Regulation positioning the traditional chief of village as the internal supervisor of the Village Credit Institution and to balance the external supervisory function carried out by the Development Team Provincial General and Regency/City General Advisory Team. Superintendent existence The external objective is to assist the task of the traditional village chief as supervisor internal staff who do not necessarily fully understand credit issues or provisions regarding the management of customer funds. When viewed from a structural point of view with the existence of a Team of Trustees whose formation and

[143] Pasal 9 Peraturan Gubernur Bali Nomor 16 Tahun 2008 tentang Pengurus dan Pengawas Internal Lembaga Perkreditan Desa

composition of membership will be determined by the Governor is the right choice. before experiencing changes, the external supervisor of the Village Credit Institution regulated in The Regional Regulations of the Province of Bali are executed by the Regional Development Bank of Bali. Although the Village Credit Institution has a form that resembles a Bank especially Village Credit Banks, but when viewed in terms of the name "Institution Village Credit", where there is the word "Institution" and it is clearly not a Bank. Changes in the external supervisor of the Village Credit Institution which was initially run by the Regional Development Bank of Bali to become a special Team of Trustees carry out guidance and supervision of Village Credit Institutions is a step taken appropriately by the Provincial Government of Bali which provide clarity this form of customary financial institutions is very different from Bank. The duties of an internal supervisor at the Village Credit Institution are based on Article 11 Regulation of the Governor of Bali Number 16 of 2008 namely (a) supervises management Village Credit Institutions; (b) provide instructions to the management; (c) provide advice, consideration and participate in solving problems; (d) socialize the existence of Village Credit Institutions; (e) evaluate management performance on a regular basis; and (f) preparing and submitting results reports oversight of the Paruman Desa to improve the function of transparency and control of the Village Credit Institution by indigenous peoples.

4. Conclusion

The role of awig-awig in empowering Traditional Village Credit Institutions Mantring is very influential in the activities of Credit Institutions The village, where awig-awig is always used as a guide so that customary village communities who have loans at the Village Credit Institution Adat Mantring will try to repay the loan out of fear regarding the customary sanctions contained in the awig-awig of the Mantring Traditional Village.

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Customs of Tepung Tawar as a Form of Restorative Justice in the Society of Besemah, South Sumatera

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Abstract

Customary law is basically the wisdom of the Indonesian people that help to solve problems among customary law communities. The Besemah customary law community in Lahat Regency and Pagaralam City has a legal culture of tepung tawar in settling of criminal acts, both minor and serious crimes, which injure the body. For minor crimes, customary fines in the form of payment of tepung tawar are sufficient to reconcile the two parties. However, for serious crimes, this tepung tawar is still followed by state law. Chief of Police Regulation no. 8 of 2021 allows the use of restorative justice for criminal handling to fulfill people's sense of justice.

Keywords: restorative justice, customary law, tepung tawar, Besemah

Abstrak

Hukum adat adalah kearifan masyarakat Indonesia yang mampu menyelesaikan permasalahan di antara masyarakat hukum adat. Masyarakat hukum adat Besemah di Kabupaten Lahat dan Kota Pagaralam memiliki budaya hukum tepung tawar dalam penyelesaian tindak pidana, baik ringan maupun berat, yang melukai tubuh. Untuk tindak pidana ringan, denda adat berupa pembayaran tepung tawar ini sudah cukup mendamaikan kedua belah pihak. Namun untuk tindak pidana berat, tepung tawar ini juga tetap diikuti dengan hukum negara. Peraturan Kapolri no. 8 tahun 2021 mengizinkan penggunaan restorative justice untuk penanganan pidana untuk memenuhi rasa keadilan masyarakat.

Kata kunci: restorative justice, hukum adat, tepung tawar, Besemah

1. Introduction

Human beings interact with each other and form social groups. There have been many sociological studies regarding the interaction of society and these social groups. Charles Horton Cooley said that the types of social groups are categorized into primary groups, namely small, close-knit groups, which have lasting or permanent relationships with each other, such as family and neighbors and the secondary groups, such as professional groups and so on. In contrast to Cooley, Ferdinand Tonnies divided society into Gemeinschaft groups, namely people whose inner relationship is pure, natural, and eternal, such as family, neighborhood,

community association, and Gesselschaft groups, which are rational and short-term, such as interest groups.[144]

In carrying out the interaction, the interaction is not always an associative process, such as cooperation, but sometimes a dissociative social process occurs, such as conflict. Emotions that are ignited sometimes lead to strife and sometimes end in bleeding wounds. Sometimes there are also accidents and negative excesses that wound someone. Indigenous peoples have social control mechanisms through customary law based on wisdom and collectiveness to handle the negative excesses that might occur. Their social control is through customary obligations or sanctions related to the occurrence of excesses in community interaction. These obligations and sanctions, for example, *bangun* sanction when a murder occurs, *tepung* sanctions when an act of injuring occurs, whether they are bleeding or not. These sanctions are related to the character or nature of customary law, which include religio-magical, communal, cash, and concrete (visual). Fatahuddin Siregar added one more feature of customary law, namely democracy.

In the customary law of Besemah, bleeding wounds and unbleeding wounds must be followed by sanctions to prevent these actions from being repeated and to reduce the impact of the "offences" on those concerned and the wider community. The sanction is customary *nepung* In accordance with the nature of customary law proposed by customary law experts that customary law has the religio-magical character, which means that customary law must be obeyed by the community, otherwise there will be consequences that will befall the perpetrators and society from invisible (magical) sources. Payment for the tepung, for example, is in order that the wound heal quickly. Payment for the *tepung* is also made with the knowledge of local residents, at least representatives of residents and neighbors. This reflects that customary law is communal. In cash, it means that an excess of *nepung* was immediately agreed upon, and concretely, it means that the customary law of *nepung* was really carried out. This means that everything can be resolved through deliberation for the common good. The amount of payment for nepung can be adjusted according to the ability of the offender by taking into account the resulting excess, for example the cost of medicine and others. This illustrates the democratic nature of customary law.

[144] Soerjono Soekanto, *Sosiologi: Suatu Pengantar*, Jakarta: Rajagrafindo Persada, 2002, h. 125-135.

2. Research Method

This paper which will discuss The Tradition of Tepung Tawar as Restorative Justice in the Besemah Tribal Community, South Sumatra is obtained from the results of literature studies and interviews both directly and through the Whatsapp Group

3. Discussion

3.1. Definition of Restorative Justice

According to the General Provisions of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/ those of victims, and other related parties to jointly seek a fair settlement by emphasizes restoration to the original state, and not retaliation.

According to the guidelines of the Circular Letter of the Director General of the General Judiciary Agency no. 1691/DJU/SK/PS.00/12/2020 dated 22 December 2020, restorative justice is an alternative settlement of crimes, which in the mechanism of criminal justice procedures, focuses on punishment which is changed to a dialogue and mediation process. The process involves the perpetrator, victim, perpetrator's family, victim's family, community leaders, religious leaders, traditional leaders, or other related parties to jointly create an agreement on a fair and balanced settlement of criminal cases for victims as well as perpetrators seeking a fair solution through peace by prioritizing restoration to its original state, and returning on good relations in society. [145]

The principle of justice in restorative justice is recovery for the victim by providing compensation according to the agreement between the victim and the perpetrator. Fair law in the concept of restorative justice is one that is in favor of the truth in accordance with applicable legal provisions by considering equality of rights, compensation, and balance in all aspects.[146]

Restorative justice is one of the principles of law enforcement in the settlement of criminal cases. Restorative justice can be used as an instrument of recovery and has been implemented by the Police, the

[145] Surat Edaran Direktur Jenderal Badan Peradilan Umum no.1691/DJU/SK/PS.00/12/2020, h. 2.
[146] Surat Edaran Direktur Jenderal Badan Peradilan Umum no. 1691/DJU/SK/PS.00/12/2020, h. 3.

Attorney General's Office and the Supreme Court (MA) in the form of implementing policies.[147]

In consideration of Police Regulation No. 8 of 2021 concerning the handling of criminal acts based on restorative justice, it is said that restorative justice is the settlement of criminal acts by involving the perpetrator, victim, perpetrator's family, victim's family, community leaders, religious leaders, traditional leaders, or stakeholders to jointly seek a satisfactory solution. justice through peace by emphasizing restoration to its original state.

4. Norms Regarding Restorative Justice

a. Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, in its general provisions, it states that Restorative Justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to work together seeking a just settlement by emphasizing restoration to the original state, and not retaliation. According to article 93 regarding community participation in the juvenile justice system, the community can play a role, among others, through diversion and a restorative justice approach.

   In the general explanation of Law no. 11 of 2012 Restorative Justice is a process of diversion, namely all parties involved in a particular crime jointly overcome problems and create an obligation to make things better by involving victims, children and society in finding solutions to repair, reconciliation, and reassurance that is not based on revenge. Article 5 stipulates that the juvenile justice system prioritizes a restorative approach.

b. Indonesian Police Regulation No. 8 of 2021 concerning the handling of criminal acts based on restorative justice, in its considerations, it states that Indonesian police needs to realize a criminal settlement by prioritizing restorative justice which emphasizes restoration to its original state and balance of protection and interests of victims and perpetrators of crimes that are not oriented towards punishment is a public legal need.

   Based on the needs of the community, Indonesian police formulates a new concept in criminal law enforcement that accommodates the societal living norms and values to provide legal certainty as well as benefits and a sense of social justice.

[147] Baca artikel detiknews, "Apa itu Restorative Justice? Dasar Hukum dan Syaratnya" selengkapnya https://news.detik.com/berita/d-6347468/apa-itu-restorative-justice-dasar-hukum-dan-syaratnya.

c. Law no. 1 of 2023 concerning the Criminal Code (the new Criminal Code).

Article 54 paragraph (1) stipulates that in sentencing it is mandatory to consider:

a. the form of guilt of the perpetrators of the Criminal Act;
b. motive and purpose of committing a Criminal Act;
c. the inner attitude of the perpetrator of the Criminal Act;
d. Criminal acts are committed with a plan or not planned;
e. how to commit a criminal act;
f. the attitude and actions of the perpetrator after committing the Criminal Act;
g. curriculum vitae, social conditions, and economic conditions through the Criminal Act;
h. criminal influence on the future perpetrators of criminal acts;
i. the influence of the Crime on the Victim or the Victim's family;
j. forgiveness from the Victim and/or the Victim's family; and/or
k. values of law and justice that live in society.

Verse (2) stipulates that the lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a sentence or not to take action by considering the aspects of justice and humanity.

Article 55 stipulates that every person who commits a crime is not released from criminal responsibility based on the reason for the abolition of the crime if the person has intentionally caused a situation which could become the reason for the abolition of the crime.

In the explanation of Law no. 1 of 2023 Article 32 paragraph 1 letter (d) states that for minor crimes that are only punishable by fines category I or category II, it is considered sufficient if the person who committed the crime is not prosecuted, as long as he pays the maximum fine that is threatened. The public prosecutor must accept the defendant's desire to meet the maximum fine.

Point (e) stipulates that for crimes punishable by a maximum imprisonment of 1 (one) year or a maximum fine of category III, if the public prosecutor agrees, the defendant may meet the maximum fine to drop the prosecution.

In point (f) Against criminal acts that can only be prosecuted based on complaints, if the complaint is withdrawn it is considered that there is no complaint, provided that it is carried out within the time limit specified in this law.

Article 132 letter (d) Law no. 1 of 2023 stipulates that for minor crimes that are only punishable by fines of category I or category II, it is considered sufficient if the person who committed the crime is not prosecuted, as long as he pays the maximum fine that is threatened. The public prosecutor must accept the defendant's desire to meet the maximum fine.

5. The Tradition of *Tepung Tawar*

The custom of *tepung tawar* exists in the UUSC (Simbur Cahaya Act). In the Oendang-Oendang Palembang[148] (another name for UUSC), chapter 1 (Custom on boys and girls) article 11 reads: "if a woman who is pregnant unknown who made the pregnancy is not clear then goes to someone's house in order to give birth, then the person who owns the house has to pay *tepung* sanction of one goat."

Chapter 3 (rules of the village and farming) article 14 regulates: "if a person has a house in the hamlet on fire due to lack of care then the hamlet is *mutung* (author: means charred) then that person is sanctioned one buffalo as village *tepung*, one hundred bushels of rice, one hundred coconuts, one jar of sugar, one jar of *bekasam* (fermented fish). It is for meals for many people.

Chapter 4 (punitive customs) article 14 reads; "If a person screams or *balah* (author: means fighting) with hands or a stick inside the house or in the hamlet until swelling or no swelling is fined from two to six ringgit and those who are wrong are sanctioned to give *tepung* from one to four ringgit to those who are injured or swollen."

Article 39 stipulates that "if someone injures not intentionally, they are subject to *tepung* from two to eight ringgit, and pasirah proatin (author: those who are injured not intentionally) are subject to *tepung* sanction from three to twelve ringgit. The *tepung* goes home to the injured."

Article 46 stipulates: "no one may ever install a *kukas kula* or *belantik* near fields or near roads. If someone violates this rule, he is subject to a fine of twelve ringgit paid to a *pasirah proatin*. If there is a person who shoots the *kula belantik* till dead, the person who installed it is sanctioned with *bangun*, as stated in Article 36. If the person who is injured does not die, the person who installs the trap subject to tepung sanction from six to twelve ringgit.

[148] KITLV Or. 91 (Undang-undang Palembang I) dan KITLV Or. 92 (Undang-undang Palembang II)

In the *Oendang-oendang or Verzameling van Voorschriften in de Lematang Oeloe en Ilir en de Pasemah Landen*[149] (Collection of Rules in Lematang Ulu, Lematang Ilir and Tanah Besemah), the term *tepung* is mentioned in the chapter on Hamlet Rules and Punishment Customs. The Hamlet Rules Chapter Article 14 regulates: "*Indien een bewoond huis, in de doesoen, ten gevolge van onvoorzigtigheid of nalatigheid in brand geraakt en daardoor geen andere huizen verbranden, wordt de eigenaar of bewoner beboet met zes spaansche matten* (if the house lived in the hamlet catches fire due to carelessness or negligence and no other house is on fire, as a result the owner or occupant is fined six *Spaansche matten*).
Article 15 regulates:

> "*Indien echter tengevolge van den door onvoorzigtigheid onstanen brand meer huizen verbranden, wordt de eigenaar of bewonervan het huis, waarin de brand begonnen is, gestraft met zes spaansche matten boete en moet bovendien een kerbouw slagten (tepoeng) om door de gezammenlijke doesoen bewoners te worden gegeven*." (However, if due to the carelessness of the fire, more houses are burned, then the owner or occupant of the house where the fire occurred, shall be punished with a fine of six Spaansche matten and must slaughter one buffalo (tepung) which must be given to the residents of the hamlet together).

Tepung is also mentioned in the Punishment Customary chapter, articles 13, 16, 46, and 47. Article 13 regulates:

> "*ieder, die in de doesoen of in huis vecht, of met stokken of rottingen als anderszins slaat, wordt beboet met twee tot zes spaansche matten; terwijl degene, die de meeste schuld heeft, buitendien een tot vier spaansche matten tepoeng (smartengeld) aan zijn tegenpartij betaalt, zoo deze daardoor verwond of gekneusd is* (barangsiapa berkelahi di dusun atau di dalam rumah, atau memukul dengan tongkat atau rotan lain-lain, akan didenda dua sampai enam kali *Spaansche matten*"; sedangkan orang yang paling bersalah membayar tambahan (uang) *tepung* satu sampai empat *Spaansche matten* kepada lawannya, jika dia terluka atau memar karenanya).

Article 16 regulates:

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[149] G.J. Gersen, *Oendang-oendang or Verzameling van Voorschriften in de Lematang Oeloe en Ilir en de Pasemah Landen*, 1868.

"*ieder, die met bloote wapens vecht, wordt, zo bij nog geene verwonding heeft toegebragt, beboet met acht spaansche matten. indien hij echter iemand heeft verwond, wordt hem de betaling van vier en twintig spaansche matten boete en vban twee tot tien spaansche matten, naar gelang van de meerdere of mindere belangrijkheid der wond, oewang oebat (genezingskosten of smartengeld) opgelegd* (any person who fights with bare hands, without causing injury, is fined eight Spaansche matten. if, he has injured someone, he shall be fined twenty-four Spaansche matten and from two to ten Spaansche matten, according to the more or less significance of the wound, *uwang ubat* (healing or suffering costs)

Article 46 regulates: "*Ieder, die een ander bij ongeluk verwondt, betaalt tepoeng (smartengeld) van twee tot tien spaansche matten, naar gelang de mindere of merdere belangrijkheid der verwonding* (whoever accidentally injures another pays *tepung* (money) from two to ten Spaansche matten, according to the lesser or more serious the injury).

Article 47 regulates: *Het is uitdrukkelijk aan een ieder verboden om in de nabijheid van de doesoens, ladangs, wegen, tuinen en andere bezocht wordende plaatsen, toega's, kala's of belantiks te plaatsen, zonder toestemming van het bestuur* (it is strictly forbidden for anyone to place toega's, kalas or belantik around hamlets, fields, roads, gardens and other visited places, without the official's permission).

Indien iemand door zulk een toestel wordt getroffen en tengevolge daarvan komt te overlijden moet degene, die hetzelve geplaatst heeft, de bangoen en de begrafeniskosten, 4 spaansche matten, betalen (if someone is hit by the device and dies as a result, the person who installed it must pay the *bangun* and funeral costs, 4 *Spaansche matten*).

Indien echter alleene eene verwonding heeft plaats gehad, moet alleen tepoeng (smartengeld) van twee tot tien spaansche matten betaald worden (However, if only injuries have occurred, only two to ten Spaansche matten *tepung* will have to be paid for).

As it is written in the Simbur Cahaya Law, the *tepung* payments are often made using Spaansche matten. Spaansche matten is a common silver coin consisting of 8 reals or 8 real silver coins, used in the Spanish

Empire since the Spanish monetary reform of 1497. The coins were used as legal means of payment there until its ban in 1857 and were known there as Spanish dollars. Spaansche matten became the world's means of payment in the 18th century.[150] The coin was also used in the Dutch East Indies from the 16th to 18th centuries, where the locals also called it Batu Asli (or *pasmat* for short) because of its resemblance to the stone.[151]

Picture of Spaansche matten

Source: https://oudlisse.nl/historie/oud-nieuws-een-gokje-wagen-met-spaanse-matten/

Picture of Spaansche matten in the form of original stone:

Source:
https://www.maritiemdigitaal.nl/index.cfm?event=search.getdetail&id=110004674

[150] https://nl.wikipedia.org/wiki/Spaanse_mat_(munt)
[151] https://nl.wikipedia.org/wiki/Spaanse_mat_(munt)

After the UUSC was no longer binding, the custom of *tepung tawar* became an intangible inheritance. This tepung tawar is to repel misfortune as well as to make peace. In Palembang City, the tepung tawar ceremony is performed by serving a large plate of turmeric sticky rice and grilled chicken.[152] In contrast, in Besemah land it is performed by serving rice with chicken curry, and money.

6. Examples of criminal cases settled with tepung tawar in Besemah

a) Experience of Pak Adi[153]:

Pak Adi has experienced the tepung payment twice because someone committed a minor crime against him. Firstly, because he reprimanded a young man who dried the water in upstream of the public bath fountain when Mr. Adi was about to perform ablution for a Friday prayer. The young man who was rebuked was offended and then waved a knife (*kuduq*) at Mr. Adi that tore Mr. Adi's trousers even though Mr. Adi was not injured by the flick of the knife. The perpetrator's family was subject to customary sanctions by carrying out a *tepung tawar* ceremony at Pak Adi's house. The young man's family brought two chickens as *tepung tawar* and then cooked it at the victim's house.

Secondly, Pak Adi was walking on foot in the weekly market, then he bumped into a motorbike and got a little scratched up. The victim asked the perpetrator to carry out the customary *tepung* in the form of medicine and money. The victim was taken to the Kota Agung Public Health Center, Lahat, South Sumatra, covered for medical expenses and given money Rp. 500,000.

According to Mr. Adi, this *tepung* sanction was carried out so that the crime would not be repeated and as a countermeasure (to repel misfortune). In this ceremony, several community representatives, especially the village head and closest neighbors, were invited to witness the payment of the *nepung* sanctions.

b) Experience of Pak Iwan[154]

When he was a child, Pak Iwan experienced the custom of paying for *tepung* (*nepung*) twice and being paid the *tepung* once when he was going in elementary school. The first tepung is when Mr. Iwan scolded

[152] https://www.liputan 6.com/lifestyle/read/4830547/4-karya-warisan-budaya-takbenda-indonesia-asal-sumatra-selatn-bagian-1

[153] Wawancara dengan Pak Adi (bukan nama sebenarnya), perantau dari Besemah di Tangerang Selatan, 20 Juli 2023.

[154] Wawancara dengan Pak Iwan lewat grup whatsapp Ikatan Keluarga Mulak, 2 Agustus 2023.

Firman for stabbing Firman's cheek with a pencil until it penetrated into his mouth. As a result, Pak Iwan's parents paid for the custom of tepung tawar to Firman's parents by cutting up a chicken and eating on the same plate with Firman using a large dish. The second *tepung* is when Mr. Iwan stabbed Mr. Imran's back with a nail. As a result, once again, Mr. Iwan's parents slaughtered two chickens for Mr. Iwan and Mr. Imran to eat.

Mr. Iwan's experience of being paid the tepung was when he was still in elementary school. Feri stabbed Mr. Iwan's earlobe with a pencil. Feri's parents then carried out the nepung custom by bringing the chicken to Iwan's house where it was cooked and served for the two of them on the same plate.

c) Experience case of Tami

When she was a child, Tami was paid the *tepung*. At that time, his neighbor's children, namely Rudi and his older sister, were playing in front of Tami's house, then Rudi and his older brother had an argument and Rudi threw a pebble at his older brother, but it hit Tami's forehead causing a lump in Tami's forehead. As a result, Rudi's parents paid the traditional *nepung* sanction, namely chicken and Rudi and Tami eating together on a large plate.[155]

7. The Effect of Criminal settlement through *Tepung Tawar* Restorative Justice

From the *nepung* experiences of Mr. Adi, Tami, and Mr. Asrul above, information was obtained about the purpose of carrying out the fine sanction of *tepung tawar*. According to Mr. Adi, the purpose of this *nepung* was that the mistake would not be repeated and that the wound suffered by Mr. Adi would heal quickly. According to Tami, the purpose of holding this *nepung* ceremony is that the lump or wound on Tami's forehead heals quickly. Meanwhile, according to Pak Asrul, in a discussion at the Mulak Family Association, this *nepung* ceremony was held so that there would be no grudges between the families. The perpetrator's mistake is forgiven by the victim at the payment of *tepung*.

The *tepung tawar* is done for offenses that hurt others. By fulfilling the custom of *tepung tawar*, the mistake is forgiven, and there is no grudge left between the two people and the two parties involved. Social relations become harmonious again.

This *tepung tawar* is applied to both minor and serious crimes. For minor crimes, the customary offering of *tepung tawar* makes the

[155] Wawancara dengan Asrul dan Tami di grup Whatsapp IKM, 2 Agustus 2023.

perpetrator's mistake forgiven and the relationship returns to normal. For example, the *nepung* experience of Pak Adi, Tami, and Pak Asrul above.

For serious crimes, such as setting fire to a house or garden, village tepung payment is given. This hamlet *tepung* payment gives a deterrent effect for the perpetrators and the community because in the event of a fire in the house or garden they still have to organize hamlet *tepung* as a countermeasure. For the crime of murder, even though it is also subject to the sanction of village tepung, it is also usually followed by the offender leaving indefinitely in the jungle and his family moving to another hamlet and breaking up relations, although judging from the kinship of the two parties, they still have a kinship relationship. This village *tepung* sanction is nothing more than to repel misfortune so that it would not happen again in the future.

Summary

The custom of *tepung tawar* (*nepung*) still applies in the Besemah community. This *tepung tawar* custom is carried out both for minor crimes and serious crimes. For minor customary crimes, this is performed in the form of slaughtering chickens and possibly adding money for medical purposes. For this nepung customary major crime by slaughtering a four-legged animal. If the serious crime is murder, it is usually followed by moving to another village.

This *tepung tawar* custom is relevant to the Law and the Chief of Police's Regulations concerning the handling of minor crimes. The advantage of resolving restorative justice is that there is no grudge between the two parties, the perpetrator and the victim and the situation returns to harmony as before.

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Lampiran Surat Keputusan Direktur Jenderal Badan Peradilan Umum No. 1691/DJU/SK/PS.00/12/2020.
Peraturan Kepolisian Republik Indonesia No. 8 Tahun 2021 tentang Penanganan Tindak Pidana berdasarkan Keadilan Restoratif.
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Criticism of Keris Marriage as a Form of Discrimination Against Women's Dignity and Rights

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Abstract

Marriage is a spiritual and physical bond between a man and a woman as husband and wife, with the goal of forming a happy and everlasting family based on the belief in the One Almighty God. As regulated in Law Number 1 of 1974 concerning Marriage, in conjunction with Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. However, in practice, there exists the tradition of women marrying a keris (a ceremonial dagger), recognized by the Balinese community. This type of marriage is intriguing to be examined because its legal consequences tend to be discriminatory towards women and the children born from such marriages. The research methodology used is normative juridical, employing legislative and conceptual approaches. The keris marriage has implications for the legal status of children in civil administration, such as on Family Cards and Birth Certificates, which only establish a legal relationship with the mother. Stipulated in Law Number 1 of 1974 concerning Marriage, women who give birth to a child without identifying the biological father are governed by Article 43 paragraph (1), which states that a child born out of wedlock only has a civil relationship with the mother and her family. Following a constitutional review of Article 43 paragraph (1) in the Constitutional Court, a subsequent change was made that allows children born out of wedlock to claim their rights to legal paternity from their biological father through DNA testing (Deoxyribonucleic Acid).

Keywords: Keris Marriage, Rights, Women-Children.

1. Introduction

Arysio Nunes dos Santos stated that based on evidence from his 30-year research, he came to the belief that Indonesia is the birthplace of world civilization (Santos, 2010). Another researcher, Stephen Oppenheimer, found that Indonesia and Southeast Asia are considered centers of past civilizations (Stephen Oppenheimer, 2010). In both Oppenheimer's and Arysio Santos's research, there is an indication that the nation now known as Indonesia actually has a very long history dating back to prehistoric times.

The history of Indonesia doesn't solely begin with the history of small kingdoms in Sumatra, Java, Kalimantan, and Sulawesi. Although since the era of the Sriwijaya Kingdom, known as a respected maritime empire in the world, there has been a significant civilization that grew and developed within the archipelago long before that. This civilization is known as the legend of the lost continent of Atlantis or the Garden of Eden in the East (Asshiddiqie, Aktualisasi Nilai-Nilai Pancasila dan Tantangan Revolusi Biru Indonesia).

The classical concept of the state in Southeast Asia and Indonesia was influenced by two centers of civilization, namely India and China (Onghokham, 1989), particularly regarding cosmic-magical aspects, numbers, sacred objects, leaders, geography, positions, and others. This influence was so strong that it dominated Indonesia's history from the first century to the fifteenth century. The governance structure of the Javanese (Hindu) kingdom had a simple and long-lasting concept, which persisted with common patterns even during the colonial era. Under the Keraton (royal palace), there were two levels of governance: Wanua or villages, which represented the lowest level, and Watek or groups of villages, which represented the intermediate level (Christie, 1989). Both terms can be translated as groups and seem to apply to all units and territories of the population. Epigraphically, Wanua was the smallest economic and political unit, which could be observed in the lowlands of Java. Wanua served as the fundamental building block of the state by the end of the first millennium. Although the village was the lowest level in the hierarchical society, it also had its own internal hierarchy. Various classifications with specific ranks existed within this unit. The governing body consisted of prominent individuals or elders in the community. It's unclear whether this status was acquired through lineage, ownership, wealth, or, as was the case in Bali at that time, based on the position as the head of a household (kuren).

The Balinese society is deeply bound by customary law inherited from their ancestors, in addition to the positive law of Indonesia. This should be recognized, considering that Indonesia consists of a wide variety of ethnic groups and religions, leading to legal pluralism. For the Balinese people, violating the provisions of customary law is seen as a violation of justice and proper conduct within their society. Law is perceived as an existential relationship between individuals, not just something formal (Suartha, 2015). This perspective aligns with the viewpoint of Eugen Ehrlich (Tanya, 2010), who stated that law originates from the idea of society to regulate all social relationships, spanning from family, village, social institutions, state, nation, global

economic system, and so on. These social relationships gather people into a higher and authoritative unity above them. Ehrlich's theory emphasizes that a country's positive law coexists with the law that lives within society.

The authority possessed by traditional leaders can be understood as rulers of a region whose commands are to be followed by the local community. There exists a relationship between rulers and the tranquility of society, yet the extent of power held by a ruler (King) can also lead to unrest within the community. This can occur due to the issue of impermanence, which is linked to the instability and impermanence of an individual's power. On the other hand, the concept of traditional power can be continuously nurtured until it reaches its zenith, but after reaching its peak, this power will inevitably experience decline (Anderson, 1972). In the magical-traditional conception, there is always the nurturing of power from rival power centers, which are closely tied to individuals with limited lifespans or ages as humans. In other words, what limits the existence of a state in the past is the lifespan of the humans who lead it.

In their daily lives, the Balinese community practices Tri Hita Karana, a concept or teaching within Hinduism that emphasizes living together harmoniously, greeting each other, avoiding hatred, practicing tolerance, and maintaining a sense of peace. Tri Hita Karana can also be understood lexically, meaning "three causes of well-being." This term is derived from "Tri," which means three, "Hita," which means balance or prosperity, and "Karana," which means cause. These three elements are Parahyangan, Pawongan, and Palemahan (Indonesia, 2022), However, throughout life's journey, individuals often face challenges that result in imbalances, leading them to engage in actions that violate traditional norms or state laws. In the teachings of Hinduism, Balinese customary law aims to regulate the balance between God, humans, and nature. The Tri Hita Karana doctrine is conceptualized by the Balinese society to ensure the preservation of the balance of customary law and to maintain harmony with the provisions of positive law.

In several studies, one form of violation that occurs is "pidana adat lokika sanggraha," which refers to a romantic relationship between a man and a woman, where the man ends the relationship out of fear of being blamed and attempts to evade responsibility when the woman becomes pregnant as a result of the relationship (Suartha, 2015). The customary sanction for the perpetrator of lokika sanggraha is to carry out a marriage before the baby is born if the man acknowledges his actions. If the man does not acknowledge his actions and refuses to take

responsibility, a village customary ritual called "pecaruan desa" is conducted, which involves being isolated from the village community. Based on cases of lokika sanggraha, if the man refuses to take responsibility and undergo the pecaruan desa ritual, it is the woman who will be adversely affected as she must bear the shame and responsibility for her pregnancy alone.

The family of the woman would naturally make efforts to protect their daughter. To address pregnancies outside of marriage, in Bali, there is a practice known as "perkawinan keris," which symbolizes the absence of the male spouse. This practice involves a ceremony called "nganten keris" (marriage with a keris) and is not widely recognized. During this ceremony, the female bride is not accompanied by the male groom, but instead is symbolically placed next to a keris (Ngurah et al., 1974). This ceremony is often performed when the male groom passes away before the wedding, and the female bride is already pregnant.

This article will discuss the event of "nganten keris," which results in a lack of legal protection for women. This lack of legal protection can affect the validity of the marriage recognized by the state, as well as the acknowledgment and well-being of the child born from such a union.

2. Methods

The research method employed is normative research with a conceptual approach, involving analysis through Talcott Parsons' integration theory and a legislative approach that specifically examines the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) and Law Number 1 of 1974 concerning Marriage.

3. Findings and Discussion

The philosophy of marriage within the Indonesian Law Number 1 of 1974 concerning Marriage, Chapter I, Article 1, defines marriage as a physical and spiritual bond between a man and a woman as husband and wife, with the aim of forming a happy and eternal family based on the belief in the One and Only God. The validity of marriage and marriage registration is outlined in Article 2 of the Marriage Law, which states that (1) a marriage is considered valid if conducted according to the respective religious laws and beliefs, and (2) every marriage must be recorded according to the prevailing legal regulations. In the Compilation of Islamic Law (KHI), Article 5, paragraphs (1) and (2), ensure orderly marriages for the Muslim community. Each marriage must be recorded in the Marriage Registration as stated in paragraph (1), carried out by the Marriage Registrar as regulated in Law Number

22 of 1946 concerning Marriage, Divorce, and Reconciliation, in conjunction with Law Number 32 of 1954 concerning the Enforcement of the Republic of Indonesia Law Number 22 of 1946 concerning Marriage, Divorce, and Reconciliation in Areas Outside of Java and Madura. Marriage is a sacred covenant between a man and a woman to build a family that is harmonious, peaceful, filled with love and affection, while obeying the commandments of God, and it is considered an act of worship (Musyafah, 2020).

Specifically, the keris marriage practiced in Banjar Adat Peken Baleran, Kapal Village, Mengwi District, Badung Regency, involves the marriage of a woman to a keris as a substitute for the presence of a man. This practice has been regulated in several "awig-awig" (customary rules governing social conduct to establish a harmonious community life) within the village's "paruman" (assembly or council). These marriages take place after discussions within the village and local community. Various underlying issues and factors contribute to this practice, including cases where no man acknowledges paternity of the unborn child, cases where the man and woman belong to different castes or lineages, situations where a woman becomes pregnant out of wedlock while the prospective groom passes away before the marriage, or situations where families of both prospective groom and bride do not agree to "nyentana" (marriage of the only child) (Kadek Dwi Wirasanjaya, 2021).

From this history, the practice of marriage with a keris can still be found in several regions in Bali, often arising from situations where the groom is unable to attend due to certain circumstances. These circumstances might include the prospective groom's passing away, while the prospective bride is already pregnant with his child. To avoid the birth of a child outside of a valid marriage (referred to as "anak bebinjat" in Balinese, which is considered unfavorable in Balinese society) and to prevent situations of "cuntaka" (a state deemed impure in Balinese Hindu belief), the groom can be symbolically replaced with a keris since the keris is a symbol of "purusa" (masculinity).

Article 42 in conjunction with Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage stipulates that a child born through a valid marriage is considered legitimate. Essentially, legally and administratively, there should be no inherent difference between a child born through a legally valid religious marriage and one recorded administratively compared to a child born through a marriage that cannot be administratively recorded. Both are legal subjects entitled to rights that must be upheld and protected by the state. A child should not bear the consequences of their parents' mistakes (Farani, 2016).

Marriage with a keris conducted in accordance with the beliefs of Hinduism in Bali is considered a valid marriage as it is carried out based on Bali's religious beliefs and marriage customs, even if it is not recorded administratively in civil records. This does not mean that the rights of the child born from such a union are overlooked. A pregnancy that occurs before marriage is referred to as being "hamil di luar kawin" (pregnant outside of wedlock). Although the prospective bride has undergone ceremonial marriage procedures in accordance with Hindu beliefs in Bali, the child's status remains as "anak di luar kawin" (child born outside of marriage). In Indonesia, the distinction between children born out of wedlock, children born from unofficial marriages, children only registered under their mother's name, and children born without known parents is not clearly defined. Therefore, the status of such children is categorized as "anak di luar kawin" (Dzanurusyamsi, 2016).

An "anak luar kawin" or, in Balinese tradition, referred to as "anak astra," is a child born before the marriage of their parents. Similar to civil law provisions, an "anak astra" does not have a legal connection with their biological father and his family. Legally, the child's relationship is only with the mother and her family, and the child inherits the maternal family's name and caste. An "anak astra" is not recognized within the father's family, does not have the right to use the father's name or caste, and lacks inheritance rights. In the event that the father passes away and the child is born out of wedlock, the child's mother becomes the inheritor (Manuaba, 2022).

A significant consideration regarding "ngaten keris" is that a keris is an object and not a legal entity, whether an individual or a legal entity. In the context of "ngaten keris," the keris is personified as a legal entity, which creates a disparity in legal concepts. This results in a contradiction between adapting legal values and the principles of legal certainty and utility. Mochtar Kusumaatmadja and Bernard Arief Sidharta state that a legal entity is a holder or bearer of rights and obligations. However, Lambertus Johannes van Apeldoorn argues that anything having legal authority is considered a legal entity (Apeldoorn, 1986). This aligns with Hans Kelsen's perspective. Kelsen emphasizes that the relationship between legal entities and their rights and obligations is an inseparable entity with its legal norms (Kelsen, 1994).

Human beings, as legal entities, possess rights and obligations. However, not everyone can independently exercise their rights, which is why there are individuals who lack the capacity to act in legal matters and require assistance from others. Legally, human legal entities

(Natuurlijk Persoon) possess subjective rights and legal authority or capacity to be legal subjects, which supports their rights and obligations. Men and women engaged in romantic relationships and sexual intercourse outside of marriage are aware of the risks involved. In case of pregnancy, both parties are responsible for the pregnancy. As legally capable subjects, they cannot escape the responsibility of marriage. Legal awareness of this responsibility entails fulfilling a marriage agreement. If a man evades the responsibility of marrying the woman he impregnated, Article 284 of the Criminal Code (KUH Pidana) stipulates that a man and woman who are married and commit adultery (zina) or overspel can be imprisoned for up to 9 months. Meanwhile, Article 27 of the Civil Code (KUH Perdata) applies, stating that a man can only be legally married to one woman, and a woman can only be legally married to one man. Furthermore, Article 411 of Law Number 1 of 2023 concerning the Criminal Code (KUHP) states that anyone engaging in sexual intercourse with someone other than their spouse can be imprisoned for up to 1 year or fined a maximum of Rp. 10,000,000 (ten million Indonesian rupiahs).

Referring to the imposition of a fine penalty in Article 411 of the 2023 Criminal Code, a man who avoids responsibility can be subject to a fine penalty. In Balinese customary law, customary sanctions include "arta danda" (a customary sanction with economic value), "jiwa danda" (a customary sanction involving psychological burden), and "sangaskara danda" (a customary sanction involving specific ceremonies). "Arta danda" involves imposing a fine on any legal subject who violates local customary regulations. Resolving pregnancies outside of marriage is addressed through the traditional village institution. For the Hindu community, this institution is referred to as "pakraman" or a member of the traditional village. Raka Dherana states that according to Part 10 of "Pandecten van Het Adatrecht," customary criminal law involves compensating for non-material damage in various forms, such as being compelled to marry a woman who has been defiled. Paying customary fees to the victim, performing rituals (sacrifices) to cleanse the community of negative spiritual forces, offering apologies, or exile from the community are some examples (Raka Dherana dan Widnyana, 1975). Within the philosophy of Balinese society, these sanctions are applied to restore the village's condition, eliminate negative feelings, and restore balance and legal equilibrium. Imposing such customary sanctions, the author contends, creates injustice for women if a man avoids the responsibility for an unintended pregnancy. The payment of fines, apologies, offering

sacrifices, or performing purification rituals would lead to the woman bearing the burden of a pregnancy outside of marriage.

The analysis using the theory of legal recognition will focus on how customary legal systems are recognized or integrated into the formal legal system of a country or region. Customary law refers to norms, values, and legal practices developed within specific local or ethnic communities, distinct from laws based on official government regulations. This often occurs when a state has ethnic groups or indigenous communities with strong traditional legal systems recognized by the constitution or laws, as is stated in Article 18B(2) of the Constitution of the Republic of Indonesia, which acknowledges and respects the unity of customary legal communities and their traditional rights as long as they are in line with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law. The recognition of customary law can mean granting autonomy or special jurisdiction to indigenous communities to regulate their own affairs, such as marriage, land rights, and inheritance laws. This recognition can take the form of customary bodies, customary courts, or other institutions that handle customary legal matters. However, in practice, there's an adjustment process to determine whether a certain custom holds legitimate customary legality, whether it contains elements of values relevant to the current era and embodies the spirit of the indigenous community's national identity (Volksgeist).

In terminological context, "recognition" refers to the process, manner, or act of acknowledging, while "acknowledgment" refers to declaring rights. In the context of international law, for instance, recognizing the existence of a state/government usually leads to the terms "de facto recognition" and "de jure recognition." De facto recognition refers to a state's real recognition of a specific entity's effective control over a territory. This recognition is temporary, as it is shown in response to the facts surrounding the position of the new government. If this recognition is continuously upheld and further advanced, de facto recognition will transform into de jure recognition, which is permanent and followed by other legal actions. Legal recognition (de jure) involves one state's recognition of another state followed by specific legal actions, such as establishing diplomatic relations and creating agreements between the two states (Moh. Kusnadi and Bintan R Saragih, 1989:82).

According to John Austin as described by Otje Salman Soemadiningrat (2002:2), legal recognition through state law (positive law) refers to laws created by individuals or institutions with

sovereignty, applied to members of an independent political society, and recognizing the sovereignty or supremacy of the individuals or institutions making the relevant laws. Therefore, a customary practice will only be considered law if legislation expressly provides for its validity. Friedrich Carl von Savigny, a key figure in the historical school, posits that law is not intentionally created but emerges from within society. Thus, as long as society exists, law will persist. Law will disappear with the decline of society. Therefore, the presence of state law does not automatically replace natural law as a norm. This is because law should reflect the values that exist within society. Von Savigny sees law as a historical phenomenon, with the existence of each law being different, dependent on the time and place of its application. Law must be viewed as a manifestation of the soul or spirit of a nation (Volksgeist).

Recognition of customary law must consider protecting individual rights and equality under the law without disregarding the values and traditions of indigenous communities. Legal protection for indigenous communities: The recognition of customary law can provide protection and rights for indigenous communities that have often been marginalized or overlooked by the formal legal system. This may encompass rights to ancestral land, the preservation of culture and language, as well as participation in decisions that affect the indigenous community. However, it's important to ensure that the recognition of customary law is done carefully and fairly, ensuring that individual rights and human rights remain protected. The integration of customary law with the formal state law system should strike a proper balance between respecting cultural heritage and traditions while safeguarding universal values of justice and equality.

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) emphasizes the principle of non-discrimination and equality. Discrimination against women is defined as any distinction, exclusion, or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field, on the basis of equality between men and women. If both the state and customary authorities implement the provisions of Article 1 of CEDAW, cases like "ngaten keris" would not occur, as ensuring equality and justice between spouses is imperative within the principles of justice and gender equality. To protect women's rights, a rule of law and customary authorities must harmonize customary sanctions with the positive laws of Indonesia. To fulfill women's rights in cases like

"ngaten keris," customary leaders can impose customary sanctions that are applicable in their region and decide that the responsibility for an unintended pregnancy remains with the man to marry his partner. This responsibility embodies Human Rights, particularly in protecting Women's Rights.

4. Conclusion

There is a philosophical shift from the concept of keris marriage, which has led to its irrelevance in today's era. Marriage is the spiritual and emotional bond between a man and a woman as husband and wife, with the goal of forming a happy and eternal family based on the belief in the One Almighty God. Keris marriage still occurs in several regions of Indonesia. However, the keris (dagger) is an object of law and not a legal subject, whether an individual or a legal entity. In the context of keris marriage, the keris is personified as a legal subject, resulting in a discrepancy in legal concepts. This can lead to conflicts in adapting legal values that contradict the principles of legal certainty, justice, and utility.

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Balinese Customary Law Community in Coastal Area Management: Actualization of Traditional Villages as Legal Subjects

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Abstract

The purpose of this study is to find and analyze the actualization of the position of indigenous peoples as legal subjects in the management of coastal areas in Bali. The management of traditional villages in Bali over the scope of their living areas including coastal areas is a form of inherent traditional rights according to the mandate of the constitution. state law with laws and regulations and policies on coastal areas and also the existence of customary law as a rule in traditional villages is an integral part of the study. Moreover, it has regulated Traditional Villages in Bali as legal subjects in the Regional Regulation of the Province of Bali Number 4 of 2019 Concerning Traditional Villages, regulated in Article 5. This status has strategic meaning for legal actions that can be carried out by traditional villages The applicability of as legal entities including coastal management in scope of the area. Empirical legal research methods were used in this study with a fact, case and statutory approach. The results showed that the right to manage coastal areas by customary villages was actually based on state law arrangements that apply nationally and regionally, realized by the Provincial Government of Bali and the Regency on the basis of management adopts elements of local wisdom based on Regional Regulations and Governor Regulations. In addition to being based on state law The arrangements, the position of Traditional Villages in managing coastal areas is based on customary village rules set forth in the form of Pararem but not all Traditional Villages in Bali regulate them in the form of such rules.

Keywords: Traditional Village, Legal Subject. Coastal Region

Abstrak

Tujuan penelitian ini yaitu untuk menemukan dan menganalisis aktualisasi kedudukan masyarakat hukum adat sebagai subjek hukum dalam pengelolaan wilayah pesisir di Bali. Pengelolaan Desa Adat di Bali atas ruang lingkup wilayah hidupnya termasuk wilayah pesisir merupakan wujud hak tradisional yang melekat sesuai amanat konstitusi. Keberlakuan hukum negara dengan peraturan perundang-undangan dan kebijakan atas wilayah pesisir dan juga eksisnya hukum adat sebagai aturan di Desa Adat menjadi bagian yang tak terpisahkan untuk dikaji. Apalagi telah diaturnya Desa Adat di Bali sebagai

subjek hukum dalam Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 Tentang Desa Adat, Pasal 5. Status ini punya arti strategis terhadap perbuatan-perbuatan hukum yang dapat dilakukan Desa Adat sebagai badan hukum termasuk pengelolaan pesisir dalam lingkup wilayahnya. Metode penelitian hukum empiris digunakan dalam penelitian ini dengan pendekatan fakta, kasus dan perundang-undangan.Hasil penelitian menunjukkan bahwa hak pengelolaan wilayah pesisir oleh desa adat secara aktual didasari oleh pengaturan hukum negara yang berlaku secara nasional dan daerah diwujudkan Pemerintah Propinsi Bali dan kabupaten dengan dasar pengelolaan mengadopsi unsur kearifan lokal berdasar Peratutan Daerah dan Peraturan Gubernur.Selain berdasarkan pengaturan hukum negara, kedudukan Desa Adat dalam pengelolaan wilayah pantai didasari oleh aturan desa adat yang dituangkan dalam bentuk Pararem namun belum semua Desa Adat di Bali yang mengaturnya dalam bentuk aturan demikian.

Kata Kunci: Desa Adat, Subjek Hukum. Wilayah Pesisir

1. Introduction

The existence of customary law communities and their traditional rights through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) turns out that these recognized rights are faced with the interests of the state or government which are also directly determined by the constitution Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. There are contradictory facts considering that for their survival throughout their lives, indigenous peoples depend on natural resources within the scope of their customary territories (Muazzin. 2014).

The scope of the area that cannot be released as labenraum, includes the living space of indigenous peoples, namely the coastal area since the re-establishment of improvements to the Management of Coastal Zone and Small Islands. Governance of coastal areas through Law Number 1 of 2014 concerning Amendments to Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands. (Hereinafter abbreviated as UUPWPPK). However, the policy on the management of coastal waters actually created a contradictory situation where the government through the UUPWPPK gave area and management permits which turned out to be more accessible to large investors. Even though it is hoped that all elements of society, including the traditional rights of indigenous peoples, will continue to be guaranteed. Utilization in coastal areas still has a tendency to be delegitimized in upholding the existence of indigenous and tribal peoples. According to Yurista (2016) the implementation of the rights of indigenous peoples in coastal management as stipulated in the

positive regulations that are currently in force is not optimal according to what is stated in the preamble of Law Number 1 of 2014.Korporatisme yang mengutamakan investasi dan pelaku usaha menjadi titik fokus dalam dimanika hukum yang juga kemudian berlaku pada masyarakat hukum adat di wilayah pesisir. Kaitan keberadaan masyarakat hukum adat yaitu tidak sesuainya pengakuan yang seharusnya dalam format sebagai subjek hukum mengalami pengabaian (Zamrowi dan Kafrawi 2021).

When viewed from a juridical perspective, the dynamics that occur in the neglect of customary law communities in Bali definitely have good expectations with the legal subject status of traditional villages in Bali determined according to Article 5 of Bali Provincial Regulation Number 4 of 2019 concerning Traditional Villages. However, it is important to look more closely at how these arrangements are actualized when dealing with customary laws governing customary village areas that concern coastal waters.

Normatively, regulation by determining customary law communities, especially traditional villages in Bali, as legal subjects is a strengthening of their existence. However, in terms of implementation, how state law principles fulfill people's constitutional rights in the context of meeting the needs of daily life needs to be studied for its actualization.

Research conducted by Ananda Prima Yurista in 2016 specifically for regulations relating to the opportunity for indigenous and tribal peoples in coastal areas to live their lives has not been optimally protected. No less problematic nationally, this can also be seen with the fact that there is still the territorialization of coastal areas with permits issued by the state, conflicts when traditional villages carry out traditional rights rituals, for example, coastal claims, coastal borders by investors and this is a question that requires deep research to be sought. the answer is the actualization of the position of traditional villages as legal subjects. The focus of his research is on the formulation of the problem of how to regulate customary law communities, especially Traditional Villages in Bali as legal subjects for the scope of their life area, namely the coast and the factors that influence the implementation of the legal subject status of customary law communities (customary villages) in the management of coastal areas as part of the environment. his life.

2. Methods

The research method used is empirical legal research focused on facts and case approaches which are also based on statutory regulations and

conceptual approaches. Review the laws and regulations that are related to the relevant laws and regulations, namely regarding the recognition of customary law community units as legal subjects and management of coastal areas. The primary data in this study are derived from the main sources, namely informants and community respondents. The research location was determined purposively by representing coastal areas in South Bali. The research data that has been obtained is then processed in a qualitative descriptive analysis with the stages of editing, data classification, and then elaborating the discussion. Analysis of the implementation of norms at the empirical level through a series of systematic and measurable validity tests.

3. Findings and Discussions

3.1 Setting of Traditional Villages in Bali as Legal Subjects in the Management of Coastal Areas

Indigenous peoples are community groups that have ancestral origins, have inhabited a certain geographical area for generations, and have their own value system, ideology, economy, politics, culture, social and territory (territory) and are equipped with provisions of customary law as a tradition that continues to be carried out by indigenous peoples who are formed from normative values that are rooted in society and fulfill a sense of justice and harmony (Nurtjahyo and Fokky, 2010). The delegitimization of indigenous peoples over their living area, including in coastal areas, which are also part of the many existing traditional communities and their arrangements are mentioned in laws related to natural resources, is felt and part of the question is because the constitution has given recognition to the existence of indigenous peoples (Adrianto 2015)

The management of coastal areas and indigenous peoples is related to human rights which regulate and maintain the existence of indigenous peoples so that the human rights of indigenous peoples are maintained and fulfilled constitutionally (Syafa'at and Yono, 2017).

The challenges faced by indigenous and tribal peoples are encountered at the normative and implementation levels, with the various mentions and elements provided by sectoral laws on natural resources. So that as a legal subject which means as an executor of rights and obligations also has not maximized its existence. Management of natural resources is carried out based on conditions where in growing and developing in their living area, control over communal wealth is also attached (Kurniasari, et.al, 2016).

The opinion of Gatot Dwi Hendro Wibowo (2009) in terms of coastal management is determined through an integration in the legal system, mainly the existence of a regulatory substance in placing all

components of coastal communities as a central point in coastal management, including indigenous peoples. State institutions with an interest in the coast and sea make policies that are more sectoral in nature. It must be admitted that currently there is no institutional mechanism or arrangement capable of synergizing and integrating coastal and oceanic development policies. As a result, the handling of cases in coastal and marine development often creates conflicts.

If the components of the implementation of development activities in the coastal area are seen in Bali, with a water area of more than 9,440 km2 and a coastline length of approximately 633 KM, then from this area there is the life of the Balinese customary law community which is called a traditional village with its local wisdom. In a press statement as published on BeritaBali.com August 5, 2020 the Governor of Bali, Wayan Koster, emphasized that the Draft Regional Regulation (Raperda) for the Province of Bali concerning Zoning Plans for Coastal Areas and Small Islands (RZWP3K) for the Province of Bali for 2020-2040 contains potential sources big economy. This statement is of course closely related to how regulations provide space for recognition of Traditional Villages in Bali. The substance of laws and regulations governing customary law communities in Bali in the management of natural resources, especially coastal areas is inventoried in this study so that an overview is obtained of its accommodation. space for the rights of the Traditional Village.

Table 3.1 Arrangement of Traditional Villages in Bali in the Management of Coastal AreasPengaturan Desa Adat di Bali Dalam Pengelolaan Wilayah Pesisir

No	Instrumen Hukum	Pengaturan
1	Law Number 1 of 2014 concerning Amendments to Law Number 27 of 2007 concerning Coastal Zone and Small Islands	a. Article 7 paragraph (3) that Regional Governments are obligated to prepare all plans as referred to in paragraph (1) in accordance with their respective authorities. The Regional Government is given the authority to determine the Strategic Plan for Coastal Zone and Small Islands (hereinafter abbreviated as RSWP-3-K) as confirmed in the provisions of Article 8 to Article 15

		b. Article 21 paragraph (1) of the Coastal Law stipulates that the utilization of space and resources in coastal waters and small island waters in the territory of indigenous peoples by customary law communities is the authority of local customary law communities.
2	Law Number 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government	Full authority over their own region, then each regional head has the right to then carry out spatial planning. Spatial planning does not only regulate the existing spatial structure in the mainland area, but also concerns the entire district/city area, including the coastal area
3	Decree of the Minister of Maritime Affairs and Fisheries Number Kep.10/Men/2003 concerning Guidelines for Integrated Coastal Management Planning.	The coastal area is defined as a transitional area between land and sea ecosystems that interact with each other, where seaward is 12 miles from the coastline and one third of the sea area for the Regency/City and landward to the administrative boundaries of the Regency/City.
4	Regulation of the Minister of Maritime Affairs and Fisheries Number 40 of 2014 concerning Regulation of Community Participation in the Management of Coastal Areas	Article 1 number 7 mentions customary law communities.
5	Regulation of the Minister of Maritime Affairs and Fisheries Number 8/PERMEN-KP/2018 of 2018 concerning Procedures for Designating Areas for Management of Customary Law Communities in Utilization of Space in Coastal Areas and Small Islands	Article 4 The utilization of space and resources of Coastal Waters and Waters of Small Islands in the Management Area by the Customary Law Community is the authority of the local Customary Law Community. Furthermore, in paragraph (2) it stipulates that the utilization of space and resources of Coastal Waters and Waters of Small Islands as referred to in paragraph (1) is carried out by

		considering the national interest and in accordance with the provisions of laws and regulations. Then in paragraph (3) it states that the Indigenous Peoples as referred to in paragraph (1) are determined for their recognition and protection by the Regent/Mayor.
7	Regional Regulation Number 4 of 2019 Concerning Traditional Villages in Bali	a. Article 5 Traditional Village has the status of a legal subject in the government system of the Province of Bali. Article 23 defines the Authority of a Traditional Village including authority based on origin rights and local authority on the scale of a Traditional Village. This article determines the authority of the Traditional Village based on the rights of origin. The right of origin is the original right owned by the Traditional Village from generation to generation. The original rights are limited to the local area owned by the Traditional Village. The authority of the Traditional Village is based on the origin rights as referred to in Article 23 which mainly mentions authority establishment of Awig-Awig, Perarem, and other customary regulations; establishment of customary village development plans development and preservation of customary, religious, traditional, artistic and cultural values as well as local wisdom; management of customary village wewidangan and padruwen land; managing *Padruwen* Traditional Villages; participating in decision making and implementation of

		development in the Customary Village authority; b. Article 25 paragraph (1) Regional Regulations on Traditional Villages stipulate that local authority on the scale of Traditional Villages, as referred to in Article 23 includes related management, namely water sources; Pasisi and Segara;

Source: Processed from various laws and regulations related to the management of coastal areas.

Seeing the position of laws and regulations as regulatory instruments or as laws that regulate life and state administration, the purpose of establishing statutory regulations is to provide legal protection and legal certainty which leads to the creation of justice for all people, justice that can be felt by everyone, including in social justice in the goals of the state. The existence of law in the form of statutory regulations as social control or regulate society should the law originate from the community (Syafa'at and Yono, 2017). Protection of customary law communities is a very important discourse at this time because indigenous peoples are one of the groups that is very vulnerable to being the object of rights violations so that legal certainty over coastal management for traditional villages in Bali has actually been accommodated. By law, through regional regulations, they have been given the right to have predetermined origins, including the management of assets (*padruwen*) in traditional villages, one of which is the coast.

In accordance with the provisions of Article 1 paragraph (8) of the Regional Regulation of the Province of Bali Number 4 of 2019 Concerning Traditional Villages in Bali, it states that a Traditional Village is a "traditional law community unit in the Province of Bali which has a unity of traditions and customs of social life like a Hindu community. from generation to generation in relation to Kahyangan Tiga or Kahyangan Desa which has its own leader, has regulations (awig-awig) that exist in the village to regulate its citizens.

According to Muh. Afif Mahfud (2017) control and management of natural resources must be based on four principles, namely first, recognition of the customary rights of customary law communities. Second, protection of customary law community customary rights and third, participatory and open principles in making policies related to

customary law community units. This is consistent with the reality of the existence and actualization of recognition of traditional villages in Bali in accordance with applicable regional regulations. It can be said that the Government and Regional Government of the Province of Bali are very serious about strengthening the existence of the Traditional Village within the framework of the Unitary State of the Republic of Indonesia.

3.2 Faktor Yang Mempengaruhi Status Subjek Hukum Desa Adat dalam Pengelolaan Wilayah Pesisir

The scope of research in the Traditional Village which has part of the coastal area in Badung Regency includes the Ungasan Traditional Village and Melasti Beach. Management related to the economy cannot be carried out fully considering that the rights that are in accordance with state legal arrangements have not been owned. One of these things is an illustration that the legal subject status stated through the Customary Village Regulation still has to fulfill concrete procedures so that there is legality in managing the Melasti Beach coast.

When viewed from the concept of legal certainty (rechtszekerhied, legal certainty) is an important principle in legal action (rechtshandeling) and law enforcement (rechtshandling, law enforcement). It is common knowledge that legislation can provide higher legal certainty than customary law, customary law or jurisprudential law. However, it should also be noted that the legal certainty of laws and regulations is not solely placed in its written form (Prasetyo). This statement ultimately also refers to the legal subject status of management at a normative level with legal certainty that can be supported by existing arrangements based on customary law provisions. The legal synergy between the two is sufficient to provide certainty over the legal subject status of the Traditional Village. In the situation in the Ungasan Traditional Village, namely management The coast of Melasti Beach refers to Perarem Number 6 of 2020 concerning the Formation and Management of the Melasti Beach Area Utsaha Unit, Ungasan Traditional Village in Ungasan Traditional Village. Wayan Suarta, one of the administrators in the Indigenous village said that the external factor that hindered the management of the Melasti Beach coast in the Ungasan Traditional Village was that there was no basis for rights owned by the Ungasan Traditional Village. Because Melasti Beach is a coastal area, of course it has customary Village customary rights, it's just that there is no certificate yet. This is also a factor influencing coastal governance in the Ungasan Traditional Village.

Legal certainty on the legal subject status of coastal management

of the Kuta Traditional Village, which is also pursued by the issuance of a Regent's Decree. The management of the coastal area of the Kuta Traditional Village is limited to two beaches. Along Kuta Beach from the north of the airport, namely Sekeh Beach to the border with the Legian Traditional Village, it is managed by the Kuta Traditional Village. Coastal management in Kuta is strengthened by submitting to the Badung Regency Government so that it has legality in 2020. The submission aims to have beach management rights in the Kuta Traditional Village. Based on this submission, the Decree of the Badung Regent Number 205/0411/HK/2021 was issued concerning the Stipulation of the Implementation of the Management of Kuta Beach Tourism Attraction, Kuta Village, Kuta District, Badung Regency by the Kuta Traditional Village. Furthermore, the arrangement of Kuta Beach and Art Market was proposed by the Kuta Traditional Village to the Government of Badung Regency. The head of the customary village of Kuta, Wayan Wasista,April, 12 , 2023 in an interview said that coastal management in Kuta was strengthened by submitting to the Badung Regency Government so that it has legality in 2020.

Beach management rights in the Kuta Traditional Village. Based on this submission, the Decree of the Badung Regent Number 205/0411/HK/2021 was issued concerning the Stipulation of the Implementation of the Management of Kuta Beach Tourism Attraction, Kuta Village, Kuta District, Badung Regency by the Kuta Traditional Village. Furthermore, the arrangement of Kuta Beach and Art Market was proposed by the Kuta Traditional Village to the Government of Badung Regency. Based on the decree, the BUPDA of the Kuta Traditional Village was formed which also oversees the management of Kuta Beach including German Beach. In its management, a German Beach management unit was created. Currently, the Kuta Traditional Village is submitting a Cooperation Agreement (PKS) with the Government of Badung Regency in the context of managing the Kuta Beach Tourist Attraction. Currently, a special regulation on the management of Kuta Beach is being worked on.The discussion is intended to interpret the research results according to the theory used and not just explain the findings. The discussion must be enriched by referring to the results of previous research that have been published in scientific journals.

The concrete efforts made by the two traditional villages in the southern part of the coast of Bali, when analyzed, are actually to strengthen the status of the traditional village and its management so that legal guarantees in the customary village management rights have a strong element of proof and legality.

All legal products and their enforcement in Indonesia must be based on the main ideas contained in the 1945 Constitution, so that we are familiar with the term constitutional justice. This principle can also be a test for the truth of positive law as well as a direction for the law to be crystallized in the form of imperative norms in order to obtain true justice. More specifically, when the 1945 Constitution has been made the basic law that underlies the legal system in force in Indonesia which adheres to the rule of law, then automatically one of the main principles in Pancasila is the fifth precept which reads, "Social justice for all Indonesian people". will be one of the important footholds in interpreting and protecting constitutional norms. This is consistent with the protection of customary law communities in accordance with Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

Upholding the constitution means upholding law and justice, and conversely achieving justice will strengthen the building of a legal state in Indonesia, because the meaning of justice in Pancasila contains the principle that every Indonesian citizen must receive fair treatment in various domains of life, starting from the realm of law, political, economic, social and cultural.

4. Conclusion

The arrangement for the management of coastal areas by customary law communities, namely Traditional Villages in Bali, is actually confirmed through the determination of the status of customary villages as legal subjects and the granting of authority over pasisi or coastal areas through Regional Regulation Number 4 of 2019 which are managed as assets of the Padruwen Desa Indigenous Village.

Factors that influence the legal status of customary village subjects are that in several coastal areas in the Southern Bali Region, namely Badung Regency, not all of them have Pararem that underlies coastal management in their customary territory. When viewed from the scheme of the issuance of a management decree by the Bapati, this has not been fully obtained as legitimacy for carrying out coastal management in their customary village area.

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Bali Provincial Regulation Number 4 of 2019 concerning Traditional Villages in Bali.

State Responsibility in the Recognition of Customary Court as a Implementing Article 18 B Paragraph (2) of the 1945 Constitution

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Abstract

The existence of customary law communities with various groups and cultures, is a consequence of the geographical conditions of Indonesia's territory in the form of an archipelago with 1.340 of ethnic groups. The constitution mandates the state to protect and recognize its customary rights and even commands that separate regulations be made in the form of laws. But in the fact in society, their existence has not received serious protection. This can be seen from the doubts in mapping the position of customary courts in the national justice system. As a terminology there is recognition of this people's law or customary law, which is displayed in various terms such as living law, values in society, the original law of the Indonesian nation, or the others. In addition, in the regions, it was also found that not all regional heads have inventoried and made regional regulations related to indigenous peoples and local wisdom in their regions. This can cause the rights of indigenous peoples to their customary territories to be often interfered with by rules and policies made by the State. In this paper, we will discuss the extent of state recognition of customary justice institutions and optimization efforts that can be taken to realize the mandate of Article 18 B Paragraph (2) of the 1945 Constitution. The writing method of this paper is using normative method with a legal approach.

Keywords: judiciary, customary, recognition

Abstrak

Keberadaan masyarakat hukum adat dengan berbagai macam kelompok dan budaya, merupakan konsekuensi dari kondisi geografis wilayah Indonesia yang berbentuk kepulauan dengan 1.340 suku bangsa. Konstitusi mengamanatkan kepada negara untuk melindungi dan mengakui hak ulayatnya bahkan juga memerintahkan untuk dibuatkan peraturan tersendiri dalam bentuk undang-undang. Namun dalam praktik yang berjalan di masyarakat keberadaan mereka belum mendapatkan perlindungan yang sungguh-sungguh. Hal ini dapat dilihat dari adanya keraguan dalam memetakan posisi kedudukan peradilan adat dalam sistem peradilan nasional. Sebagai terminologi ada pengakuan terhadap hukum rakyat atau hukum adat ini yang ditampilkan dalam berbagai istilah seperti hukum yang hidup (living law), nilai-nilai dalam masyarakat, hukum asli bangsa Indonesia, dan sebagainya. Selain itu pada daerah-daerah juga ditemukan bahwa belum

semua kepala daerah menginventarisir dan membuat peraturan daerah terkait dengan masyarakat adat dan kearifan lokal di daerahnya. Hal ini dapat menyebabkan hak-hak masyarakat adat terhadap wilayah adatnya seringkali diganggu oleh aturan dan kebijakan yang dibuat oleh Negara. Dalam tulisan ini akan dibahas sejauh mana pengakuan negara terhadap lembaga peradilan adat dan upaya optimalisasi yang dapat ditempuh untuk mewujudkan amanat Pasal 18 B ayat (2) Undang-Undang Dasar Tahun 1945. Metode penulisan yang digunakan adalah normatif dengan pendekatan undang-undang.

Kata Kunci: Peradilan, Adat, Pengakuan

1. Introduction

The 1945 Constitution of the Republic Indonesia has mandated the state to recognize and respect the unity of indigenous peoples and their traditional rights. This provision is regulated in Article 18 B paragraph (2) of The 1945 Constitution, and affirmation related to the guarantee of human rights protection is regulated in Article 28 I paragraph (3) of The 1945 Constitution.

> Article 18 B paragraph (2) of The 1945 Constitution:
> *"Negara mengakui dan menghormati satuan-satuan pemerintahan daerah yang bersifat khusus atau bersifat istimewa yang diatur dengan undang-undang.*
> *Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia, yang diatur dalam undang-undang."*
>
> Article 28 I paragraph (3) of The 1945 Constitution :
> *"Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban."*

In Article 18 B paragraph (2) of the 1945 Constitution, it can be seen that there are conditions that must be fullfilled so that the existence of customary law communities in Indonesia can be recognized for their existence in Indonesia:

1) As long as the unity of the peoples of customary law exists;
2) in accordance with the development of society;
3) in accordance with the principles of the Unitary State of the Republic of Indonesia and;
4) regulated in law.

Although there have been constitutional arrangements regarding conditional constitutional respect for indigenous peoples, this has turned out to have problems. F. Budi Hardiman said that conditional recognition has a subject-centric, paternalistic, asymmetrical, and monologal paradigm, as revealed in the phrases 'State recognizes', 'State respects', '... along... in accordance with the principles of the Republic of Indonesia'' which presupposes the great role of the state to define, recognize, legitimize, legitimize existence, as long as indigenous peoples are willing to be conquered under state regulation or in other words 'domesticated'. Such a paradigm is incompatible with the principles of equality and autonomy that exist in democracies.[156]

The existence of indigenous peoples and their traditional rights, including the enforceability of customary courts, is dilemmatic. On the one hand, because it requires positivization (recognition of state law), its existence and traditional rights will only be recognized if it is regulated in written law made by state institutions. In a contrario, it can be said that, If it is not legally recognized, the existence of customary courts is considered to be lost or non-existent. In fact, the existence of indigenous peoples and their traditional rights as well as other human rights are inherent rights of indigenous peoples.[157]

In addition, various laws and regulations in various sectors implicitly recognize the existence of indigenous peoples but recognition by the government alone is not enough to protect the existence of indigenous peoples in Indonesia. That the 1945 Constitution has expressly mandated that the existence of customary law communities and their local wisdom will be regulated in law. This mandates that implementing regulations to the lowest level as well as regional regulations become urgent to be drafted so that customary law communities in the regions have a legal umbrella and local governments know more about the community and local wisdom owned in their areas.

Therefore, it is important to analyze the extent of state efforts in recognizing the existence of customary courts and how to optimize these recognition efforts as an implementation of article 18 B paragraph (2) of the 1945 Constitution. [158]

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[156] F. Budi Hardiman, "Posisi Struktural Suku Bangsa dan Hubungan antar Suku Bangsa in Kehidupan Kebangsaan dan Kenegaraan di Indonesia (Ditinjau dari Perspektif Filsafat)", dalam Ignas Tri, Hubungan Struktural Masyarakat Adat, Suku Bangsa, Bangsa, dan Negara (Ditinjau dari Perspektif Hak Asasi Manusia), 2006, Komnas HAM, Jakarta

[157] Herlambang P. Wirtraman, Perkembangan Politik Hukum Peradilan Adat, Mimbar Hukum Volume 30, Nomor 3, Oktober 2018, hal 491

[158] *Ibid*

2. Methods

This research is a normative research, namely research on legal principles related to legal recognition and protection for customary law communities in the perspective of the State of Law. The approach method used in this study is the statute approach and conceptual approach, which utilizes the views and thoughts of experts related to indigenous peoples. Data collection by collecting legal materials, namely by document study, namely reviewing literature data (secondary data) relevant to the object of research which includes pimer, secondary and tertiary legal materials both against laws and regulations, reference books and legal dictionaries. Furthermore, it is analyzed in a qualitative descriptive manner.

3. Findings

Customary Law, Customary Courts, and Related Laws and Regulations

3.1. Customary Law

According to Abdul Manan, that the law must be used as a reformer in the life of the nation and state which must be formed with an orientation to the future (for word looking) it must not be built with an orientation to the past (back word looking). Therefore, the law must be used as a driver and pioneer to change people's lives for the better and beneficial for all parties. This means that the legal rules made in terms of the protection of indigenous peoples and their local wisdom must be oriented towards protecting not only the recognition of the existence of indigenous peoples and their customary rights but also that the law must also give place to local customary law when facing the court when there is a violation of the customary law of the local community.[159]

Customary Law as the law of the Indonesian people is increasingly receiving attention, especially in the context of the development of National Law, therefore in the development that is being carried out today the development of the field of Customary Law is not left behind either. It can be seen that in the development of law universally, Customary Law has always received very important attention, which is one of the sources of law in the formation of National Law.The existence of customary law in addition to state law is recognized by the Constitution.

[159] H. Abdul Manan, 2009. Aspek-Aspek Pengubah Hukum, Penerbit Kencana, Jakarta, hal 6-7

In Law Number 17 of 2007 concerning the National Long-Term Development Plan for 2005-2025, customary law as a local wisdom in the development of national law is recognized and respected. In order to organize national law, customary law has a place as material for drafting and making laws and regulations. In the Medium-Term Development Plan 2004 – 2009, policies and revamping the legal system and politics are directed through improving legal substance, legal structure and legal culture, through efforts[160]:

1) Reorganize the substance of law through review and rearrangement of laws and regulations to realize legal order, taking into account general principles and legislative hierarchy and respecting and strengthening local wisdom and customary law to enrich the legal and regulatory system through the empowerment of jurisprudence as part of efforts to update national legal materials. Reconstruction the legal structure through institutional structuring by improving the professionalism of judges and court staff as well as the quality of the system.
2) Reorganize the substance of law through review and rearrangement of laws and regulations to realize legal order, taking into account general principles and legislative hierarchy and respecting and strengthening local wisdom and customary law to enrich the legal and regulatory system through empowering jurisprudence as part of efforts to update national legal materials.
3) Reconstruction the legal structure through institutional structuring by improving the professionalism of judges and court staff as well as the quality of an open and transparent judicial system, simplifying the judicial system, increasing transparency so that the judiciary can be accessed by the public and ensure that laws are applied fairly and in favor of truth, strengthen local wisdom and customary law to enrich the legal and regulatory system through the empowerment of jurisprudence as part of efforts to reform national legal materials;
4) Improve legal culture, among others, through education and dissemination of various laws and regulations as well as exemplary behavior of the head of state and his staff in obeying and obeying the law and upholding the rule of law.

Interpreting the relevance of the existence of customary justice to the National Long-Term Development Plan 2005-2025, is the

[160] Rencana Pembangunan Jangka Panjang Menengah Nasional Tahun 2004 – 2009, Bagian III-9, hlm. 5.

relationship and relationship between legal reform as a sub-system in the national development system as a whole and fundamental. The revival of customary justice in the justice system in Indonesia must be based on respect and protection of indigenous people, by affirming normative juridical, especially those concerning formulations in laws and regulations, and in line with the principles of the National Long-Term Development Plan 2005-2025.[161]

3.2. Customary Court

Customary justice is an institution of peace justice between citizens of customary law communities within existing customary law communities. Customary justice is a normative terminology mentioned in various laws and regulations, especially in laws and regulations that were born after the reform. However, the formal legal terminology is known by different terms by the public. Some customary law unitary communities refer to customary court institutions with various terms, such as "sidingadat", "para-para adat", "pokara adat", or "rapatadat", as well as various terms according to the peculiarities of the local language. And this slowly led to the rebirth of customary courts whose existence is juridically recognized in the justice system in Indonesia[162].

Law Number 6 of 2014 about Villages, Article 103 regulates the authority of Indigenous peoples based on the right of origin which includes: Affirming Authority based on the right of origin is a right that is a living inheritance and Village initiatives or Village community initiatives. Such authority includes the following:

a. Pengaturan dan pelaksanaan pemerintahan berdasarkan susunan asli;
b. Pengaturan dan pengurusan ulayat atau wilayah adat;
c. Pelestarian nilai sosial budaya Desa Adat;
d. Penyelesaian sengketa adat berdasarkan hukum adat yang berlaku di Desa.

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[161] Fathor Rahman, "Eksistensi Peradilan Adat dalam Peraturan Perundang-Undangan di Indonesia", Jurnal Hukum Samudra Keadilan, Volume 13, Nomor 2, Juli-Desember 2018. Hal 334

[162] Ewa Wojkoswka, "How Informal Justice System Can Contribute", Paper, United Nations Development Program Oslo Governance Centre, Oslo, Desember 2006, hlm. 11. Dalam Tody Sasmitha Jiwa Utamadan Sandra Dini Febri Aristya, Kajian Tentang Relevansi Peradilan Adat Terhadap Sistem Peradilan Perdata Indonesia, Makalah : Bagian Hukum Adat dan Bagian Hukum Acara Fakultas Hukum Universitas Gadjah Mada, Yogyakarta.

e. Adat dalam wilayah yang selaras dengan prinsip hak asasi manusia dengan mengutamakan penyelesaian secara musyawarah;
f. Penyelenggaraan sidang perdamaian peradilan Desa Adat sesuai dengan ketentuan peraturan perundang-undangan;
g. Pemeliharaan ketenteraman dan ketertiban masyarakat Desa Adat berdasarkan hukum adat yang berlaku di Desa Adat; dan
h. Pengembangan kehidupan hukum adat sesuai dengan kondisi sosial budaya masyarakat Desa Adat.

Based on these provisions, especially in point e, textually it is clearly mentioned about "customary courts" which can be understood, that customary courts, have been revived, to resolve customary disputes based on customary law in force in customary villages in areas that are in line with human rights principles by prioritizing amicative settlement.

Furthermore, in Article 26 paragraph (4) letter k, Law No. 6 of 2016 concerning Villages is stated:

(4) Dalam melaksanakan tugas sebagaimana dimaksud pada ayat (1), Kepala Desa berkewajiban:
a. memegang teguh dan mengamalkan Pancasila, melaksanakan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, serta mempertahankan dan memelihara keutuhan Negara Kesatuan Republik Indonesia, dan Bhinneka Tunggal Ika;
b. meningkatkan kesejahteraan masyarakat Desa;
c. memelihara ketenteraman dan ketertiban masyarakat Desa;
d. menaati dan menegakkan peraturan perundang-undangan; e. melaksanakan kehidupan demokrasi dan berkeadilan gender;
e. melaksanakan prinsip tata Pemerintahan Desa yang akuntabel, transparan, profesional, efektif dan efisien, bersih, serta bebas dari kolusi, korupsi, dan nepotisme;
f. menjalin kerja sama dan koordinasi dengan seluruh pemangku kepentingan di Desa;
g. menyelenggarakan administrasi Pemerintahan Desa yang baik;
h. mengelola Keuangan dan Aset Desa;
i. melaksanakan urusan pemerintahan yang menjadi kewenangan Desa;
j. menyelesaikan perselisihan masyarakat di Desa;
k. mengembangkan perekonomian masyarakat Desa;
l. membina dan melestarikan nilai sosial budaya masyarakat Desa;
m. memberdayakan masyarakat dan lembaga kemasyarakatan di Desa;

n. mengembangkan potensi sumber daya alam dan melestarikan lingkungan hidup; dan
o. memberikan informasi kepada masyarakat Desa.

In Article 26 paragraph (4) letter k, Law No. 6 of 2016 concerning Villages affirms the position of the Village Head, who is obliged to resolve disputes in the Village community. Although it is not explained rigidly about what form of dispute must be resolved by the Village Head, contextually it can be interpreted that the Village Head has the duty and authority to create a safe and peaceful community among his villagers, by resolving various kinds of conflicts or matters that arise in the community. Such as economic, political, religious, ethnic, class, self-esteem, and so on which can then cause horizontal conflicts[163].

In fact, in some regions in Indonesia, such as in Bali, Padang, Papua, and so on, in fact there are social institutions that resemble the judiciary that are still running so far, which with the birth of the Village Law can be institutionalized as customary courts that are part of the traditional institutions of customary villages which in the legal definition are called the "original structure" of customary law communities.. The institution of customary courts is a court that lives in daily practice in customary villages (customary law communities).

This is in accordance with Article 103 letter a of Law Number 6 of 2014 about Villages [164]:

"Kewenangan Desa Adat berdasarkan hak asal usul sebagaimana dimaksud dalam Pasal 19 huruf a meliputi:
a. pengaturan dan pelaksanaan pemerintahan berdasarkan susunan asli;
b. pengaturan dan pengurusan ulayat atau wilayah adat;
c. pelestarian nilai sosial budaya Desa Adat;
d. penyelesaian sengketa adat berdasarkan hukum adat yang berlaku di Desa Adat dalam wilayah yang selaras dengan prinsip hak asasi manusia dengan mengutamakan penyelesaian secara musyawarah;
e. penyelenggaraan sidang perdamaian peradilan Desa Adat sesuai dengan ketentuan peraturan perundang-undangan;
f. pemeliharaan ketenteraman dan ketertiban masyarakat Desa Adat berdasarkan hukum adat yang berlaku di Desa Adat; dan
g. pengembangan kehidupan hukum adat sesuai dengan kondisi sosial budaya masyarakat Desa Adat"

[163]Fathor Rozi, Op.cit hal 330
[164] Pasal 103 huruf a Undang-Undang Nomor 6 Tahun 2014 tentang Desa

In letter a above, it states that the arrangement and implementation of government by customary villages is based on the original structure. The original arrangement is the system of organization of indigenous village life known in their respective territories. By referring to the formulation of Article 103 letter a and associated with Article 103 letter d and e of Law Number 6 of 2014 concerning Villages, Therefore, the institution of the Customary Village Court is a customary court known by the customary law community, both the one that functions to decide, and the one that functions to reconcile customary disputes based on customary law. This means that the courts known by the customary law community are then recognized as customary village courts in the formulation of Law Number 6 of 2014 concerning Villages.

3.3. Laws and Regulations Regarding the Existence of Customary Courts

So far the existence of Customary Justice in the Legal System in Indonesia can be traced from several laws and regulations in Indonesia, including the following [165]:

a. The 1945 Constitutions legal basis for the enactment of customary criminal law is based on the provisions of Article 18 B paragraph (2) of the Constitution of the Republic of Indonesia in 1945 which states that: Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society.
b. Emergency Law Number 1 of 1951 In addition to the 1945 Law, the legal basis and existence of customary criminal law can also be seen based on the provisions of Article 5 paragraph (3) sub-Emergency Law Number 1 of 1951 (LN 1951 Number 9).
c. Law Number 48 of 2009 concerning Judicial Power In addition to the provisions of Article 5 paragraph (3) of the Emergency Law Number 1 of 1951, the legal basis for the enactment of customary criminal law also refers to the provisions of Law Number 48 of 2009 concerning Judicial Power. Explicitly or implicitly the provisions of Article 5 paragraph (1), Article 10 paragraph (1) and Article 50 paragraph (1) of Law Number 48 of 2009 lay the foundation for the existence of customary criminal law.
d. Law Number 21 of 2001 concerning Special Autonomy for Papua Province The existence of customary criminal law and customary

[165] Rantau Isnur Eka dan Dodo, "Eksistensi Peradilan Adat Pada Sistem Hukum Pidana di Indonesia dalam Upaya Pembaharuan Hukum Pidana Nasional", Pakuan Justice Journal of Law Volume 02, Nomor 01, Januari-Juli 2021, hal 68

justice can be found in Law Number 21 of 2001 concerning Special Autonomy for Papua Province. Here are some articles that outline the provisions of customary law and customary courts:

1) Article 1 letter (q) of Law Number 21 of 2001 concerning Special Autonomy for Papua Province which states that customary law is an unwritten rule or norm that lives in customary law communities, regulates, binds and is maintained, and has sanctions;
2) Article 43 paragraph (1) of Law Number 21 of 2001 concerning Special Autonomy for Papua Province which states that the Papua Provincial Government is obliged to recognize, respect, protect, empower and develop the rights of indigenous peoples based on the provisions of applicable legal regulations.
3) Article 51 paragraph (1) of Law Number 21 of 2001 concerning Special Autonomy for Papua Province which states that customary courts are peace courts within customary law communities, which have the authority to examine and adjudicate customary civil disputes and criminal cases among the citizens of the customary law communities concerned.

e. Papua Special Region Regulation Number 20 of 2008 concerning Customary Courts in Papua. The existence of customary courts is more specifically found in Papua Special Regional Regulation Number 20 of 2008 concerning Customary Courts in Papua. This regulation is regulated starting from customary court procedures to decisions from the customary court. Here are some articles that mention the authority of customary courts in Papua:
   1) Article 4 of Papua Special Region Regulation Number 20 of 2008 concerning Customary Courts in Papua which states that customary courts are not part of the state judiciary, but rather the judicial institution of indigenous Papuans.
   2) Article 8 Paragraph (1) of Papua Special Region Regulation Number 20 of 2008 concerning Customary Courts in Papua which states that customary courts have the authority to receive and administer customary civil cases and customary criminal cases among indigenous peoples in Papua.

4. Discussion

The Position of Customary Courts in Indonesia, Government Recognition Efforts, and Strengthening Customary Institutions as Alternative Dispute Resolution

4.1. Implementation of Customary Justice in Indonesia

Aliansi Masyarakat Adat Nusantara has published a number of thoughts through the book 'Customary and Local Justice Systems in Indonesia, Opportunities and Challenges' (AMAN, 2003). One of the studies emphasized that there is a desire to expand and strengthen the guarantee of the implementation of customary justice in the context of the Indonesian legal system[166].

Likewise, in the context of state institutions that carry out judicial power functions, such as the Supreme Court of the Republic of Indonesia, have launched a number of judicial reform programs in the Blueprint 2010-2035. Unfortunately, the document pays little attention to the relationship of judicial power with customary justice, or does not exist at all. However, now the Supreme Court has opened space to explore dialogue to discuss customary justice issues, as jointly initiated by the HuMa Association and the Supreme Court Research and Development Agency, in Royal Kuningan, October 10, 2013. In BPHN's research notes, there are several reasons for the need to encourage the non-litigation dispute resolution process through customary courts in dispute resolution. First, in Indonesia peaceful dispute resolution procedures have long been and commonly used by the Indonesian people. Some studies also show this.[167] Causes, among others [168]:

(a) Limited public access to the existing formal legal system;
(b) Traditional communities in isolated areas basically still have strong legal traditions based on their traditional laws in solving legal

[166] Abdurrahman, 2002, "Peradilan Adat dan Lembaga Adat dalam Sistem Peradilan Indonesia", makalah, disampaikan dalam Sarasehan Peradilan Adat Kongres Aman II, Mataram, 20 September 2002. Dalam Herlambang P. Wiratraman Perkembangan Politik Hukum Peradilan Adat, Mimbar Hukum Volume 30, Nomor 3, Oktober 2018, hal 496

[167] Ahmadi Hasan, 2007, Penyelesaian Sengketa Hukum Berdasarkan Adat Badamai Pada Masyarakat Banjar dalam Kerangka Sistem Hukum Nasional, Disertasi, Program Doktor Ilmu Hukum Pasasarjana Fakultas Hukum Universitas Islam Indonesia, Yogyakarta. Lihat juga Muhammad Koesnoe, "Musyawarah", dalam Miriam Budiardjo, 1971, Masalah Kenegaraan, tanpa penerbit, Jakarta, hlm. 551. Dominikus Rato, 2013, "Prinsip, Mekanisme dan Praktek Peradilan Adat dalam Menangani Kasus Hukum dengan Pihak Lain", Makalah, Focus Group Discussion, BPHN, Jakarta.

[168] Sinclair Dinnen, Interfaces Between Formal and Informal Justice Sistem To Strengthen Access to Justice By Disadvantaged Sistem, Makalah disampaikan dalam Practice In Action Workshop UNDP Asia- Pasific Rights and Justice Initiative, Ahungala Sri Lanka, 19-21 November 2003 sebagaimana dikutip Eva Achjani Zulfa, "Keadilan Restoratif dan Revitalisasi Lembaga Adat Di Indonesia", Jurnal Kriminologi Indonesia, Vol. 6, No.II, Agustus 2010, hlm. 182-203. Lihat juga Herlambang P. Wiratraman Perkembangan Politik Hukum Peradilan Adat, Mimbar Hukum Volume 30, Nomor 3, Oktober 2018, hal 497

problems that occur.. This is a reality where tradition or custom (custom) still prevails in many places. It is also a reality where societal change sometimes crosses borders, and that it is also a reality where there are areas that are still 'sterile' or untouched by the enactment of the formal legal system.

(c) The type of problem solving offered by the formal legal system sometimes acquires a different view and is considered inadequate and and are considered inadequate and lack of a sense of justice for people who still hold their own legal traditions;

(d) The lack of adequate infrastructure and resources owned by the formal legal system causes a lack of adaptability in absorbing the needs of a sense of justice of the community.

Second, in most Indonesians there is a tendency to resolve disputes by peaceful means. This method is recognized as effective in resolving disputes or disputes. As well as being able to eliminate feelings of resentment[169], and play a role in creating security, order, and peace. Third, the existence of customary courts is becoming increasingly important amid the situation of the state that has not been fully able to provide case resolution services through formal channels to remote villages. In addition, the capacity of the formal judiciary is also heavy because there is a backlog of very serious cases. For the record, when viewed at the highest institution of the state judiciary, data from the Indonesian Legal Institution Foundation (YLBHI) shows that "every year there are 13 thousand cases that go to the Supreme Court. That number must be resolved by 54 Supreme Court Justices who always leave 8 thousand cases at the end of each year.".[170] Of course, the burden of such a backlog of cases has consequences for efforts to access justice for the public. On that basis, it is important to consider the enactment of justice at the local level that gives more social meaning and strengthens local wisdom, such as a number of examples quoted from the SAJI study, namely the tradition of conflict resolution in the community Dalihan Na Tolu (Tapanuli), Rumah Betang (Kalimantan

[169] Ahmadi Hasan, 2007, "Penyelesaian Sengketa Melalui Upaya (Non Ligitasi) Menurut Peraturan Perundang-Undangan", Jurnal AL-BANJARI, Vol. 5, No. 9, Januari-Juni 2007

[170] Detik News, "Tunggakan 8 Ribu Perkara Tiap Tahun Jadi Tantangan Ketua MA Baru", http://news.detik.com/read/2012/02/06/190613/1835 694/10/tunggakan-8-ribu-perkara- tiap-tahun-jadi-tantangan-ketua-ma-baru?nd992203605, diakses 10 Agustus 2018. Lihat juga catatan dari SAJI Project, Pedoman Peradilan Adat Sulawesi Tengah, 2013.

Tengah), Menyama Braya (Bali), Saling Jot and Saling Pelarangan (NTB), or Clan Selupu Lebong Customary Court (Bengkulu)[171].

Interestingly, one of the important factors in discussing the applicability of customary courts is the extent to which customary courts are adhered to by parties in conflict. From the point of enforceability of the law, whether the parties comply with it in the context of the work of customary courts. Sociologically, studies of legal compliance basically involve two variables, each of which is the law and the human being who is the object of the legal regulation. Kepatuhan terhadap hukum tidak hanya dilihat sebagai fungsi peraturan hukum, melainkan juga fungsi manusia yang menjadi sasaran pengaturan. Kepatuhan hukum tidak hanya dijelaskan dari kehadiran hukum semata, melainkan juga dari kesediaan manusia untuk mematuhinya.[172] If the legal position in question is customary law and the mechanism is customary court, whether the position of human beings identified in compliance becomes problematic because one is part of indigenous peoples, and on the other hand there are also those who are not related or not part of indigenous peoples (outsiders).

4.2. Recognition by the Government

State recognition of indigenous peoples is recognized through the Constitution and laws and regulations as mentioned earlier. One of them is in Law Number 6 of 2014 concerning Villages. In the Law, the authority of customary villages to resolve legal problems of their citizens is recognized by the state through Article 103 letter d and e of the Village Law as follows:

> "Kewenangan Desa Adat berdasarkan hak asal usul sebagaimana dimaksud dalam Pasal 19 huruf a meliputi:
> a. pengaturan dan pelaksanaan pemerintahan berdasarkan susunan asli;
> b. pengaturan dan pengurusan ulayat atau wilayah adat;
> c. pelestarian nilai sosial budaya Desa Adat;
> d. penyelesaian sengketa adat berdasarkan hukum adat yang berlaku di Desa Adat dalam wilayah yang selaras dengan prinsip

[171] Ibid

[172] Satjipto Rahardjo, 2010, Sosiologi Hukum Perkembangan Metode dan Pilihan Masalah, Genta Publishing, Yogyakarta. Satjipto Rahardjo, "Hukum Adat dalam Negara Kesatuan Republik Indonesia (Perspektif Sosiologi Hukum)", dalam Hilmi Rosyida dan Bisariyadi, 2005, Inventarisasi dan Perlindungan Hak Masyarakat Hukum Adat. Komnas HAM, Mahkamah Konstitusi RI, dan Departemen Dalam Negeri, Jakarta

hak asasi manusia dengan mengutamakan penyelesaian secara musyawarah;

e. penyelenggaraan sidang perdamaian peradilan Desa Adat sesuai dengan ketentuan peraturan perundang-undangan;
f. pemeliharaan ketenteraman dan ketertiban masyarakat Desa Adat berdasarkan hukum adat yang berlaku di Desa Adat; dan
g. pengembangan kehidupan hukum adat sesuai dengan kondisi sosial budaya masyarakat Desa Adat."

Outside of the Village Law, the position of decisions from customary dispute resolution processes is also recognized as one of the sources of law for judges. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. This provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and the sense of justice of the community.

Furthermore, court decisions must not only contain the reasons and basis for the decision, but also contain certain articles from the relevant laws and regulations or unwritten legal sources that are used as a basis for trial. Structurally, customary courts are not bound in a hierarchical relationship with formal judicial bodies in Indonesia. Law No. 48 of 2009 does not recognize customary courts as part of judicial power in Indonesia. The judicial power itself based on Article 1 number 1 of Law Number 48 of 2009 is:

"Kekuasaan negara yang merdeka untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan berdasarkan Pancasila dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, demi terselenggaranya Negara Hukum Republik Indonesia."

Article 18 of Law Number 48 of 2009 concerning Judicial Power then limits that judicial power is exercised by a Supreme Court and subordinate judicial bodies within the general judicial environment, religious court environment, military court environment, state administrative court environment, and by a Constitutional Court.

In this case, the position of customary courts can be likened as one of the alternative forms of dispute resolution institutions, which are regulated. Alternative dispute resolution is a dispute resolution institution or disagreement through a procedure agreed by the parties,

namely out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert assessment[173].

The Position of Customary Court Decisions

Since it originally functioned as a source of law and was not bound by structural relationships, there was essentially no obligation for a judge to obey the decisions of customary courts. This is as explained by Tody Sasmitha Jiwa Utama and Sandra Dini Febri Aristya [174] , Both explained that there is a non-binding functional relationship between state courts and customary court decisions, in which case state courts recognize the authority of customary/village courts in making peace decisions even though the decisions do not have a binding nature for judges.

One of the rulings referred to by the study is Supreme Court Decision Number 436K/Sip/1970. The ruling gave birth to the rule that peace decisions through customary mechanisms are not binding on district court judges and only become guidelines. If there are compelling legal reasons, the district court judge may deviate the customary peace decision.

In the context of civil procedural law, written decisions of customary courts can be submitted to the court as evidence to support the judge's consideration. Article 164 of the Herzien Inlandsch Reglement ("HIR") states that evidence in civil trials consists of:

a. Letters;
b. Witnesses;
c. Disclaimers;
d. Acknowledgment; and
e. Oath.

Thus, the decision stated in writing can be likened to a letter. The letter under Article 165 HIR is:

"Suatu surat yang diperbuat demikian oleh atau di hadapan pegawai umum yang berkuasa untuk membuatnya menjadi bukti yang cukup bagi kedua belah pihak dan ahli warisnya dan sekalian orang yang mendapat hak daripadanya tentang segala hal yang disebut di

[173] Artikel Arasy Pradana A. Azis, S.H., M.H. pada Hukum Online "Kedudukan Keputusan Pengadilan Adat" https://www.hukumonline.com/klinik/a/kedudukan-keputusan-pengadilan-adat-lt5d2bf896f3ec3 diakses pada 1 Agustus 2023 pukul 17.11 WIB

[174] Tody Sasmitha Jiwa Utama dan Sandra Dini Febri Aristya. Kajian tentang Relevansi Peradilan Adat terhadap Sistem Peradilan Perdata Indonesia. Jurnal Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada, Vol. 27, No. 1, 2015.

dalam surat itu dan juga tentang yang ada dalam surat itu sebagai pemberitahuan sahaya, dalam hal terakhir ini hanya jika yang diberitahukan itu berhubungan langsung dengan perihal pada surat (akte) itu."

Apart from being evidence, there is an expert opinion that customary court decisions only need to be submitted to the district court for state recognition. Elfi Marzuni, as quoted by Utama and Aristya, said that customary court decisions as outlined in the peace deed can be strengthened by court decisions, so that they have permanent legal force[175].

In the criminal realm, there is a precedent that also recognizes customary crime as a source of law. For example, in Makassar High Court Decision Number 427/Pid/2008 as described in the article Judgments Respecting Customary Crimes, judges punish someone for sexual intercourse outside marriage. Since such behavior is not essentially prohibited by the Criminal Code ("KUHP"), the judge then linked his ruling to local customary law.

4.3. Strengthening Customary Institutions as an Alternative to Dispute Resolution

Sociologically, customary institutions are recognized by the community and become a priority in regulating and solving all problems in the community. Settlement through customary institutions is more effective, because a customary institution grows based on values that live in the community and have been recognized and embraced for generations. It's just that to continue to ensure legal certainty, regulation as recognition of the community through legislation is still needed, especially regarding matters related to neutral areas of life such as administration, education and others[176].

Resolution mechanisms through customary institutions always prioritize social harmony and harmony. Maintaining social harmony is highly valued in rural life, and informal actors prioritize restoring social relations when problems occur. Settlement through customary institutions has a flexible character. Structures and norms are loose to adjust to social change. People prefer non-state courts primarily because of the authority of the perpetrators in rural settings to solve problems and implement verdicts. In terms of costs incurred, customary

[175] Ibid

[176] Inosentius Samsul, "Penguatan Lembaga Adat Sebagai Lembaga Alternatif Penyelesaian Sengketa", Jurnal Negara Hukum Vol. 5, No. 2, November 2014, hal 135

courts are actually relatively cheap / even no costs, with a simple and fast process completed.

However, resolution through customary institutions has several major drawbacks,[177] that is, arbitrariness and lack of supervision. Although social authority is the core power of the non-state judiciary, its uncontrolled exercise is a major weakness. The lack of clear procedures and norms and the absence of accountability will make the weak and marginalized underserved, with no alternative.

Despite these weaknesses and advantages, the implementation of customary justice is still carried out in several regions such as Bali, Padang, or Papua. One solution model is to use the deliberative model. Deliberation is a general model and the main one in the trial process in customary courts. This means that customary justice institutions do not come with the primary mission of being a means of coercion. The role of mediators for the reconciliation and consolidation of the parties, through a decision-finding process that relieves all parties, including the general public from their communities who are not directly related to the case is an important feature of dispute resolution mechanisms through customary institutions.

The dispute resolution model with the deliberation method makes customary courts escape the trap of unworkable rulings. Due to its principle, the decision is taken voluntarily by the parties. There is no suspicion and prejudice against the decisions taken. Because all the processes are carried out openly which allows all parties to convey all information freely, without having to think about the formal aspects.

However, from some of these practices it can also be seen that indigenous peoples – at least reflected in customary court rulings – also do not make final decisions. There are even those who leave it to the formal judiciary if there are parties who are not satisfied with the verdict. There are suspicions that this practice is due to the weakening of the confidence of indigenous functionaries who hope for another legal system.

The limitation of dispute resolution time depends on both parties to the dispute if they have achieved a sense of social justice by maintaining cosmic (social balance) not to be disturbed. Each dispute can be resolved through two mechanisms, namely the litigation mechanism or with alternative dispute resolution. Dispute resolution through customary institutions is one alternative dispute resolution outside the ligitigation (judiciary). So if this alternative does not work,

[177] Justice for the Poor, Titik Keseimbangan: Mempertimbangkan Keadilan Non-negara di Indonesia, World Bank, Mei 2009, hal. 41.

it can be done with other alternatives, such as consultation, good services, arbitration, and if all these alternatives also do not work, it can be done with the court as the last alternative[178].

Settlement through customary institutions can cover several areas of law, namely private (civil), criminal and constitutional law. For settlement through arbitration and mediation mechanisms, the decision of customary institutions is final. Then for private law cases (civil) it became the first court while for public law (criminal and statecraft) it became the first court.

In practice, customary courts can only examine disputes arising between members of indigenous peoples within a community. In practice, customary justice is very difficult to apply to land disputes that bring together indigenous peoples with other parties such as the government and companies. Therefore, the way out taken by the community so far is usually through negotiation methods. This method was chosen because indigenous peoples realize that the weakness of indigenous peoples' (formal) legal status over their customary territories will make it difficult for them to achieve justice if the settlement is carried out through state courts. On the other hand, it is not possible to force governments and companies to submit to customary law and therefore dispute resolution can be done through customary courts. This method is usually used by indigenous peoples to fight for the legal (formal) status of their ownership of customary territories.

The attitude of the district court towards the decisions of customary institutions shows the importance of exploring customary values that have been mandated by law. The decision of the customary institution has not been taken into consideration in the decision of the district court if one of the parties continues its case to the district court. When problems are not resolved in customary institutions it is usually done cross-culturally for the validity of the problem being solved, or under to the police but the resolution material uses customary law. Even if one of the parties is not satisfied, it can proceed to the District Court.

Efforts to Strengthen Customary Institutions through Regional Regulations

The attention of local governments that elevate and revive customary institutions through regional regulations is an example of efforts made by each region to strengthen the role of customary institutions. In Indonesia, not many regions have established Regional Regulations to strengthen the existence of customary institutions. One example is the

[178] Ibid

Regional Regulation of Muara Enim Regency Number 2 of 2007 concerning Customary Institutions of Marga and Papua Special Regional Regulation Number 20 of 2008 concerning Customary Courts in Papua.

Efforts that can be made to strengthen the position and role of customary institutions in dispute resolution can be done by, among others:

1) Customary stakeholders must first have the ability and in-depth understanding of customs and customs, as well as the values espoused in the community,
2) Customary stakeholders must understand the background of each dispute well, so as to provide the resolution expected by the parties,
3) Continued socialization to the community about the existence of customary institutions as an alternative that can be used by the community in dispute resolution,
4) Improvement of institutional structures internally, and
5) Understanding to the community that not all disputes must be brought to court, but can be forged with various alternative resolutions.

5. Conclusion

Juridically, the existence of customary courts can be found in several laws and regulations, which in essence customary courts are peace courts within customary law communities, which have the authority to examine and adjudicate customary dispute disputes among the residents of the customary law community concerned. To trace the re-enactment of customary courts can be seen in the Darsar Law of the Republic of Indonesia Year 1945, especially in Article Article 18B paragraph (2) and article 24 paragraph (3); Law Number 6 of 2014 concerning Villages, Article 103; Law Number 21 of 2001 concerning Special Autonomy of Papua Province in Article 50 paragraph (2) and Article 51; Law Number 11 of 2006 about the Government of Aceh. What then emerged Qanun related to customary justice in Aceh, namely: Aceh Qanun Number 10 of 2008 concerning Customary Institutions, which was ratified December 30, 2008. The relevance of the existence of Indigenous Courts to the National Long-Term Development Plan 2005-2025, is a relationship and linkage between legal reform and development that reflects the ideals, soul, spirit and social values that live in Indonesia, where the development of such laws is a sub-system in the national development system as a whole. The revival of Customary Justice in the justice system in Indonesia, then customary law can be implemented according to its function, customary justice can be an alternative effort

to resolve disputes with many advantages and facilitate the community. Customary courts and prioritize respect and protection of indigenous people, by affirming normative juridical, especially those concerning formulations in laws and regulations, which are in line with the principles of the National Long-Term Development Plan 2005-2025.

To ensure that Customary Courts run in accordance with their functions, the existence of Customary Courts in practice so as not to often clash with formal law, then in revamping national law as a whole, it must be seen the relevance of the Customary Court system to the State Court, where the meeting point, lies in simple matters, which can be resolved customarily, not necessarily brought to the realm of the State Court, so it is necessary to form a Draft Law on Customary Courts that affirms the existence of customary courts, in the justice system in Indonesia. The government also needs to provide training as mediators or negotiators for indigenous peoples, this is an effort to improve the quality of customary decisions made, and minimize the occurrence of prolonged conflicts in the community.

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The Crime of Genocide to Indigenous People
(A Violation of Human Rights Towards Rohingya People in Myanmar Under the International Law and Human Rights Perspective)

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Abstract

This paper aims to review the crime of genocide against the Rohingya people in Myanmar, based on the perspective of international law and human rights law. The approach methodology in this research uses the juridical normative methodology which is conducted by analyzing many international conventions and regulations related to the crime of genocide and reviewing the case of the genocide against the Rohingya people. Genocide in Myanmar, has become a global issue nowadays since the attack of Rohingya people which was led by the military regime. This crime of genocide has killed many innocent people where thousands of people died and were wounded by mass killings which were conducted by Myanmar troops indiscriminately. Genocide became one of the most heinous crimes which constituted a crime against humanity. The genocide of the Rohingya ethnic is a serious international crime which took place widely and systematically, organized by state actors, targeting the civilian population by means of extermination in whole or in part. This study will show that the violation of human rights against the Rohingya People whose numbers are very small constitutes a crime against humanity.

Keywords: Indigenous People, Genocide, Rohingya People, International Law

1. Introduction

Entering 2017, the international community was shocked by the mass killings of hundreds or even thousands of Rohingya in Myanmar. The political crisis that occurred in the country of Myanmar which had been going on for quite a long time, eventually expanded to become ethnic cleansing (Ethnic Cleansing) where Buddhist extremists were involved in the killing of hundreds or even thousands of Rohingya ethnic civilians where mass killings were not seen as murder but efforts made jointly with the Myanmar military in the context of "exterminating pests" (pest control).

The helpless ethnic Rohingya are considered as agents of global Islam who spread and carry out a conspiracy to take over the world and create an Islamic caliphate (Islamic State). On the basis of this thought,

finally the Buddhist monks (monks) together with the government represented by the Myanmar military regime moved and acted together to prevent the existence of the Rohingya ethnic group, from children, youth, adults to the elderly, to maintain the religious and national character of the Myanmar nation by the way in which acts of mass murder were carried out in a widespread and systematic manner.

Even though the Myanmar government argued that its actions were taken in order to safeguard and protect Myanmar from Rohingya people who were considered "terrorists" who endangered Myanmar, the actions taken by the Myanmar military regime were truly inhumane and outside the boundaries of humanity and violated human rights. -human rights. Not only that, the government of Myanmar has also been intensively carrying out a campaign voicing resistance against the Rohingya ethnicity which has been going on for decades, which eventually became an act of genocide since the mass violence in Myanmar in 2012 which resulted in around 200,000-300,000 Rohingya fleeing from Myanmar to nearby countries such as Bangladesh and India.

The mass killings of the Rohingya are now a human tragedy which is so important to be resolved both diplomatically through the negotiating table of countries at the ASEAN level and also through international judicial efforts so that the crimes of genocide against the Rohingya can be stopped and resolved through legal means. so that the Rohingya ethnic community can be saved from the inhumane actions of the Myanmar military. Against the background of this deep concern for the tragedy of the Rohingya ethnic group, the author tries to explain the genocide crimes against the Rohingya ethnic group in Myanmar which will be reviewed from the perspective of international law and human rights.

1. An Overview Of Genocide And Ethnic Conflict

1.1. Study of Ethnic Conflict

Before discussing the crime of genocide further, the author will first explain a little about ethnic conflict because one of the factors that is considered to determine the occurrence of genocide is ethnic conflict. In terms of the potential for genocide, ethnic conflict actually coexists with other conflicts that also have the potential to trigger genocide, namely racial conflict, religious conflict, and national conflict.[179]However, the unique characteristics of ethnic conflict make this conflict have a great opportunity to continue into genocide.

[179]Arie Siswanto, International Criminal Law, ANDI OFFSET, Yogjakarta, 2015, p. 52

The concept of ethnicity basically cannot be separated from the concept of nationalism. Nationalism comes from the word 'nation' which means that a nation actually contains ethnic elements. In every nation there is almost always a group of people who constitute a certain "cultural unit" that is different from other cultural units. This difference can be as large as differences in language, religion, or customs. But these differences may also be very small and only nuanced differences, but still form a distinct group. Groups of people with a certain cultural unity is called ethnic unity.[180]

More fundamentally, ethnicity can be defined as a human community that has a name, which is related to one homeland, has a shared noble myth, shared memories, one or several shared cultural elements and also has a certain solidarity. It can be said that it is rare for a nation to only consist of one ethnic group because most of the countries in the world have different ethnic groups within them.

After the end of the Cold War and the subsequent dissolution of the Soviet Union, many hoped that a period of peace would fill the world. A new world order that is safe and prosperous, which will prevent divisions among nations has been the dream of the rulers of the past. However, this hope is inversely proportional to reality because after the Cold War, world conditions were colored by ethnic conflicts with various economic and political interests.

According to Michael E. Brown, ethnic conflict is conflict related to urgent political, economic, social, cultural and territorial issues between two or more ethnic communities.[181] This definition shows that there are two elements in an ethnic conflict, namely the substantial element and the subject element. Substantial elements refer to the "content" of ethnic conflicts, namely political, economic, social, cultural or territorial disputes, while the subject element, which is a characteristic feature of ethnic conflicts, refers to the parties involved in ethnic conflicts, namely two or more communities. ethnicity. As for what is meant by ethnic community here, namely a human population united by a common ancestor, memories of the same events and cultural elements, based on territory or homeland, and a solidarity effort.[182]

Brown further explained that an ethnic community must meet six criteria, namely as follows; (a) the group must have its own name as

[180]Budi Winarno, Dynamics of Contemporary Global Issues, Center of Publishing Academic Service, Yogjakarta, p. 247
[181]Michael E Brown, 1997, "Causes and Implications of Ethnic Conflict" in Duibernau and Jogn Rex, The Ethniciy Reader, Nationalism, Multiculturalism and Migration, Great Britain: Polity Press, p. 82
[182]Ibid.

a reflection of collective identity; (b) group members have the belief that they share a common ancestral experience; (c) group members feel that they have the same historical experience; (d) the group has the same culture; (e) the group feels related to a certain area and (f) group members must think of themselves as a group (self-awareness).[183]

When talking about ethnic conflict, it is generally understood that this conflict is solely due to interethnic hatred, especially hatred that has been going on for generations. But mere hatred between ethnic groups does not automatically lead to ethnic conflict. As ethnic Czechs and Slovaks, for example, as well as Ukrainians and Russians, have a long history of ethnic contestation. However, this condition does not necessarily lead to the outbreak of ethnic conflict which can be considered serious. Therefore, even though the factor of hatred often plays an important role in ethnic conflict, it is more appropriate to understand that this factor is only one of the factors causing the emergence of ethnic conflict which can escalate towards genocide.[184]

Ethnic conflicts are often nuanced in violence. For example, the ethnic conflicts that occurred in Rwanda, Bosnia and Angola which had extraordinary dimensions of violence. Thematically, Brown identified four groups of factors (cluster of factors) that could give rise to ethnic conflict, including; a) structural factors caused by the weakness of the state and domestic security issues; b) economic and social factors, namely the unfair allocation of economic resources; c) political factors, namely the discriminatory political system and d) cultural factors and perceptions in the form of hatred that has been passed down for generations.[185]

Ethnic conflict is caused by several factors. The first factor is the emergence of ethnocentrism. The concept of ethnocentrism is often used together with racism. This concept represents an understanding that every ethnic or racial group has the spirit that their group is superior, compared to other groups, so that they consider other ethnicities to be inferior to their own ethnicity. For example, like Adolf Hitler who considered the Jews as the lowest in the world so they should be exterminated.

The second factor is territorial legitimacy. Especially for ethnic groups "newcomers" who inhabit the territory of other nations. "Native" ethnic groups can carry out ethnic cleansing operations (Ethnic Cleansing) for "newcomer" ethnic groups because they want their nation's territory to be inhabited only by the original descendants of that

[183]Ibid.
[184]*Ibid.*
[185]*Ibid.*

nation. For example, this is experienced by Hungarians in Romania, Tamils in Sri Lanka, white people in South Africa.

The third factor is the existence of negative stereotypes that arise against a certain ethnicity that is passed down from generation to generation so that the image of that ethnicity is always bad, for example in the case of ethnic conflict between Chinese and indigenous people in Tangerang. The ethnic Chinese consider the natives to be lazy, stupid, unable to take advantage of good opportunities and so on. Meanwhile, ethnic Chinese descent is referred to as a group who wants to benefit themselves without seeing halal or haram

The fourth factor, there is discrimination that occurs against certain ethnic groups, giving rise to prejudices of injustice, for example, discrimination that occurs within the ranks of government, organizations, education, and so on. This usually happens to ethnic minorities in their area. Fifth, there are threats that arise from other ethnicities that trigger conflict. For example, such as territorial disputes, violence and others

The fifth factor is the existence of social disparities that occur between ethnic groups, especially in a nation that has many ethnic groups. The social gap in question can be caused by differences, such as religion, culture, language and others. The sixth factor is the existence of provocation from other parties (usually from political actors) who want to gain benefits from the conflict that occurs so that two or more ethnic groups are pitted against one another. The seventh factor is the existence of threats that arise from other ethnic groups that trigger conflict. The eighth factor is that many countries do not yet have adequate laws to protect the rights of ethnic minority groups.

1.2. Ethnic Conflict in Myanmar

The Rohingya are an ethnic Muslim minority in Myanmar who mostly live in the Arakan (Rakhine) region. Initially, the Rohingya were immigrants from the Middle East who settled in Arakan as a result of trade by Arab countries to the Southeast Asian region. At that time, Arakan was not a territory of Myanmar, but a territory that had not been registered with any administration. However, in 1785 Myanmar took control of it so that the area inhabited by Rohingya came under the administration of Myanmar.

Even though Arakan is within the territory of Myanmar, and under the government of Myanmar, the Rohingya are not recognized as citizens of Myanmar. This has led to continuous repression and discrimination against the Rohingya from other non-Muslim ethnic groups in Arakan. Before the conflict that captured the world's attention

in 2012, the Rohingya people had often experienced acts of violence from both the Myanmar government and other ethnic groups, most of whom were Buddhists. Apart from acts of violence, the Rohingya also experienced administrative difficulties because they were not recognized as citizens of any country.

In Myanmar they find it difficult to get married and have a family. The Myanmar government requires Rohingya residents to ask permission from the government before they get married. But to get the permit, they have to wait a very long time and pay a very high price. In addition, they also have to agree to an agreement with the government that they will not have more than two children. Prohibitions like this are actually a form of ethnic cleansing and genocide which is condemned by the international community.[186]

The Rohingya ethnic group is also hindered from gaining access to natural resources and property rights. Arakan is a relatively poor area in Myanmar and the Rohingya have to give in for other ethnicities because they are not included as citizens and are not under the protection of the government. The social and economic life of the Rohingya people is very poor, suffering and discriminated against. Not to mention the physical violence and killing of the Rohingya ethnic group since many years ago in Myanmar. All these forms of oppression and discrimination actually stem from the non-recognition of the Rohingya as part of the state of Myanmar so that with their "Stateless" status they become more vulnerable and do not have human rights defense and protection.[187]

The conflict that occurred in Myanmar against the ethnic Rohingya people that had occurred for decades had become an iceberg that escalated until massive violence occurred in early 2012. The Rohingya ethnic conflict began with the tragedy of the rape and murder of a Buddhist girl committed by three ethnic Rohingya on May 28, 2012. The local residents did not accept and then demanded revenge on the Rohingya Muslims. This incident eventually sparked conflict between the Rohingya ethnic groups and the local community which resulted in the Rohingya being targeted by the masses. Rohingya ethnic residents not only experienced acts of violence but also destruction of property belonging to residents and other acts such as murder, forced displacement, rape, persecution, persecution, and other inhuman acts. This act caused most of the Rohingya to flee to other countries outside Myanmar, such as Thailand, Indonesia, Bangladesh and India.

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[186]Ibid
[187]*Ibid.*

There are at least two main factors that have caused the Rohingya ethnic conflict to become a world concern, namely:[188]First, the conflict has the potential to lead to genocide. Genocide has been categorized as an international crime as regulated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[189]Genocide has also been categorized as a crime against humanity as provided for in Article 5 of the 1998 Rome Statute of the International Criminal Court (ICC).[190]Genocide's position as a serious international crime cannot be separated from its past where Hitler attempted to exterminate Jewish ethnic groups in Europe during the reign of the Nazi German military regime which resulted in the deaths of 6.5 million ethnic Jews.

Second, the involvement of the state or community groups in other countries. Although the beginning of ethnic conflict is almost always local, in its development it often invites community groups in other countries. Although the beginning of ethnic conflict is almost always local, in its development it often invites groups from other countries to get involved. In fact, it is not uncommon for other countries to get involved in these "local wars".[191]

For example, the ethnic conflict between the Hutu and Tutsi ethnic groups in Rwanda, where there was conflict between the two ethnic groups, so that they killed each other because of ethnic and party differences and conflicting interests of several parties in that country.[192]The ethnic conflict in Rwanda sacrificed the Tutsi ethnicity where the bodies of the Tutsi tribe were thrown into the river. The conflict that occurred in 1994 is known as the Rwandan Genocide. The killing of approximately 800,000 Tutsis and moderate Hutus by a group of Hutu extremists known as "Interhamwe" occurred over a 100-day period in 1994.

Another example is ethnic conflict related to religion as happened in Bosnia during the Bosnian war. The ethnic conflict in Bosnia began with the dissolution of the communist state of Yugoslavia, which resulted in the country splitting into several republican states. The ethnic conflict in the Balkans occurred between 1992-1995. Prior to the conflict, long before that, the region had been divided into ethnicities perpetuated by Yugoslav President Joseph Tito.

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[188]Budi Winarno, Op. cit., p. 257
[189]See Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations, 9 December 1948
[190]See Article 5 of the Rome Statute of The International Criminal Court, accessed via http://legal.un.org/icc/statute/99_corr/cstatute.htm on 29 November 2017.
[191]Budi Winarno, loc. cit.
[192]Budi Winarno, Op. cit., p. 252

Then when Yugoslavia disbanded, ethnic divisions became more and more inevitable and became a terrible inter-ethnic war.[193]

In the former Yugoslav country, there are three major ethnic groups, namely Serbs, Croats and Bosnians. The dissolution of Yugoslavia began with the release of Croatia and Slovenia in June 1991. Later that year the parliament of Bosnia and Herzegovina held a vote. The result of the vote was that they wanted to form an independent state apart from Serbia. This sparked ethnic clashes and divisions, resulting in an inter-ethnic war that began when the Serbs bombarded the Bosnian capital, Sarajevo and other cities. Murders were carried out throughout the country, and claimed hundreds or even thousands of Bosnians, most of whom adhered to Islam (Muslims).

The climax of this human tragedy occurred in 1995 in the Srebrenika area, when Serb soldiers killed no less than 8,000 Serbs so that the event became known as the "Srebrenika Tragedy". During the Bosnian war that occurred in the period 1992-1995, no less than two million people fled and attracted international attention. The massacre of Bosnian Muslims by ethnic Serbs has fueled Muslim sentiment worldwide.

The third factor is the implications of ethnic conflict at the regional level. A local conflict will become the world's attention if the conflict leads to regional destabilization. Usually this happens when the conflict involves actors outside the country where the ethnic conflict occurs. If this happens, then ethnic conflict will attract world attention and can eventually lead to the destabilization of the surrounding area because of course it will lead to a very large wave of refugees, just as the ethnic conflict in Rwanda and Bosnia has given birth to thousands of refugees.[194]

The term "ethnic cleansing" or "ethnic cleansing" was used in the wars that took place in the countries of the former Yugoslavia and refers to acts committed by Serb military forces in Bosnia and Herzegovina that forced Muslims and Croats out of their areas of residence. This act of forced expulsion was aimed at creating an area occupied only by Serbs, which would later unite to form "Greater Serbia". Such actions were carried out by means of "cleansing operations", in which civilians were massacred and abused, acts of sexual violence were carried out, cities were bombarded, places of worship were destroyed and houses where residents lived were all confiscated. The term "ethnic cleansing" describes a complex phenomenon of crime,[195]

[193]Budi Winarno, Op. cit., p. 251
[194]Budi Winarno, Op. cit., p. 258
[195]Gerhard Werle, Op. cit., p. 204

2. The Crime of Genocide

2.1. Definition of Genocide

The term genocide consists of two words namely "geno" and "cide". Geno or genos which comes from ancient Greek means race, nation or ethnicity. While cide, caedere, or cidium comes from the Latin which means to kill.[196]Literally, genocide can be interpreted as 'ethnic killing' or 'racial killing'. This term was introduced by Raphael Lemkin in 1944- a Polish-born Jew who migrated to America in 1930. Lemkin, the inventor of the term genocide, briefly defined genocide as "the destruction of a nation or an ethnic group".

Lemkin explained that genocide should not always be understood as an act of destroying a nation (nation) directly, but what is more important is that genocide is intended to paralyze the foundations of the life of certain national groups with the ultimate goal being the annihilation of that national group.[197]Lemkin also stated the important characteristics of genocide which then influenced the legal definition of genocide in international convention instruments. Lemkin said that genocide was directed against certain national groups as an entity, and these acts were directed against individuals, not in their capacity as individuals, but as members of a national group.[198]

According to Lemkin, genocide can be fully defined as a coordinated and planned plan of different actions aimed at destroying the basic foundations in the life of a nation or a particular group with the intent or purpose of eliminating that nation or group. The goals of the plan are the disintegration of political and social institutions from culture, language, nationalism (sense of nationality), religion, economic existence of certain groups and the destruction of personal security, freedom, health, dignity and even life of people included in that group.[199]

Furthermore, according to Lemkin, the Genocide was divided into two phases. The first phase is to destroy the national pattern of the oppressed group. The second phase is the disruption of the national pattern of the oppressor.[200]This disturbance can be carried out against the remaining oppressed population or over the territory, after the

[196]William A. Schabas, Genocide in International Law, Cambridge University Press, 2000, p. 25
[197]Adam Jones, Genocide A Comprehensive Introduction, 2nd ed., Routledge, New York, 2006, p. 20
[198]Ibid.
[199]William A. Schabas, Op. cit., p. 24-25
[200]Ibid., p. 28

oppressing nation has moved the population and occupied the area with residents of the oppressing group.

The term 'genocide' was increasingly known when America filed charges against Nazi Germany war criminals, at the International Military Tribunal (IMT) in Nuremberg, Germany.[201]Although the term genocide itself only appeared in the early 1940s, efforts to prosecute genocide crimes had started since 1918. At that time, in an "Imperial War Cabinet" meeting, on November 20, 1918, Lord Curzon from England emphasized efforts to prosecute the German leaders and Young Turk leaders who carried out purges of the Armenian ethnic minority in Turkey. It's just that objectively the prosecution did not use the term 'genocide' but with the term 'atrocious offenses against the laws of war'. Therefore it is very appropriate what the sociologist Leo Kuper stated that even though genocide is a new term, what is contained in this term is actually an old concept.[202]

Although the modern study of genocide only developed through Lemkin's activities in the 20th Century as a practice of mass extermination of a group of people for reasons of nationality, race, ethnicity or religion, it is as old as the history of human civilization. According to Chalk & Jonassohn, genocidal behavior is closely related to human history because in essence, anthropologically and historically, a community group usually has a category for themselves and they will give a different predicate to community groups outside of them. If other groups of people are considered to be very different and inferior in terms of behavior, beliefs, habits and customs, it is not uncommon for them to be given a title that reflects dehumanistic assumptions such as "barbarians".[203]

The factor of dehumanism (considering other social groups as creatures that are lower than humans) in the history of genocide has proven to be one of the important elements that contributed to the climate of genocide. One of the dehumanization processes leading up to the genocide can be seen from the German Nazi propaganda published in the propaganda tabloid Der Sturmer which called the Jews "parasites", "grasshoppers" and "our misfortune". A strong smell of dehumanization was also present in various cases of genocide, including in the Rwandan genocide which involved two different ethnic groups, namely Hutu and Tutsi. In that incident the Hutu tribe

[201]Eddy, OS, Hiearij , Trials for Several Serious Crimes Against Human Rights, Erlangga, Jakarta, 2010, p. 7
[202]Adam Jones, Op. cit.,, p. 3
[203]Arie Siswanto, Op.cit.,, p. 31

dehumanized the Tutsi tribe as victims of genocide by calling them "cockroaches".[204]

Bryan A. Garner in the Black's Law Dictionary defines genocide as an act intended to destroy, in whole or in part, a national, ethnic, racial or religious group.[205]Meanwhile, Goldstein defines genocide as "the systematic extermination of an ethnic, religious or religious group.[206] From the several definitions put forward, it is clear that genocide refers to two things. First, the act of killing or annihilating and secondly, the target is a certain group.

As forActions or actions that can be punished as crimes of genocide are if the actions or actions are intended to destroy in whole or in part against a particular nation, ethnicity, race or religious group. The physical and psychological conditions of the group are the main protection, and the dignity of the victims of genocide is also protected. The crime of genocide requires the conditions of the following acts as stipulated in Article 6 points (a) to (e) of the Statute of the International Criminal Court. While the targets of genocide are individuals who are part of a certain group.

The material element of genocide does not presuppose that individual actions can form part of a widespread or systematic attack against a particular group. Meanwhile, the mental element of genocide requires that the material elements of the crime were committed with "intent and knowledge" as stipulated in Article 30 of the ICC Statute.

In addition, genocide requires the existence of a specific intent to destroy in whole or in part a nation, ethnicity, race or religious group, so that the aim of the genocidal perpetrators to destroy the group either in whole or in part is not the main element. The intention to destroy was carried out simultaneously which became a systematic element of a genocidal crime, which caused it to become a crime with an international dimension.[207]

The destruction of certain groups can also be realized by destroying group identities such as physical annihilation, which leads to the death of groups and human losses. Destruction of groups becomes something that can endanger the individual rights of certain groups which causes it to become an international crime of genocide.[208]What is meant by groups here are those with the characteristics of "nation",

[204]Ibid.
[205]Bryan A. Garner, p. 694
[206]Arie Siswanto, 2005, Material Jurisdiction: International Criminal Court, Ghalia Indonesia, Bogor, p. 48
[207]Gerhard Werle, Op. cit., p. 192
[208]Gerhard Werle, Op. cit., p. 193

"ethnicity", "race" or "religion" which are protected in the definition of the crime of genocide. The particular group referred to here has several criteria including: first, groups that have similarities in customs, language, religion or characteristics that look the same as skin color or stature. However, groups can also be seen from group characteristics subjectively and depending on other perspectives.

Second, national groups are groups formed because they have the same nation in terms of history, customs, culture and language. Third, ethnic groups, namely groups that have the same characteristics or are identical in national, racial or religious groups. Ethnic groups can be distinguished in particular by specific cultural traditions and a common history. Members of certain ethnic groups speak the same language, have the same customs and habits and share the same way of life. Ethnic groups can be found within a particular area or geographical area. Fourth, certain racial groups. The racial group referred to here is aimed at social groups whose members inherit the same physical characteristics such as skin color or physical stature. Fifth, certain religious groups.

Religious groups as described in UN General Assembly Resolution No. 96 (I) 1946 is a group that can become victims of genocide and religious groups can also disappear as a result of genocide. Members of these religious groups have the same beliefs, the same beliefs in the same spiritual paradigm and share the same spiritual beliefs and thoughts or forms of religious practices in the form of small groups, religious sects, and also religious groups. big religion.[209]

Furthermore, in the crime of genocide the targets or targets are individuals within a certain group. Various forms of genocide have been defined as acts of murder under Article 6(a) of the Statutes of the International Criminal Court (ICC Statutes), causing serious bodily or mental injury under Article 6(b), and causing conditions of broken soul. as stipulated in Article 6 (c). Measures taken to prevent births within the groups regulated in Article 6(d) , can also be considered a form of biological genocide, while Article 6 (e) stipulates that the forced transfer of children from one group to another , represents a special form from genocide.[210]

2.2. Genocide Regulations at the International Juridical Level

1) Genocide Regulations in the Statutes of the International Nuremberg Military Tribunal (IMT), Germany

[209]Gerhard Werle, Op. cit., p. 195-199
[210]Gerhard Werle, Op. cit., p. 199

Although the term 'genocide' cannot be found in the Charter of the Nuremberg International Military Tribunal, the substance of the genocide arrangement has actually been contained in the Charter on "Crimes against Humanity", where this is clearly stated as follows:[211]

> *(c) Crimes Against Humanity: namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions, on political, racial or religious grounds in the execution of or in the connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*

In this definition, the mention of "persecutions on...racial or religious grounds.." then developed into a special form of "crime against humanity" which was later known as genocide. In fact, the term 'genocide' does not have to wait long to appear in the judicial process which is based on the Charter of the International Military Court. When prosecuting commanders of Einsatzgruppen forces who committed mass crimes in Poland and Russia during World War II, public prosecutors used the term "genocide" to describe their actions.[212]From the genocide regulation, it can be said that according to the Statute (Charter) of the Nuremberg International Military Court, materially the crime of genocide is still one with crimes against humanity (Crimes Against Humanity). The formulation of genocide as a separate crime category apart from crimes against humanity explicitly only occurred when countries agreed to the 1948 Genocide Convention.

2) Genocide Regulations in the 1948 Genocide Convention

The Genocide Convention agreed in 1948 to date is the most comprehensive document on genocide ever signed by countries. The 1948 Genocide Convention has such an important role in view of the various legal instruments that underlie the establishment of various ad hoc trials in the following period. The term Genocide was formally defined in the Convention on the Prevention and Punishment of the Crime of Genocide adopted by UN General Assembly Resolution 260

[211]See Charter of the Military International Tribunal 8 August 1945, accessed from https://www.uni-marburg.de/icwc/dateien/imtcenglish.pdf, p. 2
[212]John Quigley, The Genocide Convention- An International Law Analysis, Ashgate Publishing Limited, Hampshire, 2006, p. 6

A (III) on 9 December 1948.[213]The 1948 Genocide Convention was a reaction to acts of genocide committed by Nazi German soldiers. Likewise when the world was shocked by the tragedy in Nigeria, after a wave of mass killings by the Ibo group, the western part of the country, whose majority population is ethnic Ibo who want to seek independence. In July 1967, world war broke out between the government and eastern Nigeria, in which ethnic Ibo people became the target (target) of an extermination campaign that resulted in an estimated 600,000 and millions of ethnic Ibo people lost their lives. Many Ibo people were killed en masse or died as a result of starvation due to the wars that took place.[214]

Until the end of the 20th century, atrocities in Rwanda and in parts of the former Yugoslavia came to international public attention. In Rwanda, there was civil war that broke out in April 1994 after the Prime Minister of Rwanda was killed in an airplane crash. In the months that followed, thousands of Hutus took up arms to annihilate the Tutsis, led by the military and militia groups. As a result of the ethnic war, within a few months, civilians became victims in which 500,000-1,000,000 civilians died.[215]

The crime of genocide was also committed during the ethnic and religious war in Bosnia, as stated by the International Crimes Tribunal for the Former Yugoslavia (ICTY). In July 1995, a number of Bosnian Serb soldiers took over the enclave of Srebrenica, which had in fact been declared a UN safe area where a number of Muslims sought refuge from the war that had taken place. Bosnian Muslims were segregated, women, children and the elderly were forcibly displaced and men killed.[216]

According to Article 1 of the 1948 Genocide Convention, it is explained that the crime of genocide committed during peacetime or during war is a crime under international law and states are obliged to prevent and punish the perpetrators.[217] Article 2 of the convention contains the complete definition of genocide, that genocide is any of the following acts carried out with the aim of simply destroying, in whole or in part, a national, ethnic, religious or religious group which includes:

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[213]See Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by the General Assembly of the United Nations on 9 December 1948
[214]Gerhard Werle, Op. cit., p. 189
[215]Ibid.
[216]Ibid.
[217]See Article 1 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide, accessed via https://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf on 3 December 2017

a) killing members of the group; b) causing bodily or mental harm to group members; c) intentionally causes physical damage in whole or in part; d) adopt measures intended to prevent births within the group; e) forcibly transferring children from one group to another.[218]

Meanwhile, Article 3 of the genocide convention states that the following acts that can be punished include: a) genocide, b) conspiracy to commit genocide, c) direct and public incitement to commit genocide, d) attempted genocide and e) complicity in genocide. In other words, conspiracy, trial, and participation in committing genocide, are punished the same as committing genocide.[219]

Article 4 of this convention explains that people who commit genocide or any of the actions mentioned in article 3 of this convention can be punished, whether they are legally authorities, public officials or individuals.[220]Article 4 indirectly contains the principle of individual criminal responsibility, namely the principle that requires perpetrators of international crimes to bear their own criminal responsibility as individuals, regardless of their status or position in government. In other words, the status of an offender as a public official or even as a ruler cannot be used as an excuse or as an effort to protect himself to avoid his individual criminal responsibility. This principle can also be found in the Charter of the International Military Tribunal for Nuremberg, Germany.

Article 5 of this convention explains that the 1948 Genocide Convention is a convention whose implementation is highly dependent on the countries that are parties to it. For this reason, Article 5 of the Convention requires member countries of the Convention to make national laws and regulations to ensure the implementation of the provisions of the Convention at the national level, in particular to provide criminal threats to perpetrators of genocide.[221]

Article 6 of the convention affirms that the court having jurisdiction to try the perpetrators of genocide is the competent court of the country where the genocide occurred. However, the convention also

[218]See Article 2 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide
[219]See Article 3 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide
[220]See Article 4 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide
[221]See Article 5 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide

opens opportunities for international courts to exercise their jurisdiction based on the agreement of the parties to the Convention.[222]

Whereas Article 7 of the convention contains provisions which emphasize that genocide is not categorized as a political crime, especially in the context of extradition. This assertion is important, because in international law relating to extradition there is a known principle that a political offender cannot be extradited (non-extradition of political offenders). Based on this principle, when a perpetrator of a political crime (treason) in a country flees to another country, he should be protected in the country where he is. In this regard, The affirmation that genocide is not a political crime is of course meant to prevent a single country from granting asylum to a perpetrator of the crime of genocide so that he must be handed over to a country that wishes to apply jurisdiction to try and punish him. This idea is in line with the principles in International Criminal Law, namely the principle of "Aut dedere aut punere" which means that international criminals are punished according to the place where they committed the crime. In other words, perpetrators of international crimes are tried according to locus delicti.

3) Genocide Regulations in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

a) killing members of certain groups; b) causing serious bodily harm or endangering the life of members of a particular group; c) deliberately causing conditions that may cause physical destruction of certain groups in whole or in part; d) imposing measures intended to prevent births within a certain group; e) transferring children in a group by force to another group.[223]

Based on the definition contained in the 1948 ICTY Statute Genocide Convention, the elements of genocide in the ICTY Statute are as follows:[224]

i. Genocide can be in the form of acts; a) killing group members; b) causing physical or mental harm to group members; c) intentionally applying living conditions calculated to bring about the physical destruction of a group; d) implement measures intended to prevent births within a group; e) forcibly transferring children from one group to another

[222]See Article 6 of the Convention of Convention on the Prevention and Punishment of the Crime of Genocide
[223]See Article 4 of the Statute of the International Tribunal for Ex - Yugoslavia (ICTY)
[224]Arie Siswanto, Op. cit., p. 59

ii. Genocide is committed with the intention of destroying a national, ethnic, racial or religious group, either in whole or in part
iii. The targets of genocide are national, ethnic, racial or religious groups

4) Genocide Regulations in the Statutes of the International Criminal Court for Rwanda (ICTR)

Almost the same as the ICTY Statute, the ICTR Statute is a statute (law) of an ad hoc Rwanda International Criminal Court which was formed specifically to deal with gross violations of human rights which were also international crimes that occurred in Rwanda between January 1 and December 31, 1994. As a response to the ethnic clashes between the Hutu and Tutis ethnic groups which claimed 500,000 to 1,000,000 lives, the UN Security Council issued Resolution Number 955 (1994) which became the basis for the establishment of the International Criminal Tribunal for Rwanda (ICTR)). The ICTR also contains elements of genocide that are the same as those in the ICTY.

a) cause serious injury or endanger the life of a member of a particular group; b) intentionally inflicting conditions on a particular group which may result in its destruction in whole or in part; c) take actions intended to prevent births within a certain group; d) transferring children intentionally by force from one particular group to another.[225]

5) Genocide Regulations in the Statute of the International Criminal Court (Rome Statute 1998)

Similar to the ICTY and ICTR Statutes, the 1998 Rome Statute which underlies the establishment of the International Criminal Court (ICC) also adopted the definition of genocide contained in the 1948 genocide convention. Based on the various international instruments above, it is clear that the term genocide refers to definitions that have similarities that show the elements of the crime of genocide include:[226]

i. The first element, doing good deeds that are positive or negative. Actions that are positive is called crime by commission while doing negative actions is called crime by omission. The acts referred to here are 'killing members of a group' meaning, these actions must result in the death of members of a national, ethnic, racial or religious group.

[225]See Article 2 paragraph (2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR)
[226]Eddy OS, Hiarij, Op. cit., p. 14

ii. The second element, 'causing bodily or mental harm to assemblies'. This act is a material offense. This means that the act is more focused on the consequences of both injuries to the body, as well as the mentality of members of national, racial, ethnic or religious groups
iii. The third element, 'deliberately causing the group living conditions that are expected to cause physical damage in whole or in part', This act also explicitly includes intention as a form of wrongdoing and is a material offense that focuses on physical damage to national, racial, ethnic groups. or religion.
iv. The fourth element, is the act of 'putting on measures intended to prevent births within the group'. This act is a form of intentional wrongdoing with the intention of preventing births within a national, racial, ethnic or religious group.
v. This action can be in the form of coercion to transfer; 1) children from one national group to another; 2) children from one national group to another racial group; 3) children from one national group to another ethnic group; 4) children from one national group to another religious group; 5) children from one racial group to another; 6) children from one racial group to another; 7) children from one racial group to another religious group; 8) children from one ethnic group to another; 9) children from one ethnic group to another religious group; 10) children from one religious group to another religious group.

2.3. Ethnic Conflict and Causes of Genocide

Although according to the 1948 Genocide Convention, groups that can be targeted for genocide are racial groups, religious groups, national groups and ethnic groups, but it should be noted that there is a tendency to assume that at present ethnic groups have a greater chance of being targeted (targets). group) the crime of genocide. In addition, it is not uncommon for ethnic group categories to have the same religious identity (so that ethnic groups can also be considered as religious groups) and sometimes also have the same national ideas so that these ethnic groups can also be considered as a national group.[227]

Bearing in mind that the crime of genocide is acts directed against certain ethnic (or religious, national and racial) groups, naturally the situation that becomes the background for genocide is ethnic conflict. In this regard, Michael E. Brown, defines ethnic conflict as a dispute relating to matters that are political, economic, social, cultural

[227]Arie Siswanto, Op.cit.,, p. 50

or territorial (territory) between two or more ethnic communities. Thus, ethnic conflict is a conflict involving two or more ethnic communities.[228]

Furthermore, Brown also said that there are six criteria that a group can be categorized as an ethnic community, namely: (a) the group has its own name as a reflection of identity; (b) those who are members of the group believe that they come from a common ancestor; (c) those who are members of the group feel that they have the same historical experience; (d) the group has the same culture; (e) the group must have a connection with a certain area (f) the members of the group must think of themselves as a group.[229]

3. Genocide as a Violation of Human Rights (Serious Violation Of Human Rights)

At the level of international law, when examined, the crime of genocide both from the elements of the act and the impact it causes can be classified as a type or part of a serious international crime. As is well known, the types of serious international crimes include; a) war crimes, b) genocide, c) crimes against humanity, d) torture (torture).

b) cause serious injury or endanger the life of a member of a particular group; c) intentionally inflicting conditions of life upon a particular group which is estimated or calculated to result in its destruction in whole or in part; d) take actions intended to prevent births within a certain group; e) transferring children intentionally by force from one particular group to another.[230]

The crime of genocide is essentially a form of serious international crime as regulated in the International Criminal Court through the 1998 Rome Statute where the International Criminal Court has jurisdiction to try genocide crimes. Besides thatthe crime of genocide is also "Jus cogens", namely a coercive rule or law that must be obeyed and obeyed by countries in the world because it is in the highest hierarchical position compared to all other norms and principles. The jus cogens norm is considered peremtory and cannot be ignored. Against this crime, every human being has the responsibility (obligatio erga omnes) to carry out a just punishment.

Genocide is a form of human rights violation. In the 1948 Universal Declaration of Human Rights formulated by the United Nations, in article 2 it is explained that everyone is entitled to all rights

[228]Michael E. Brown, Ethnic and Internal Conflicts: Causes and Implications, 2001, p. 5
[229]Michael E. Brown, Op. cit., p. 3
[230]See Article 6 of Rome Statute of International Criminal Court (ICC)

and freedoms without any exceptions such as race, skin color, gender. , language, religion, political or other views, national origin, social origin, property rights, or other position. Furthermore, it is not distinguished on the basis of political, legal or international position of the country or region from which a person originates, whether from an independent country in the form of a trust territory, a colony or that is under other limits of sovereignty.[231]

With the formulation of Article 2 of the Universal Declaration of Human Rights, it emphasizes that every individual is not discriminated against based on skin color, sex, race, language, religion, politics, national origin and position, including origin, whether from an independent country or territory. guardianship or colony. This is of course very contradictory to the events of the mass extermination of the Rohingya in Myanmar, where almost the majority of the Rohingya Muslims were killed by the Myanmar army through extermination, extermination, enforced disappearance and even mass killings, which clearly contradicts the principles and recognition of Human Rights as regulated in Article 2.

Genocide arrangements are also contained in Law no. 26 concerning the Court of Human Rights (HAM). In Article 8 of Law no. 26 of 2000 explains the meaning of genocide, namely any act committed with the intent to destroy or annihilate all or part of a national, racial, ethnic or religious group by means of; a) killing group members; b) cause serious physical or mental harm to group members; c) create conditions of life for the group which will result in its physical destruction in whole or in part; d) imposing measures aimed at preventing births within the group; e) forcibly transferring children from certain groups to other groups.

From this formulation, there are two elements in the crime of genocide. First, the general elements of the crime of genocide in the form of a mental element (Mental Element) and secondly the elements of the crime of genocide (Material Element) which will be described below.

3.1. General Elements of the Crime of Genocide

There are several general elements or elements that make up a genocide crime as stipulated in Law no. 26 of 2000 concerning the Human Rights Court namely; a) killing group members (homicide); b) causing physical or mental harm (causing serious or mental harm); c) creating

[231]See Article 2 of the Universal Declaration of Human Rights, accessed on 26 March 2018 via the website ps://www.komnasham.go.id/files/1475231326-deklarasi-universal-hak-asasi--$R48R63.pdf

conditions of life (deliberately inflicting certain conditions of lie on the target group); d) preventing births (taking measures to prevent births within the group and e) forcibly transferring children of the target group form the target group.[232]The general elements of the genocide can be described as follows;

1) With Intent (Intent and Knowledge)

The mental element of the act of genocide is the existence of "intention and awareness" as regulated in Article 30 of the ICC Statute as a specific intention to destroy a protected group in whole or in part.[233]The first subjective requirement of this mental element is that the perpetrators of crimes commit acts of genocide with intent and knowledge. Acts of killing committed as part of an attack directed against the civilian population in conditions of armed conflict are also included here. The phrase "with intent" is a mental element (mens rea) in genocide or in another language, namely "intention". In other words, there must be the intention of the perpetrator to do what he did. Intention here can be in the form of special intent, specific intent, dolus specialis, particular intent and intention to commit genocidal intent.[234]

Intentions must also be distinguished from motives. It is important to distinguish between specific intent and motive. Only personal economic motives, for example to gain personal economic benefits or political interests or to gain power, but the existence of personal motives does not prevent the perpetrators from having specific intentions to commit genocide. With this intention, the perpetrator must have the intention to exterminate, in part or in whole, one of the four protected groups even when he carries out his intention it is not complete. Intentions can be resolved from factors including; there is a general context that criminal acts, whether committed by the same or different actors, systematically directed against the same group; the scale of the atrocities committed; the general nature of the atrocities that occurred in a particular region or country; the fact that the act was carried out intentionally or systematically targeting victims based on membership of a particular group and not targeting other groups; the existence of a doctrine or policy that gives rise to certain actions; and the existence of repeated acts of destruction aimed at a discriminatory manner.

[232]Mahrus Ali & Syarif Nurhidayat, Settlement of Serious Human Rights Violations in Court System and Out Court System, Gramata Publishing, Depok, 2011
[233]Gerhard Werle, Op. cit., p. 206
[234]Ibid.

Several important indications of intention also need to be considered so that an act can be categorized as genocide, namely as follows; a) the number of group members who became victims; b) physical goals and property rights of group members; c) the weapon used and the extent of serious injury; d) ways to formulate plans; e) method of systematic killing f) attempted action to destroy a group.

2) Destroy or destroy in whole or in part (Specific intent to destroy)

The next mental element after "intention and awareness" requires that the perpetrator of the crime has acted with specific intentions to destroy the protected group either in whole or in part.[235]The intention to destroy a group in whole or in part as required for the mental element is best understood as a specific intention. The destruction of a group either in whole or in part must be the initial goal of the perpetrators of crime. The element of awareness possessed by the perpetrators of genocidal crimes that they participated (participated) in the extermination campaign against a group cannot replace specific intentions (goals), but can indicate their existence. In other words, evildoers act with the intent to destroy.[236]

Article 8 of Law no. 26 of 2000 concerning the Human Rights Court uses the word "destroy" or "destroy". The formulation of the law is different when compared to the formulation in the International Tribunal for Rwanda (ICTR), the International Tribunal for the Former Yugoslavia (ICTY) and the Rome Statute of International Criminal Court (ICC) which only use the word "destroy". The term "destroys" requires more weighty proof when compared to the term "destroys". The meaning of the word "destroy" includes only acts that give rise to physical and biological genocide. Destroying here includes actions that destroy physically and not destroy culturally.

Destroying or annihilating in the crime of genocide can be committed against a protected group either in whole or in part. With this understanding, the crime of genocide does not include crimes with racial motives alone. The term "with the intent to destroy or annihilate either in whole or in part a group" is intended as a specific intention to destroy individuals in large numbers who are members of a group. Meanwhile, the word "whole or part" indicates that the perpetrator does not need to intend to destroy or destroy all members of the group, but

[235]Gerhard Werle, Op. cit., p. 208
[236]Ibid.

only some. So that in this context, the perpetrator's intention must be aimed at destroying or annihilating a group, in this case is a separate or separate entity and not just individuals who are members of a particular group. Although the destruction or extermination need not be directed at all members of the group in question, the intention to carry out the destruction or extermination must be directed at at least to a substantial part of the group.[237]

In the verdict on the genocide case with the defendant "Sikirica", the panel of judges said that the intention to destroy some of them could occur if there was evidence that the destruction was carried out on a significant part of a group, for example its leader. The intention is intended to realize the desire to destroy a number of people who are selected to get a certain effect, namely that the disappearance of these people will have an impact on the group. The important element contained here is that the target of the action is a number of people who have been selected selectively based on specific reasons such as their leadership in the group as a whole.[238]

The same thing happened when the judge in the genocide case with the defendant Jelisic interpreted the meaning of "some members of the group" by saying that intention in genocide could be manifested in two forms. First, the intention to destroy a large number of group members, and the action is intended to destroy the group en masse. Second, the action can be in the form of intentional destruction of a small number of selected people, for example a group leader with the aim that their loss will disrupt the continuity of the group. This condition is called the intention to intentionally destroy a small number of selected people, for example a group leader with the aim that their disappearance will disrupt the group's survival.[239]

From the description above, it can be concluded that the destruction or extermination that occurs in the crime of genocide does not need to be directed at all members of the group, but the intention to do so must be aimed at at least a substantial part of the group. In this case genocide does not imply the destruction or annihilation of all group members. A crime of genocide is understood if an act declared to be included in the crime of genocide is carried out with a specific purpose, namely to completely or partially destroy a protected group. A person

[237]Human Rights Watch, Genocide, War Crimes, and Crimes against humanity, Human Right Watch, New York, 2004, translated by Eddie Riyadi and Aida Milasari, Genocide, War Crimes and Crimes against Humanity, ELSAM, first print, Jakarta, 207, matter. 93
[238]Ibid.
[239]Ibid.

can be said to be guilty of genocide, even though the acts he committed did not cover the entire country.

3) Protected group (The Group as the Object of Destructive Intent)

The object of the destruction carried out by the perpetrators of crimes is a particular nation, ethnicity, race or religious group. The desire of the perpetrator here is to destroy the group (not the individual). The perpetrator of the crime must act with the intent to destroy the group "in whole or in part".[240]It becomes enough for the perpetrators of crime if their actions are aimed at annihilating an important part of a group.

In the explanation of Article 8 letter (a) in Law no. 26 of 2000 concerning the Human Rights Court stated that what is meant by "group member" is one or more members of a group. While the protected group (victim group) here is a group based on nationality, ethnicity, race and religion. A national group is a group of people who are considered to have legal ties based on the same nationality in line with their reciprocal rights and obligations.

Meanwhile, ethnic groups are groups whose members share a common language and culture or a group that identifies itself as having its own identity or a group that is identified by other people, including groups of perpetrators of crimes. Racial groups are usually characterized by similarities in physical and spiritual characteristics. Regarding special religious groups in the Indonesian context, according to religions that are officially recognized by state law.

With regard to this protected group, it should be noted that the specific intent which is characterized as the crime of genocide requires the perpetrator to choose his victims on the grounds that they are part of the group that is being destroyed or exterminated. The perpetrator's goal is to destroy or annihilate all or part of the group, based on the individual's membership in a particular group. The criterion for determining the direct victims of genocide is their membership in a group, not individual identity.

3.2. Elements of the Crime of Genocide

1) Killing Guild Members

Explanation of Law no. 26 of 2000 concerning the Human Rights Court does not provide an explanation regarding the intent of this murder but if you look at the verdict in the Rwanda court, what is meant by murder in the context of the crime of genocide is murder in the context of the

[240]Gerhard Werle, Op. cit., p. 209

crime of genocide is murder which comes from the French translation "meurtre" which can be interpreted as murder committed with the intention of causing death. In addition, what is meant by killing in genocide does not include accidental killing, because there has never been international legal practice which states that acts of unintentional killing are included in the category of genocide. The elements of killing in the crime of genocide do not require an element of planning, there is only an element with intent.

Article 6 letter (b) of the ICC Statute requires that the perpetrators of the crime of genocide can cause bodily and mental injuries that are dangerous or even fatal to certain groups. Serious bodily injury here is defined as serious damage to health and serious injuries to persons inside or outside the body. Examples of acts included here are mutilation and the use of force, beatings with weapons, wounds caused by a machete including sexual violence, which causes serious bodily harm and mental injury.[241]

In the ICC Statutes, the elements of killing in genocide include: (a) the perpetrator killed one or more people, (b) these people or those killed came from a certain nation, ethnic group, or a certain religion, (c) the perpetrator had the intention to destroy either all or part of a particular nation, group, ethnicity, race or religion, (d) the act took place in the context of a manifest pattern of similar actions directed against the said group or the act was a step which would certainly result in the destruction of certain groups.[242]

2) Causing Serious Bodily or Mental Harm

UU no. 26 of 2000 concerning the Human Rights Court also does not explain this formulation. However, an element of this crime is that the genocidal perpetrator caused serious physical or mental harm to one or more persons. This article also does not explain the definition of serious injury, but according to the general understanding what matters is the condition that accompanies the serious injury. Physical or mental suffering accompanies the serious injury. Severe physical or mental suffering including physical or mental inhumane acts, inhuman or degrading treatment, rape, sexual violence or persecution. Suffering rape, sexual violence, or persecution. This physical or mental suffering does not have to be permanent or incurable such as rape, sexual violence or threats during interrogation.

[241]Gerhard Werle, Op. cit., p. 200
[242]See Article 6 letter a of the Rome Statute of International Criminal Court

In the 1998 Rome Statute, the elements of physical or mental suffering include: (a) the perpetrator caused serious physical or mental injury to one or more persons; (b) the person or people who were injured came from a certain nation, ethnic group, taste or religion; (c) the perpetrator intended to destroy, in whole or in part, a nation, group, ethnicity, or a particular religion, (d) the action occurred in the context of a manifest pattern of similar actions directed at that group or the action was an act that inevitably will result in the destruction of certain groups.[243]

3) Creating destructive living conditions (Inflicting Destructive Conditions of Life)

Causing destructive living conditions here can be interpreted as all kinds of actions that can result in the slow death of people such as lack of proper shelter facilities, clean clothes and medicines, being forced to do hard work both physically and mentally, rape, starving people, reducing health services to a minimum and forced evictions. All of these actions must be intended to destroy or destroy all or part of the members of the group. Thus, there are two important elements in action. First, the perpetrator causes certain living conditions to one or more people. Second, the living conditions are calculated to bring about the destruction or physical destruction of the group,

In the Rome Statute, the elements concerning causing these damaging living conditions include; (a) the perpetrator intentionally caused certain living conditions that would bring physical destruction to one or more people, (b) the person or people belonged to a certain nation, ethnic group, or a certain religion, (c) the perpetrator had the intention to destroy, either in whole or in part, against a particular nation, group, ethnicity, or religion; (d) the physical condition of the group, whether in whole or in part, (e) the act occurred in the context of a manifest pattern of similar acts directed against the group or the act was a step which could not necessarily result in the destruction of the group certain group.[244]As an example, this can be seen in the genocidal crimes committed by the NAZI against ethnic Jews in Europe, including forced labor, forced deportation, including ethnic cleansing. However, mass rape here is not included but can be included if the conditions of life can be expected to physically destroy part of a particular group.

4) Imposing Measures to Prevent Birth

[243]See Article 6 letter b of the Rome Statute of International Criminal Court
[244]See Article 6 letter c of the Rome Statute of International Criminal Court

Included in the category of "preventing group births" include acts of sexual mutilation, sterilization practices, forced birth control, segregation based on sex and prohibition of marriage. In a patrilineal society, group membership is determined by the identity of the father. For example, in a case where a woman from one group was forcibly impregnated by a man from another group with the intention that the woman would give birth to a child who was not from her mother's group. This action is both mental and physical. For example, rape can be an act aimed at preventing birth when a woman who is raped refuses to give birth. At the same time, the group can also be dominated through threats or trauma not to give birth.

Article 6 letter (d) of the ICC Statute includes coercive measures aimed at preventing births within a certain group. Acts which include for example sterilization, forced birth control, prohibition of marriage and segregation of the sexes, rape are also included (if it causes the victim to decide not to reproduce due to trauma). However, China, as a country with the largest population in the world, uses forced birth control in order to lower the birth rate for social, economic or other reasons, which cannot be included in the element of genocide.[245]

In the Rome Statute, the elements of preventing births in a group include: (a) the actor forcing certain actions against one or more people; (b) the person or persons come from a certain nation, ethnic group, or certain religion, (c) the perpetrator intends to destroy, either in whole or in part, a certain nation, group, ethnicity, race or religion, (d) acts - the enforced action was intended to prevent births within the group, (e) the act occurred in the context of a manifest pattern of similar acts directed against the group or the act was an act which would inevitably result in the destruction of the group- certain group.[246]

5) Forcibly Transferring Children

The act of forcibly transferring children is not only aimed at direct acts of forced physical transfer, but also towards acts of threatening or creating trauma which then result in the forced transfer of children from one group to another. In addition, coercion here is done by using violence or threats of violence.

Article 6 letter (e) of the ICC Statute covers the forced transfer of children from one group to another. Acts of forced displacement were carried out with the specific intention of destroying the group's existence. When transfers are made to other groups, children cannot

[245]Gerhard Werle, Op. cit., p. 202
[246]See Article 6 letter d in the Rome Statute of International Criminal Court

grow as part of their group or they become alienated from their cultural identity. The language, traditions and culture of their group become foreign to the children. This action can therefore endanger the social existence of the group, and can also endanger the biological existence of a group, because in general they cannot produce offspring with each other.[247]

What is meant by children here is children under 18 years of age. The transfer of children here is forced. This coercion can be physical or psychological as regulated in Article 6 (e) of the ICC Statutes such as fear resulting from violence, detention, coercion, psychological suppression or abuse of power against certain people or other people or by taking advantage of a coercive environment. The elements of forcibly transferring children are: (a) the perpetrator forcibly transferring one or more children, (b) the transfer from one group - another group; (c) the persons being forced to move were persons under the age of 18 and (d) the perpetrator knew or should have known that the person or persons were under 18 years of age.

Whereas in the Rome Statute, the elements for forcibly transferring children are as follows: [248] (a) the perpetrator forcibly transferred one or more persons; (2) the person or people come from a certain nation, ethnic group, taste or religion; (3) the perpetrator intended to destroy all or part of a particular nation, group, ethnicity, or religion (4) the transfer was from one group to another; (5) people who are forced to move are those under 18 years of age; (6) the perpetrator knew or should have known that the person or people were indeed under 18 years of age; (7) the action occurred in the context of a manifest pattern of similar actions directed at the group or the action was an action which inevitably resulted in the destruction of certain groups.

4. Closing

From the description above, the authors conclude several important things related to the problem of genocide crimes and ethnic Rohingya conflict, including the following:

1. Genocide is a type of international crime that is serious in nature, such as war crimes, crimes against humanity, and aggression which are carried out by carrying out widespread and systematic killings committed by state actors. against a nation, ethnicity, race or religious group with the main objective of annihilating in whole or in part a nation, ethnicity, race or religious group.

[247]Gerhard Werle, Op. cit., p. 203
[248]See Article 6 letter e in the Rome Statute of International Criminal Court

2. Genocide apart from being a form of serious international crime is also a form of violation of human rights on a large scale because it was carried out as an intentional act and was carried out systematically by way of mass killing of a population that had been identified by the perpetrators based on race, culture. certain ethnic, religious and political affiliations. This is contrary to the principles in the Universal Declaration of Human Rights which give respect and recognition to every individual without discriminating against race, religion, political background, gender and origin where the right to life is the most fundamental right and inherent in all human beings. human self that should not be reduced under any circumstances.
3. Genocide as a serious international crime has been regulated both at the level of international law through the Statute of the International Military Court of Nuremberg, the Statute of the International Court of Justice for Rwanda, the Statute of the International Court of Justice for the Former Yugoslavia, and the Statute of the International Criminal Court. Likewise in national law, genocide has been regulated in Law Number 26 concerning the Human Rights Court. With the regulation of genocide as a serious international crime, judicial efforts for the crime of genocide can be carried out through the international justice system and the national justice system.

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Statute of the International Criminal Tribunal for the Former of Yugoslavia, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

Adat Village in Managing Tourism Destinations as Padruwen Desa Adat in Bali

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Abstract

Bali is one of the world's most popular tourist destinations because of its culture. Bali, as one of the world's tourism destinations has village dualism, namely Adat Villages and Administrative Villages, which has implications for the dualism of government in Bali. The existence of government dualism actually runs harmoniously according to their respective duties and functions. However, along with the development of the implementation of Balinese cultural tourism, it is not uncommon for conflicts to occur in the management of tourist destinations, especially those related to fees charged to tourist destinations. Based on these conditions, this study aims to determine and analyze the authority possessed by the Adat Village in managing a tourist destination within its territory, in particular, the authority possessed by the village in carrying out tourism levies. The research method used in this study is normative legal research with a type of statutory approach, which is carried out by examining the laws and regulations related to the issues studied. In addition to the statutory approach, this research also uses a conceptual approach by trying to explore the value of a norm. Based on the research results, it is known that Adat Villages have local-scale authority to manage tourist destinations in their own area as a form of Padruwen Desa Adat. However, in practice, there are difficulties in identifying these local-scale authorities because there are tourist destinations whose management is carried out by the local government but in collaboration with Adat Villages.

Keywords: Adat Village, Tourism, Levies, Balinese Culture

Abstrak

Bali merupakan salah satu destinasi pariwisata dunia yang populer karena kebudayaannya. Bali sebagai salah satu destinasi pariwisata dunia memiliki dualism desa yaitu Desa Adat dan Desa Dinas yang berimplikasi pada dualism pemerintahan di Bali. Keberadaan dualism pemerintahan sesungguhnya berjalan harmonis sesuai dengan tugas dan fungsinya masing – masing. Namun seiring dengan perkembangnnya penyelenggaraan kepariwisataan budaya Bali, tidak jarang terjadi konflik dalam pengelolaan destinasi wisata khususnya yang berkaitan dengan biaya pungutan pada destinasi wisata. Berdasarkan kondisi tersebut, maka penelitian ini bertujuan untuk mengetahui dan menganalisis kewenangan yang dimiliki Desa Adat dalam pengelolaan suatu destinasi wisata yang berada didalam wilayah Desa Adat, khususnya mengkaji kewenangan yang dimiliki desa dalam melakukan pungutan

kepariwisataan. Metode penelitian yang digunakan dalam penelitian ini adalah penelitian hukum normative dengan jenis pendekatan peraturan perundang – undangan yang dilakukan dengan menelaah peraturan perundang – undangan yang berkaitan dengan permasalahan yang dikaji. Selain jenis pendekatan peraturan perundang – undangan, dalam penelitian ini juga menggunakan jenis pendekatan konseptual dengan berusaha menggali nilai dari suatu penormaan. Berdasarkan hasil penelitian diketahui bahwa Desa Adat memiliki kewenangan berskala lokal untuk melakukan pengelolaan terhadap destinasi wisata yang ada diwilayahnya sendiri sebagai salah satu bentuk Padruwen Desa Adat. Akan tetapi dalam pelaksanaanya terdapat kesulitan untuk mengidentifikasikan kewenangan berskala lokal tersebut karena terdapat destinasi wisata yang pengelolaan dilaksanakan oleh pemerintah daerah namun dikerjasamakan dengan Desa Adat.

Kata Kunci: Desa Adat, Kepariwisataan, Pengelolaan Pariwisata, Budaya Bali

1. Introduction

Indonesia is a unitary state in the form of a republic. Indonesia, as a unitary state, has a territory divided into several administrative regions, namely provincial regional governments, district or city regional governments, and village governments. The village government is the smallest government bureaucratic entity with a crucial role in providing public services.[249] The village, as the smallest entity of an Indonesian regional government, can be divided into two forms: *Adat* Villages and administrative villages. Constitutional recognition of *Adat* Villages is stated in Law No. 6 of 2014 concerning Villages. It is stated that a village is a village and an *Adat* Village, or what is referred to by another name, hereinafter referred to as a Village, is a legal community unit that has territorial boundaries that are authorized to regulate and manage government affairs, the interests of the local community based on community initiatives, origin rights, and/or traditional rights that are recognized and respected within the system of government of the Unitary State of the Republic of Indonesia. The authority of the village to regulate and manage its government affairs is commonly referred to as regional autonomy, while the existence of two forms of the village in Bali is called village dualism, which includes the existence of an *Adat* Village and an Administrative Village.

The existence of village dualism in Bali provides its own challenges for the Province of Bali, which is known as one of the best cultural tourism

[249]Kapojos, M. J. (2022). PENGANGKATAN DAN PEMBERHENTIAN PERANGKAT DESA DALAM RANGKA TERTIB PENYELENGGARAAN PEMERINTAHAN DESA. *LEX ET SOCIETATIS*, *10*(1

destinations in the world. Each village has its own autonomy. Regional Autonomy is a condition that allows the region to optimally actualize all the potential it has.[250] This regional autonomy is intended to give regional governments the authority to manage their own regions, including in the economic sector, because local governments are considered to know their respective regions better, so they will be better able to develop their regions through the regional autonomy granted.[251] *Adat* Villages in Bali are members of the Balinese Customary Law Community, whose existence is recognized in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia as long as it is still alive, in accordance with developments, and does not conflict with the Unitary State of the Republic of Indonesia. The existence of *Adat* Villages in Bali was confirmed by the Provincial Government of Bali through the Regional Regulation of the Province of Bali No. 4 of 2019 concerning *Adat* Villages in Bali (Regional Regulation of Desa *Adat* in Bali), which is tasked with realizing *Kasukretan Desa Adat*, which includes peace, prosperity, happiness, and peace at all times. and abstract. Sakala and Niskala are the beliefs of the Balinese Customary Law Community regarding the concept of duality *(Rwa Bhineda)*[252] in the form of *sekala* (visible) and *Niskala* (invisible) socio-religious elements.[253] More specifically, Article 22 of the Regional Regulation of Desa *Adat* in Bali states that *Adat* Villages are tasked with developing their economies. In carrying out its responsibilities for developing the *Adat* Village economy, it has authority based on proposal rights and local-scale authority between managing destinations and/or tourist attractions. However, recently there have been many cases that have ensnared the *Adat* Village government in Bali, or what is called *Prajuru Adat Desa* carry out their duties because they are suspected of committing illegal fees in managing tourist attractions. Even though the purpose of implementing these fees is nothing but the welfare of the community, the implementation is not right.

Based on the results of tracing previous research, a similar study was conducted by I Dewa Gede Herman Yudiawan with the title

[250]Safitri, S. (2016). Sejarah perkembangan otonomi daerah di Indonesia. *Criksetra: Jurnal Pendidikan Sejarah*, *5*(1).

[251] Ristanti, Y. D., & Handoyo, E. (2017). Undang-undang otonomi daerah dan pembangunan ekonomi daerah. *Jurnal RAK (Riset Akuntansi Keuangan)*, *2*(1), 115-122.

[252]Rwa Bhineda consists of two words, namely Rwa and Bhineda. Rwa literally means two, while Bhineda means different. Rwa Bhineda is a concept of duality that concerns differences in order to create harmony and balance in the universe.

[253]Sari, N. P. M., Pinatih, D. A. A. I., Juniarta, I. K., & Supriliyani, N. W. Jurnal Kajian Bali.

"Income of *Adat* Villages: Construction of Levies Law to Realize Free of Illegal Fees".[254] This research was published in 2019 with the aim of analyzing regulations for *Adat* Villages in Bali in imposing levies on tourism object areas with reference to Provincial Regulation No. 3 of 2001 concerning *Pakraman* Village, which is now valid again. The other research is the research of Novie Afif Mauludin with the title "The Existence of Village Regulations Concerning Village Fees Based on Law Number 6 of 2014 Concerning Villages",[255] which was published in 2022. This study aims to determine the existence of Village Regulations regarding village levies based on Law No. 6 of 2014 concerning Villages in positive law in Indonesia.

Based on the description of the previous research, the current study has no similarities to the research of the two previous researchers or other similar studies. This study specifically aims to determine the authority possessed by *Adat* Villages through Prajuru Desa *Adat* in managing tourist attractions in their area, with the aim of prospering the economies of indigenous peoples. The title of this research is "*Adat* Village in Managing Tourist Destinations as the *Padruwen Desa Adat i*n Bali".

2. Methods

This study uses normative legal research using the statute approach and the contextual approach. The regulatory approach is used to analyze regulations relating to customary village rights in the management of tourist destinations such as *Padruwen Desa Adat* in their territory. The conceptual approach is used to understand concepts related to norms in statutory regulation and whether they are in accordance with the concept of the spirit contained in the legal concepts of its formulation.[256] This legal material tracing technique uses library research techniques and is analyzed using qualitative analysis.

3. Finding and Discussions

3.1 Findings

[254]Yudiawan, I., & Herman, D. (2019). Pendapatan desa *Adat*: kontruksi hukum pungutan untuk mewujudkan bebas pungutan liar. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, *8*(2), 249-260.

[255]Mauludin, N. A. (2022). Eksistensi Peraturan Desa Tentang Pungutan Desa Berdasarkan Undang-Undang Nomor 6 Tahun 2014 Tentang Desa. *Unizar Law Review (ULR)*, *5*(1).

[256] Irwansyah, I. (2020). Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel. *Yogyakarta: Mirra Buana Media*, p.147

The natural beauty of Bali combined with the uniqueness of Balinese culture has made Bali one of the world's top tourism destinations. The majority of Balinese people depend on the tourism industry directly or indirectly for their lives. This was proven when the Covid -19 pandemic occurred, the impact of the economic downturn was not only felt by workers in the tourism sector but also in other industrial sectors because tourism is Bali's leading sector. Quoting a statement from the Head of the Bali Province Manpower and ESDM Office, 73,397 workers were laid off, and 2,635 people were laid off.[257] Slowly but surely, after the Covid-19 pandemic, Bali is improving in the implementation of tourism, and various pilot projects are designed to accelerate the economy, including involving the role of *Adat* Villages.

Based on data compiled through the official website of the Province of Bali, there are currently 1,493 *Adat* villages, [258] while administrative villages and kelurahan are 636.[259] The difference in these numbers is an implication of the dualism of villages in Bali, so it allows for several conditions in the areas of *Adat* Villages and official villages/kelurahan, as follows:

1. One Administrative Village/Kelurahan Village has the same area and population as one *Adat* Village.
2. One Administrative Village/Kelurahan Se includes several *Adat* Villages.
3. One *Adat* Village consists of several Administrative Villages.
4. One Administrative village/Kelurahan includes several *Adat* villages and part of another *Adat* Village.

The differences in area coverage that often overlap between *Adat* Villages and official villages in Bali give rise to challenges in the management of Balinese tourism. Bali tourism arrangements are

[257] Hasil Kajian Fiskal Regional (KFR) Triwulan II / 2020: Dampak Ekonomi Akibat Covid-19 Lebih Parah Daripada Bom Bali, https://djpb.kemenkeu.go.id/kanwil/bali/id/data-publikasi/berita-terbaru/2886-hasil-kajian-fiskal-regional-kfr-triwulan-ii-2020-dampak-ekonomi-akibat-covid-19-lebih-parah-daripada-bom-bali.html, accessed on July 27, 2023 at 10.12 PM

[258] Desa *Adat* Perkabupaten Kota Yang Memiliki Awig – Awig,https://balisatudata.baliprov.go.id/laporan/data-desa-*Adat*-per-kabupatenkota-yang-memiliki-awigawig?year=2021 , accessed on July 27, 2023 at 10.45 PM

[259] Sistem Infromasi Wilayah dan Tata Ruang Bali, https://tarubali.baliprov.go.id/profil/wilayah-administrasi/#:~:text=Wilayah%20Administrasi%20%E2%80%93%20Sistem%20Informasi%20Wilayah%20dan%20Tata%20Ruang%20Bali&text=Provinsi%20Bali%20terdiri%20dari%208,80%20kelurahan%2C%20dan%20636%20desa. accessed on July 27, 2023 at 10.57 PM

regulated specifically through the Regional Regulation of the Province of Bali No. 5 of 2020 concerning Standards for Implementing Balinese Cultural Tourism, which states that the standards for implementing Balinese cultural tourism are guided by Balinese culture, which is imbued with the philosophy of *Tri Hita Karana*, which originates from the cultural values and local wisdom of the Balinese people. Local culture and wisdom are united in the implementation of Balinese cultural tourism, which is guarded and preserved by the Balinese people. In the theory of cultural ecology, Julian H. Steward states that the environment and culture cannot be seen separately but are mixed products that proceed through dialectics.[260] Agusyanto further stated that ecological processes have reciprocal laws and influence each other because culture and the environment are not separate entities.[261]

Based on Julian H. Steward's theory of cultural ecology, if cultural tourism is to be maintained and sustainable, Balinese indigenous people should enjoy this positive impact, but in reality, this is not the case. Referring to BPS publications, the number of poor people in Bali in September 2022 in urban areas decreased by 2.24 thousand people (from 136.06 thousand people in March 2022 to 133.82 thousand people in September 2022). During the same period, the number of poor Balinese living in rural areas increased by 1.93 thousand people (from 69.62 thousand people in March 2022 to 71.55 thousand people in September 2022).[262] The Poverty Line in Bali in September 2022 was recorded at IDR 515,037/capita/month with a composition of the Food Poverty Line of IDR 357,640 (69.44 percent) and the Non-Food Poverty Line of IDR 157,398 (30.56 percent)[263] with an income of IDR 515,037/ capita/month for the people of Bali who are predominantly Hindu. This is certainly not an easy thing.

The Balinese Hindu community believes that maintaining the balance of the *sekala* and *niskala* natures is an absolute thing to do with sincere *yadnya* and certain ceremonial means. In the teachings of Hinduism, people are never forced to carry out ceremonies beyond their capabilities. But of course, there is a fee for every religious ceremony that is correlated with the existence of culture and wisdom among the

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[260] Setiawan, E., & Triyanto, J. (2021). Integrasi kearifan lokal dan konservasi masyarakat sekitar Desa Penyangga Taman Nasional Alas Purwo. *Jurnal Analisa Sosiologi*, *10*(2). h.459
[261] *Ibid.*
[262] Profile Kemiskinan Bali September Tahun 2022, https://bali.bps.go.id/pressrelease/2023/01/16/717826/profil-kemiskinan-bali--september-2022.html , accessed on July 27, 2023 at 11.30 PM
[263] Ibid

local Balinese people, who carry the concept of cultural tourism. For *Adat* Village communities, a *Adat* Village is actually a group of people living in a holy place or temple (*kahyangan tiga* or *kahyangan desa)* whose preservation is both spiritually and abstractly maintained by the community. This conservation effort certainly costs money. On the other hand, temples and other holy or cultural places in Bali are also attractive tourist destinations.

Sacred places like temples in the Regional Regulation of Desa *Adat* in Bali are part of the *Padruwen Desa Adat*, or what can be referred to as the wealth belonging to the *Adat* Village. Based on the Regional Regulations on *Adat* Villages in Bali, there are several other *Padruwen Desa Adat* objects, including natural resources, economic resources, which are the traditional rights of the *Adat* Village, and other material assets found in the *Adat* Village. Apart from being material in nature, *Adat* Villages in Bali also have other immaterial assets such as belief systems, traditional values, customs, art, and culture, as well as local wisdom with the spirit of Hinduism. The wealth of material and immaterial *Adat* Villages is generally interconnected; for example, the performance of dances held in sacred places.

The collaboration between the material and immaterial wealth of the *Adat* Village is generally a tourist attraction. Responding to these conditions, based on the authority possessed by *Adat* Villages in Article 23 of the Regional Regulations on *Adat* Villages in Bali, *Adat* Villages can manage *Padruwen Desa Adat* based on the principle of benefit for the welfare of their people, one of which is by imposing levies on tourist destinations in their area. However, in recent years, Bali has been rocked by various issues of "illegal fees". Based on Bali Governor Regulation Number 34 of 2019 concerning the financial management of *Adat* Villages in Bali (Governor Regulation of Financial Management of *Adat* Villages in Bali), in Article 4, it is stated that one source of income for *Adat* Villages is the management of *Padruwen Desa Adat*. The management and use of income from the *Padruwen Desa Adat* are based on an agreement with the *Paruman Desa Adat,* as outlined in *Pararem Desa Adat. Paruman Desa Adat* is the highest decision-making body on matters of principle and strategy in the *Adat* Village, whereas *Pararem* is the regulations and decisions of the *Paruman Desa Adat* as they relate to the implementation of *awig-awig*[264] or arranging new matters and/or resolving *Adat* or oral cases in

[264] Quoted in Wayan P. Windia's Introduction to Balinese Customary Law, Tjok's wife Putra Astiti defines in general what is meant by awig - awig are standards of behavior, both written and unwritten, made by the community concerned, based on a sense of justice and propriety that lives in society, in the relationship between krama (members

the *Adat* Village. Referring to these provisions, there should be room for *Adat* Villages to carry out their management independently, but this needs to be studied further so that there is no excess of authority by *Adat* Villages.

3.2. Discussions

Villages and *Adat* Villages are two types of villages mentioned in the Village Law. Referring to the understanding of the Village Law, it seems that there is no difference between the two villages, including the authority they have as regulated in Article 19 of the Village Law, including the exercise of authority based on origin rights, village authority local, and other authorities assigned by the government, Provincial government, regional government, regency, or city. In Article 103 of the Village Law, it is emphasized that the authority of customary villages is based on customary village origin rights, which include the arrangement and management of customary territories, the preservation of the socio-cultural values of *Adat* Villages, and other rights of origin. In principle, the rights of origin and customary law that apply in the *Adat* Village must be maintained in the community and in accordance with the times, not contrary to the constitution.

In an effort to prosper the community's economy through Tourism Retribution, if it is fully managed by the *Adat* Village, then it is not appropriate because it's not under the authority of customary villages. In Law No. 1 of 2022 concerning Financial Relations between the Central Government and Regional Governments (Law of HKPPPD), it states that regional retribution is the collection of regional levies as payments for services or the granting of certain permits specifically provided and/or given by local governments for the benefit of individuals or entities. Retribution is an important source of regional income to finance regional administration, regional development, and regional autonomy.[265] However, in accordance with the provisions of Article 94 of the HKPPPD Law, the collection of levies is regulated by a regional regulation as the basis for collection. Based on these

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of Pakraman Village) and God, among fellow krama, as well as Krama and their environment. Note: Currently, based on the Regional Regulation on Traditional Villages in Bali, the term "Prakraman Village" has been replaced with the term "*Adat* Village".

[265] Ersita, M., & Elim, I. (2016). Analisis efektivitas penerimaan retribusi daerah dan kontribusinya terhadap peningkatan pendapatan asli daerah (pad) di provinsi Sulawesi Utara. *Jurnal EMBA: Jurnal Riset Ekonomi, Manajemen, Bisnis dan Akuntansi*, *4*(1). p.890

provisions, of course, *Adat* Villages do not have the authority to collect retribution as *Padruwen Desa Adat* in their territory.

In the management of *Padruwen Desa Adat*, *Adat* Village have the authority to make levies called *Dudukan* based on Governor Regulation of Financial Management of *Adat* Villages in Bali. *Dudukan* is a mandatory contribution from Krama Tamiu and Tamiu. In administering governance in *Adat* villages, Bali is divided into three community groups, namely:

1. Krama Desa *Adat* consists of members of the Balinese Hindu community with status *milpil* and registered as members of the local *Adat* Village.
2. Krama Tamiu are Balinese Hindus who are not Mipil, but recorded in the local *Adat* Village.
3. Tamiu is a person other than Krama Desa *Adat* and Krama Tamiu who be in territory of *Adat* Village for temporarily living and registered in the local *Adat* Village.

by the term *milpil* in community groupings in Bali is a registration system that is detrimental to *Adat* villages. The distinction between these three community groups is intended to define the rights and obligations of each community. Related to the conception of *dudukan*, they can be loaded onto *Krama Tamiu or Tamiu* who visit tourist destinations as a form of their mandatory contribution when visiting tourist destinations managed by *Adat* Villages.

The legality of the *Adat* Village in carrying out *Dudukan* must be based on the decision of the local community and be recorded as Pararem in the *Adat* Village. Pararem is the result of a joint decision in a traditional meeting in Balinese society, which is then agreed to be carried out as well as possible.[266] The authority of *Adat* Village to regulate and manage their village does not give *Adat* Village freedom to implement *dudukan.* Based on Governor of Bali Regulation Number 55 of 2022 concerning Amendments to Governor Regulation Number 34 of 2019 concerning Financial Management of *Adat* Villages in Bali (Governor Regulation of Financial Management of Traditional *Adat* in Bali, P1), *dudukan* must be implemented based on the principles of fairness, the principle of benefit, the principle of decency, and

[266] Mardika, I. M. (2013). EKSISTENSI HUKUM *ADAT* DALAM MENJAGA KEHARMONISAN MASYARAKAT BALI (Penerapan Pararem di Desa Pakraman Jumpai, Kecamatan Klungkung, Kabupaten Klungkung). *Jurnal Pendidikan Kewarganegaraan Undiksha*, *1*(2).

conformity with the applicable laws. Stands are arranged by involving Provincial MDA and Regional Apparatuses. Procedures for collecting and using Stands in *Adat* Village Pararem are guided by special guidelines for *Krama Tamiu* and *Tamiu Pararem* prepared and stipulated by the Provincial MDA. The supervision of results obtained by the *Adat* Village is supervised by the Regional Apparatus to ensure that the management of the *Padruwen Desa Adat* in the form of a Tourism Destination provides benefits and is able to improve the economy of the *Adat* Village community.

Based on the analysis above, in fact, the autonomy of traditional villages to manage their tourist destinations has been given a very wide space by the government. However, in its implementation, there were difficulties in determining the local authority for the restoration of traditional villages as tourist destinations. The Traditional Village Regulation does not provide further explanation as to what is meant by a tourist Destination, whereas when referring to Law No. 10 of 2009 concerning Tourism, the term used is tourism Destinations, not tourist Destinations. In this case, it is difficult for traditional villages to identify tourist destinations that have the right to be managed through traditional village seats. On the other hand, based on the results of a literature study, it is known that the local government in Bali has also established tourist destinations whose management is carried out by retribution, so automatically these tourist destinations are no longer the realm of traditional villages, even though their existence is guarded by traditional villages.

In general, tourism management is carried out in collaboration between the Regional Government and *Adat* villages, as carried out by Bangli Regency. Article 16 of Bangli Regency Regional Regulation, Number 2 of 2018, concerning the 2019-2025 Regional Tourism Development Master Plan stipulates several locations for Tourist Attractions and Special Tourist Attractions. The amount of retribution is specifically determined through a Regent's Regulation. For example, Panglipuran Tourism Village is one of the Tourism Villages whose retribution rates have been determined by Bangli Regent Regulation Number 8 Of 2022 Regarding The Second Amendment To Regent Regulation Number 47 Of 2014 Concerning Review Of Retribution Rates For Recreational And Sports Places In Bangli District. However, in the management of the Panglipuran tourist village there is cooperation between the Regional Government and *Adat* Villages with

a division of 60% Regional Government and 40% *Adat* Village.[267] This percentage of profit sharing is actually not profitable for Panglipuran Traditional Village because in its management the Traditional Village requires a lot of money to maintain the existence of customs, culture, traditions, and supporting aspects of implementing tourism in Panglipuran Tourism Village.

Another example is the management of the Tibumana Waterfall Tourist Attraction, Apuan Bangli Village, Luh Putu Suryani stated in his research that the management of Tibumana Waterfall is managed by the Service Village and Traditional Village through a Cooperation Agreement. The proportion of profit sharing is 10% for Service Villages and 90% for Customary Villages, and there is a provision stating that maintenance costs are borne by the Village Office.[268] This agreement is actually for both parties because, with a 10% profit sharing percentage for traditional villages, it cannot provide the maximum contribution to the maintenance and development of the tourist attraction of Tibumana Waterfall which gradually does not rule out the possibility of this location being abandoned by and no longer providing economic benefits.

Based on the description above, it is known that there is a blurring of norms in the management of tourist destinations such as *Padruwen Desa Adat*, so it is necessary to clarify the objects of *Padruwen Desa Adat* that can be managed autonomously by traditional villages. On the other hand, if it must be carried out through retribution as a manifestation of the dualism of government in Bali, then the presentation of development results cannot harm the parties, especially the *Adat* Village, because the pillars of Balinese cultural tourism are traditional villages.

4. Conclusion

Bali as a world tourism destination, carries the concept of Balinese cultural tourism. Balinese cultural tourism is based on Hindu religious beliefs, namely *Tri Hita Karana*, to create a balance of nature whose existence is maintained by the Balinese customary law community in the *Adat* Village. *Adat* Villages in Bali have local authority on the scale of Traditional Villages to manage their own villages, including the

[267]Sentanu, I., & Sriyono, M. E. E. (2022). PEMBERDAYAAN MASYARAKAT DESA MELALUI DESA WISATA BERBASIS KEARIFAN LOKAL DENGAN KONSEP PENTHA HELIX. h.146

[268] Suryani, L. P., Ujianti, N. M. P., & Widiati, I. A. P. (2022). Kebijakan Pembagian Hasil Pengelolaan Objek Wisata di Kabupaten Bangli. *KERTHA WICAKSANA*, *16*(1), 51-56.

management of Padruwern Desa *Adat* (traditional village assets), which can include tourist destinations. However, several tourist destinations that are maintained and preserved by the Balinese indigenous people have been managed by the local government. Based on research, it is known that several tourist destinations have entered into sharing profit agreements with villages at various percentages. The various percentages are often detrimental to one of the parties, which actually threatens the implementation of Balinese cultural tourism, so they need to be formulated more concretely in order to provide the maximum possible benefits for indigenous village communities.

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Sentanu, I., & Sriyono, M. E. E. (2022). PEMBERDAYAAN MASYARAKAT DESA MELALUI DESA WISATA BERBASIS KEARIFAN LOKAL DENGAN KONSEP PENTHA HELIX. p.146

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Regional Regulation of the Province of Bali No. 5 of 2020 concerning Standards for Implementing Balinese Cultural Tourism
Governor of Bali Regulation Number 55 of 2022 concerning Amendments to Governor Regulation Number 34 of 2019 concerning Financial Management of Adat Villages in Bali
Bangli Regency Regional Regulation, Number 2 of 2018, concerning the 2019-2025 Regional Tourism Development Master Plan
Bangli Regent Regulation Number 8 Of 2022 Regarding The Second Amendment To Regent Regulation Number 47 Of 2014 Concerning Review Of Retribution Rates For Recreational And Sports Places In Bangli District.

Peran Negara Terhadap Pengelolaan Hutan Adat dari Hegemoni Oligarki untuk Kesejahteraan Perekonomian Masyarakat Adat

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Abstract

Government policy for the welfare of indigenous peoples need to be realized with a protection of laws and regulations containing their own existing values in indigenous community. The aim of this research is expected support the stakeholders, especially the Government and Customary Law Communities in completing the management of customary forest areas, so that justice and prosperity for indigenous peoples can be realized according to the needs of indigenous peoples. The method used in this research is descriptive evaluative research method, in which this study only describes the facts found in the field without making changes to each research variable. The results of this study are expected to issue an ideal rule of law and its implementation must be adjusted based on the needs of the community. Campaigns for customary forest schemes must be carried out systematically and strengthened by legal policies as a form of sovereignty and dignity of independent indigenous peoples, conservation of customary forests and the potential benefits of forests can be utilized for the economic welfare of indigenous peoples. The government must truly side with indigenous peoples in formulating their legal policies. Harmony of customary forest management developed by indigenous and tribal peoples conforms to government policies so that the development programs developed are not contradictory and can be implemented. Conclusion, the role of the government in policies on customary forests to improve the economy of indigenous peoples is expected to provide welfare and stuck indigenous peoples life without being controlled by oligarchic hegemony.

Keywords: National Law, Customary Forests, and the Economy of Indigenous Peoples.

Abstrak

Kebijakan pemerintah terhadap kesejahteraan masyarakat adat perlu di wujudkan dalam suatu ketentuan yang diatur kedalam undang-undang dengan memperhatikan nilai-nilai hukum yang hidup pada masyarakat adat. Tujuan penelitian ini diharapkan mampu memberikan masukan kepada pemangku kepentingan, khususnya Pemerintah dan Masyarakat Hukum Adat dalam menyelesaikan pengelolaan kawasan hutan adat, agar keadilan dan kesejahteraan masyarakat hukum adat dapat terealisasi sesuai kebutuhan masyarakat hukum adat. Metode yang digunakan dalam penelitian ini adalah metode penelitian deskriptif evaluatif, di mana dalam penelitian ini

hanya mendeskripsikan fakta-fakta yang ditemukan di lapangan tanpa mengadakan perubahan pada masing-masing variabel penelitian. Hasil penelitian ini diharapkan menerbitkan aturan hukum yang ideal dan pelaksanaannya harus disesuaikan berdasarkan kebutuhan masyarakat. Kampanye skema hutan adat harus dilakukan secara sistematis dan di kuatkan dengan kebijakan hukum sebagai bentuk kedaulatan dan martabat masyarakat adat yang mandiri, pelestarian hutan adat beserta potensi yang ada di dalamnya dapat dimanfaatkan untuk kesejahteraan perekonomian masyarakat adat. Pemerintah harus benar-benar berpihak pada masyarakat adat dalam menuangkan kebijakan hukumnya. keselarasan pengelolaan hutan adat yang dikembangkan oleh masyarakat hukum adat menyesuaikan kebijakan pemeritah agar program pembanguan yang di kembangkan tidak bertentangan dan dapat dilaksanakan. Simpulan, Peran pemerintah dalam kebijakan terhadap hutan adat untuk meningkatkan perekonomian masyarakat adat diharapkan dapat memberikan kesejahteraan dan kehidupan yang layak bagi masyarakat adat tanpa dikuasai oleh hegemoni oligarki.

Kata Kunci: Peran Negara, Hutan Adat, dan Perekonomian Masyarakat Hukum Adat.

1. Pendahuluan

Kebijakan Perhutanan sosial yang di keluarkan oleh pemerintah, bertujuan untuk meningkatkan kesejahteraan masyarakat melalui pola pemberdayaan dan dengan tetap berpedoman pada aspek kelestarian. Sebagai kebijakan prioritas, kebijakan tersebut menyediakan pemberian hak kelola legal kawasan hutan Negara kepada masyarakat yang diatur dalam peraturan menteri lingkungan hidup dan kehutanan no. P39/Menlhk/Sekjen/kum.1/10/2016 dan nomor P.39/Menlhk/ Sekjen/Kum.1/6/2017 berisi tentang Perhutanan Sosial dan wilayah kerja perum perhutani, di dalam peraturan tersebut, diatur tentang bagaimana proses pengajuan pemanfaatan hutan oleh masyarakat sekitar

Dalam penelitian-penelitian sebelumnya menyatakan bahwa masyarakat memilki kapasitas untuk mengelola kawasan hutan yang umumnya memiliki kearifan lokal, modal sosial dan pengetahuan lokal dan juga hambatan serta minimnya manfaat yang diperoleh masyarakat dari kebijakan perhutanan sosial. Belum banyak peneliti yang meneliti bagaimana masyarakat melawan hegemoni Oligarki dalam melindungi hutan adat.

Ada 5 (lima) skema yang ditawarkan dalam kebijakan perhutanan sosial, yaitu Hutan Desa, Hutan Kemasyarakatan, Hutan Tanaman rakyat, Hutan adat dan Kemitraan Kehutanan. Masyarakat yang telah melaksanakan kebijakan perhutanan sosial Jumlah yang

disediakan Pemerintah untuk kawasan perhutanan sosial berjumlah 12,7 juta Ha.

Direktorat Jenderal Perhutanan Sosial dan Kemitraan Lingkungan Kementerian Lingkungan Hidup dan Kehutanan (KLHK) bertanggungjawab atas kegiatan Penyiapan Kawasan Perhutanan Sosial yang memiliki sasaran kegiatan yaitu meningkatnya luas areal kelola masyarakat.

Sasaran kegiatan tersebut mendukung sasaran program PSKL yang pertama yaitu meningkatnya akses pengelolaan hutan oleh masyarakat.

Berdasarkan Peraturan Pemerintah Nomer 23 Tahun 2021 tentang Penyelenggaraan Kehutanan, perhutsos adalah sistem pengelolaan Hutan lestari yang dilaksanakan dalam Kawasan Hutan Negara atau Hutan Hak/Hutan Adat yang dilaksanakan oleh Masyarakat setempat atau Masyarakat Hukum Adat sebagai pelaku utama untuk meningkatkan kesejahteraannya, keseimbangan lingkungan dan dinamika sosial budaya.

Sampai dengan 1 Oktober 2022, realisasi capaian Perhutanan Sosial mencapai 5.087.754 Hektar, menurut laporan terbaru dari Direktorat Jenderal Perhutanan Sosial dan Kemitraan Lingkungan (Ditjen PSKL), kurang lebih 1.127.815 KK dan 7.694 Unit Sk Secara terperinci, berdasarkan realisasi per skema capain perhutsos sampai 1 Oktober 2022 adalah sebagai berikut:

1. Hutan Desa dengan luas 2.013.017,21 Ha;
2. Hutan Kemasyarakatan (HKM) dengan luas 916.414,60 Ha;
3. Hutan Tanaman Rakyat (HTR) dengan luas 355.185,08 Ha;
4. Kemitraan Kehutanan (KK), meliput Kulin KK dengan luas 571.622,38 Ha dan IPHPS dengan luas 34.789,79 Ha;
5. Hutan adat mencapai 1.196.725,01 HA (Penetapan Hutan Adat 108.576 Ha dan Indikatif Hutan Adat 1.088.149 Ha). (pskl menlhk:2022)

Jika dilihat dari jumlah area yang dicadangkan untuk perhutanan sosial dan area yang diberikan pada masyarakat, masih jauh dari harapan pelaksanaan kebijakan perhutanan sosial tersebut. Hal ini menimbulkan pertanyaan, mengapa kebijakan perhutanan sosial belum di manfaatkan masyarakat? Padahal jelas bahwa tujuan dikeluarkannya kebijakn perhutanan sosial diterbitkan untuk menyelesaikan permasalahan tenurial dan keadilan bagi masyarakat setempat dan masyarakat hukum adat yang berada di dalam hutan dan memberikan kesejahteraan masyarakat adat. Mengingat kebijakan telah dikeluarkkan kurang lebih 6 (enam) tahun lalu.

Jika di lihat dari ketentuan Peraturan Mentri Lingkungan Hidup dan Kehutanan No. 4 tahun 2023 tentang pengelolaan perhutanan sosial pada kawasan hutan dengan pengelolaan Khusus, yang menyatakan bahwa, Perhutanan Sosial adalah sistem pengelolaan hutan lestari yang dilaksanakan dalam Kawasan Hutan negara atau hutan hak/hutan adat yang dilaksanakan oleh Masyarakat Setempat atau masyarakat hukum adat sebagai pelaku utama untuk meningkatkan kesejahteraannya, keseimbangan lingkungan dan dinamika sosial budaya dalam bentuk Hutan Desa, Hutan Kemasyarakatan, Hutan Tanaman Rakyat, hutan adat, dan kemitraan Kehutanan.

Sebagai bentuk dari peran pemerintah memanfaatkan hutan yang ada disekitar masyarakat adat guna kepentingkan meningkatkan perekonomian masyarakat. Pendampingan pada masyarakat dalam pengelolaan hutan, perlu untuk mendapatkan bimbingan, arahan agar kebijakan yang dikeluarkan sesuai dengan tujuan dari kebijakan tersebut dan dapat terealisasi dengan baik dan sesuai harapan pemerintah dan keadilan serta kesejahteraan masyarakat Hukum adat, khususnya meningkatkan perekonomian masyarakat sekitar hutan.

2. Permasalahan

Kebijakan Pemerintah mengeluarkan aturan tentang perhutanan sosial, sesuai ketentuan pasal 2 ayat (2) pemmenhut No. P.83/2016 bertujuan untuk menyelesaikan permasalahan teturial dan keadilan bagi masyarakat setempat, dan masyarakat hukum adat yang berada di dalam atau disekitar kawasan hutan dalam rangka kesejahteraan masyarakat dan pelestarian fungsi hutan. (Tasya Moedy Agusti, dll:2019)

Area perhutanan sosial yang diberikan pemerintah berjumlah 12,7 juta ha belum di kelola secara maksimal dan konsisten. Ada banyak kasus di tingkat tapak, setelah menerima SK perizinan dengan skema tertentu, ternyata tidak ditindak lanjuti dengan pengelolaan sesuai ketentuan syarat yang dibuat saat proses pengajuan izin. Banyak kendala yang dihadapi para penerima izin pengelola, diantaranya adalah tidak memiliki biaya/modal yang yang cukup, perlu pendampingan/kemitraan dari lembaga masyarakat, dan konsultan analisis dan justifikasi areal konsesi yang diperuntukan pemanfaatannya. Dari permasalahan tersebut bagaimana masyarakat hukum adat dapat terlindungi hutan adatnya dari praktek-praktek para pialang lahan yang memanipulasi dokumen persyaratan dengan mengatas namakan kelompok masyarakat, yang pada akhirnya hasil dari pengelolaan area hutannya hanya untuk segelitir orang saja. Karena konsekwensi bagi penerima izin pegelolaan hutan, tidak boleh berhenti,

karena pemerintah akan meminta tanggung jawab atas syarat dan kewajiban masyarakat yang disetujui sebelumnya.

3. Metode Penelitian

Metode yang digunakan dalam penelitian ini adalah metode penelitian deskriptif evaluatif, di mana dalam penelitian ini hanya mendeskripsikan fakta-fakta yang ditemukan di lapangan tanpa mengadakan perubahan pada masing-masing variabel penelitian.

4. Pembahasan

Pasal 18B ayat (2) UUD 1945 menyebutkan "Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat serta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyaakat dan prinsip negara kesatuan Republik Indonesia, selanjutnya pasal 28I ayat (3) UUD 1945 menyebutkan identitas budaya dan hak masyarakat tradisional di hormati selaras dengan perkembangan zaman dan beradaban maupun berbasisi TAP MPR No.IX/2001 tentang pembaruan agraria dan pengelolaan sumber daya Alam.

Keputusan Mahkamah Konstitusi (MK) nomor 35/PUU-X/2012 mengenai hutan adat yang membatalkan sejumlah ayat dan pasal yang mengatur keberadaan hutan adat dalam UU Nomor 41 tahun 1999 tentang Kehutanan. Hutan adat kini resmi disahkan menjadi milik komunitas adat, bukan lagi milik negara. Pengakuan keputusan MK ini membawa sejumlah konsekuensi, diantaranya mekanisme pengukuhan tentang keberadaan masyarakat hukum adat, penetapan batas kawasan hutan adat, dan pembagian kewenangan antara masyarakat hukum adat dengan negara dalam tata kelola hutan.

Pemerintah mengimplementasikan keputusan MK dengan mengeluarkan program perhutanan sosial. Program perhutanan sosial adalah sistem pengelolaan hutan lestari dalam kawasan hutan negara atau hutan hak/hutan adat oleh masyarakat setempat untuk meningkatkan kesejahteraan, keseimbangan lingkungan, dan dinamika sosial budaya.

Ada 5 (lima) skema yang ditawarkan dalam kebijakan perhutanan sosial, yaitu Hutan Desa, Hutan Kemasyarakatan, Hutan Tanaman rakyat, Hutan adat dan Kemitraan Kehutanan. Jumlah yang disediakan Pemerintah untuk kawasan perhutanan sosial berjumlah 12,7 juta Ha.berrdasarkan peta Indikatif dan areal Perhutanan sosial (PIAPS), yang bisa diajukan masyarakat untuk perhutanan sosial.(Dimas Jarot Bayu:2019)

Kegiatan pengelolaan perhutanan sosial pada kawasan hutan dengan pengelolaan khusus. Ada dua kegiatan pengelolaan Perhutanan

Sosial dengan pengelolaan khusus di dilakukan adalah Penataan Areal dan Penyusunan Rencana.

A. Penataan Area terdiri dari:

1) Kegiatan penataan areal meliputi:
   a. penandaan batas areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK;
   b. inventarisasi potensi;
   c. pembuatan ruang areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK;
   d. pembuatan andil garapan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK; dan
   e. pemetaan hasil penataan areal.
2) Penandaan batas meliputi:
   a. batas persetujuan areal hasil kegiatan penandaan batas; dan
   b. titik koordinat tanda batas.
3) Inventarisasi potensi meliputi:
   a. kondisi Kawasan Hutan;
   b. jenis dan sebaran potensi hasil hutan kayu;
   c. jenis dan sebaran potensi hasil hutan bukan kayu; dan
   d. jenis dan sebaran potensi jasa lingkungan.
4) Pembuatan ruang sebagaimana dimasud pada ayat (1) huruf c meliputi:
   a. lokasi, luas dan batas ruang perlindungan; dan
   b. lokasi, luas dan batas ruang pemanfaatan.
5) Pembuatan andil garapan sebagaimana dimaksud pada ayat (1) huruf d meliputi:
   a. data penggarap; dan b. batas dan luas andil garapan.
6) Hasil pembuatan andil garapan, dituangkan ke dalam peta.

B. Penyusunan Rencana

Penyusunan rencana Perhutanan Sosial dilaksanakan pada:
   a. Persetujuan Pengelolaan HD;
   b. Persetujuan Pengelolaan HKm; dan
   c. Persetujuan Pengelolaan HTR.

Penyusunan rencana meliputi:
   a. penyusunan RKPS untuk jangka waktu 10 (sepuluh) tahun; dan
   b. penyusunan RKT untuk jangka waktu 1 (satu) tahun.

Penyusunan rencana memuat kegiatan:
   a. penguatan kelembagaan;

b. pengelolaan hutan meliputi:
   1. penataan areal;
   2. Pemanfaatan Hutan;
   3. rehabilitasi hutan; dan
   4. perlindungan dan pengamanan hutan;
c. pengembangan kewirausahaan; dan
d. monitoring dan evaluasi.

Rencana disusun dengan memperhatikan kearifan lokal, potensi hutan, peluang pasar dan aspek pengarusutamaan gender serta mempertimbangkan rencana pengelolaan hutan jangka panjang.

RKPS memuat:
a. gambaran umum;
b. rencana kegiatan; dan peta rencana kelola.

Kegiatan pengembangan usaha dapat difasilitasi oleh Kementerian, kementerian/lembaga, dan dinas provinsi terkait, lembaga swadaya masyarakat, Pendamping/ penyuluh/penyuluh Kehutanan swadaya masyarakat, Pokja PPS, dan perguruan tinggi.
Kegiatan pengembangan usaha Perhutanan Sosial meliputi:
a. penguatan kelembagaan;
b. Pemanfaatan Hutan;
c. pengembangan kewirausahaan; dan
d. kerja sama pengembangan usaha.

Pemanfaatan Hutan

1. Pemanfaatan Hutan pada areal kerja Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK meliputi:
   a. Pemanfaatan Hutan pada Hutan Lindung.
   b. Pemanfaatan Hutan pada Hutan Produksi.
2. Pemanfaatan Hutan pada areal kerja Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK dapat dilaksanakan dengan pola wana tani atau agroforestry, wana ternak atau silvopastura, wana mina atau silvofishery, dan wana tani ternak atau agrosilvopastura. sesuai dengan fungsi hutan dan jenis ruangnya.
3. Pemanfaatan Hutan dengan pola wana tani atau agroforestry dilaksanakan dalam bentuk jalur.
4. Pemanfaatan Hutan dengan pola kegiatan silvofishery, luas budi daya ikan/udang (tambak) paling banyak seluas 30% (tiga puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK.

5. Pemanfaatan Hutan dengan pola kegiatan agrosilvopastura, luas budi daya tanaman semusim paling banyak/lebih kurang seluas 20% (dua puluh persen) dapat ditanami tanaman pakan ternak.
6. Pemanfaatan Hutan pada Hutan Lindung dengan pola tanam: a. tanaman kayu non fast growing species untuk perlindungan tanah dan air seluas 20% (dua puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK; b. tanaman multi guna/Multi Purpose Trees Species (MPTS) seluas 80% (delapan puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK; dan c. tanaman di bawah tegakan berupa tanaman selain jenis umbi-umbian dan/atau tanaman lainnya yang menyebabkan kerusakan lahan.
7. Pemanfaatan Hutan pada Hutan Produksi dengan pola tanam: a. budi daya tanaman pokok hutan seluas 50% (lima puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK; b. budi daya tanaman multi guna/Multi Purpose Trees Species (MPTS) seluas 30% (tiga puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK; dan c. budi daya tanaman semusim seluas 20% (dua puluh persen) dari luasan areal Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK.
8. Program rehabilitasi hutan dan lahan dapat dilaksanakan pada Persetujuan Pengelolaan Perhutanan Sosial pada KHDPK.
9. Pelaksanaan program rehabilitasi hutan dan lahan dilakukan sesuai dengan ketentuan peraturan perundang-undangan.

Pemanfaatan Hutan pada Hutan Lindung pada ruang perlindungan meliputi kegiatan:

a. pemanfaatan air untuk kebutuhan Masyarakat Setempat.
b. pemulihan lingkungan berupa rehabilitasi hutan pada areal terbuka.
c. penyerapan dan/atau penyimpanan karbon.

Kegiatan pemungutan hasil hutan bukan kayu meliputi:

a. madu;
b. getah;
c. buah;
d. biji;
e. jamur;
f. daun;
g. bunga; dan/atau
h. sarang burung walet.

Kegiatan pemanfaatan Hutan pada Hutan Lindung pada ruang pemanfaatan dilakukan melalui kegiatan:

a. budi daya tanaman obat;
b. budi daya tanaman hias;
c. budi daya jamur;
d. budi daya lebah;
e. budi daya hijauan makanan ternak;
f. budi daya buah-buahan dan biji-bijian;
g. budi daya tanaman atsiri;
h. budi daya tanaman nira;
i. penangkaran satwa liar; dan/atau
j. rehabilitasi satwa.

Kegiatan pemanfaatan jasa lingkungan meliputi kegiatan:

a. pemanfaatan jasa aliran air;
b. pemanfaatan air;
c. wisata alam;
d. pembangunan sarana prasarana wisata alam;
e. perlindungan keanekaragaman hayati;
f. pemulihan lingkungan; dan/atau
g. penyerapan dan/atau penyimpanan karbon.

Pengembangan Kewirausahaan

Pengembangan Kewirausahaan meliputi kegiatan:

a. peningkatan produksi;
b. peningkatan nilai tambah produk;
c. promosi dan pemasaran produk; dan
d. akses permodalan.

Akses Permodalan

Akses permodalan dapat diperoleh melalui:

a. bantuan pemerintah/lembaga;
b. pinjaman lembaga perbankan dan lembaga keuangan lainnya;
c. corporate social responsibility badan usaha milik negara, badan usaha milik swasta, atau pihak lain;
d. bantuan modal usaha badan usaha milik negara atau badan usaha milik daerah;
e. dana hibah; dan/atau
f. lembaga filantropi.

Dari beberpa kegiatan pengelolaan kawasan Hutan sosial yang diberikan pemerintah untuk dikelola oleh masyarakat sebagai wujud

peran pemerintah dalam meningkatkan kesejahteraan masyarakat sekitar kawasan hutan/hutan adat, adalah dibutuhkan permodalan, masalah ini menjadi salah satu hambatan masyarakat pengelolaan kawasan hutan yang diprogramkan oleh pemerintah. Agar terhindar dari kekuasaan dan monopoli pemilik modal, maka pemrintah harus berperan memberikan solusi nyata dalam melindungi masyarakat sekitar hutan/hutan adat

Berdasarkan laporan Asep Setiawan (Kompas.id 19 Februari 2023) dari perhitungan nilai transaksi ekonomi perhutanan sosial pada 5 persen KUPS, nilai transaksi yang bergulir mencapai Rp 117,59 miliar atau dikonversi total mencapai Rp 1,98 triliun. Pada 2022 telah dibentuk inovasi pengembangan usaha yang berskala ekonomi dan hilirisasi produk melalui integrated area development (IAD). Hal ini untuk meningkatkan skala ekonomi dan nilai tambah komoditas yang dilakukan terintegrasi dan kolaborasi dengan berbagai pemangku kepentingan. Jumlah IAD yang ditetapkan pada tahun 2022 adalah 20 lokasi di 15 provinsi.

Menurut KLHK, luas hutan adat yang telah ditetapkan 148.488 ha, bagi 105 komunitas masyarakat adat.[269] Indikatif hutan adat seluas 988.393 ha dari 50 usulan (2022). Di luar peta indikatif terdapat 33 usulan baru yang diterima KLHK. Total permohonan dari masyarakat 83 usulan. Sementara anggaran tahun 2023 hanya tersedia untuk 15 surat keputusan hutan adat.

Secara kualitatif, perhutanan sosial meningkatkan rasa memiliki warga terhadap hutan sehingga warga sekitar lebih menjaga kelestarian hutan untuk layanan alam. Pandangan baik warga sekitar hutan terhadap pemerintah dalam membuka kesempatan bagi warga untuk ikut mengelola hutan.

Selain itu, kesempatan kerja dan naiknya produktivitas ekonomi di pedesaan karena pengakuan terhadap penguasaan tanah warga di dalam kawasan hutan. Perhutanan sosial membuka kesempatan bagi warga sekitar hutan untuk meningkatkan pendapatan dari pengelolaan tanah di dalam hutan.

Terjaganya kualitas lingkungan dan terhindarnya hutan dari tindakan pembalakan liar yang merugikan ekonomi negara dan merusak kualitas lingkungan. Meningkatnya kesadaran warga penerima akses perhutanan sosial terhadap kewajiban melestarikan hutan dan mitigasi perubahan iklim.

Pada 2023 hingga 2030 telah ditetapkan target percepatan perhutanan sosial melalui distribusi akses legal 12,7 juta ha,

[269] https://www.kompas.id/label/masyarakat-adat?track_source=automate_body_url

penambahan pendamping sebanyak 25.000 orang, pembentukan 25.000 KUPS, pembentukan percontohan IAD minimum satu per kabupaten, percepatan peningkatan kelas KUPS, dan meningkatnya kontribusi menjaga lingkungan hidup.

Banyaknya rambu-rabu yang harus dilewati dalam persyaratan pengajuan perhutanan sosial, bisa diartikan sebagai alat untuk meredahkan konflik struktural yang melebeli pemerintah yang cendrung berpihak pada kepentingan para pengusaha, ketimbang masyarakat adat.

Kebijakan perhutanan sosial semata-mata kebijakan untuk kepentingan masyarakat setempat, investor, serta kepentigan pemerintah dalam peningkatan pendapatan negara. Akibatnya bagaimana dengan keberadaan masyarakat hukum adat, yang pemerintahan daerahnya blum membuat peraturan daerah. Apabila belum ada peraturan daerah masyarakat hukum adat, maka tujuan perhutanan sosial untuk menyelesaikan masalaha lahan tenurial dan keadilan bagimasyarakat adat hanya sebuah mimpi.

Masalah lain muncul, bagaimana perhutanan sosial menjadi program prioritas pembangunan daerah jangka panjang, jika kebijakan perhutanan sosial masih belum terjadi di sebagian besar provinsi di Indonesia.

Gerakan masif skema Hutan Adat.

Batas luasan dan lokasi hutan adat dapat dilihat ketentuan pasal 1 huruf f UU No.41/1999 yang menyebutkan bahwa hutan adat adalah hutan negara yang berada didalam wilayah masyakarakat hukum adat. Ketika membangun skema hukum adat diharapkan ada kepastian proses tranpormasi pengetahuan soal nilai-nilai tradisional dengan berbagai kearifan lokal. Gerakan masif skema Hutan adat diupayakan bertumpuh pada: (1) Revitalisasi semangat kepemilikan secara komunal, (2) Tidak dialihkan menjadi kepemilikan pribadi anggota asyarakat Hukum adat (3)Tidak menjual/mengalihkan kepemilikan kepada masyarakat luar desa/adat (4)membangun visioner melalui penyiapan lokasi destinasi unggulan, dan (5)mewariskan asset adat dengan penyiapan lapangan pekerjan baik anak cucu. [Khusnul Zaini:2021]

Perhutanan sosial merupakan program yang implementasinya rumit dengan kompleksitas tinggi. Setidaknya ada tiga pilar jika perhutanan sosial ingin mencapai target seluas itu:a) masyarakat di dalam dan sekitar hutan yang mau dan mampu membentuk kelompok tani, b) kesiapan, kemampuan, dan ketrampilan penyuluh kehutanan serta pendamping petani hutan sosial, dan c) kesiapan, kemauan, dan

kemampuan pemerintah memfasilitasi (perizinan, permodalan, pemasaran)

Simpulan

Dikeluarkannya Peraturan Menteri Lingkungan Hidup dan Kehutanan No. 4 tahun 2023 tentang Pengelolaan Perhutanan sosial pada kawasan hutan dengan pengelolaan khusus merupakan bentuk peran Negara dalam pengembangan ekonomi masyarakat adat untuk kesehateraannya. Kebijakan ini juga harus memperhatikan kearifan lokal yang terbebas dari kontaminasi budaya kota dan intervensi kebijakan pemerintah dengan alasan pertumbuhan dan pemerataan pembangunan wilayah pedesaan merupakan skema ideal bagi masyarakat hukum adat. Karena masyarakat adat pada dasarnya memiliki strategi konservasi tradisional yang teruji, karena mereka dapat bertahan hidup dengan cara dan kerifan tradisionalnya. Dengan mengembalikan eksistensi dan menghormati keputusan komunal mereka adalah langkah bijak bagi pemerintah untuk turut berperan mensejahterakan masyarakat adat.

Masyarakat adat tidak memiliki batasan untuk mengukur kesejahteraan hidup hingga kemakmurannya, karena itu masyarakat adat tanpa harus dipaksa menyesuaikan tingkat kesehteraannya susuai dengan kebijakan pemerintah dengan amanat konstiitusi yang dikeluarkan.

Kebijakan perhutanan sosial bagi masyarakat sekitar hutan/hutan adat diharapkan ada kepastian proses transformasi pengetahuan tentang nilai-nilai tradisional dengan berbagai kearifan lokal dan pemanfaatan hasil bumi dan lingkungan alam dengan keseimbangan berbasis kelestarian alam, tanpa dikuasai oleh hegemoni oligarki.

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State And Company Responsibilities Toward the Indigenous People Around the Mine
(Study on Bati Tribe Communities in Maluku Province)

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Abstrak

Pengaturan tentang pemanfaatan wilayah ulayat masyarakat hukum adat telah diatur dengan jelas dalam Undang-Undang Migas, bahwa dalam kegiatan usaha migas tidak dapat dilaksanakan pada tempat pemakaman, tempat yang dianggap suci, tempat umum, sarana dan prasarana umum, cagar alam, cagar budaya serta tanah milik masyarakat hukum adat. Faktanya kegiatan usaha pertambangan migas cenderung dilakukan di wilayah masyarakat hukum adat. Demikian halnya yang dilakukan usaha pertambangan migas kerjasama PT. Balam Energy dan PT. Bureau Geophysical Prospecting (BGP) di wilayah keramat atau yang dianggap sakral oleh masyarakat suku Bati di Provinsi Maluku, tanpa mendapat persetujuan dari masyarakat setempat, sehingga menimbulkan konflik. Penulisan ini dilakakukan dengan berpedoman pada metode penelitian sosio-legal yakni pendekatan interdisipliner yang merupakan hibrida dari studi besar tentang ilmu hukum dan ilmu-ilmu tentang hukum dari perspektif kemasyarakatan yang lahir sebelumnya yakni pendekatan antropologi hukum. untuk mencapai tujuan yakni adanya pengakuan dalam bentuk regulasi terhadap eksistensi masyarakat hukum adat dan sumber daya alam dalam kaitannya dengan kegiatan usaha migas pada wilayah ulayat masyarakat hukum adat, untuk menjamin tanggung jawab negara dan pelaku usaha pertambangan migas bagi masyarakat hukum adat.

Kata Kunci: *Tanggung Jawab, Negara, Perusahaan pertambangan, dan Masyarakat Hukum Adat*

Abstract

Arrangements regarding the utilization of customary lands of customary law communities have been regulated in the Oil and Gas Law, that oil and gas business activities cannot be carried out at cemeteries, places that are considered sacred, public places, public facilities and infrastructure, nature reserves, cultural reserves and land to the customary law community. The fact is that oil and gas mining business activities tend to be carried out in the territory of customary law communities. Likewise, the oil and gas mining business in cooperation with PT. Balm Energy and PT. Bureau of Geophysical Prospecting (BGP) in sacred areas or those considered sacred by the Bati people in Maluku Province, without obtaining approval from the local

community, causing conflict. This writing was carried out by referring to the socio-legal research method, namely an interdisciplinary approach which is a hybrid of a major study of legal science and the science of law from a societal perspective that was born earlier, namely the legal anthropological approach. to achieve the goal, namely, the existence of recognition in the form of regulations on the existence of indigenous peoples and natural resources regarding oil and gas business activities in the customary areas of customary law communities, to guarantee the responsibility of the state and oil and gas mining business actors for customary law communities.

Keywords: *Responsibility, state, mining companies, and Indigenous Peoples*

1. Introduction

The state's responsibility to the people is motivated by the mandate of the 1945 Constitution (1945 Constitution). In the Preamble of the 1945 Constitution IV, paragraph stipulates that: the Indonesian State Government aims to protect the entire Indonesian nation and all of Indonesia's bloodshed, to promote public welfare, educate the nation's life, and participate in carrying out world order based on freedom, eternal peace, and social justice. About these objectives, especially regarding the national economy and social welfare, all potential owned by the state is controlled and managed by the state, as mandated by Article 33 of the 1945 Constitution in paragraphs (2) and (3) that;

Paragraph (2): The branches of production which are essential for the state and which affect the life of the people at large, are controlled by the state.

Paragraph (3) Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.

This provision represents the purpose of the state given to the government based on the right to control the state, control by the state to regulate (regulate), manage (permit) and supervise (repressively and preventively) the use of natural resources. Thus, the role of the state is needed for economic potentials that concern the interests of the people.

"The role of the state is essential for economic activities that concern the interests of many people's lives. The concept of state tenure rights in Article 33 of the 1945 Constitution is based on: (a) considerations of economic democracy, (b) to avoid the accumulation of production and falling into the hands of influential individuals, and

(c) to avoid the oppression of the people at large by those who are economically and very strong politics.[270]

Therefore, the conception of the right to control by the state should be interpreted as an instrument of authority, not ownership. Ownership of natural resources in the territory of the Republic of Indonesia belongs to the people of Indonesia. The authority of the Government to carry out state responsibilities regulates the management of natural resources for the greatest possible prosperity of the people, as the goal of the Republic of Indonesia, so that the results of managing natural resources can be enjoyed by all Indonesian people.

Regarding mining management in Indonesia based on Law Number 11 of 1967 concerning Basic Mining Provisions, Article 1 stipulates that;

"All minerals contained in Indonesian mining areas, which are natural deposits, as a gift from God Almighty, are the natural wealth of the Indonesian nation and therefore are controlled and used by the state for the greatest prosperity of the people".

The Mining Advocacy Network (JATAM) noted that there were 45 cases of mining conflicts in 2020. This number has increased compared to the number of cases that occurred in 2019 where only 11 cases occurred. As of 2014-2019 there were 116 recorded mining conflicts, with an area of mining conflicts throughout 2020 reaching 71.46 hectares.[271]

The facts also show that mining problems include the issuance of permits that ignore the risk aspects of natural disasters. As noted in JATAM's year-end records, 104 mining concessions are located in disaster-risk areas such as earthquakes, floods, and tsunamis. The South Kalimantan region, for example, has 814 mining pits that contribute to flooding. In addition, from the forestry perspective, in terms of leasing to use forest areas (SIPKH), as of June 2020 there were 1,034 units of permits to borrow and use forest areas (IPPKH) in 34 provinces covering an area of 500 thousand hectares, including in Maluku. IPPKH is a permit to use a forest area that is granted by an official at the ministerial level for non-forestry purposes, including oil palm and mining. Licensing issues also have the potential to cause conflicts of

[270]Abrar saleng, *Hukum Pertambangan,* UII Press, Yogyakarta, 2004. hlm.34
[268] Andita Rahma, *JATAM Nasional Catat ada 45 Konflik Tambang Sepanjang 2020*, https://nasional.tempo.co/read/1426234/jatam-nasional-catat-ada-45-konflik-tambang-sepanjang-2020, diakses tanggal 16 Juli 2023

interest between ministries, political elites and corporations in the mining sector.[272]

Mining conflicts, as happened in other areas, also occurred in Maluku Province. Maluku Province with an area of 712,480 km2 where the sea area is more dominant than the land area, which is 54,184 km2 or only about 7.4 percent of the land area includes 1,412 islands. Most of these islands were formed from volcanic processes causing Maluku to become one of the provinces in Indonesia with great potential in the mining sector which until now has not been optimally developed.[273] These potentials include gold on Lirang Island, kaolin, quartz sand, sulfur, lime, pumice, asbestos, manganese, copper, chromium, and other mineral materials spread across forty mining locations in Maluku, besides that there is also oil and gas potential. which is located on the Tanimbar Islands with the block Masela, the Aru Islands, Buru Island and Seram Island.[274]

Specificall for Seram Island, recently the Special Task Force for Upstream Oil and Gas Business and Cooperation Contract Contractor Citic Seram Energy claimed to have found 15.02 million cubic feet of gas on Seram Island.[275] In addition to these discoveries, various explorations have also been carried out at various points of the area that have the potential to contain oil and gas on Seram Island, one of the areas, namely oil and gas exploration carried out by PT. Balam Energy Limited and PT. Bureau of Geophysical Prospecting (BGP).

These two companies are companies from Australia that are exploring sacred areas where the Bati people believe that their ancestors reside. The areas where exploration activities have been carried out include the jurisdictions of Bati Kelusy and Bati Tabalean, East Seram Regency, and Maluku Province.

The Bati tribe is an alliance of customary law communities located in hamlets called tana (land) Bati which includes coastal areas,

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[272]Ady Theo DA, *Catatan Akhir Tahun Jaringan Advokad Tambang*, https://www.hukumonline.com/berita/a/ini-empat-jenis-konflik-pertambangan-sepanjang-tahun-2020-lt600ff8e000976/?, diakses tanggal 16 Juli 2023

[273]Maluku Energi Abadi, Peta Pertambangan di Provinsi Maluku, https://mea-maluku.com/bisnis-kami/pertambangan-mineral/pertambangan, diakses pada 20 Juli 2023

[274]Rindang Kurniawan, Potensi Pertambangan di Kepulauan Maluku, https://www.scribd.com/document/469999860/Potensi-Pertambangan-Di-Kepulauan-Maluku#, diakses pada 20 Juli 2023

[6]Kementerian Pendayagunaan Aparatur Negara dan Reformasi Birokrasi, SKK Migas Temukan 15,02 Juta Kaki Kubik Gas di Pulau Seram, **https://www.menpan.go.id/site/berita-terkini/berita-daerah/skk-migas-temukan-15-02-juta-kaki-kubik-gas-di-pulau-seram**, diakses pada 21 Juli 2023

hillsides, and mountains which in the Bati concept is called territory (*watas nakuasa*). The Bati tribe or the Bati people (a term according to the perception of the people of Maluku) with a fairly broad territory covering the customary territory of weuartafela Kian Darat, Kelbarin in Waru, kwairumaratu centered in Kelimuri.[276]

Land in the view of the Bati tribe is the entire territory (*watas nakuasa*) that territory stretches from the village or hamlet of Madak to the village or hamlet of Uta or Utafa, and the village or hamlet of Kileser to the village or hamlet of Bati Kelusi (start Bati). For the land is life because in their view the Bati ancestors never die and still live side by side with them in the Bati tribe's territory (*watas nakuasa*). Because lives cannot be owned by other people and lives cannot be replaced with anything, people outside the Bati tribe cannot enter the territory without the constant knowledge of the head of the alliance. [277] This shows that the territory of the Bati people/Bati people is a sacred area that describes the relationship between the Bati people and the social environment in the Bati lands in a chain that unites the land and magical religious aspects that are interrelated.

In connection with the exploration activities carried out by PT. Balam Energy Limited and PT. BGP which was carried out in the Bati tribe's territory without the approval and permission of the Bati people was considered a serious violation because carrying out land drilling activities meant taking lives, so it was met with resistance from the Bati people. State policy through granting mining business permits without involving the community to approve land acquisition, and providing information to the public regarding state interests due to the right to control by the state, adds to the conflict-triggering factors.

2. Methods

This writing was carried out based on Socio-Legal research, namely research with an interdisciplinary approach which is a hybrid of major studies of law and the sciences of law from a societal perspective that was born earlier.[278] By using a legal anthropological approach that provides an analysis of how social and political factors affect the performance of legal institutions in interpreting and applying the law. Starting from the problems studied, in solving problems, researchers are

[276]Pieter Jacob Pelupessy, *Esuriun Orang Bati*, Universitas Satya Wacana, Salatiga, 2012, Hlm 186-187
[277]Ibid
[278]Sulistiowaty irianto, *Memperkenalkan Studi Sosio Legal dan Implikasi Metodologisnya*, 2009, http://bphn.go.id/data/documents/materi_cle_8_yg_ke-2prof_dr_sulistyowati_irianto.pdf, diakses pada selasa 21 Maret 2023

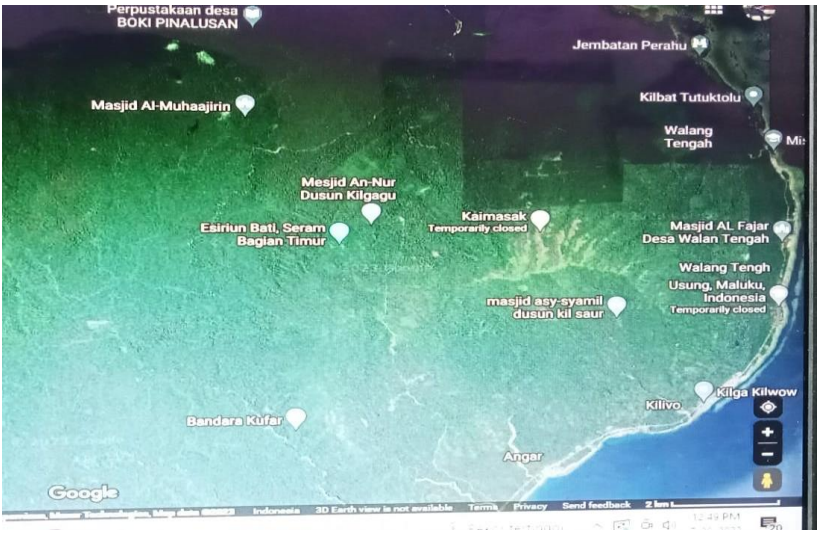
guided by a descriptive qualitative approach. This research was conducted on the Bati tribe, namely the Kelusi Bati tribe and the Tabalean Bati tribe, Kian Darat, which includes two villages, namely Watu-Watu Village and Kelaba Village, Kian Darat District, East Seram District. The entire data collected through interview techniques, observation, and collection of library materials will then be sorted based on their relevance to the problem, then it will be presented scientifically without covering up the deficiencies, then. Then they will look for answers as a conclusion.

3. Finddings and Discussions

3.1. Finddings

3.1.1. Overview of Research Locations

The Bati tribe or the Bati people are an alliance of customary law communities located in East Seram Regency, Maluku Province. The Bati tribe calls their area of residence "tana Bati" (Bati land) which stretches from the coast to the mountains, covering the Weurartafela customary territory in Kian Darat, East Seram District, and Kilimoi Village, as well as Tutuk Tolo District, Eastern Seram District.



Picture 1. Map of the Bati tribal area

Socially, there are four groups of Bati people who inhabit the Weurartafela customary area, namely the Early Bati, Central Bati, Dalam Bati, and Pantai Bati. Among the four groups of Bati people, only the starting Bati (Bati Kelusi) can use the name Bati to refer to their place of residence.

The Bati tribe inhabits the Eastern Seram region. Until now, most of the Bati tribe's territory still consists of wilderness, but that does not mean that the land has no owner. All Bati land areas, both residential areas and wilderness areas, have owners, namely those belonging to certain clans as owners and rulers who control the Bati tana area (Bati land).

The existence of the Bati tribe and its territory for the people of Maluku is generally considered a sacred thing, even containing the meaning of pamali or taboo, has a mystical value that is framed in the myth that the existence of the Bati tribe is generally considered non-human for people in Maluku. They are understood as people who can disappear (missing people) so they should not be called in vain.

Based on this research, it was found that the Bati people, or the Bati people as they call themselves, are not creatures that can disappear (missing people) or monstrous creatures like bats that are scary and prey on other humans as seen by people outside the tribe. The Bati tribe or the Bati people are a community of indigenous peoples who exist and live together with nature which is their territory (*watas nakuasa*).

Administratively, the Bati tribe is in the administrative area of Kian Darat District, which is led by the adat with the title of king. Based on the data collected in 2022, the Bati people are 6288 people with a larger male population, namely 3211 people while the female population is 3077 people.[279]

This entire population is spread throughout the territory of the Bati tribe both in the mountains and on the coast as a wall or guardian of the "tana Bati" (Bati land) with customs, identity, language, and all matters related to the life of the Bati tribe about interactions between tribal peoples. Bati with nature and with people outside the Bati tribe, as an act of survival (survive), which is called "*Esurium of the Bati Tribe*".[280]

The distribution of the Bati people as a stronghold protecting the territory is based on living values related to the territory, that the relationship between the Bati tribe and the territory is the relationship between the Bati's children and grandchildren and their ancestors so that for them the area where they live and live is a living area. Thus, they have a unified relationship with nature, especially forests and land. In their view, the sacred ground is animate by it. Life cannot be exchanged whit anything, life cannot be damaged by anyone. Destroying nature, in

[279]Kabupaten Seram Bagian Timur Dalam Angka Tahun 2022
[280]Pieter Jacob Pelupessy, Op Cit, hlm 101

this case, forests (*esu*) and land, means destroying the lives or bodies of the Bati tribe.

3.1.2. Mining Conflict in the Customary Territory of the Bati Tribe

"Tana Bati" (Bati Land) has abundant natural resource potential. One potential that later became the object of conflict was that beneath the soil layer belonging to the Bati tribe, there were oil and gas deposits. Therefore, based on the exploration permit held by PT. Balam Energy Limited and PT. Bureau Geophysical Prospecting (BGP), it conducts oil and gas exploration activities in the area.

Before carrying out exploration or survey activities on points suspected of having oil deposits, the two companies coordinate with the local government, in this case, the Regent and related offices. However, the Regional People's Representative Council (Dewan Perwakilan Rakyat Daerah or DPRD) of East Seram Regency, as a legislator in the area which is also a regional government unit, is not involved in the coordination process, so the DPRD is not aware of the activities of PT. Balam Energy Limited and PT. BGP in East Seram District. The DPRD only found out about the existence of the two companies after the conflict occurred. The results showed that the activities of PT. Balam Energy Limited and PT. BGP in the Bati tribe area without going through a process of requesting approval from the Bati tribe. The company only conducted outreach to the community, which involved hamlet heads, Raja Kian Darat, the sub-district head of Kian Darat, the head of the police for the Kian Darat sector, and the commander of the military district of Kian Darat. [281] However, according to the community, the company has been active in logging trees to build camps and helipads and has even conducted surveys at several points before carrying out socialization.[282]

After the socialization, the company then continued exploration activities by drilling holes at several predetermined points. This activity then caused problems with the community, especially the Bati Kelusi (start Bati) and Bati Tabalean people. There were three drilling points at a location considered sacred on Mount Bati, which then caused unrest in the community. Therefore, they performed a meaningful traditional ritual to cool the ground (fakariki ritual). This ritual aims to avoid the anger of the ancestors because the company has harmed the land.[283]

Starting from the view of the Bati people that their customary territory is considered alive and sacred, while exploration activities will

[281]Interview whit king of Kian Darat, 24 July 2023
[282]Interview whit Mr. J, a community leader of the Bati Kelusi tribe, 25 July 2023
[283] interview whit Mr. A, a community leader of the Bati Tabalean tribe, 25 July 2023

damage the environment of their customary territory, the community rejects mining activities in any form, both exploration and exploitation of oil and gas.

3.2. Discussion

3.2.1 State Responsibilities to Mining Circle Customary Law Community

Article 33 (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution), stipulates that the branches of production which are essential to the state and which affect the life of the masses are controlled by the state. Likewise, the land, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people. The mining sector is a non-renewable and strategic natural resource that is important to be controlled by the state so that its management is carried out optimally and its utilization is for the greatest prosperity of the people.

Controlled by the state, is interpreted as the right of control by the state over natural resources to regulate their allocation for the greatest possible prosperity of the people, as stated in the 1945 Constitution of the Republic of Indonesia. Likewise, the natural resources contained in the territory of the Republic of Indonesia belong to the Indonesian nation, so, control by the state over natural resources is; to regulate (regelen), administer (besturen), supervise (toezichthhouden), and use them optimally for the prosperity of the people so that an increase in welfare for the community is realized. Thus, the government is given the authority to regulate, manage and supervise, through establishing policies to determine the use, utilization of natural resource rights, and supervision of the management and utilization of natural resources.

Based on Article 4 paragraph (2) of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining, it stipulates that state control over mining is held by the Central Government.

Based on the state's right to control, it creates a form of state responsibility for the management and utilization of mining for the community and the surrounding environment. Considering that mining natural resources in Indonesia are unrenewable resources, vital commodities that control the livelihoods of many people and have an important role in the national economy, its management is carried out optimally for the greatest prosperity and welfare of the people. This means that through mining, the state is responsible for realizing the maximum prosperity of the people. For this reason, the management

and utilization of mining should not create a "discourse about the sad burden of suffering" for the community and the surrounding environment, because there are those who "get their springs", and "the community gets tears", as a result of the community losing their lives, their nature that has become their source of life. source of livelihood for his life. This phenomenon has become a portrait of the life of mining circles, resulting in conflict as a form of rejection by indigenous peoples of mining business activities in their area.[284]

In addition, the form of state responsibility in the mine circle is to protect the interests of life for future generations, as the goal of sustainable development. Therefore, a wise and prudent attitude as well as caution is needed in implementing mining business activity management policies. Legal arrangements are important to becoming the "commander in chief" for investment activities in the mining sector. The law, according to Roscoe Pound[285], functions as a tool of social engineering. As an instrument of community renewal (agent of change), the law must be by the ideals of social justice so that the law can be obeyed by society.[286]

Governments based on law, of course, will give birth to guarantees for the protection of people's rights. Philipus M. Hadjon argued that, as a rule of law, the government has the responsibility to provide legal protection to the public. Furthermore, according to Hadjon, legal protection is divided into; preventive and repressive protection. The purpose of preventive protection is to prevent disputes from occurring. While the purpose of repressive protection is to resolve disputes.[287]

Forms of preventive protection for the community by the government in mining activities by establishing laws and regulations in the mining sector, namely government Law Number 22 of 2001 concerning Oil and Gas (Oil and Gas Law) and government policies in the mining sector have become legal rules to protect the community and the surrounding environment so that the greatest possible prosperity for the community can be realized.

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[284]Ermy Ardhyanti, *Anomali Konflik Pertambangan dan Pemenuhan hak-Hak Masyarakat Adat di Indonesia*, https://article33.Indonesia.or.id/opini, diakses tanggal 2 Agustus 2023
[285]Roscoe Pound, *An Introduction to the Philosophy of law*, Yale Uniersity Press, 1972
[286]Tyler Room R, *Why People Obey the Law,* Princeton University Press, Princeton and Oxford New Jersey, 2006, hal.14
[287]Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat,* Bina ilmu Surabaya, 1987, hal.84

Even though the provisions of laws and regulations have regulated the use of customary land for mining purposes, until now mining cases involving companies and indigenous peoples have continued to occur. Likewise, oil and gas exploration activities carried out by PT. Balam Energy Limited and PT. The Geophysical Bureau (BGP) is considered to have hurt and disrespected the Bati tribal customary law community unit as the owner of the Mount Bati area. Licensing procedures that are centered on the central government ignore customary law communities, which tend to cause conflicts.

Another problem is that there are no regulations in the regions that protect indigenous peoples, related to their rights to customary territories and natural resources. The absence of recognition and protection of indigenous peoples in the regions is rooted in the absence of strong recognition of the rights of indigenous peoples to land, territories, and natural resources in a law that specifically regulates the recognition and protection of indigenous peoples.

Constitutionally, the State's recognition and respect for indigenous and tribal peoples is regulated in Article 18B paragraph (2) of the 1945 Constitution, which; "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law." However, arrangements related to state recognition and protection of indigenous and tribal peoples are still scattered in various related laws. Therefore, as a form of state responsibility, the state should provide preventive legal protection for indigenous peoples and their ulayat territories and natural resources, with a provision in the law that specifically regulates the recognition and protection of indigenous peoples.

3.2.2. Corporate Responsibility towards Communities in the Mine Area

Philosophically, Article 33 of the 1945 Constitution has become a norm of the values contained in the Fourth Paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia, regulating the basics of the economic system, or the arrangement of the pre-economy and economic activities desired in the Republic of Indonesia. The basics of the economy and economic activity are determined with the aim of

realizing social welfare. Social welfare is a community right that should be received from economic activities carried out through investment.[288]

Therefore, economic activity is not oriented solely to the interests of the company, to pursue profit/profit only, but is attached to responsibility for the utilization of resources and the environment, so that economic activities can lead to the state's goal of realizing the greatest prosperity of the people. According to Bagir Manan, to realize the maximum prosperity of the people, the state's obligations are:[289]

1. All forms of utilization (earth and water) as well as the results obtained (natural wealth), must significantly increase the prosperity and welfare of the community.
2. Protect and guarantee all the rights of the people contained in or on the earth, water, and certain natural resources that can be produced directly or directly enjoyed by the people.
3. Prevent any action by any party that will cause people to not have the opportunity or will lose their rights to enjoy wealth.

The embodiment of this state goal, then implemented in government policies towards investment activities in Indonesia, including mining business activities, is to accelerate and articulate the interests of the community in a systematic and continuous or sustainable manner, to realize the greatest prosperity and prosperity for the community. This is the basis of the mining management company's responsibility to comply with all government policies in the mining sector.

In connection with corporate responsibility to society in mining activities, the Government has regulated a form of corporate responsibility, known as Social and Environmental Responsibility, as a translation of Corporate Social Responsibility (hereinafter referred to as CSR). Pablo Nieto explained the reasons for the need for CSR to be regulated by state law. First, that the state has a role to regulate corporations and, second, legal arrangements are needed to clarify the definition of CSR, implementation measures and standardization in the audit system.[290]

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[288]Nancy Silvana Haliwela, *Esensi Pengawasan Pemerintah Daerah Pada Pelaksanaan Tanggung Jawab Sosial dan Lingkungan Perseroan Terbatas,* Disertasi Ilmu Hukum, Fakultas Hukum, Universitas Hasanuddin, Makassar, 2021, hal. 145
[289]Abrar Saleng, *Hukum Pertambangan*, Op Cit, hal.117
[290]Mukti Fajar MD, *Tanggung Jawab Sosial Perusahaan di Indonesia,* Pustaka Pelajar, Yogyakarta, hal.104.

In relation to the responsibilities of mining companies to society, mining management companies are burdened with social and environmental responsibilities, as required in Article 74 of Law Number 40 of 2007 concerning Limited Liability Companies (UU PT), social and environmental responsibility according to Article 1 number 3 UU P, stipulates that;

"Social and environmental responsibility is the Company's commitment to participate in sustainable economic development in order to improve the quality of life and the environment that is beneficial, both for the Company itself, the local community, and society in general."

Furthermore, it is regulated more specifically, regulated in Article 74 of the Company Law concerning Social and Environmental Responsibility, stipulates that;

Paragraph (1) *Companies that carry out their business activities in the field of and/or related to natural resources are required to carry out Social and Environmental Responsibility.*

Paragraph (2) *Social and Environmental Responsibility as referred to in paragraph (1) is an obligation of the Company which is budgeted for and calculated as the cost of the Company whose implementation is carried out with due observance of decency and fairness.*

Paragraph (3) *Companies that do not carry out the obligations as referred to in paragraph (1) are subject to sanctions in accordance with the provisions of the laws and regulations.*

Paragraph (4) *Further provisions regarding Social and Environmental Responsibility are regulated by Government Regulation.*

Furthermore, in Law Number 22 of 2011 concerning Oil and Gas, the Oil and Gas Law, although it does not specifically regulate the obligations and responsibilities of oil and gas mining companies, Article 11 paragraph (3) of the Oil and Gas Law confirms that companies through cooperation contracts must carry out the development of the surrounding community and guarantee the rights of indigenous peoples. With this arrangement, social and environmental responsibility is attached to the company managing mining activities. As a result of its business activities in the natural resources sector, it is

obligated to actively contribute to society and the environment as a form of compliance with applicable legal regulations.

Mining companies do not only seek profit (profit), as stated by Garry von Stage, but corporations must not only seek profit for personal gain, because corporations that are established under the law in an area, should serve the interests of the community where the law exists.[291]

The implementation of CSR by mining companies for the community and the surrounding environment should have been carried out from the start of the company's operational activities, because when companies apply for permits, CSR is already a requirement for mining permit applications. Therefore, the company has been able to communicate and build relationships with the regional government and the surrounding community, to realize the form of CSR that has been listed in the licensing document, which can then be adapted to the needs of the community and the surrounding environment and outlined in a collective agreement.

If the company consistently applies the CSR mechanism, of course, the mining company will receive support from indigenous peoples, as well as the Regional Government, because, since the beginning of the company's activities, the company has built a dialogue with local indigenous peoples, community leaders, and the Regional Government. Deliberation and company transparency regarding activities will create an investment climate that supports mining business activities. Conflicts within the mine circle can be resolved and a harmonious relationship can be built between the company and the surrounding community.

Mining companies that do not carry out CSR towards the community in the area of their business activities, by the provisions of Article 74 (3) of the Company Law, companies will be subject to sanctions according to laws and regulations. The form of the sanction refers to the provisions in Article 34 paragraph (1) of the PM Law, namely; written warning, limitation of business activities, freezing of business activities and/or investment facilities, or revocation of business activities and/or investment facilities.

In connection with the mining business activities that have been completed in the Mount Bati region which is the object of this research, PT. Balam Energy Limited and PT. BGP has carried out exploration activities in the form of surveys in areas that are considered sacred by the Bati people. So forest destruction for the construction of supporting facilities and drilling, so PT. Balam is limited and PT. BGP must

[291]Ibid hlm 13

continue to restore the environment and the community, in this case, the Bati tribal customary law community, so this form of corporate social responsibility towards the community also includes the responsibility to restore the relationship between the Bati tribal customary law community and nature on Mount Bati, bearing in mind the Bati mountain area is sacred because the forest and land are the life of the Bati tribe.

4. Conclusion

Based on the description in the discussion, it can be concluded that the state and companies in mining business activities are responsible for the community, especially the customary law community in the mining area where mining business activities are carried out. About the state, this responsibility includes legal certainty for the community through the availability of laws and regulations that guarantee legal protection for indigenous peoples, in this case, the Law on the Recognition and Protection of indigenous peoples. Companies in mining business activities are responsible to the community around the mine for the environmental and social restoration of the community. Regarding social responsibility, this responsibility also includes restoring relations between the community, especially indigenous and tribal peoples, and their natural environment, because this relationship is religious-magical.

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Ambivalence of the Principle of Material Legality in the New Criminal Code

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Abstract

The principle of legality in criminal law has so far been understood that every act can be punished if it has been regulated in law (written law). This understanding in the New Criminal Code is expanded by the existence of the principle of material legality. Article 2 paragraph (1) of the New Criminal Code is the basis for enforcing the principle of material legality, namely by giving recognition to living law (unwritten law) to determine what actions can be punished as long as they have not been determined in law. This paper will examine two things, namely how the ambivalence of the principle of material legality in the New Criminal Code and how the formulation of the principle of material legality is in accordance with living law. This paper uses insights into criminal law renewal as an instrument of analysis, so in this paper it argues that Article 2 paragraph (1) of the New Criminal Code has at first glance provided space for a living law, but if one pays attention to the elucidation of the article the application of the principle of material legality turns out to have caused ambivalence. The elucidation of the article requires that every customary crime act as a form of action that is prohibited under living law to be regulated in regional regulations. These provisions have eliminated the essence of living law as unwritten law, because regulation through local regulations is tantamount to making living law a written law. Apart from that, the concept of codification and unification which is still maintained can also cause turmoil in the nature of living law, so that the concept of legal pluralism can be used as a breakthrough in formulating the principle of material legality.

Keywords: ambivalence, living law, material legality principle, New Criminal Code

Abstrak

Asas legalitas dalam hukum pidana selama ini dipahami bahwa setiap perbuatan dapat dipidana apabila sudah diatur dalam undang-undang (hukum tertulis). Pemahaman tersebut dalam KUHP Baru diperluas dengan adanya asas legalitas materiil. Pasal 2 ayat (1) KUHP Baru menjadi dasar pemberlakuan asas legalitas materiil, yaitu dengan memberikan pengakuan terhadap hukum yang hidup (hukum tidak tertulis) untuk menentukkan perbuatan yang dapat dipidana selama belum ditentukan dalam undang-undang. Tulisan ini akan mengkaji tentang dua hal, yaitu bagaimana ambivalensi asas legalitas materiil dalam KUHP Baru dan bagaimana

rumusan asas legalitas materiil yang sesuai dengan hukum yang hidup. Tulisan ini menggunakan wawasan dalam pembaruan hukum pidana sebagai instrumen analisis, maka dalam tulisan ini berargumen Pasal 2 ayat (1) KUHP Baru sekilas telah memberikan ruang bagi hukum yang hidup, tetapi apabila diperhatikan dalam penjelasan pasal tersebut pemberlakuan asas legalitas materiil ternyata telah menimbulkan ambivalensi. Penjelasan pasal tersebut mengharuskan setiap tindak pidana adat sebagai bentuk perbuatan yang dilarang berdasarkan hukum yang hidup untuk diatur dalam peraturan daerah. Ketentuan tersebut telah menghilangkan hakikat hukum yang hidup sebagai hukum tidak tertulis, karena pengaturan melalui peraturan daerah sama saja dengan menjadikan hukum yang hidup sebagai hukum tertulis. Selain itu, masih dipertahankannya konsep kodifikasi dan unifikasi juga dapat menimbulkan gejolak dalam hakikat hukum yang hidup, sehingga konsep pluralisme hukum dapat dijadikan terobosan dalam merumuskan asas legalitas materiil.

Kata Kunci: ambivalensi, hukum yang hidup, asas legalitas materiil, KUHP Baru

1. Introduction

The principle of legality is the most important principle in criminal law. This principle regulates the source of law in determining criminal acts, criminal responsibility, and criminal sanctions. The principle of legality was created by Paul Johan Anslem von Feuerbach (1775 – 1833), he formulated an adage that reads *nullum delictum, nulla poena sine praevia legi poenali* (Hiariej, 2009). This adage means that there is no offense, no crime without prior legislation. Based on this adage, criminal law must be regulated clearly in statutes (written law), so that it is often associated with the principle of *lex certa* which obliges legislators to formulate criminal provisions as carefully and in detail as possible (Widayati, 2011).

The principle of legality that has been understood by the public is strongly influenced by the thoughts of its creator, namely Feuerbach. The public understands that the source of law in the regulation of criminal law is only the law as stipulated in Article 1 paragraph (1) of Law Number 1 of 1946 concerning Criminal Law Regulations which is commonly referred to as the Criminal Code (KUHP). The article reads, an act cannot be punished, unless it is based on the strength of existing criminal law provisions. Based on this article, determining an act as a crime must be based on existing laws, while other sources of law such as living law cannot be used as a basis for determining a crime even though the act may have a negative impact or damage.

At the beginning of 2023, the Indonesian government has enacted Law Number 1 of 2023 concerning the Criminal Code which

has become known as the New Criminal Code. The principle of legality fundamentally in the New Criminal Code is still maintained, namely by making the law a source of law to determine an act as a crime. Article 1 paragraph (1) of the New Criminal Code explains that there is not a single act that can be subject to criminal sanctions and/or action, except for the force of criminal regulations in laws and regulations that existed before the act was committed. Article 1 paragraph (2) confirms the prohibition of using analogy in determining the existence of a crime.

The New Criminal Code as a result of criminal law reform which has gone through a long process since 1963 has expanded the meaning of the principle of legality. The New Criminal Code explains the existence of a formal legality principle and a material legality principle. The principle of formal legality in question is the provision in Article 1, while the principle of material legality in question is the provision in Article 2 paragraph (1). Article 2 paragraph (1) of the New Criminal Code explains that the provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in society which determines that a person should be punished even though the act is not regulated in law. Based on this article, the New Criminal Code determines a different concept from the adage *nullum delictum, nulla poena sine praevia legi poenali* , so that living law has been given space in determining an act as a crime as long as there is no equal in law (Widayati, 2011).

The living law in the New Criminal Code has been given space to show its existence, but when one pays attention to the conditions for enacting living law there is an ambivalence about the principle of material legality in the New Criminal Code. This ambivalence can be seen in the elucidation of Article 2 paragraph (1) of the New Criminal Code that in order to strengthen the enforcement of this living law, regional regulations regulate these customary crimes. This explanation is very contrary to the nature of the living law as an unwritten law. Provisions that require customary criminal acts to be regulated by regional regulations indirectly impose living law or commonly referred to as customary law as written law. This statement is in line with the understanding of customary law as a synonym for unwritten law in legislative regulations, law that lives as a convention in state institutions (parliament, provincial councils, and so on), law that lives as rules that are maintained in social life, both in cities and towns. as well as in certain villages (Harahap, 2018).

The expansion of the material legality principle in the New Criminal Code is inseparable from the background of criminal law

reform, namely political reasons, philosophical reasons, and sociological reasons (Muhammad, 2019). Political reasons are based on the understanding that Indonesia is an independent country that should have rid itself of colonial influence, including in legal arrangements. Based on these reasons, it is only natural that every independent country has a Criminal Code which is compiled independently and reflects the political ideology of a nation in which the law develops. Philosophical reasons are based on the Criminal Code left by the colonizers made on the basis of their outlook on life, so that the arrangement will adjust to the values that exist in the life of the colonizers. This reason explains that the Criminal Code should be built on the basis of values that live in the nation itself. Sociological reasons are based on the many acts and developments in the modus operandi that have not been accommodated by the Criminal Code, so that its application has not been effective enough to deal with crimes for the welfare of society. Based on these three reasons, it is fitting for living law to become a source of law in criminal law as a form of existence and effectiveness of crime prevention in people's lives.

Indonesian criminal law reform also has three insights that must be considered. This insight includes national insight, archipelago insight, and Bhinneka Tunggal Ika insight (Muhammad, 2019). Based on these three insights then led to an expansion in the legality principle of criminal law. The national perspective directs criminal law in accordance with the goals of the Indonesian nation. The Archipelagic Insight is more directing the existence of criminal law regulations that can be applied to all regions of Indonesia. The Bhinneka Tunggal Ika insight is the insight that underlies the two previous insights, this insight directs that criminal law must be able to accommodate the diversity/diversity that exists in Indonesian society. The diversity that exists in Indonesian society is a gift from God as a form of the strength of the Indonesian nation, so this diversity needs to be maintained within the framework of unity.

Recognition of the living law in the New Criminal Code is implemented with the principle of material legality. This principle provides space for determining acts as criminal acts based on living law. These provisions are influenced by the background and insights contained in criminal law reform, so that it is clearly realized that law does not only originate from written law (statute) but law also originates from unwritten law (living law). Article 2 paragraph (1) has expressly regulated this matter, but the elucidation of the article raises ambivalence about the principle of material legality as previously stated. The regulation of customary crimes in regional regulations has

eliminated the essence of living law, so this paper will examine the ambivalence of material legality in the New Criminal Code, as well as examine the appropriate formulation in providing space for living law through the principle of material legality in criminal law.

2. Method

In principle, legal research is normative research (Marzuki, 2010), but various techniques and perspectives are used. This research uses a juridical-normative approach which examines the ambivalence in the New Criminal Code by systematically conducting a literature study on legal materials, both primary, secondary and tertiary. This study uses qualitative data analysis, namely the existing legal materials are then explained and described using logically arranged sentences. This study will present the results of the analysis in a deductive way, namely drawing conclusions from something that is general in nature, then describing it to answer the formulation of the problems in this study.

3. Findings and Discussion

Indonesian society is a very heterogeneous society, so talking about living law will bring up various forms of living law. The diversity of the Indonesian people is not an obstacle to becoming a great nation, the motto Bhinneka Tunggal Ika has shown that the diversity of the Indonesian nation is a gift that must be united to gain strength. This diversity will also relate to the development of national law, including criminal law. The development of criminal law is the creation of an integral policy concept in crime prevention, but this development will be useless if it creates criminogenic characteristics. The development will lead to criminogenic properties if (Arief, 2017):

a. Not planned rationally;
b. Planning is lame or unbalanced ;
c. Ignoring cultural and moral values; as well as
d. Does not include an integral community protection strategy.

Based on the third point above, it has been explained that in the development of criminal law, cultural and moral values must be considered. The consequence that must be accepted in a very heterogeneous Indonesian society is to pay attention to very diverse cultural and moral values. These provisions are then attempted to provide space for the living law in the New Criminal Code. The principle of material legality as the basis for providing space for living law has basically shown the characteristics of the legality principle according to the views and thoughts of the Indonesian people which are

not too formalistic and separate (Arief, 2017). This explanation is a form of criminal law development efforts carried out to pay attention to cultural and moral values.

The material legality principle is a counterbalance to the formal legality principle in the New Criminal Code. The New Criminal Code stipulates that an act as a crime is not only based on the law (principle of formal legality), but also based on living law (principle of material legality). These provisions are based on the premise that a crime is essentially an act against the law, both formally and materially (Arief, 2017). Based on this, the New Criminal Code has regulated the principle of material legality contained in Article 2 paragraph (1). This article seeks to accommodate the laws that live in Indonesian society, but Indonesia consists of a heterogeneous society so that the laws that live will be very diverse. Further understanding of living law needs to be considered carefully, because living law is an unwritten law that has its own nature and is different from written law. This statement shows that ambivalence in the principle of material legality can occur in understanding the nature of living law, this is in line with the existence of provisions and explanations in the New Criminal Code regarding living law.

3.1. Findings

3.1.1. Legality Principle in Criminal Law

Criminal law is synonymous with the principle of legality. The legality principle currently understood by the public is based on the adage *nullum delictum nulla poena sine praevia legi poenali* which was introduced by von Feuerbach. Based on this adage, in imposing and applying criminal law, it must be based on the applicable law. The principle of legality contains three meanings or understandings, namely as follows (Moeljatno, 2008):

a. There is no action that is prohibited and punishable by crime if the act is not regulated in advance in the rules of law.
b. To determine the existence of a criminal act cannot use analogy.
c. Criminal law provisions cannot be retroactive.

The three content of meaning contained in the legality principle emphasizes that the source of criminal law is written law (statute). This statement is based on the history of the birth of the principle of legality itself, the principle of legality emerged as a result of the mounting reaction against the absolute power (absolutism) of the ruling kings. In Roman times, a crime was known called *crimina extra ordinaria* , which can be interpreted as a crime that is not mentioned in the law. At

that time, this crime was exploited by the ruling kings and enforced it arbitrarily, according to personal wishes and needs (Moeljatno, 2008). Furthermore, the principle of legality was also based on the desire to protect individual rights from the cruelty of absolute government where European kings at that time acted arbitrarily (Remmelink, 2003).

The principle of legality in Indonesian criminal law is emphasized in Article 1 paragraph (1) of the Criminal Code. The article emphasizes that an act cannot be punished, unless it is based on the strength of existing criminal laws and regulations. This provision is the main source of law in the enactment and application of criminal law in Indonesia. The application of the principle of legality in the Criminal Code which has been in effect since Indonesia's independence has the aim of guaranteeing the rights of all people to avoid arbitrary application of the law and to realize community welfare (Pradiva & Hariyanto, 2022). This understanding is still recognized today that in determining the source of criminal law, it will rely on statutes (written law) as a form of legal certainty which is expected to reflect justice.

The principle of legality basically has two functions, namely the function of protection and the function of instrumentation. The function of protecting can be interpreted that the criminal law protects the people against unlimited government power. The instrumentation function can be interpreted that within the limits determined by law, the exercise of power by the government is strictly permissible (Hiariej, 2009). Based on this explanation, it can be concluded that the principle of legality in criminal law is strongly influenced by western thinking, especially positivism, so that the only recognized source of law is statutes (written law). This conclusion is also inseparable from the nature of criminal law as *ultimum remedium*, it is necessary to have firm legal certainty to determine the application of criminal law.

3.1.2. The Principle of Material Legality in the New Criminal Code

Article 2 paragraph (1) of the New Criminal Code has confirmed the arrangement regarding the principle of material legality. The article explains the expansion of the meaning of the legality principle which has been understood by the public. The expansion in question is that the source of law in determining an act as a crime is not only based on statutes (written law), but can also be based on living law (unwritten law). The material legality principle in the New Criminal Code is regulated as a counterbalance to the formal legality principle, so that in the following provisions there are several conditions and explanations that must be met in applying the material legality principle.

The material legality principle as a counterbalance to the formal

legality principle is also based on the idea that the formal legality principle in Indonesian criminal law has actually had a positive impact, but on the other hand it will have a negative impact. The negative impact that can be caused is by setting aside the existence of customary law as original Indonesian law. Customary law is a law that has existed and lived in society since the time of our ancestors. The existence of a rigid formal legality principle can result in a living law never being found and studied completely, especially in the application of criminal law (Pradiva & Hariyanto, 2022). This explanation is in line with the insight of Bhinneka Tunggal Ika in criminal law reform. This insight confirms that criminal law reform cannot be separated from the values that are spread in Indonesian society, including the existence of living law. In this case, the New Criminal Code basically wants to reinforce the recognition of living law as a source of law in criminal law.

Expansion of the legality principle with the recognition of the living law in the New Criminal Code is actually not a new thing. Studies and provisions for the recognition of living law have basically been carried out in several regulations and national seminars in Indonesia, such as (Hairi, 2017):

a. Article 5 paragraph (3) sub b Law Number 1 Drt. 1951, which essentially regulates actions based on living law, must be assessed as criminal acts, as long as there is no comparison in the Civil Criminal Code.
b. Point 4 of the results of the 1st/1963 National Law Seminar explains that what is considered a crime is an act whose components are spelled out in the Criminal Code and other laws and does not rule out the possibility of prohibiting acts based on living customary law and does not prevent the formation of a population which is expected with customary punishment that can be in line with the dignity of the nation. Furthermore, point 8 explains the elements of religious law and customary law are woven into the Criminal Code.
c. Sub b.II's report on the National Legal System at the 6th/1979 National Law Seminar states that the national legal system must be in accordance with the legal needs and awareness of the Indonesian people, and national law as far as possible is endeavored in written form, in addition to unwritten law. remains part of national law.
d. The results of the 8th/1995 National Law Seminar explained that written law and unwritten law should be complementary and customary law is an important source of law in national life.
e. Article 5 paragraph (1) of Law Number 48 of 2009 concerning judicial power emphasizes that judges and constitutional justices are required to explore, follow, and understand legal values and a sense

of justice that lives in society.

Based on this explanation, it can be concluded that the principle of material legality in the New Criminal Code is a legal affirmation of living legal recognition, which has actually been formulated since the beginning of the criminal law reform process (Arief, 2017). This formulation is intended to avoid deification and shackles to the principle of formal legality by focusing on legal certainty, which in fact legal certainty also exists in living law as unwritten law (Fathurokhman, 2022).

Setting the principle of material legality in the New Criminal Code is an important part of reforming Indonesian criminal law. The principle of material legality is a concrete manifestation in seeking space for living law, but in its application there are terms and conditions that must be met. Article 2 paragraph (2) explains that acts can be punished based on living law that will apply where the law grows and develops and as long as it is not regulated in laws (the New Criminal Code). Furthermore, the article also explains that living law must be in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles that are recognized by the people of nations.

The terms and conditions for applying the principle of material legality are further explained in the elucidation of Article 2 paragraph (1). This explanation emphasizes that the living law is customary law which determines that a person who commits certain acts should be punished. The living law will be related to the unwritten law that is still valid and developing in people's lives in Indonesia. Actions determined as criminal acts according to living law are strengthened through the regulation of customary criminal acts in regional regulations. This explanation confirms that in the application of the principle of material legality other than living law, it is still growing and developing, so living legal provisions are formulated in a hierarchy of legislation, namely through regional regulations. Based on this provision, it can be seen that the application of the principle of material legality in the New Criminal Code is very limited and there is an inconsistency with provisions to be strengthened through regional regulations, where regional regulations are part of written law. Regulating customary crimes through regional regulations in this case will lead to state arbitrariness and give birth to a living legal duality (Utama, 2020).

3.1.3. The Living Law

Living law is a term introduced by Eugen Ehrlich in 1913 with the concept of *the living law* . He explained that the meaning of law does

not lie in the formal process of its formation, but when the law integrates with practice and social interaction (Utama, 2020). Explanation of living law according to Ehrlich explains that law is formed by society through continuous habits and interactions between community members. Another term to describe the law that lives in Indonesian society can use the term customary law which was introduced by Cristian Snouck Hurgronje.

Hurgronje used the term customary law for the first time in his book entitled *De Aceher's* (the people of Aceh) in 1894. The term customary law is used to refer to a system of social control that has sanctions, which differentiates it from the term adat as other social control systems that do not have sanctions. (Wiranata, 2005). The definition conveyed by Hurgronje then provides a clear picture of distinguishing between custom and customary law, although indirectly it remains difficult to distinguish between the two. This distinction was then continued to be used by other legal experts who focused on the study of customary law.

Customary law as a living law in general can be interpreted as a law that applies and develops within the community in an area. Another understanding of customary law is conveyed by Soepomo, which is a synonym of unwritten law in legislative regulations, law that lives as a convention in state institutions, law that lives as customary rules that are maintained in social life, both in cities and villages (Manarisip, 2012). Cornelis van Vollenhoven explained that customary law is a set of rules regarding behavior for natives and foreigners. On the one hand, it has sanctions (because it is legal) and on the other hand it is not codified (because it is customary) (Wulansari, 2010).

Customary law as living law in its studies in Indonesia can be seen in the results of a seminar in Yogyakarta 1975. In the seminar on customary law and national law development in Yogyakarta which was held on 15-17 January 1975 by the National Legal Development Agency (BPHN) with Gajah University Mada, which was attended by most of the experts on customary law from all over Indonesia, concluded that the meaning of customary law in Indonesia is original Indonesian law that is not written in the form of legislation of the Republic of Indonesia which here and there contains elements of religion (Hadikusumo, 1992).

Hilman Hadikusumo continued his explanation that in the preparation of national law, taking materials from customary law basically means (Hadikusumo, 1992):

a. The use of legal conceptions and principles from customary law to be formulated into legal norms that meet the needs of society.

b. The use of customary law institutions that are modernized and adapted to the needs of the times.
c. Incorporate customary law concepts and principles into new legal institutions.

Based on the explanation above, it can be said that in the development of national law in Indonesia one cannot ignore living law or customary law in society. This statement is in line with the previous explanation, that in order to prevent law development from being criminogenic, it must pay attention to the cultural and moral values of society. IGK Sutha also explained that development that ignores and is even indifferent to customary laws governing the relationship between the elements of the teaching of balance will experience difficulties and can experience total failure (Sutha, 1987).

The existence of living law or customary law in Indonesia basically has a strong legal basis in the state constitution. Articles 18B paragraph (2), 28I paragraph (3), and 32 paragraph (1) of the 1945 Constitution of the Republic of Indonesia have become the basis for the Indonesian state to provide space and acknowledge the existence of living laws. The following is an explanation of each of these articles:

a. Article 18B paragraph (2) explains that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law.
b. Article 28I paragraph (3) explains that cultural identity and the rights of traditional communities are respected in accordance with the times and civilization.
c. Article 32 paragraph (1) explains that the state promotes Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the people to maintain and develop their cultural values.

The existence of living law in the field of criminal law has basically been explained previously in the section on the extension of the principle of legality in the New Criminal Code. Furthermore, what needs to be considered is that living law or customary law basically does not separate private (civil) law from public (criminal) law. Soepomo explained further that customary law does not separate law violations which require demands to revise the law in the field of criminal law and violations of law which can only be prosecuted in the field of civil law (Soepomo, 1982). This explanation illustrates that

customary law does not separate criminal and civil law, so that the existence of customary law in the development of criminal law will provide a different view of the understanding of criminal law originating from Europe and the West.

Customary criminal law is one of the terms commonly used to refer to the field of customary law which regulates criminal matters. Another term commonly used by experts is customary offense introduced by Ter Haar or customary law of deviation introduced by Soerjono Soekanto. Based on the explanation regarding customary law which does not separate civil and criminal matters, this is also reflected in customary offense arrangements which have their own characteristics. Van Vollenhoven's conception of delict includes all forms and types of actions and the consequences that arise both subjectively and objectively. Furthermore, it was explained that the fundamental difference between customary offenses and criminal law is that prohibited acts and their sanctions have been determined in law, while in customary law prohibited acts and their sanctions are not predetermined, so the forms of actions and sanctions are not static (Soemarman, 2003).

Ter Haar provides an explanation of delict as any disturbance from one party to the balance and any collision from one party to the goods of life, both material and immaterial for a person or many people who form a unit (a group). This action then causes a reaction called the customary reaction, because this reaction can restore balance and restore the situation to normal (Fathurokhman, 2022). IGK Sutha further explained that according to the conception of customary law, if there is an act of violation of the provisions of customary norms, then the customary sanction which is essentially a customary reaction, the content is not in the form of torture or suffering, but what is primarily to restore the disturbed cosmos as a result of the violation (Sutha, 1987).

Based on this explanation, it can be said that in living law or customary law there are actions that are prohibited from being carried out. These actions are actions that can disrupt the balance in people's lives, so that these actions are inherent in customary reactions whose forms are uncertain. This uncertainty is due to the fact that giving customary reactions does not aim to provide retribution or suffering, but aims to restore the balance that has been disturbed. Regarding the efforts made to provide and find customary reactions, basically living law or customary law has its own provisions. Iman Sudiyat explained that all actions that conflict with customary law regulations are illegal actions, customary law also recognizes efforts to restore the law if the

law is violated (Sudiyat, 1981).

Nyoman Putra Jaya Association also concluded that customary crime is an act that violates the feelings of justice and decency that live in society, thus causing disruption to the peace and balance of the community concerned. The restoration of peace and balance, then there are customary reactions. This customary reaction is an action that intends to restore the disturbed magical peace and negate or neutralize a bad situation caused by a violation of custom (Jaya, 2005). Artidjo Alkotsar further explained that the ethical relevance of case settlement procedures in customary law is to maintain the relationship between community members with one another, and in turn also the relationship between community members and other indigenous communities. Based on this explanation, living law is a law that grows and develops in a particular society, living law has different characteristics from understanding western law and is strongly influenced by the cosmic relationship. Furthermore, in the living law there are also actions that are prohibited from being carried out and can cause a reaction to restore the impact that has been caused, and there are procedures for providing reactions to these actions that are flexible.

3.2. Discussion

3.2.1. The Ambivalence of the Principle of Material Legality in the New Criminal Code

Article 2 paragraph (1) of the New Criminal Code has regulated the principle of material legality, which aims to provide space for living law in the field of criminal law. The background of this provision cannot be separated from the urgency of criminal law reform. Indonesian people really need criminal law reform , because so far the applicable criminal law (KUHP) has not been able to provide justice for society. Furthermore, as already explained , criminal law reform is carried out for political reasons, philosophical reasons, and sociological reasons, as well as using national insights, archipelago insights, and Bhinneka Tunggal Ika insights. Based on this statement, the aim of reforming criminal law, apart from providing protection and welfare for the community, is to formulate a criminal law that is in accordance with the values and personality of the Indonesian nation, so that the formation of the New Criminal Code provides space for living law. Living law is original Indonesian law which has grown and developed following the times, and is made part of national law as unwritten law.

Living law is given space in the New Criminal Code through the expansion of the legality principle, it is hoped that the material legality principle will become a counterbalance to the formal legality principle.

This provision wants the New Criminal Code as a form of unification and codification of criminal law to be able to accommodate the needs of society in crime prevention. Elucidation of Article 2 paragraph (1) of the New Criminal Code has emphasized that living legal provisions can be accommodated by the New Criminal Code with the regulation of customary crimes through regional regulations. In fact, this provision can lead to ambivalence in the material legality principle of the New Criminal Code.

Ambivalence can be interpreted as a contradiction in one provision, if this is related to the provisions of the principle of material legality in the New Criminal Code, it creates a conflict between accommodating living law but also negating living law. This statement is based on the provisions for regulating customary crimes through regional regulations as previously explained. Provisions in living law, if an inventory is then carried out through regional regulations, will result in negating the essence of living law as unwritten law. Making living law or customary law a regional regulation can no longer be said to be a living law (Utama, 2020). Furthermore, the New Criminal Code only provides recognition for acts based on living law as long as there is no equal in the New Criminal Code. This explanation creates the next problem, because every act that is prohibited in living law can always change and has a character that is not static. Furthermore, the provisions in the living law regarding prohibited actions start from disturbances to the balance in people's lives, this will also always develop following changes in people's views on cultural and moral values that are influenced by the needs and conditions of the community.

Hilman Hadikusumo further explained that when talking about customary criminal law, it means that in this case trying to find an understanding of customary law which regulates violations of customary law which causes disruption of the balance of society and so on seeks understanding on how problems that disturb the balance of society are resolved (Hadikusumo, 1980). Based on this explanation, actions that are prohibited in living law are an inseparable series, this is also based on the inherent nature of the living law regarding prohibited actions. I Made Widnyana mentions that there are 5 (five) characteristics, namely (Widnyana, 1993):

a. Comprehensive and unifying, because it is imbued with a cosmic nature that is interconnected so that customary criminal law does not distinguish between criminal and civil violations.
b. Provisions that are open, because they are based on the inability to predict what will happen so that they are not certain and the

provisions are always open to all events or actions that might occur.

c. Distinguishing the problems, that if a violation occurs it will not only be seen the actions and the consequences, but what will be seen including what is the background and who the perpetrators are, so that the resolution will be different.
d. Courts with requests, that resolving customary violations is mostly based on requests or complaints, claims or lawsuits from parties who are aggrieved or treated unfairly. This provision does not apply when the act committed directly harms and disrupts the balance of society which cannot be resolved within the limits of kinship authority.
e. Reaction or corrective action can not only be imposed on the perpetrator but can also be imposed on his relatives or family, perhaps even charged to the community concerned to restore the disturbed balance.

Based on these five characteristics, the New Criminal Code does not provide complete space for living law. The provisions contained in the elucidation of the principle of material legality are more directed to the abolition of living law, this is because every act that can be punished according to living law will be resolved using state law (statute), in addition to the necessity for the act to be regulated in regional regulations first. formerly. Settlement of cases in customary law always relies on settling cases, not on deciding cases as happened in European and Western legal procedures. The purpose of customary criminal law is essentially more aimed at maintaining relations between citizens, both between perpetrators and victims and with their community environment, so that there is a restoration of balance and peace (Fathurokhman, 2022).

3.2.2. Formulation of the Principle of Material Legality in Accordance with the Living Law

Laws that exist as original Indonesian law in criminal law reform have been given space through the existence of the principle of material legality. The explanation contained in these provisions actually creates ambivalence which has actually been developed through the existence of 3 (three) insights used in criminal law reform, namely national insight, archipelago insight, and Unity in Diversity insight. These three insights can basically be used to reorient and reform criminal law in accordance with the central sociopolitical and socio-philosophical values of Indonesian society which underlies social policy, criminal policy, and law enforcement policies in Indonesia (Arief, 2017).

The national perspective in criminal law reform basically directs

criminal law to be oriented towards the interests of the nation in the hope that it can reflect legal ideals, the goals and functions of law, as well as the characteristics and objectives of the life of the nation and state of Indonesia. This explanation can be related to Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that Indonesia is a country based on law. The formulation of this article without the term *rechtsstaat* as in the elucidation of the 1945 Constitution of the Republic of Indonesia before the amendment was intended so that the concept of a rule of law in Indonesia today is a prismatic rule of law state. This statement can be interpreted by combining the positive aspects of *the rechtsstaat* and *the rule of law*. The formulation was carried out deliberately, with the intention of giving a broad place to the fulfillment of the sense of justice (*the rule of law*) which can be found in living law (Hiariej, 2009).

The reform of criminal law that applies the concept of nationalism basically does not only look at the current state of the nation, but also looks at how this nation was originally formed. The Youth Pledge is a product that became the beginning of the formation of the Indonesian nation. The Youth Pledge has created a national identity and collective awareness as a nation. The binder of nationalism is displayed in the text items of the Youth Pledge, namely the unity of the region, nation and language. The complete decision on the Youth Pledge also explains the basis of Indonesian unity, namely will, history, language, customary law, education and scouting (Wahyono, 2018). This explanation shows that customary law has actually become the basis of Indonesian unity, so that in the reform of criminal law this must be a concern.

Insight into the archipelago in the reform of criminal law wants the existence of a national legal unit, so efforts are still being made to use the concepts of codification and unification. Based on this, it will indeed cause obstacles in the reform of criminal law, because Indonesian society is a heterogeneous society that is very diverse. The concepts of codification and unification can raise pros and cons, such as the concept of codification conveyed by von Savigny which always has a negative effect, that is, it hinders the development of law, history continues to develop, but law has been established statically (Fathurokhman, 2022). The concept of unification can also have a negative impact by triggering upheaval in society if it is not accompanied by accommodation towards local practices (Utama, 2020). The picture that can be seen in this explanation is that when the archipelago perspective is still oriented towards the concepts of codification and unification, it will continue to hinder the reform of

Indonesian criminal law. The concept that might be used to apply this insight is to use the concept of legal pluralism.

True legal pluralism in academic studies continues to experience changes and is sharpened through various scientific debates. The definition of legal pluralism in the early days was very different from today. The early period of this concept was interpreted as the co-existence of several legal systems in a particular social field and strongly accentuated the dichotomy between state law on the one hand and various types of people's law on the other hand, so that in the early days only a mapping of legal diversity was carried out. The next period until now this concept explains the diversity of legal systems adopted by existing societies is considered as a symptom of the development of legal evolution in society, so that this diversity is responded to as a symptom of legal pluralism and can produce hybrid norms (Pujirahayu, 2021; Utama, 2020) . The use of this concept in criminal law reform with an archipelago perspective will basically require a change in the meaning of orientation towards legal unity. This orientation cannot be interpreted in terms of the current understanding of unification, namely legal uniformity. The orientation should be used with the understanding that there is a legal entity that can accommodate living law by providing legitimacy without eliminating the essence of the living law itself. This explanation is basically also in line with the spirit of national legal development that has been described previously.

The insight of Bhinneka Tunggal Ika in criminal law reform is basically the key that underlies the two previous insights. The Bhinneka Tunggal Ika insight explains that Indonesia is a diverse or heterogeneous society and has diverse laws, so criminal law reform must be able to accommodate this. The background in this insight is actually to create a sense of community justice, which is sometimes inconsistent with people's beliefs if local values are not accommodated. This insight also requires a deep understanding of the meaning of living law, especially in the study of criminal law. Previous explanations have provided an overview of this, but in relation to this insight, in order to realize the Bhinneka Tunggal Ika insight, you can use the concepts of *desa, kala, patra*. This concept explains that in understanding living law, one must pay attention to the place, time, and circumstances of how the law lives (Mulyadi, 2015).

Recognition of the living law in criminal law reform cannot only be limited to acknowledging his actions, this is because living law regulates in a series regarding prohibited acts, settlement procedures, and reactions given. The New Criminal Code only regulates acts that can be punished based on living law and then the settlement uses state

law, so in this case it will continue to create a sense of injustice in society. This explanation is based on customary reactions being maintained in an indigenous community not as a retaliation so that offenders become deterrent, but aims to restore the legal balance that has been disrupted by the occurrence of a customary violation. The procedure for settling cases in living law has at least 3 (three) principles that can become a benchmark, namely (Mulyadi, 2015):

a. The basis of harmony, intended to restore the state of life as it was, status and honor, as well as the realization of a harmonious relationship among *villagers*. This principle does not emphasize winning or losing on either side.
b. The basis of merit, intended so that the settlement of customary conflicts can protect the good name of each party, so that no one feels lowered or degraded in terms of their status and honor as a matter of *village etiquette*.
c. The basis of harmony, meant to pay attention to the facts and feelings that live in the community, which have been embedded in tradition from generation to generation. The use of the basic alignment approach is done by paying attention to place, time, and situation (*village, time, pattern*), so that the decision can be accepted by the parties in the community.

4. Conclusion

The principle of material legality in the New Criminal Code can be said to be a long-awaited breakthrough in the regulation of Indonesian criminal law. Recognition of living law should be given space in crime prevention through criminal law policies so that a sense of justice for society can be realized. This is because the community actually has its own laws that have grown and developed following the development of people's lives, and in accordance with the values used as a way of life, including in resolving conflicts that occur.

The ambivalence in the principle of material legality is very visible when the recognition of living law must be regulated in regional regulations. These provisions will eliminate the essence of living law as unwritten law which has a dynamic nature. Such an arrangement can also negate living law and make state law (written law) increasingly dominate criminal law arrangements which will ultimately lead to failure in realizing a sense of justice for society. The ambivalence contained in the material legality principle of the New Criminal Code also shows the inconsistency of legislators regarding the recognition of living law, so that this will increase public distrust of written law which

in the end not only does justice not materialize, but certainty and benefit also cannot be achieved. embodied.

The formulation of the principle of material legality can actually use the concept of legal pluralism. The arrangements made should not legalize living law, but rather legitimize living law. Regulation through regional regulations is a form of legality of living law, so that the interpretation of living law becomes the absolute authority of legislators. Living law should be recognized with its legitimacy, so that the interpretation of living law will be in accordance with the values used by society. The New Criminal Code, which is currently still in the socialization stage, should be able to evaluate these provisions so that their enactment later is in line with the socio-philosophical, socio-political, and socio-cultural values approach which is the urgency of criminal law reform with the spirit of Bhinneka Tunggal Ika.

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The Act of Criminal Offense Involving the Taking of Lives of Baduy Indigenous Community Members: A Criminological Perspective

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Abstract

Murder is a crime that is considered very nasty for humans.Crimes of murder set in the Criminal Code in detail. Premeditated murder is one part of the crime of murder in the Criminal Code.Criminology is the study of crime and the causes of crime. This study aims to determine the driving factors of the crime of murder, law enforcement and application of the law in the perspective of criminal law and criminal customs.To determine the tendency of criminal acts and to avoid crimes such as the crime of murder.The rise of the crime of murder should not be underestimated.Crimes of murder is the act of cruel and inhumane. The research is empirical legal research with empirical juridical approach that was taken from primary and secondary data and concluded in the description of the sentence that is easily understood by the reader. Based on the results of the study, it is understood that internal factors such as education and religion as well as external factors such as the environment can cause someone to commit a crime. The results also showed that the traditional criminal law Baduy an unwritten law that orient the completion of the criminal case is integrally which includes recovery of the interests of victims, offenders and community interests.Baduy traditional criminal law recognize the various types of criminal offenses including the concept of accountability and legal sanctions. Law enforcement conducted by the public prosecutor in the form of demand as in the chapter violated. and application of the law in accordance with the provisions of the legislation for the fulfillment of the elements in Article 338 of the Criminal Code that are considered by the judge in the criminal sanctions in accordance with the facts in trial.

Keywords: Baduy Customary Law, Criminology, Murder, Law Enforcement.

1. Introduction

Crime is a term that is no stranger in societal life. Essentially, the term crime is attributed to a certain type of action or behavior of humans that can be judged as evil deeds. Taking a life, or commonly known as murder, is any intentional act to eliminate or take away another person's life. The horrifying prevalence of murders in our surroundings is evident through mass media, which exposes several cases of murder. Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia states, "The State of Indonesia is a Rechtsstaat (a state based

on the rule of law)", where the factors contributing to these crimes include social jealousy, grudges, and individual psychological factors. Such actions contradict the principles of the 1945 Constitution which states, "Everyone has the right to life and is entitled to defend and maintain life and its existence" (Roeslan Saleh, 1983).

The intentionality of taking another person's life, as defined by the current Penal Code, is referred to as murder. To take another person's life, a perpetrator must undertake certain actions or a series of actions that result in the death of another person, with the condition that the perpetrator's intention must be directed towards the consequence of the victim's death. It is clear that what is not explicitly stated in the law is the intent to cause the death of another person. Unintended consequences or those not desired by the law are referred to in doctrine as constitutive consequences or constitutive effects(P.A.F. Lamintang & Theo Lamintang, 2010).

In the present era, crime rates in society are increasing. One commonly encountered criminal offense is murder. Indonesia guarantees protection for all its citizens without exception, indicating that not only victims have the right to protection from the State, but also criminals have the right to receive protection. This is based on the recognition of human rights upheld by the State, and as fellow humans, we must respect the human rights even of criminals.

According to Bonger, crime is not a result of a unique structure inherent to the criminal, a structure that is specific to the criminal and compels them to commit evil acts. Criminals, whether habitual or seemingly born as criminals, exhibit many physical and mental defects, but these do not possess a distinctive pattern that sets them apart. Therefore, criminals can be differentiated and recognized from their fellow beings (W.A.Bonger, 1982).

Tolib Effendi defines criminology as a means to understand the causes of crimes and their consequences, to study the methods employed by individuals in committing criminal acts, and to rehabilitate criminals while preventing the possibility of crime. Over time, criminology has shifted from being a science for the welfare of society to a science for social welfare (Tolib Effendi, 2017).

According to Romli Atmasasmita, criminology serves as social control over policy implementation in criminal law. In other words, criminology plays both an anticipatory and reactive role in shaping policies in criminal law enforcement, preventing harmful consequences for perpetrators, victims, and society as a whole.

Within criminology, there is also criminal statistics introduced by Quetelet, which involves observing crime using numbers to identify

regularities in crime development, enabling the prediction of crimes. This aims to obtain data about criminality in society, such as its quantity, frequency, distribution of offenders, and types of crimes. This data is then used by the government to formulate crime prevention policies based on the rise and fall of crime rates during specific periods (Tolib Effendi, 2017).

Looking into the Indonesian Criminal Code, it is evident that legislative efforts have been made to regulate criminal provisions related to acts targeting human life. The Adat Law, on the other hand, is often identified with customs practiced by specific individuals, groups, or communities. However, not many of them are aware that customary law has become part of the national legal system, a feature driven by Indonesia's pluralism (Gatot Efrianto, 2019).

There are still lots of criminal acts of murder that occur in Indonesia if we see it in the newspapers or the news on television. Of the several cases involving crimes or crimes committed in Indonesia, there was one case of murder that occurred in Outer Baduy which killed a young girl aged 13 years. The girl named Sawi was found dead in a saung or field house because the Baduy people had 2 houses, namely a house in the village and a house in the fields. This heinous act has also reached the ears of the traditional leaders of the Baduy tribe. Previously, the police arrested three men with the initials AMS who was 19 years old, AR who was 15 years old and MF who was 16 years old. The alleged perpetrator of the rape of a girl named Sawi at the farmhouse, Kaduhelang Village, Cisimeut, Leuwidamar, Lebak Regency. The victim was killed first before being raped in turns. AMS, one of the perpetrators, admitted that the killing was carried out spontaneously. He said that his intention was only to rape, but this girl who came from the village of Karahkal, Kanekes village, Leuwidamar screamed and rebelled. Her motive to kill was fear of being found out by the residents because this girl named Sawi screamed. Initially, his intention was to rape the victim, AMS said, after he and MF were invited by AR, who is still in grade 2 of high school. They are tempted by the beauty of the victim's face to the point that they want to rape them. The family and traditional leaders asked that the three perpetrators be punished in the strictest way. Head of Baduy Region Village Jaro Saija said that the Baduy community and outside Baduy were once made furious by the perpetrator's actions. This is because this is the first time that the Baduy people have experienced this (Bahtiar Rifa'i, 2020).

Based on this case it is very clear that what has been written in the laws and regulations does not make people afraid to commit a criminal act. The lack of public legal awareness means that there are

still many people who are not afraid to commit a criminal act because the community does not know the sanctions that can be imposed on them if they commit a criminal act that violates laws and regulations.

Among the many kinds of customary law that exist in Indonesia, the Baduy customary law which is located in West Java, to be precise in Banten, rejects the entry of all kinds of forms of modernization that are contrary to the prohibitions and regulations that exist in its customary law area, one of which is the rejection of the entry of foreign nationals. (WNA) into the Baduy area, this has become customary law that is still valid to regulate the Baduy indigenous people for hundreds of years of generations. Even today, the Baduy customary law is still binding on the Baduy customary community. The Baduy tribe also has its own regulations regarding criminal acts which are often known as Baduy customary criminal law.

Based on the above description, it can be inferred that the Baduy community has its own distinct system or methods for addressing criminal issues that are considered disruptive. This is what piques the author's interest in understanding the factors that lead perpetrators to commit murder, resulting in the loss of a victim's life. Additionally, the author seeks to explore how sanctions or punishments are implemented for offenders in cases of criminal acts, particularly in cases of murder. Furthermore, the author aims to investigate the sanctions received by perpetrators of homicide outside the Baduy customary jurisdiction or beyond the Baduy community's territory. This exploration is particularly relevant given the fact that Baduy customary criminal law remains in existence and binding for the Baduy community, even though knowledge about these matters is still quite limited. In light of these considerations, the author's research will delve into these aspects.

Based on the aforementioned background, the issue addressed in this written work is related to the practice of criminal acts of murder or deprivation of life within the Baduy community. The present challenge involves the current state of criminal accountability within positive criminal law, which includes the responsibility of the perpetrator, the presence of unlawful acts, the absence of justifying reasons, or reasons that would absolve the criminal responsibility of the perpetrator.

2. Methods

The research is empirical legal research with empirical juridical approach that was taken from primary and secondary data and concluded in the description of the sentence that is easily understood by the reader.

3. Findings and Discussions

Factors Leading to Homicidal Crimes against Members of the Outer Baduy Indigenous Community from a Criminological Perspective

Criminal law is a theory concerning rules or norms, while criminology is a theory about legal phenomena. Both converge in the realm of crime, which refers to behavior or actions punishable by law. The distinction between criminal law and criminology lies in their objects. The primary object of criminal law is to determine what can be punished according to prevailing legal norms, whereas criminology focuses on individuals who violate criminal law and the environment in which these individuals exist (Indah Sri Utari, 2012).

When discussing the factors contributing to a crime, it's essential to approach the topic from a criminological perspective. There are three approaches in criminology used to study crimes. First is the descriptive approach, which involves observation and data collection related to facts about crimes and criminals. This includes analyzing the forms of criminal behavior, how crimes are committed, the frequency of crimes in different times and places, specific characteristics of criminals such as age, gender, and more, as well as the criminal career development of an individual (Indah Sri Utari, 2012).

Understanding crime through the descriptive approach is known as phenomenology or symptomatology of crime. Although considered relatively simple among scholars, the descriptive approach is beneficial as an initial study before delving into more in-depth analyses.

In utilizing the descriptive approach, there are specific conditions that need to be fulfilled, namely (Indah Sri Utari, 2012):

1. The collection of facts cannot be done randomly. Therefore, the gathered facts must be obtained selectively.
2. Interpretation, evaluation, and providing a general understanding of the acquired facts must be carried out. Without interpretation, evaluation, and general understanding, the facts would lack meaning.

The second approach is the cause-effect approach. In the cause-effect approach, the facts present in society can be interpreted to understand the causes of crimes, whether in individual cases or general ones. The cause-effect relationship in criminology differs from the cause-effect relationship in criminal law. In criminal law, for a case to

be prosecuted, there must be proven cause-and-effect relationship between an act and a prohibited consequence.

In contrast, in criminology, the cause-effect relationship is sought in the context of understanding why an individual commits a crime. The effort to understand crime using the cause-effect approach is referred to as the criminological etiology (etiology of crime) (Indah Sri Utari, 2012).

The third approach is the normative approach. Criminology is considered both an idiographic discipline and a nomothetic discipline. It's an idiographic discipline because it studies facts, cause-and-effect relationships, and possibilities in individual cases. On the other hand, the term nomothetic discipline aims to discover and reveal scientific laws that demonstrate uniformity and tendencies.

Based on these three approaches mentioned above, it's crucial to first understand what "crime" is. Crime is a label or term given by people to assess specific actions as evil deeds. Consequently, the doer is labeled as a criminal. This understanding comes from the realm of values, making it highly relative and dependent on the individual making the judgment. Thus, what one person considers a crime might not necessarily be seen as such by others. Even if, for instance, all members can agree that something is a crime, the severity of that act can still lead to differing opinions.

The crime referred to in this study pertains to crimes against a person's life, as these crimes result in the loss of life. Crimes against life involve attacks on another person's life. The legal interest protected and the object of this crime is human life.

Crimes intentionally committed against human life are categorized and qualified as homicide, which includes (Indah Sri Utari, 2012):

1. Ordinary Homicide in its basic form.
2. Homicide followed, accompanied, or preceded by another criminal act.
3. Premeditated Homicide.
4. Maternal Homicide against a newborn either at the time of or shortly after birth.
5. Homicide upon the victim's request.
6. Incitement and assistance to commit suicide.
7. Abortion and homicide of a fetus.

Formulating the phenomenon of crime is difficult due to the inherent nature of crime itself, making it challenging to pinpoint the

exact causes. Many scholars and experts have put forth various factors causing the emergence of crimes according to their expertise. As a result, these factors vary and can lead to differing interpretations. Thus, the causes of crime are highly complex, and the relationships between different factors can be interrelated and influential (Ramadhan, 2014).

Sutherland suggests that crime results from diverse and varied factors, and the determining factors both at present and in the future cannot be universally formulated without exceptions.

In general, the factors causing crime can be divided into two categories: internal and external factors:

1. Internal Factors
   Internal factors are those that exist within an individual. These factors can determine the causes of crime, such as age, gender, religion (personality), mental state, and more.
   a. Age factor: Natural changes occur in a person from childhood to adulthood, both physically and mentally. Individuals in a specific age group, such as adolescence, can engage in certain behaviors like juvenile delinquency. Forms of juvenile delinquency are only associated with adolescents approaching adulthood. Crimes like juvenile delinquency are not committed by adults.
   b. Gender factor: Gender, whether male or female, also plays a role in crime. Generally, males have more physical strength compared to females. As a result, males can commit crimes that require physical force, such as murder or arson. In contrast, females tend to commit crimes that don't require physical strength, like adultery or prostitution.
   c. Educational (personal) factor: This can influence an individual's mental state and behavior, especially their intelligence and thinking.
   d. Individual's religious factor: Religion is a fundamental element in human life, serving spiritual needs universally. The norms within religion hold the highest value in life as they are divine norms that guide individuals toward the path of righteousness. These norms dictate what is forbidden and what is required, what is good and what is bad. If a person truly comprehends and understands the essence of their religion, they will undoubtedly obey its commands and prohibitions. A specific individual factor is the psychological state of the perpetrator.

2. External Factors
   External factors are those that lead to crime due to reasons beyond the individual. Criminology experts often refer to these external

factors as environmental factors. One cause of crime is an unfavorable environment, which can be chaotic, where children aren't nurtured by society with values like respect for others' property, education as a means of progress, and more. The factors causing homicidal crimes according to criminal psychology theories include (Nia Amanda, 2017):

1) Personality Characteristics: Four different psychological research streams have tested the relationship between personality and crime:
   a. Examining differences in personality structures between criminals and non-criminals.
   b. Predicting behavior.
   c. Testing the extent to which normal personality dynamics operate within criminals.
   d. Attempting to calculate individual differences between different types and groups of criminals. According to this theory, the possibility of committing mutilation crimes could be rooted in an individual's personality traits.
2) Psychoanalytic Theory of Criminality: This theory connects delinquency and criminal behavior to a well-controlled conscience that generates individual urges and needs that must be satisfied immediately. This theory suggests that a criminal might commit certain crimes due to their inability to control their impulses and their need for immediate gratification.
3) Personality Traits: Nowadays, the previously mentioned mental condition is referred to as antisocial personality or psychopathy, characterized by an inability to learn from experiences, lack of friendliness, indifference, and an absence of guilt. Research on personality traits has delved into explaining mental capabilities from a biological perspective. Conditions like feeblemindedness, insanity, stupidity, and dull-wittedness have been considered to be hereditary.
4) Moral Development Theory: The theory of moral development progresses through preconventional stages. In this context, a child's moral rules and values consist of "do" and "don't" actions to avoid punishment. According to this theory, children under the age of 9 to 11 usually think at the preconventional level. Their need for warmth and affection from birth and the consequences if denied these necessities play a significant role. Adolescents typically operate within conventional law stages. At this level, an

individual embraces and adopts societal values and rules. Furthermore, they strive to uphold these regulations.

Based on Verdict Number 143/Pid.B/2019/PN Rkb, a brief chronology of the murder that occurred in a Baduy indigenous community started on Friday, August 30, 2019, around 11:00 AM. The perpetrator departed from home towards Kp. Kaduleulang with the intention of offering a motorcycle to the Baduy people. Later, when approaching an incline near an oil palm plantation, precisely in Block Kaduheulang, Cisimeut Raya Village, Leuwidamar Sub-District, Lebak Regency, Banten Province, the defendant encountered Mr. Ahmad Rifa'i (a convict in another case) and Mr. Muhammad Furqonuddin (a defendant in a separate case file). After gathering by the roadside, the defendant invited them to move to a cooler place, which was the oil palm plantation. Once in the plantation, Mr. Ahmad Rifa'i noticed two huts not far from where the defendant, Mr. Ahmad Rifa'i, and Mr. Muhammad Furqonuddin were sitting, approximately 10 meters away. Mr. Ahmad Rifa'i inquired about the ownership of the huts, and the defendant answered that they belonged to the "orang tonggoh" (Baduy people). Mr. Ahmad Rifa'i then instructed the defendant to check the condition of the huts.

Upon returning from inspecting the huts and rejoining Mr. Ahmad Rifa'i and Mr. Muhammad Furqonuddin, the defendant informed them that he had seen a woman alone in one of the huts. At that moment, an idea arose from Mr. Ahmad Rifa'i to assault the woman sexually, with him saying "hayu perkosa" (let's rape her). Ultimately, the defendant and Mr. Muhammad Furqonuddin agreed to this plan. Once the three of them reached an agreement, the defendant led the way to the hut, followed by Mr. Ahmad Rifa'i and Mr. Muhammad Furqonuddin. The defendant went directly to the hut where the woman (the victim) was situated, while Mr. Ahmad Rifa'i and Mr. Muhammad Furqonuddin approached the hut adjacent to the victim's. Arriving at the hut, the defendant observed the victim sitting on the front platform. The defendant pretended to borrow a machete and asked if a machete could create or purchase something. With the machete in hand, the defendant raised it towards the victim's neck, saying "diaam diaam diaaam" as she resisted. The defendant pushed the victim, causing her to fall. He then swung the machete he was holding, which the victim blocked with her right hand, almost severing it. The defendant swung the machete towards the victim's face and head multiple times. As the victim continued to resist and call for help, the defendant held her head with his left hand and slit her throat using the machete. Panicking, the

defendant ran out of the hut with the machete still in hand. He discarded the machete in the bushes behind the hut and returned to see Mr. Muhammad Furqonuddin sexually assaulting the victim. Mr. Ahmad Rifa'i remained outside the hut. After Mr. Muhammad Furqonuddin finished the assault, the defendant also sexually assaulted the victim. While she was still lying down, the defendant removed his pants and engaged in sexual activity, climaxing and ejaculating on the victim's thigh. Subsequently, the defendant, along with Mr. Ahmad Rifa'i and Mr. Muhammad Furqonuddin, gathered in front of the hut. Once they completed their actions, they left the scene. The defendant walked home, stopping at a spring to wash his blood-stained pants before discarding them near the spring. Mr. Ahmad Rifa'i and Mr. Muhammad Furqonuddin returned to their respective homes using a Honda Beat motorcycle, riding as passengers.

Based on the results of an interview with Mr. Zakiuddin, S.H., as one of the judges handling the case, Zakiuddin S.H., (interview on February 27, 2021), he said that the background to the occurrence of this crime of murder initially had several causative factors, namely as following;

1. Moral depravity,
2. Lack of public awareness of the dangers of crime,
3. The opening of opportunities for criminals,
4. There are supporting tools

He also believes that crimes that occur in society can be caused by various factors. Factors that cause crime to occur include factors originating from oneself, for example lack of upbringing from parents or family, and lack of formal education, as well as lack of religious strength that is inherent in oneself, so that this can also result in someone committing a crime. crime, besides that there are environmental factors, for example in social life in society that is not in a good condition, so it is easy to be influenced and a crime can occur (PN Rangkasbitung, Personal Interview, 2021).

In conducting an interview with one of the judges handling the case, the author also conducts a direct interview with a member of the Leuwidamar police sector, where he also knows about this murder case. Based on the results of an interview with Mr. Jamaludin Malik as a member of the leuwidamar sector police (interview on 25 February 2021), he said that the background to the crime of murder initially involved several factors. According to him, the main factors were because the perpetrator had a heart for the victim . The next factor is the factor of the lack of awareness of the perpetrators due to the dangers of

crime, crime has a very detrimental impact on society, especially victims as well as detrimental for the perpetrators of the crime itself. The criminal act of murder committed by a young man against a girl belonging to the Baduy community is a lack of awareness of the perpetrators of the consequences of the dangers of crime.

As a young man commits a crime of murder, the danger is that the crime he commits, in addition to getting severe legal sanctions in accordance with statutory regulations, will also have a negative impact on the future of the young man. When the young man has completed his sentence and returns to live with society, it will be difficult for him to get a normal life, because people around him will stay away from him because they are afraid to remember the history of the crime of murder he committed, then it will be difficult for the perpetrator to get a job because no one wants to accept him. as a worker because of his criminal history. In addition, the educational factor in this case does indeed play a very important role in people's lives, it does not rule out the possibility that various crimes are motivated by low educational background and the perpetrators. With people who have never attended an education bench, resulting in a lack of knowledge about the rule of law, or morals and religion so that it supports people to commit crimes, namely murder (Jamaludin Malik, Personal Interview, 2021).

The writer also conducted an interview with Mr. Imam Rismahayadin, S.Hut, M.Si, the head of the Department of Culture and Tourism of Lebak Regency, who was knowledgeable about the case (interview conducted on February 25, 2021). Based on the interview, he stated that the factors contributing to a young man committing murder against a girl from the Baduy indigenous community include the Moral Degradation factor. Moral is the term humans use to refer to positive actions towards themselves or others. A person lacking moral values is considered amoral, lacking positive values in the eyes of others. Thus, morality is an absolute concept that humans must possess. Morality represents the core values of a complete societal life. Moral judgments are measured within the cultural context of a society. Morality is also a product of culture and religion. It pertains to an individual's behavior, actions, and expressions when interacting with others. If someone's actions conform to the prevailing values of society and are acceptable and pleasing to the community, they are deemed to have good morals. Conversely, if someone cannot behave according to the established norms, they are said to be beginning to exhibit moral degradation.

Additionally, another factor mentioned is the Weakness of Faith. This is a fundamental factor that leads to someone committing a crime. A low level of religious belief and knowledge weakens a person's faith.

Individuals with weak or insufficient faith are more susceptible to emotional triggers that lead to criminal actions. The present era's development isn't always accompanied by societal improvement, increased religious devotion, or moral values. Society often prioritizes worldly life over the afterlife. People tend to abandon goodness and commit wrongdoing. Such wrongdoing arises from the failure to properly observe religious duties. However, religious devotion, as an essential performance, can prevent individuals from committing crimes. The young man who killed the girl from the Baduy community was clearly demonstrating a weak faith. Committing a crime, especially one that results in taking another's life, indicates doubt and an inability to decisively refrain from criminal actions due to weak faith (Imam Rismahayadin, Personal Interview, 2021).

In summary, the writer contends that the factors driving the murder committed by a young man against a girl from the external Baduy community can be categorized into two types: internal factors (originating from within the individual) and external factors (found outside the individual). Internal factors include weak faith, moral degradation, and the perpetrator's lack of awareness of the dangers of crime. External factors involve influences from the surrounding environment. However, the most dominant factors contributing to the murder by the young man against the girl from the external Baduy community are moral degradation and the lack of the perpetrator's awareness of the consequences of the crime. Supporting these factors is the perpetrator's environment, characterized by unfavorable social interactions that make him susceptible to criminal actions.

Enforcement of the Law Against Perpetrators of Homicide Against Members of the Baduy Indigenous Community: A Perspective from Criminal Law and Customary Law

1. Enforcement of Criminal Law

Law enforcement is defined as the activity of harmonizing the relationship of values outlined in established principles and manifested in actions as the culmination of the final stage of value interpretation. It aims to create, maintain, and preserve peace in societal interactions. The duty undertaken by law enforcement officials is considered a "categorical obligation," an "absolute duty," as Kant states. This duty does not involve any conditions. A duty is a duty and must be fulfilled (Widiyanti & Waskita Y, 2010).

From an objective standpoint, enforcement of the law encompasses both broad and narrow meanings. Broadly, it encompasses the values of justice embedded in both formal rule texts and the justice

values prevalent in society. Narrowly, it pertains only to the enforcement of formal and written regulations (Bambang Waluyo, 2016).

From a subjective standpoint, law enforcement can be carried out by both a broad range of subjects and limited or narrow subjects. Broadly, the process involves all legal subjects in every legal relationship. From a narrow perspective, law enforcement involves the efforts of law enforcement agencies to ensure that a legal rule is executed as it should be. To achieve this, law enforcement agencies are also authorized to use force if necessary.

The implementation of law enforcement aims for legal certainty, the usefulness of the law itself, and justice for society. Legal certainty provides justifiable protection against arbitrary actions, ensuring that individuals obtain expected outcomes in specific situations. Legal certainty contributes to a more orderly society.

The implementation or enforcement of law provides benefits and usefulness to society. When law is implemented or enforced, it should not cause unrest within the community. The third element, justice, is crucial because the community has a vested interest in ensuring that justice is genuinely considered in the implementation or enforcement of the law. Furthermore, it's important to note that the law being implemented and enforced should be based on values of justice. The essence of law enforcement lies in the activity of harmonizing the relationship of values to create, maintain, and preserve peace in societal interactions.

The government, especially law enforcement agencies, must carry out the law enforcement process firmly, consistently, and comprehensively in order to achieve a just enforcement of the law, provide legal certainty to enhance public trust, create a deterrent effect, and prevent acts of homicide and other positive outcomes (Andi Hamzah, 1994).

Investigation, prosecution, and adjudication are the core components of enforcing homicide laws. Here, the role of the Police is particularly urgent. One of the functions of the police is to analyze or examine reports and information regarding indications of homicide. In this context, the community and other civil society organizations must diligently report and inform authorities about cases of homicide and indications of such crimes to investigators.

To optimize law enforcement, issues, weaknesses, or constraints should be eliminated or minimized. Legal enforcement should not be hindered by juridical, technical, or even political weaknesses. Law enforcement must not be hesitant or hindered by difficulties in handling

homicide cases; instead, there should be firmness to establish legal precedents. This requires the government's commitment and political will, coupled with the professionalism and integrity of law enforcement personnel. Additionally, efforts to enforce homicide laws can be carried out through the following means (Andi Hamzah, 1994):

1. Socializing Articles 338-350 of the Indonesian Criminal Code (KUHP) on crimes against human life.
2. Enhancing coordination and synergy between the police, the prosecutor's office, and other law enforcement agencies.
3. Eliminating differences in perception among law enforcement entities through joint education, training, and memoranda of understanding.
4. Enhancing professionalism and integrity, and implementing consistent rewards and punishments for law enforcement personnel.
5. Effectively applying evidence and ensuring transparency in public information.

The existence of criminal law undoubtedly has goals, and there are differing perspectives on the objectives of criminal law's existence. According to the first perspective, the purpose of criminal law is to protect society from crimes. The purpose of criminal law acknowledges the reality that crimes consistently exist within society, and the establishment of criminal law aims to safeguard society from these criminal activities. According to the second perspective, the purpose of criminal law is to safeguard individuals from the potential arbitrariness of authorities. This perspective is based on the premise that power tends to be abused, and thus, the enactment of criminal law serves to limit the powers of authorities (Frans Maramis, 2013).

The crime of homicide is one of the prominent topics among criminal experts, as it is viewed as an unusual criminal act due to its grave consequences of taking another person's life. Apart from the unusual nature of the act, the penalties for homicide are also severe for the perpetrators. To understand the legal consequences of an act or crime, one must first examine its underlying elements within the governing provisions.

The intentional taking of another person's life, as stipulated by the Penal Code, is termed as "membunuh" or killing. From the regulations governing criminal provisions related to crimes against human life, it can be observed that the legislators intended to differentiate between various crimes committed against human life,

classifying them into five categories, each as follows (P.A.F. Lamintang & Theo Lamintang, 2010):

1. An act of deliberately taking another person's life, as understood generally. The law further differentiates between intentional killings that were not premeditated, known as "doodslag," and intentional killings that were premeditated, known as "moord." "Doodslag" is governed by Article 338 of the Penal Code, while "moord" is covered in Article 340.
2. An act of deliberately taking the life of a newly born child by its own mother. The law also distinguishes between cases where the act was not premeditated and cases where the act was premeditated.
3. An act of intentionally taking the life of another person upon a clear and sincere request from that person, as stipulated in Article 344 of the Penal Code.
4. An act of intentionally inducing or assisting another person in committing suicide, as defined in Article 345 of the Penal Code.
5. An act of intentionally causing the termination of a woman's pregnancy or causing the death of an unborn child.

The judicial process concludes with a final verdict (sentence) that includes the imposition of criminal sanctions (punishment), and within this verdict, the judge expresses their considerations and the decision's rationale. Prior to this stage, there are prerequisites that need to be fulfilled, including the evidentiary stage in convicting the defendant.

The judge's considerations in delivering a verdict must reflect a sense of justice and should be based on credible evidence and fairness that align with Pancasila and the 1945 Constitution of the Republic of Indonesia. Regardless of whether the punishment imposed by the Panel of Judges is severe or lenient, it should not exceed the maximum or minimum limits of punishment prescribed by the relevant articles of law.

The Panel of Judges believes that the defendant has committed "intentional homicide" with certainty and conviction. In terms of legal considerations, the analysis can be detailed as follows:

In issuing a criminal verdict, the Panel of Judges must rely on valid evidence and the testimonies of credible witnesses. Based on these testimonies, the Panel of Judges should establish the belief that the alleged crime has indeed occurred and that the defendant is the perpetrator. Additionally, for the defendant to be held accountable, the Panel of Judges must ensure that the alleged crime fulfills the elements specified in the law.

The crime defined in Article 338 of the Penal Code is a principal form of criminal offense, representing a complete formulation with all its elements. If all these elements are satisfied, the legislators name or label the crime "doodslag" or "pembunuhan" (murder). The formulation in Article 338 of the Penal Code is as follows:

"Whoever intentionally takes another person's life shall be subject to imprisonment for a maximum term of fifteen years."

An example of the content of Article 338, which can be categorized as murder, is demonstrated in the case with the verdict Number 143/Pid.B/2019/PN Rkb, where the defendant committed the crime of murder without prior planning. The defendant committed the act purely out of emotion, as the victim's cries for help frightened the defendant, who feared being caught by the residents, prompting the defendant to commit the murder immediately. Based on the provisions of the Article, the elements of murder are as follows:

1. The subjective element, "opzetelijk" or intentionally
2. The objective element, "beroven" or taking, "het leven" or life, "een ander" or another person

"Intentionally" means that the action must be deliberate, and the intention must arise at that very moment. In the context of Article 338, "sengaja" (intentionally) refers to an act that is intentionally committed without prior planning, while in Article 340, "sengaja" refers to an act that is intentionally committed with prior planning.

An act is considered to be premeditated if the perpetrator has thought about it, considered the implications, and then determined the time, place, method, or tools to be used for the act of murder. During this time, the perpetrator may also think about the consequences of the murder or other methods to ensure that others do not easily identify them as the murderer. Whether the perpetrator calmly or emotionally considers this during a sufficient time frame is not of great importance.

The term "premeditated" implies that there is a time gap between the moment the intention to commit the act arises and the actual execution of the act. During this time gap, the perpetrator has enough time to think and weigh various factors, including the method of execution, the timing, and the tools to be used.

The first objective element of the crime of murder is "menghilangkan" (taking), and this element is also covered by intentionality. This means that the perpetrator must intentionally and purposefully intend to perform the action of "menghilangkan," and they must be aware that their action is intended to take another person's life. In relation to "nyawa orang lain" (another person's life), this refers to

the life of another person, regardless of their relationship to the murderer, including cases where the murderer is related to the victim, such as a parent killing their child.

The Indonesian Penal Code (KUHP) does not specify that a murderer will receive a more severe punishment because the victim held a specific position or had a special relationship with the perpetrator.

Based on these elements, in the case of verdict Number 143/Pid.B/2019/PN Rkb, the decision-making process and the application of the law by the Panel of Judges appear to comply with the applicable legal rules. Article 338 of the Penal Code stipulates the death penalty. According to witness testimonies and the defendant's statements, it is clear that the defendant indeed committed the crime they were charged with. Apart from criminal sanctions, there are social consequences that the perpetrator of this arson-based homicide must face. Social sanctions can be extremely burdensome, as humans are inherently social creatures and cannot live in isolation.

The Panel of Judges considered the accountability of the act with aggravating and mitigating factors. Aggravating factors included the fact that the defendant caused distress to the victim's family and the broader Baduy community. Mitigating factors included the fact that the defendant had no prior criminal record and acted in a mentally sound state, fully capable of being responsible for their actions.

2. Customary Law Enforcement

Custom or tradition can be defined as consistent behavior carried out in a specific manner and followed by the broader community for an extended period. Customary law, although not codified, has legal consequences for anyone who violates it. The norms and values within customary law are strictly adhered to by the community. This means that while customary law may not be written down, it contains regulations and agreements on how individuals should behave and act within family and community settings.

As a part of customary or cultural practices, customary law can be seen as a manifestation of legal consciousness, particularly in societies with simple social structures and cultures. Custom, as the direct link to daily life, carries authority and is the main asset in traditional governance. Customary law does not recognize the existence of prisons or jails. Thus, for those found guilty, customary law enforces moral and material sanctions. If the guilty party is unable to pay the material sanction, their family or heirs take over the responsibility. In line with this, the Baduy community highly values their customs, and

the behavior of the community is influenced by these longstanding traditions.

According to Ayah Yardi, a native Baduy community member, the basis for resolving crimes in Baduy is through deliberation, known as "musyawarah." The desires of the victim and their family are taken into consideration, with the aim of restoring the victim's condition after the crime. Similarly, the desires of the perpetrator are addressed to find ways to alleviate their guilt and resolve the crime they committed. If the crime causes disruption that affects the community's balance, a "ngabokoran" ceremony is conducted to restore harmony within the village (Ayah Yardi, Personal Interview, 2021).

In Baduy customary criminal law, the regulation of concurrent offenses (concursus delictorum) is not as complex as the concept in national criminal law. The application of punishment for concurrent offenses in Baduy customary law is oriented towards the interests of the victim (and also the interests of the perpetrator) as an integral part of case resolution. For example, in a case where multiple criminal offenses occur, such as rape (Article 285 of the Indonesian Penal Code) accompanied by assault (Article 351 of the Indonesian Penal Code) and culminating in the victim's murder (Article 338 of the Indonesian Penal Code), the three separate criminal rules are not merged, combined, or applied with increased severity (absorption as intensified). In Baduy customary law, a perpetrator who commits multiple offenses is held accountable individually for each offense, taking into account the legal interests of the victim, in addition to the perpetrator's internal accountability for cleansing their own conscience and the community's (village's) conscience from the committed crimes. If the criminal offenses result in multiple victims, external accountability is assigned for each victim of the criminal acts.

Moreover, Ayah Mursyid explained that the series of criminal offenses committed are not combined into one but are treated as separate offenses, and accountability is assigned for each committed offense.

The writer conducted a direct interview with a native Baduy community member regarding the enforcement of law for criminal acts within the Baduy indigenous community. Based on the interview with Ayah Mursyid, it was revealed that over hundreds of years, the Baduy community has managed to maintain harmonious relationships among its members and with the natural environment. Baduy customary law, including its customary criminal law, has been effective without the presence of arbitrariness. If a violation is committed within the Baduy community, the customary sanctions are well understood by the

community members, and they accept the legal consequences of their actions. However, it is still unclear whether Baduy customary criminal law has written legal sources or relies solely on unwritten norms that have been passed down through generations. Any Baduy individual who intentionally commits murder under Baduy customary criminal law is required to perform repentance forty times, undergo the "serah pati" ritual, be expelled along with their family from Baduy Dalam for seven generations, and excluded from customary ceremonies (Ayah Mursid, Personal Interview, 2021).

Regarding criminal punishment for offenses committed within a customary community that has its own customary law, there are various differing views on the purpose of punishment, making it a complex issue. Packer's view, as quoted by Lukman Hakim, presents two conceptual perspectives, each with distinct moral implications: the retributive view and the utilitarian view (Lukman Hakim, 2019).

The retributive view considers punishment as a negative consequence for deviant behavior committed by community members. It sees punishment solely as retribution for the individual's wrongdoing based on their moral responsibility. This view is backward-looking. The utilitarian view looks at punishment in terms of its benefits or usefulness. It considers the outcome or situation that punishment aims to achieve. Punishment is intended to correct the convict's behavior and prevent others from committing similar acts. This view is forward-looking and preventive (Lukman Hakim, 2019).

In conclusion, the retributive view focuses on punishment as retribution and deterrence for the offender, while the utilitarian view focuses on the purpose and benefits of imposing punishment. The utilitarian perspective seeks to use punishment not only as a means of penalizing an action but also to improve the convict's behavior and prevent similar actions from occurring.

Furthermore, Muladi categorizes theories of the purpose of punishment into three groups (Lukman Hakim, 2019):

1. The absolute (retributive) theory views punishment as retribution for a crime committed. It emphasizes that criminal sanctions are imposed solely because a person has committed a crime, which is an absolute consequence that must exist as retribution for the offender. The sanctions aim to satisfy the demand for justice.
2. The teleological (purpose) theory views punishment as a means to achieve beneficial goals, rather than retribution for the offender. It emphasizes the outcome, such as preventing individuals from committing crimes, rather than serving absolute justice.

3. The retributive-teleological theory combines retributive and teleological principles. This theory is dual in nature. It contains retributive characteristics as punishment is viewed as a moral critique in response to wrongful actions. At the same time, its teleological character lies in the idea that the moral critique's purpose is to reform or change the convict's behavior in the future.

Regarding the theory of absolutism proposed by Muladi, this theory is not different from the utilitarian perspective put forth by Packer, which views punishment as a means of retribution for deviant behavior committed by an individual. Similarly, the teleological or purpose theory presented by Muladi is also in line with Packer's utilitarian view. In both cases, punishment is not only about retribution for deviant behavior but also aims to achieve certain purposes and benefits, with the underlying goal being the protection and welfare of society.

Based on the various perspectives on the purpose of punishment mentioned above, the author's contention is that the retributive purpose of punishment is not relevant in the context of modern times. Social changes affecting societal structures are reasons the author disagrees with the retributive perspective, which emphasizes punishment as retribution for someone's wrongdoing. This perspective is not deemed as an effective solution for addressing societal issues.

Considering the utilitarian view proposed by Packer and the teleological theory presented by Muladi, it seems more relevant in resolving legal issues within society. As explained, the utilitarian perspective views punishment in terms of benefits and utility in achieving desired goals. Thus, punishment is not merely used as a tool for penalizing criminal behavior, but it's oriented towards reforming the offender and preventing the recurrence of such behavior by others.

The explicit formulation of the purpose of punishment will be stipulated in Article 55, paragraph (1) of the Criminal Code Bill (RKUHP). In essence, this provision states that punishment aims to prevent the commission of criminal acts by upholding legal norms for the protection and well-being of society. It also aims to reintegrate convicts into society through rehabilitation and guidance to become good and useful individuals, resolve conflicts arising from criminal acts, restore balance, promote a sense of safety and peace in society, and foster feelings of remorse while alleviating the sense of guilt in convicts. Paragraph (2) specifies that punishment is not intended to inflict suffering on humans or degrade human dignity.

The formulation of the four purposes of punishment mentioned in the RKUHP reflects a perspective centered around the protection of society (social defense), and this is further emphasized by the inclusion of the principle that punishment is not meant to demean human dignity. This perspective revolves around two key considerations: societal protection and offender rehabilitation (Lukman Hakim, 2019).

The purpose of punishment in the Criminal Code Bill (RKUHP) follows the neoclassical approach with several regulated characteristics. These include the formulation of minimum and maximum penalties, recognition of principles or circumstances that mitigate punishment, grounding in objective circumstances, and considering the need for individual rehabilitation of the criminal offender. The formulated purposes within the RKUHP appear to be rooted in the relative punishment theory, which aims to achieve benefits for protecting society and promoting societal well-being.

The author contends, based on the various perspectives on the purpose of punishment discussed above, that the purpose of punishment is the starting point for the goal of law itself. Once the purpose of punishment is established, the direction and objectives of the law can be achieved. However, Indonesia has not fully articulated the purpose of punishment in its criminal laws. Nevertheless, the RKUHP includes the intended purposes of punishment that will be applied in the future in Indonesia.

The utilitarian or teleological version of the purpose of punishment proposed by Muladi is an ideal objective for the present time. This perspective views punishment not merely as a tool for penalizing criminalized actions but considers the purposes and benefits of punishment itself.

According to the author's opinion, the retributive purpose of punishment is not suitable for application in the current era due to socio-economic and societal developments. When the law is geared solely towards retribution without considering the benefits for both offenders and victims, it could render law enforcement ineffective. If punishment is devised without considering its purpose and benefits, there's a likelihood that individuals who have committed crimes may repeat their actions. The deterrent effect is relative, as crimes are influenced by various factors. If these underlying factors are not addressed, individuals might repeat their criminal acts once they are free.

Regarding murder, as described earlier, Indonesia possesses a diverse array of customary laws and has its own regulations for resolving crimes that occur within its societies. However, in the case of murder, the punishment is regulated according to criminal law, and the

purpose of punishment has been explicitly formulated and specified within the Criminal Code. This suggests that Articles 338-350 of the Criminal Code serve as a mechanism to punish individuals who commit murder, similar to the retributive purpose of punishment, which focuses on retribution for the committed offense.

Furthermore, the retributive purpose of punishment, when considering the factors that lead someone to commit murder, is primarily rooted in intrinsic and environmental factors. Punishing a murderer is indeed justifiable due to the gravity of taking someone's life, aiming to prevent the repetition of such acts.

Considering the utilitarian perspective on the purpose of punishment and the purposes of punishment stated in Article 55 paragraphs (1) and (2), these are the principles that should be employed in the journey of modern law today, as they emphasize the principle of benefit in their application and are oriented towards societal protection. When looking at the implementation of penalties for murder in Articles 338-350 of the Criminal Code, it aligns with the purpose of punishment that emphasizes benefit. Prosecuting a murderer signifies that the offender will cease committing murder after facing the consequences of their actions.

4. Conclusion

Based on the research and discussions presented in the previous chapters, several conclusions can be drawn, including:

a. The occurrence of the crime of murder is not trivial, and it is important to identify the factors contributing to its commission, considering both internal and external factors. Internal factors include age, gender, personality traits, psychological factors, and religious beliefs, while external factors refer to environmental influences. The most dominant factors leading to the crime of murder committed by a young man against a girl from the outer Baduy community are the deterioration of moral values and the lack of awareness about the consequences of crime. External factors also play a role due to the unfavorable environment, which makes individuals susceptible to negative influences and the commission of criminal acts.
b. The enforcement of the law concerning the crime of murder in the outer Baduy region is comprehensive and even-handed, as evident from court decisions such as Case Number 143/Pid.B/2019/PN Rkb. Law enforcement is in accordance with Article 338 of the Criminal Code, and a correlation exists between the law enforcement entities,

namely the Police and the Public Prosecutor's Office in Lebak Rangkasbitung.

5. Recommendations

a. To reduce the occurrence of murder in the Outer Baduy region, efforts such as parental education, family cultural education, and promoting social and cultural awareness are essential. Interaction between law enforcement agencies and the community is necessary to educate about criminal activities.
b. Consider formalizing the customary criminal law of the Outer Baduy community in written form to ensure consistent knowledge and understanding among the Baduy community. Similar to the customary criminal law of the Baduy, any reform of national criminal law should focus on a comprehensive approach to criminal case resolution that accommodates the interests of victims, perpetrators, and society.
c. It's worth noting that in various regions of Indonesia, there's still a practice known as "membunuh tanpa menyentuh" ("killing without touching"), which is part of local wisdom developed to resolve issues.

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Model Penguatan Lembaga Adat Desa sebagai Lembaga Peradilan Adat

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Abstrak

Lembaga Adat Desa (LAD) memiliki latar belakang historis yang kuat sebagai Lembaga Peradilan Adat dan bagian dari susunan asli, namun kenyataannya pada Pasal 94 Undang Undang Nomor 6 Tahun 2014 tentang Desa (UU Desa) menempatkan kedudukan LAD sebagai "mitra" dan bahkan dalam pembentukannya harus menunggu adanya Peraturan Bupati/Peraturan Walikota. Hal ini tentu menjadi problematik, apalagi secara geneologi, LAD memiliki eksistensi pada sistem pemerintahan lokal maupun Lembaga Peradilan Adat. Metode dalam penelitian ini normatif dalam pemahaman yang lebih luas dengan berfokus pada studi literasi yang dianalisa secara deskirptif-kualitatif untuk didapatkan aspek preskriptinya. Hasilnya, eksistensi LAD sudah ada sejak era kerajaan maupun kolonial, namun negara melakukan kooptasi dan negaranisasi terhadap berbagai bentuk pemerintahan lokal termasuk menganulir LAD. Barulah melalui semangat reformasi dan UU Desa ada semangat baru untuk mengembalikan eksistensi LAD, hanya saja masih kurang diberikan tempat secara formil untuk menjadi Lembaga Peradilan Adat dan cenderung hanya menjalankan fungsi mediatif. Hal ini terlihat jelas pada pengtauran LAD melalui Peraturan Kementrian Dalam Negeri (Permendagri) Nomor 18 Tahun 2018. Sarannya, perlu ada perubahan terhadap Pasal 94 UU Desa yang menempatkan LAD sebagai mitra menjadi bagian integral dari Pemerintah Desa/Adat.

1. Latar Belakang

Menurut Hairansyah selaku Komisioner Komisi Nasional Hak Asasi Manusia (Komnas HAM) menyebutkan adanya 3 (tiga) masalah utama yang terkait Masayarakat Hukum Adat (MHA) yakni: a) konflik agraria; b) pengakuan MHA oleh negara ; dan c) perlindungan bagi pembela HAM (*human rights defender*)(Latuharhary, 2023). Konflik agrarian sebenarnya berkaitan erat dengan pengakuan MHA oleh negara, munculnya konflik karena tidak sigapnya negara dalam memberikan pengakuan terhadap MHA beserta hak-hak lainnya, termasuk keberadaan tanah ulayat maupun wilayah jelajahnya.

Data Catatan Akhir Tahun (Catahu) 2022 dari Konsorsium Pembaruan Agraria (KPA) sebagaimana dikuti dari mongabai.co.id menyebutkan setidaknya sepanjang tahun 2022 terdapat 212 letusan

konflik dimana letusan konflik tertinggi didominasi oleh sektor perkebunan (tertinggi sawit) dengan 99 kasus dengan total luasan 377.197 hektar serta menelan korban 141.001 keluarga(Arumingtyas, 2023). Angka ini cenderung meningkat setiap tahunnya, sehingga dalam hal menjadi pertanyaan bagaimana implementasi berbabagai macam regulasi yang selama ini "dianggap" mampu memberikan perlindungan terhadap MHA.

Pengakuan terhadap MHA pada dasarnya merupakan isu lama. Pada era Kolonial, pengakuan secara eksplisit mungkin belum muncul namun sudah terakomodir melalui penngakuan terhadap lembaga adatnya. Pengakuan di era kolonial muncul sejak era Vereenigde Oostindische Compagnie (VOC) sudah ada terhadap MHA yang kemudian di era Daendels ditambahkan larangan hukum adat bertentangan denngan hukum kolonial(Setiady, 2009:159).

Namun, memasuki era kemerdekaan yang terjadi malah berbanding kebalik terhadap pembangunan Hukum Adat di Indonesia. Pada tahun 1947 muncul Undang Undang (UU) No. 23 Tahun 1947 tentang Penghapusan Pengadilan-Raja di Jawa dan Sumatera yang isinya adalah menghapuskan kekuasaan mengadili oleh raja-raja di wilayah Jawa dan Sumatera dan dialihkan ke pengadilan dari Republik Indonesia. Setelah itu, muncul UU Darurat No. 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil yang berisi penghapusan terhadap segala bentuk pengadilan swapraja dan pengadilan adat terkecuali pengadilan agama. Belum selesai disini, posisi pengadilan adat semakin tidak berdaya dengan dikeluarkannya UU No. 19 Tahun 1964 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman. Dalam hal kelembagaan, posisi MHA kemudian dikooptasi dan dinegaranisasi melalui UU No. 5/1979 tentang Desa.

Munculnya UU No. 6/2014 tentang Desa (UU Desa) memberikan angin segar terhadap MHA, salah satunya adalah pengakuan terhadap MHA (*vide* Pasal 97 UU Desa) dan juga terhadap Lembaga Adat Desa (LAD) (*vide* Pasal 95 UU Desa).

Namun, angin segar ini (UU Desa) ternyata belum benar-benar segar, salah satunya problem pada asas rekognisi yang membutuhan prosedur birokrasi bukan pada peningkatan perlindungan terhadap MHA. Proses birokrasi ini sifatnya adalah *top down* (*vide* Pasal 96 UU Desa) sehingga penekanan asas ini tidaklah efektif terhadap perlidungan MHA(Yuli Isdiyanto, 2023). Peluang sebenarnya muncul pada LAD yang menjadi kewenangan Pemerintah Desa dan Masyarakat Desa (*vide* Pasal 95 ayat (1) UU Desa) tanpa perlu adanya penetapan Desa Adat namun hanya adanya Peraturan Desa. Tetapi, sangat

disayangkan muncul Pasal 11 ayat (2) Peraturan Pemerintah (PP) No. 18 Tahun 2018 tentang Lembaga Kemasyarakat Desa dan Lembaga Adat Desa yang berisi keharusan adanya Peraturan Bupati/Peraturan Walikota sebagai pedoman dalam pembentukan Peraturan Desa. Disini, terjadi kooptasi kembali setelah seakan-akan dibebaskan (baca: rekognisi).

Jika mengacu pada ketentuan Pasal 95 ayat (2) UU Desa, keberadaan LAD memiliki dua fungsi yakni: a) adat istiadat; dan b) bagian dari susunan asli desa. Hanya saja, yang menjadi pertanyaan adalah batasan apa yang dimaksud dengan "adat istiadat" disini, apakah hanya dibatasi pada *ceremony* kebudayaan atau sampai pada pelaksanaan dan penegakan hukum adat. Dalam konteks susunan asli juga timbul pertanyaan, apakah didalamnya juga termasuk bagian dari penyelenggaraan pemerintah desa dalam rangka hak asal usul ataupun hak adat tradisional? Salah satu hal yang paling penting adalah kewenangan LAD dalam aspek "peradilan lokal", karena dengan adanya kewenangan inilah sebenarnya ada peran dan fungsi dari LAD dalam mengembangkan dan melestarikan adat. Logikanya, tidak mungkin melestarikan adat yang notabene adalah norma tanpa ada upaya penegakannya, dan tidak mungkin akan ada penegakan adat tanpa adanya lembaga penegaknya.

Dari sini, penting untuk melihat peluang seperti apa yang bisa dikembangkan dengan memperkuat LAD menjadi lembaga "peradilan lokal" berbentuk peradilan adat. Model gagasan ini perlu untuk diuji secara historis, filosofis, sosiologis maupun secara yuridis. Dalam penelitian ini, dikonstruksikan bagaimana model penguatan LAD sebagai peradilan adat dianalisa lebih lanjut.

2. Metode Peneltian

Penelitian ini adalah penelitian normatif karena setiap penelitian hukum pada dasarnya adalah penelitian normatif(Marzuki, 2010), istilah normative didalamnya mengandung pemahaman *das sollen,* yakni melihat hukum dalam konteks yang seharusnya. Oleh karenanya, dasar normatif ini tidak hanya didasarkan sebatas pada perundang-undangan(Isdiyanto, 2016), melainkan juga beragam hukum yang hidup dalam masyarakat atau dalam kontruksi pluralisme hukum(Yuli Isdiyanto, 2023). Selanjutnya, kajian ini lebih pada kajian konseptual namun tidak membatasi diri pada satu pandangan saja, karena hukum pada dasarnya tidak berada di ruang hampa(Warrasih, 2016). Hukum selalu berada pada relasi anasir-anasir non hukum(Scholten, 2002).

3. Pembahasan

3.1. Gen Lembaga Adat Desa

Pembacanaan geneologi adalah pembacaan lebih melihat proses perubahan dalam setiap perkembangan, tidak hanya sebatas pada fakta sejarah namun juga latar belakang dan tujuan yang ada didalamnya, disini relasi fakta tidak bisa dilepaskan dari subyek-subyek yang mendorongnya terjadi. Seperti halnya dalam pembacaan gen hukum yang melihat hukum bukan hanya sebagai "alat" atau aturan melainkan juga sebagai identitas suatu masyarakat (subyek)(Isdiyanto, 2018), maka gagasan gen LAD juga melihat eksistensi identitas ini sebagai karakter yang menonjol (*volkgeist*) dari masyarakat adat dalam proses historisnya.

Sistem kerajaan Sriwijya sangat memungkinkan adanya pengakuan terhadap masyarakat adat, hal didasarkan pada analisa di era kerajaan Sriwijaya tidak menempatkan pola sentralistik murni melainkan lebih pada federaslitik campuran(Isdiyanto, 2016). Selainn itu, adanya Prasasti Kalasan yang menghadiahkan tanah perdikan di Desa Kalasan juga menjadi penanda bagaimana relasi antara kerajaan dengan pranata lokal (keagamaan) mampu untuk saling mendukung (Muljana, 2012:186). Data-data lain di era Sriwijaya memang sangat sulit, terutama untuk melihat dalam konstruksi berbagai lembaga lokalnya.

Di era Majapahit, hal ini lebih tersikap terutama peran Desa. Dalam pidatonya Hayam Wuruk menyebutkan *"ibu kota dan daerah pedusunan ibarat singa dan hutan"* yang mengisyaratkan perekonomian desa adalah saka dari perekonomian kerajaan(Mulyana, 2012). Selain itu, pemberian otonomi terhadap desa sangat besar salah satunya adalah berkaitan dengan otonomi hukum desa yang oleh Muhammad Yamin disebut sebagai hukum adat (Yamin, 1962a:233). Desa muncul sebagai perseukutuan hukum organic, dimana eksistensi mereka yang sudah ada sebelum era kerajaan-kerajaan besar dan masih tetap bertahan dalam berbagai pergantian rezim, hal ini bisa dilakukan karena otonomi desa mendorong desa bersifat mandiri dalam banyak aspek, baik perekonomian, sosial, politik, budaya dan hukum (Raharjo, 2011:39).

Menariknya, jika dilihat pada Piagam Gunung Wilis sebagaimana dikutip dalam bukunya Muhammad Yamin, *Tatanegara Madjapahit,* Parwa II menyebutkan dalam hal penyelesaian suatu perkara digunakan hukum yang berlaku (tertulis), hukum kebiasaan di desa maupun keterangan guru-guru serta orang tua (Yamin, 1962b). Adanya ini menjadi salah satu penguat cara pandang hukum yang lebih proporsional dalam menempatkan pranata norma lokal dalam penyelesaian sengketa (Isdiyanto, 2021:129).

Pemahaman Christian Snouck Hurgronje yang menempatkan pemahaman *adatrecht* yakni adat yang memiliki sanksi (Setiady, 2009:8) memiliki kelemahaman mendasar, karena tidak berangkat dari pemahaman emik namun pemahaman etik dan bias. Artinya Christian Snouck Hurgronje hanya menggunakan "cara pandang" hukum Barat (terutama *civil law*) terhadap adat. Pandangan Christian Snouck Hurgronje bukan hanya bias terhadap pemaknaan adat, melainkan juga bias terhadap pengertian "sanksi" itu sendiri. Sanksi dalam pemikirannnya Christian Snouck Hurgronje berbentuk penghukuman layaknya pembalasan seperti hukum badan, merenggut kebebasan maupun denda. Namun, konsep hukuman didalam masyarakat adat sangatlah beragam, bahkan tidak hanya pembalasan atau pertanggungjawaban melainkan adalah upaya harmonisasi semesta. Oleh karenanya, C. van Vollenhoven sepertinya lebih bijak dengan menyadari bahwa hal yang paling penting bukan pada adat (membicarakan adat) melainkan cara membicarakannya (Vollenhoven, 1981:154).

Gagasan C. van Vollenhoven yang lebih bijak memandang adat ini membawa dampak positif, terutama keberhasilannnya mempengaruhi pemerintah kolonial untuk mengekui eksisten adat dan sekaligus pranata hukumnya. Awalnya Hindia Belanda menerapkan asas konkondansi, yakni hukum negara penjajah yang berlaku sama dinegara jajahan(Yanis Maladi, 2011), namun C. van Vollenhoven berhasil menyakinkan Hindia Belanda untuk mengabaikan asas konkordansi dan memulai dualism hukum. Secara tegas C. van Vollenhoven menganjurkan untuk tidak mengggunakan kecamata *juristenrecht* dalam menemukan hukum di Hindia Belanda waktu itu(Yanis Maladi, 2011). Dimulailah waktu itu penerapan asas dualisme hukum, sehingga ada peluang bagi MHA untuk menjalankan dan menegakkan hukumnya sendiri. Walaupun disisi lain, dualism ini terkesan "banci" dikarenakan MHA dapat menundukkan diri kepada hukum Eropa. Startegi ini dilakukan agar kelak MHA secara bertahap dapat menerima hukum Eropa secara utuh, produknya adalah dikeluarkan kebijakan *Vrijwillige Onderwepping* (penundukan sukarela) dan *Toepasselijk Verklaring* (kebijakan aturan memaksa)(Muttaqin & Zaini, 2021). Cita-cita uniformitas ini kemudian kandas terlebih dahulu dengan direbutnya Hindia Belanda oleh Jepang, namun ternyata proses *hybrid* antara hukum "bergaya" Eropa dengan adat sudah mulai berjalan (Koesnoe, 2002:161).

Pada era perjuangan kemerdekaan, kesadaran atas adat sudah banyak merasuk seagai cita-cita sistem pembangunan hukum nasional. Puncaknya adalah saat adat menjadi cita-cita dasar hukum pasca

merdeka pada Sumpah Pemuda 1928. Pada saat rapat Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) pidato Soepomo tentang negara integralistik juga banyak mengangkat dasar dalam pemikiran adat di Indonesia, salah satunya menggeser cara berfikir negara hukum yang *rechmatigheid* yang menggeneralisir menjadi *doelmategheid* yang lebih konkrit. Bahkan, Sopeomo juga menawarkan cara berfikir berbasis pada adat Bali yakni *desa, kala, patra* menjadi *masa, tempat* dan *soalnya.*(Yamin, n.d.)

Gagasan Soepomo tentang negara integralistik walaupun tidak diterima, namun ia berhasil diberi kepercayaan oleh BPUPKI untuk merancang Undang Undang Dasar (UUD) 1945, sebagaimana disebutkan oleh Hamid Attamini, bahwa karakter Republik Indonesia terefleksikan oleh konsep lokal yakni "republik desa"(Attamimi, 1990). Bahkan, didalam penjelasan UUD 1945 ini juga disebutkan eksistensi hukum tidak tertulis (hukum adat) disamping hukum tertulis sebagai dasar konstitusinya. Istilah "disamping" menempatkan posisi hukum tidak tertulis pada dasarnya sejajar dengan hukum tertulis.

Namun, munculnya UU Darurat No. 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil yang berisi penghapusan beberapa bentuk peradilan lokal maupun peradilan swapraja berbanding terbalik dengan semangat penguatan identitas hukum nasional berdasarkan hukum adat. Menariknya, pada tahun 1960 dikeluarkan Ketetapan Majelis Permusyawaratan Rakyat Sementara Nomor II Tahun 1960 dimana pada Lampiran I menetapkan hukum adat menjadi landasan tata hukum nasional(Y. Maladi, 2010). Ditambah lagi, tidak sampai satu tahun muncul UU No. 19 Tahun 1964 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman yang menekankan sistem peradilan yang sentralistik dibawah Mahkamah Agung. Pada penjelasan UU No. 19 Tahun 1964 ini secara tegas menyebut "tidak ada tempat bagi peradilan swapraja atau peradilan Adat" yang jelas-jelas menegasikan eksistensinya selama ini, namun disisi lain terdapat *desclaimer* dengan menyebutkan ketentuan tersebut tidaklah bermaksud untuk mengingkari hukum tidak tertulis atau hukum adat.

Gelagat untuk menghilangkan hukum adat semakin sangatlah jelas dengan menghapuskan lembaga peradilan adat yang menjadi *guardian* terhadap adat. Disatu sisi, penguatan institusi negara makin kuat sampai pada tatanan yang paling rendah. Pasca era Orde Baru, negara semakin menjadi-jadi, tidak hanya peradilan lokal saja yang dihilangkan melainkan juga berbagai bentuk pranata lokal ditingkat desa dengan dikeluarkannya UU No. 5 Tahun 1979 tentang Desa. Melalui UU No. 5 Tahun 1979 ini negara melakukan kooptasi atau

negaranisasi terhadap desa (Basuki, 2017), terutama dalam aspek pranata lokalnya menjadi pranata negara atau desa tidak lain adalah bagian dari sistem administratif negara.

Baru setelah bertahun-tahun, keberadaan desa mendapatkan angin segar dengan adanya UU No. 22 Tahun 1999 tentang Pemerintah Daerah. Pada ketentuan Pasal 99 UU No. 22 Tahun 1999 sudah disebutkan kewenangan berdasarkan hak asal-usul Desa, bahkan didalam konsideran disebutkan keberadaan UU No 5 Tahun 1979 yang menyeragmkan nama, bentuk, susunan, dan kedudukan pemerintah Desa tidak sesuai dengan jiwa UUD 1945. Kewenangan berdasarkan hak asal usul ini kemudian tetap diperhankan pada UU No. 32 Tahun 2004 tentang Pemerintahan Desa namun lebih menyebutkan sebagai urusan pemerintahan (*vide* Pasal 206).

Kewenangan Desa kemudian mendapatkan perluasan dengan disahkannya UU No. 6 Tahun 2014 tentang Desa, dimana tidak hanya mengakomodir kewenangan berdasarkan hak asal usul melainkan juga kewenangan lokal berskala desa. Hal ini menjadikan terjadi perubahan struktur ketatanegaraan, dimana posisi desa bukan sebatas pada subordinat pemerintah daerah melainkan memiliki hak otonomi dalam menyelenggarakan pemerintahannya. Bahkan, produk hukum pemerintah desa seperti Peraturan Kepala Desa dan Peraturan Desa kemudian diakui sebagai perundang-undangan (*vide* Pasal 8 ayat (1) UU No. 12 Tahun 2011 dan Pasal 1 angka 7 UU No. 6 Tahun 2014).

Salah satu bentuk penguatan desa adalah diakomodirnya Lembaga Adat Desa (LAD) yang dapat dibentuk oleh Pemerintah Desa bersama masyarakat Desa (*Vide* Pasal 95 UU Desa). Pembentukan LAD jika melihat pada ketentuan perundang-undangan bersifat alternatif, artinya LAD adalah hak dari Pemerintah Desa dan masyarakat Desa sehingga tidak harus ada penetapan sebagai desa adat terlebih dahulu. LAD mungkin berangkat dari semangat hak asal usul, namun dia juga melekat dalam kewenangan desa sebagai kewenangan lokal berskala desa.

Jika melihat pada ketentuan Pasal 9 ayat (2) UU Desa menyebutkan "Lembaga adat Desa sebagaimana dimaksud pada ayat (1) merupakan lembaga yang menyelenggarakan fungsi adat istiadat dan menjadi bagian dari susunan asli Desa yang tumbuh dan berkembang atas prakarsa masyarakat Desa." Dalam ketentuan ini, paling tidak ada dua fungsi dari LAD, yakni fungsi adat istiadat dan bagian dari susunan asli desa. Dalam konteks ini ada persoalan, pada fungsi adat istiadat tidak jelas batasan mana yang menjadi kewenangan relasinya dengan adat atau hukum adat yang ada, serta pada batasan mana kewenangan berbasis pada susunan asli desa.

Setelah coba dicari pemaman tentang batasan mana yang dimaksud adat istiadat, regulasi ditinngkat pusat tidak memberikan satu pun bentuk pemahaman terhadapnya. Apakah mencakup hukum adat atau sebatas pada relasi budaya (*ceremony*) semata. Jika mengacu pada Kamus Besar Bahasa Indonesia dalam *website* yang dikelola kementrian Pendidikan dan Kebudayaan, istilah adat istiadat diartikan sebagai "tata kelakuan yang kekal dan turun-temurun dari generasi satu ke generasi lain sebagai warisan sehingga kuat integrasinya dengan pola perilaku masyarakat". Pengertian tersebut sangat sarat dengan pemahaman adat maupun hukum adat, penyebutan "tata kelakuan" menyiratkan pada aspek normative maupun *das sollen* sebagai ciri utama sebuah aturan. Artinya, pemahahan adat istiadat seharusnya bisa diarahkan pada bentuk "norma" bukan hanya sebatas pada aspek seremonial. Hal ini linear dengan pemahaman masyarakat Minangkabu yang juga mengenal adat istiadat sebagai aturan hasil dari kesepakatan atau mufat dari pada penghulu bersama dengan ninik-mamak (Isdiyanto, 2019:178).

Selanjutnya adalah fungsi dari susunan asli, dalam konteks ini seharusnya memlihat dalam sudut pandang peyelenggaraan pemerintahan. Jika dilihat pada Naskah Akademik Rancangan Undang Undang Desa Tahun 2014, susunan asli adalah dasar dari struktur pemerintahan Desa, terutama dalam hal menyelesaikan sengketa secara adat serta melestarikan adat dan budaya setempat[292].

Pengaturan pada Pasal 94 ayat (2) UU Desa yang mengakomdir LAD dalam aspek adat istiadat dan susunan asli desa ternyata tidak *linear* dengan Pasal 95 ayat (3) UU Desa yang menmaptkan LAD bertugas "membantu" dan "mitra" dari Pemerintah Desa dalam hal memberdayakan, melestarikan dan mengembangkan adat istiadat. Artinya, penempatan LAD kemudian dikeluarkan dari konsep susunan asli dan secara administrasi tidak memiliki posisi tawar didalam pemerintah Desa.

Pengaturan ini jelas seakan ingin mendorong perluasan peran LAD namun sekaligus membatasinya, sehingga kedua ayat ini jelas tidaklah inheren satu sama lain. Persoalan tidak selesai disini, merespon hal ini Kementrian Dalam Negeri kemudian meneluarkan Peraturan Kementrian Dalam Negeri (Permendagri) Nomor 18 Tahun 2018 tentang Lembaga Kemasyarakatan Desa dan Lembaga Adat Desa

[292] E.B Sitorus et al., "Naskah Akademik Rancangan Undang Undang Tentang Desa" (Jakarta: Direktorat Jenderal Pemberdayaan Masyarakat Dan Desa Kementerian Dalam Negeri Jakarta, 2014), https://www.dpr.go.id/arsip/download?file=https://berkas.dpr.go.id/armus/file/Lampiran/leg_1-20200804-100959-7345.pdf.94

dimana pada ketentuan Pasal 9 disebutkan pembentukan LAD ditetapkan dengan Peraturan Desa, hanya saja pada ketentuan Pasal 11 ayat (2) Permengri *a quo* mengatur tehnis pembentukan Peraturan Desa berkaitan LAD yang berpedoman pada Peraturan Bupati/Peraturan Walikota. Ketentuan ini jelas bertentangan dengan kewenangan Desa berdasarkan hak asal-usul maupun kewenangan lokal berskala desa, apalagi tidak ada cantolan hukumnya UU Desa.

3.2. Model Penguatan Lembaga Adat Desa sebagai Peradilan Adat

Secara konstitusi, pembentukan LAD merupakan hak yang seharusnya diberikan negara dalam rangka mengakui dan menghormati kesatuan-kesatuan MHA dan hak-hak tradisionalnya yang diatur didalam undang-undang (*vide* Pasal 18B ayat (2) UUD 1945). Jelas disini pengaturan utamanya ada pada level undang-undangan, bukan aturan dibawahnya.

Selain itu, konsitusi juga telah menjamin identitas budaya dan hak masyarakat tradisional harus diberikan penghormatan yang selaras dengan perkembangan zaman dan perabadan (*vide* Pasal 28I ayat (3) UUD 1945). LAD adalah reprsentasi dari identitas budaya dan menjadi hak Pemerintah Desa maupun masyarakat desa pada umumnya.

Jika adat adalah bagian dari nilai-nilai budaya, maka salah satu bentuk pelestariannya adalah dengan adat. Negara dalam konteks ini juga seharusnya memberikan jaminan sebagaimana dimaksud pada Pasal 32 ayat (1) UUD 1945. Dalam pasal tersebut, ada disebutkan "menjamin kebebasan" yang artinya hal ini adalah hak yang seharusnya dilindungi bukan keputusan dari pemerintah pusat. Jaminan kebebasan yang telah terakomodir didalam konstitusi seyogyanya diturunkan dalam peraturan dibawahnya.

Berkaitan dengan LAD sebagaimana diatur dalam UU Desa seharusnya berangkat dari semangat UUD 1945, dimana konstruksi yang dibangunan adalah jaminan atas perlindungan LAD, bukan semanat untuk mengaturnya. Jaminan perlindungan berarti negara bersifat aktif bukan dalam rangka memberi pengaturan, melainkan memberikan berbagai fasilitas agar legitimasi terhadap LAD bukan hanya sebatas pada legitimasi sosial, melainkan juga legitimasi hukum.

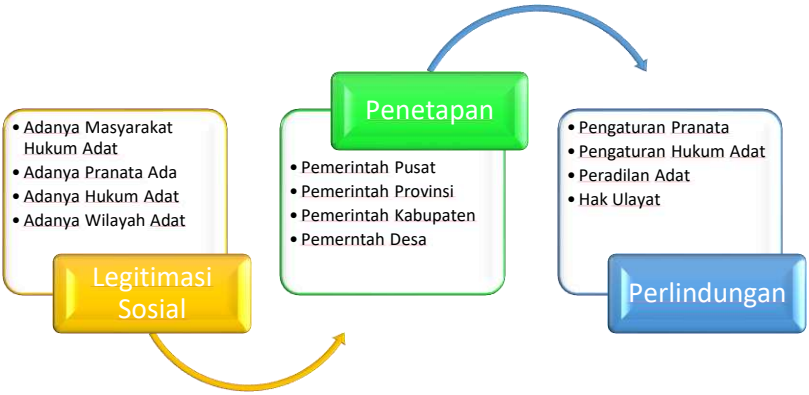
Perlindungan adalah upaya untuk melindung hak-hak yang dimiliki oleh MHA salah satunya adalah dalam rangka membentuk LAD yang merupakan bagian dari pranata adat. Paling tidak, ada 4 (empat) sektor yang perlu diberikan perlindungan dalam konteks ini, diantaranya: a) identitas MHA; b) pranata adat sebagai pelaksana dan penegakan identitas MHA; c) adat sebagai dasar nilai-nilai yang

digunakan; dan d) ulayat atau wilayah jelajah sebagai hartas pusaka MHA.

Gambar 1. Alur Logika Asas Perlindungan

Salah satu bentuk perlindungan ada negara menguranngi dominasi yang cenderung merugikan masyarakat adat, contoh negara memberikan keleluasaan pada MHA dalam konteks perlidungan dapat dilihat dalam Pasal 13 UU No 11 tahun 2010 tentang Cagar Budaya dimana negara menarik diri dari kawasan cagar budaya yang dimiliki oleh MHA. Namun, sayangnnya pada UU Desa tidak diakomodir asas perlindungan terhadap MHA, yang ada adalah asas rekognisi dan subsidiaritas sehingga semua bentuk perlindungan terhadap MHA maupun Desa Adat sifatnya cenderung prosedural dan birokratif (Pasal 96 *jo* Pasal 97 UU Desa). Perlindunngan terhadap identitas budaya MHA muncul pada ketentuan Pasal 6 ayat (2) UU No. 39 tahun 1999 tentang Hak Asasi Manusia dengan catatan selaras dengan perkembangan zaman. Melihat sifat hukum adat yang dinamis maka hal ini tidaklah menjadi soal(Koesnoe, 1979). Namun, sayangnya ketentuan pasal ini hanya bersifat "declarative" tanpa memberikan adanya penekanan pada penegakannya ataupun sanki terhadapnya.

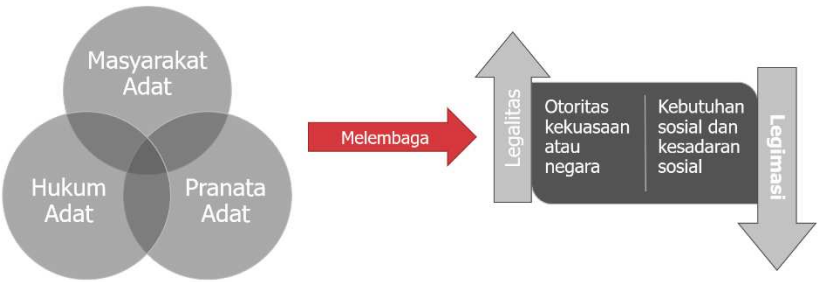
Jika mengacu pada logika asas rekognisi, maka sesuai ketentuan Pasal 96 UU Desa membutuhkan adanya "penetapan terlebih dahulu dari Pemerintah Pusat, Pemerintah Provinsi, atau Pemerintah Kabupaten sehingga baru muncul adanya perlindungan. LAD hanya membutuhkan penetapan dari Pemerintah Desa namun dengan prasyarat sudah ada pengaturan pedomannya pada Peraturan Bupati/Peraturan Walikota.



Gambar 2. Alur Logika Asas Rekognisi

Melihat alur diatas, maka bentuk perlindungan yang diberikan negara berdasarkan undang undanng yang ada adalah "perlindungan bersyarat prosedural" sehingga dalam konteks ini logikanya jika tidak diberi penetapan maka tidak dilindungi. Hal ini jelas selalu menempatkan posisi masyarakat selalu lemah(Syamsudin, 2008), beban prosedur birokrasi yang tidak banyak terpahami menjadikan arah kebijakan masih sangat kurang berpihak.

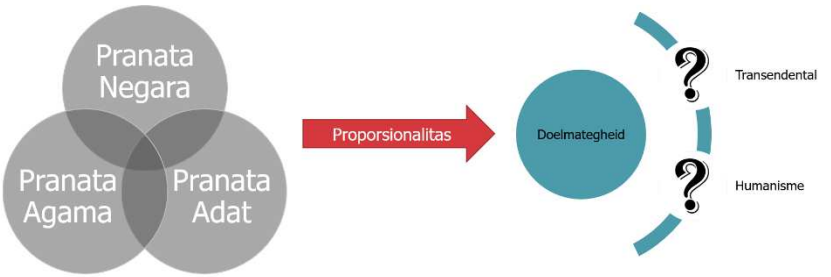
Pada dasarnya, LAD memiliki legitimasi sosial namun lemah dalam legalitas tanpa ada penetapan dari Pemerintah Desa, disisi lain, munculnya PP No. 18 Tahun 2018 bukannya mempermudah namun malah memberikan syarat tambahan dalam pembuatan Peraturan Desa yang harus berpedoman melalui Peraturan Bupati/Peraturan Walikota. Dalam hal ini, terjadi ambivalensi terhadap kedudukan LAD, yaknni antara legalitas dengan legitimasi yang tidak sejalan.



Gambar 3. Alur Logika Asas Legitimasi Sosial

Pada gambar diatas, istilah melembaga memiliki dua makna, yakni melembaga dalam pemahaman sosiologis dan melembaga dalam pemahaman yuridis. Dalam pemahaman sosiologis, istilah melembaga memiliki pemhaman diterima oleh masyarakat dan eksist didalamnya(Soekanto, 2003), sedangkan dalam pemahaman yuridis – berangkat dari asas legalitas – maka pemahaman melembaga harus berbasis pada penetapan otoritas yang berwenang (sesuai Pasal 96 UU Desa).

Menanggapi hal ini, pendekatan yang seharusnya dilakukan oleh negara adalah pendekatan proporsionalitas. Disatu sisi, regulasi memang menempatkan adanya proses rekognisi yang prosedural karena adanya asas subsidiaritas. Tetapi, harus dipahami bahwa penempatan asas rekognisi dalam kacamata prosedural akan mendorong pada bentuk formalitas, bukan pada aspek materil yang menjadi pencirian MHA. Pencirian pada aspek materil berlatar pada prinsip konkrit yang selama ini menjadi pegangan masyarakat adat. Ketidaksinkronan terhadap prinsip ini yakni berkaitan dengan pertanggungjawaban yang lebih banyak dibebankan kepada pelaksana kebijakan disbanding dengan pembuat kebijakan(Thontowi, 2015).



Gambar 4. Alur Logika Asas Proporsionalitas

Relasi MHA melalui pranata adatnya harus mampu bersinergi dengan pranata negara maupun pranata agama, pendekatan berbasis proporsionalitas disini yang paling memungkinkan untuk memahami ketiganya. Prinsip proporsionalitas mumpuni untuk mengakoodir berbagai pranata diatas dikarenakan ia berorientasi pada tujuan negara (*staatsidee*) dimana hal ini sama dengan gagasan Soepomo pada pidato di BPUPKI(Soepomo, 1945). Terhadap tujuan negara ini, sebagaimana disampaikan oleh Soepomo bukan berfokus pada *rechtmategheid,* melainkan pada *doelmategheid.* Arah negara pada aspek *doelmategheid* berarti berfokus pada tujuannya, yakni esensi kenapa negara itu muncul(Ansori, 2017). Dalam mendoronng kearah *doelmategheid* ini

Soepomo kemudian memberikan metode berbasis tidak pengkondisian, yakni; a) waktu; b) tempat; dan c) soal(Soepomo, 1945). Tiga bentuk pengkondisian ini menurut hemat penulis bukan muncul begitu saja, melainkan berasal dari nilai-nilai budaya Bali dengan istilah *desa, kala, patra* (Isdiyanto, 2021:96).

Selanjutnya, penggunaan prinsip proporsionalitas ini didasarkan pada dua faktor utama yakni; yakni; pemenuhan kodrat manusia sebagai 'prinsip primer' dan penghormatan harkat dan martabat manusia sebagai 'prinsip sekunder' (Isdiyanto, 2021:169). Pemenuhan kodrat manusia berangkat dari prinsip moral yang transendental, sedang penghormatan harkat dan martabat manusia adalah prinsip moral humanisme. Jika melihat pada kedua prinsip moral ini, maka relasi antara pranata negara, pranata adat bahkan pranat agama harus dilihat dalam dasar moralitas. Hal ini mirip dengan konsep *moral reading* yang dikembangkan oleh Dworkin(Dworkin, 1996).

Jika melihat lebih dalam lagi, berkaitan regulasi terhadap LAD belum memenuhi kapasitas proporsionalitas ini, negara masih ingin "saklek" dalam mengatur eksistensi MHA termasuk pranata adatnya. Ketidakinherennya Pasal 94 ayat (2) dan Pasal 94 ayat (3) UU Desa menjadikan regulasi ini kontradiktif, ditambahkan ketentuan dalam Pasal 11 ayat (2) Permendagri No. 18 Tahun 2018 masih menempatkan negara pada dasar *rechmategheid* bukan *doelmategheid,* padahal LAD sebagaimana diatur dalam UUD 1945 adalah termasuk "hak" sehingga seharusnya tidak perlu ada pedoman.

Berdasarkan analisa diatas, maka seharusnya arah dan model dari LAD didasarkan pada prinsip berfikir sebagai berikut :

a. eksistensi LAD sudah ada sejak era kerajaan, kolonial hingga kini dengan nama dan bentuk yang berbeda-beda sesuai dengan MHA di suatu wilayah tertentu;
b. LAD harus dilihat dalam konsteks legitimasi sosial dikarenakan telah melembaga didalam masyarakat;
c. sebagai fungsi susunan asli, LAD seharusnya bukan hanya dilihat sebagai "mitra" namun masuk bagian dari sistem penyelenggaraan Pemerintahan Desa;
d. pembentukan LAD adalah hak tradisional yang seharusnya difasilitasi, sehingga pengaturannya diserahkan pada tingkat Pemerintah Desa sebagai bagian dari kewenangaberdasarkan hak asal usul dan kewenanga lokal beskala desa.

Dalam hal penempatan LAD sebagai Lembaga Peradilan Adat, makan analisanya perlu diperkuat dengan argumentasi yuridis dan

sosiologis. Jika melihat dalam perspektif gen hukum, Penjelasan Umum I UUD 1945 sebelum amandemen menempatkan posisi hukum tidak tertulis sejajar (disamping) dengan hukum tertulis sehingga kelembagaannya dalam hal menegakkan hukum tidak tertulis seharusnnya juga medapatkan perlindungan dan pengakuan dari negara. Selanjutnya, pasca amandemen UUD 1945 walaupun menempatkan hak-hak tradisional termasuk hukum tidak tertulis (adat) secara subordinat, penempatannya sebagai "hak".

Ada banyak alasan kenapa LAD pada dasarnya perlu diberi penguatan untuk menjadi Lembaga Peradilan Adat, diantaranya:

a. keputusan LAD lebih mencerminkan "hukum dan keadilan yang hidup didalam masyarakat" sehingga linear dengan tujuan hukum di Indonesia;
b. Indonesia memiliki marwah hukum yang *diversity,* oleh karenanya pluralisme hukum dapat berjalan melalui LAD sebagai Lembaga Peradilan Adatnya;
c. putusan LAD yang berangkat dari nilai-nilai serta adat akan lebih aktual, sehingga mampu mendorong ketertiban secara lebih baik; dan
d. eksistensi LAD sesuai dengan *volkgeist* dan tidak bertentangan dengan Pancasila dan UUD 1945.

Jika melihat pada ketentuan Pasal 10 ayat (2) huruf d Permendagri No. 18 Tahun 2018 yang menyebutkan fungsi dan tugas dari LAD salah satunya adalah "mengembangkan nilai adat istiadat dalam penyelesaian sengketa pemilikan waris, tanah dan konflik dalam interaksi manusia" maka pemaknaanya kurang tegas sehingga nantinya bukan kewenangan mengadili dan memutus sengketa namun hanya menjalankan fungsi mediatif. Jika hanya menjalankan fungsi mediatif, maka tidak perlu ada ketentuan khusus karena setiap orang juga dapat melakukan hal itu sebagaimana diatur dalam Pasal 6 UU No. 30 Tahun 1999 tetang Arbitrase dan Alternatif Penyelesaian Sengketa seta Pasal 36 ayat (1) Peraturan Mahkamah Agung No. 1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan(Isdiyanto & Wahyu Asmorojati, 2021).

4. Kesimpulan

1. Eksistensi LAD sudah ada sejak era Kerajaan dan mendapatkan tempat dalam sistem pengaturan kerajaan (secara pluralisme) bahkan di era Kolonial atas desa Van Vollenhoven juga mendapatkan tempat. Namun, melalui munculnya UU Darurat No. 1/1951 dan UU No. 5/1979 maka terjadi kooptasi oleh negara

terhadap lembaga-lembaga lokal. Era reformasi sampai pada munculnya UU No. 6/2014 menjadi semangat baru dalam mengembalikan eksistensi LAD.

2. Namun LAD kini masih kurang diberikan tempat secara formil dalam penyelesaian sengketa, sifatnya lebih cenderung menjalankan fungsi mediatif yang dalam hal tertentu tidak perlu ada pengaturan secara atributif. Penguatan terhadap LAD menjadi bagian dari sistem peradilan adat adalah mengembalikan LAD dalam *marwahnya* atau sifat ontologisnya.

4.1. Saran

Revisi Pasal 94 UU No. 6/2014 tentang Desa dimana status dari LAD jangan menjadi bagian dari mitra melainkan integral dalam susunan asli desa dan memiliki kewenangan dalam menyelenggarakan peradilan adat.

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Juridical Analysis of the Role of the State in Realizing the Economic Development of Indigenous Peoples

(Analisis Yuridis Peran Negara dalam Mewujudkan Pembangunan Ekonomi Masyarakat Hukum Adat)

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Abstract

In Indonesia, the term adat community is more often used to refer to the term indigenous people. The current socio-economic revolution continues to influence the values that exist in society. This revolution will change understanding and judgment in all fields, including the field of law. The law will always adapt to developments and the ever-changing needs of society. Protection and recognition from the government, having mapped land use, both on participatory mapping and on the basis of Forestry Authority Decrees and local governments. It also has a variety of natural wealth products and environmental services, as well as a series of local cultures and wisdom. New developments in customary law, Koesnoe's theory states, that the development of customary law includes the definition of customary law, the position of customary law, and the content and environment of power over people and space. Normative juridical research methods, using a statutory approach, concept approach, analytical approach, historical approach, philosophical approach, qualitative with the type of literature research. This research is based on primary and secondary laws. The contribution of customary law to the formation of national law is in the use of principles, institutions and approaches in the formation of law. To achieve its goals, the central government and local governments must carry out three functions, namely the regulatory function, the service function, and the empowerment function. The Indonesian community empowerment program strategy needs to be determined so that the program's objectives can be achieved. Strategy formulation is carried out through the stage of gathering information on Indonesia's condition. Next, an analysis of internal factors (strengths and weaknesses) and an analysis of external factors (opportunities and threats) is carried out. With reference to the legal approach in economic development, there are elements that must be developed so as not to hinder the economy, namely stability, predictability, justice, and education.

Keywords: Customary Law, Indigenous Peoples, Economy

Abstrak

Di Indonesia, istilah masyarakat adat lebih sering digunakan untuk menyebut istilah indigenous people. Revolusi sosial ekonomi yang sekarang berjalan terus mempengaruhi nilai-nilai yang ada di dalam masyarakat. Revolusi tersebut akan mengubah pengertian dan penilaian di semua lapangan, termasuk lapangan hukum. Hukum akan selalu menyesuaikan dengan perkembangan dan kebutuhan masyarakat yang senantiasa terus berubah. Perlindungan dan pengakuan dari pemerintah, memiliki tata guna lahan yang terpetakan, baik atas pemetaan partisipatif maupun atas dasar Surat Keputusan otoritas kehutanan maupun pemerintah setempat. Juga memiliki keragaman produk kekayaan alam dan jasa lingkungan, serta serangkaian budaya dan kearifan lokal. Perkembangan baru dalam hukum adat, teori koesnoe menyatakan, bahwa perkembangan hukum adat itu mencakup, pengertian hukum adat, kedudukan hukum adat, dan isi dan lingkungan kuasa atas orang dan ruang. Metode penelitian yuridis normative, Menggunakan pendekatan Peraturan Perundang-undangan, pendekatan konsep, pendekatan analitis, pendekatan historis, pendekatan filsafat, kualitatif dengan jenis penelitian kepustakaan. Penelitian ini bersumber pada hukum primer dan sekunder. Sumbangsih hukum adat bagi pembentukan hukum nasional adalah dalam pemakaian asas-asas, pranata-pranata, dan pendekatan dalam pembentukan hukum. Untuk mencapai tujuannya pemerintah pusat dan pemerintah daerah harus menjalankan tiga fungsi yaitu, fungsi pengaturan, fungsi pelayanan, dan fungsi pemberdayaan. Strategi program pemberdayaan masyarakat Indonesia perlu ditetapkan agar tujuan program tersebut dapat tercapai. Penyusunan strategi dilakukan melalui tahap pengumpulan informasi kondisi Indonesia. Selanjutnya dilakukan analisis faktor internal (kekuatan dan kelemahan) dan analisis faktor eksternal (peluang dan ancaman), Dengan mengacu kepada pendekatan hukum dalam pembangunan ekonomi terdapat unsur-unsur yang harus dikembangkan supaya tidak menghambat ekonomi, yaitu stabilitas, prediksi , keadilan , dan Pendidikan.

Kata Kunci : Hukum Adat, Masyarakat Adat, Ekonomi

1. Introduction

The conception of the legal state based on Pancasila is a legal system that has its own peculiarities (*an sich*), so it cannot be equated with other legal systems such as Continental Europe or the *Anglo Saxon* system. This distinctiveness comes from Pancasila as a philosophical system of law that lives in Indonesian society, namely customary law. It is this customary law that forms the distinctive culture of the Indonesian legal system.

The ideal of the Pancasila state of law, shows that, the state of Pancasila is a state of law, in which all uses of power and activities related to the public interest must be based on a legal basis, and within the framework of the limits required by law, *a fortiory* for the use of

public power. So the desired government is government based on, by and by law ("rule *by* law" and *rule of law*"). Then, the Pancasila state is a democratic state in which all state activities and activities are always open to the participation of all people, in which the exercise of authority and the use of public power must be accounted for by the people and always open to the participation of all people, in which the exercise of authority and the use of public power must be accounted for by the people and always open to rational assessment by all parties in the framework of applicable values and legal systems.

The current socio-economic revolution continues to affect the values that exist in society. The revolution will change understanding and judgment in all fields, including the legal field. The revolution will also change the meaning or content of propriety, necessity and democracy, freedom, property rights and others.

The 1945 Constitution affirms the existence of customary law communities. Article 18 B paragraph (2) of the 1945 Constitution as a result of the second amendment states that the state recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia, as stipulated in the Law.

By studying customary law, in the end we will understand the Indonesian legal culture and also understand that in essence the Indonesian nation does not reject other sides of foreign legal culture as long as it does not conflict with Indonesian legal culture. Customary law is one of the important sources for obtaining materials for the development of national law, which leads to legal unification and which will mainly be done through the establishment of laws and regulations.

Government is *Bestuurvoering* or the implementation of government duties, while government is an organ or tool that runs government. Government is an organization that has the authority to make a policy in the form of the application of laws and regulations in a country and is tasked with managing the government system in achieving state goals. Government as a means of state completeness can be interpreted broadly or narrowly. Government in a broad sense includes all the fittings of the state, occurring from the executive, legislative and judicial branches of power, or other state fittings acting for and on behalf of the state. Government in the narrow sense, namely office holders as executive implementation or more importantly, government as the organizer of state administration. The functions of government that the government performs in this case are tasks related

to public office. This definition refers to government tasks carried out by public officials from the central level to the regional level. The welfare of indigenous peoples is becoming a serious concern in development in Indonesia, reflected in the National Medium-Term Development Plan (RPJMN) which places Indigenous Peoples as a priority subject of development, the Indonesian government has a strong legal basis to realize social protection for indigenous peoples.

2. Methods

Regarding new developments in customary law, Koesnoe's theory states that the development of customary law includes, the understanding of customary law, the position of customary law, and the content and environment of power over people and space. *Normative* juridical research method, Using the approach of laws and regulations, concept approach, analytical approach, historical approach, philosophical, qualitative and quantitative approach with the type of library *research*. This research is sourced from primary and secondary laws.

3. Findings and Discussions

Legal development that includes efforts to reform the legal order in Indonesia must be carried out continuously so that the law can play its role and function as a guide for behavior (function of order) in *imperative* and effective cohabitation as a guarantor of justice in society. This continuous effort to build legal order is needed for at least three reasons, first as a servant to the community, because the law is not in a vacuum, then the law must always be adjusted to the development of the community it serves is also constantly evolving. Second, as a tool to encourage community progress. Third, because realistically in Indonesia today the legal function does not work effectively, is often manipulated, and even becomes an effective instrument for hoarding power.

Efforts to reform the legal order must continue to make Pancasila as its paradigm, because Pancasila, which is positioned as the basis of ideology, legal ideals, and fundamental norms of the state, must be used as a directional orientation, a source of values, and therefore also a frame of mind in every effort to reform the law. The ineffectiveness of the law in playing its function and role in Indonesia today is not caused by the inappropriateness of Pancasila as paradigm, but otherwise caused by deviations from the Pancasila paradigm. A unitary state is a state whose power is dispersed to the regions through granting autonomy or granting authority to regions to manage and govern their own households through decentralization or through deconcentration.

Porigin 33 of the 1945 Constitution is the foundation of the national economic system. Article 33 paragraph (1) of the 1945 Constitution affirms that "The economy is structured as a joint enterprise based on the principle of kinship.

Broadly speaking, there are three main strategies that can be done in community empowerment, including, traditional strategies, The principle of using this strategy is that people are encouraged to understand problems and needs and have the freedom to make the best choices. In this case there is no other party interfering with the community in decision making, *direct action* strategy, this strategy requires domination of interests that are respected by all parties involved, viewed from the point of change that may occur, *transformative* strategy, this strategy shows that education in the long term is needed before identifying one's own interests.

The strategy in community empowerment is, the gotong royong strategy is based on the view that the community is a social system, in this case the community is formed from various elements that work together to achieve common goals, professional technical development strategies use new procedures and norms in dealing with changing situations or to solve community problems, conflict strategies, used if in the community there is found to be dominance of a group Society to fulfill its interests, the strategy of cultural defection, prioritizes change at the personal level, in the form of changing personal values into a lifestyle that loves each other.

Dalam rangka fungsi pengaturan, pemerintah dan pemerintahan Desa menerbitkan Regional Regulations, and Regional Head Regulations according to Laws and Regulations. Regional Regulation or commonly abbreviated as Perda is a strategic instrument to achieve the objectives of decentralization, The role of Regional Regulations in regional autonomy includes:

1. Perda as a policy instrument to implement broad and responsible regional autonomy.
2. Local regulations as implementers of higher laws and regulations
3. Regional regulations as absorbers and distributors of the aspirations of regional communities
4. Regional regulations as a tool for transforming regional changes, and
5. Local regulations as a means of harmonization between interests in the community

Indonesia has ratified the Covenant on Economic, Social and Rights Culture (Ekosob) that clearly reveals Indonesia's obligations as States Parties Ratifying to fulfil Social Economic Rights and culture. Ratification of the covenant on economic, socio-cultural rights will encourage: participation of all sectors related to the fulfillment of the rightsof socio-cultural economists. The obligations of the state after ratifying this include:

a. Implementation of actions that look at how strategies, policies and processes
b. What the government does in building a system of fulfilling rights
c. Socio-cultural economy.

3.1. Findings

One example of a traditional ngalaksa event in Ranca kalong, Sumedang regency, is something that is often found in indigenous peoples in Indonesia that indicates the nobleness of the values they believe in. Ngalaksa Traditional Ceremony practiced by the Rancakalong indigenous people in West Java. The Ngalaksa Traditional Ceremony is not merely a series of rituals that become a routine for a community in the Rancakalong indigenous community, but can also be seen as a form of historical narrative about an event related to the community. Using ethnographic methods, for the people of Rancakalong the Ngalaksa Traditional Ceremony is a historical narrative of events in the past as well as an imagination of the future. Therefore, three forms of historical narratives can be identified in the Ngalaksa Traditional Ceremony, namely, repetition (repetition) through a procession making orok-orokan (baby dolls) which is a picture of events when their ancestors were so sorry that their decision to replace rice with hanjeli had led to the death of a child in the barn where they kept hanjeli; amplification is seen through humming that tells about the events and origins of this custom, and elaboration, which is through efforts to adjust to the values of modern society so that this ceremony is no longer completely the same as it was first performed. Upacara Adat Ngalaksa is intended as a form of gratitude for the abundant harvest. This ceremony is carried out in turns by five Rurukan, namely Rurukan Rancakalong, Rurukan Nagarawangi, Rurukan Pamekaran, Rurukan Pasir Biru, and Rurukan Cibunar. For this year, it's the turn of Rurukan Pasir Biru to hold it. The series of activities of the Ngalaksa Traditional Ceremony consists of several stages. First, village elders are always involved in determining the implementation date. After that, ngahayu and ngaweuk materials were carried out to inform residents and the distribution of tasks ahead of the event. On the day of the

implementation, traditional leaders and invited guests were welcomed with Tarawangsa music accompaniment. This activity can be a means of reviving regional arts as well as introducing them to the younger generation. After the opening procession, in the following days a series of ceremonial activities were carried out, namely Meuseul Akan (rice shedding), ngibakan (rice washing process), nginebkeun (storage of rice to pangineban and watering with combrang leaf water), Mesel Beas / Nipung (the process of making rice flour), Making Dough, and Making Orok-orokan (wrapping the dough with congkok leaves and then boiled).

1) Preparation of the Ngalaksa Traditional Ceremony

The series of activities of the Ngalaksa Traditional Ceremony begins from preparation to completion consisting of several stages of activities, while the stages are as follows:

a. Bewara
   After the deliberation of the elders to determine the date of the implementation of Ngalaksa, the results were conveyed to all indigenous people. Or in other words, Bewara is to inform the time of implementation of Ngalaksa to all citizens, Rurukan supporters including government elements. As a medium for the delivery of information, initially it was through the delivery of news by word of mouth, but in the current era for the dissemination of information can be through hardeners in public media such as mosques, correspondence and telephones.
b. Ngahayu
   It is a process of inviting indigenous people to participate in preparing the needs of both materials and tools used for smooth activities. In discussing Sunda Ngahayu is synonymous with the word ngahayu-hayu, which is an expression of invitation, so that after being hayu-hayu by the chairman of Rurukan, community members donate ceremonial materials such as fruits, tubers, rice, coconut, rice, brown sugar and so on, then delivered to the house of the chairman of Rurukan as a center for ceremonial readiness.
c. Feeling / Cutting materials
   Mera is usually carried out one week after the implementation of Bewara, at this stage the head of the Rurukan distributes materials and tasks to each Rurukan resident.For example, who is in charge of finding firewood, taking congkok leaves to the forest, and other tasks in facilitating traditional Ngalaksa ceremonial activities.

2) Implementation of Ngalaksa Traditional Ceremony

Starting the activities of the Ngalaksa Traditional Ceremony after getting a touch of packaging for the promotion of cultural tourism, before the ceremony is held, the opening ceremony is held. This event is usually attended by various invited guests, local government bureaucrats of Sumedang Regency, invited community leaders, regional sons, cultural artists. Then the entire community took an active role to show the potential of cultural arts which were then arranged in a Helaran performing arts attraction.

At this opening procession, the substance of the activity was a symbolic opening by the Regent of Sumedang as the Cultural regent, which was marked by the handover of Baboons from the Rurukan organizer of Ngalaksa the previous year to the Regent of Sumedang, then the Regent of Sumedang handed over to the head of Rurukan who would carry out the ceremony, and then the Baboons were paraded together to the Tourism Village where the ceremony was held. Upon arrival at the Tourism Village, Tarawangsa art has been presented which will accompany the ceremonial procession from the beginning to the end of the ceremony. It was started by the chairman of Rurukan who acted as Saehu Pameget who was accompanied by Saehu's wife, so began the Tarawangsa art performance. After Saehu Pameget and Saehu's wife danced, it was followed by invited guests and other community leaders to be together until the event was over.

Law, Number 6 of 2014 concerning Villages places Village Customary Institutions as institutions that carry out customary functions and become part of the original composition of the Village that grows and develops on the initiative of the Village community. The existence of Village Customary Institutions in this does not automatically cause the Village to change its status to a Customary Village. Special provisions as stipulated in the Village Law explain that Customary Villages must meet the requirements as a unit of customary law communities and their traditional rights that are actually still alive with territorial or geneological or functional ties as a unit of customary law communities. Customary Villages meet the Elements:

1. Region/ulayat
2. Community groups with common bond
3. Have customary governance
4. Have wealth and / or customary objects
5. The set of customary law norms and their traditional rights is still developing and in accordance with the principles of the Republic of Indonesia

3.2. Discussions

Rengkong dance is a dancing activity carried out by the axle conductor (rice carrying carrying device) by following the sound that arises from the axle hole. As people walk towards the granary, the hole inside the axle produces music that has the same rhythm as the person walking along the ceremony. The dance continues to be performed with musical accompaniment from Tarawangsa. Rules for the Implementation of the Ngalaksa Ceremony The implementation of rituals before performing the rengkong dance as is common in a rite, the community in Rancakalong also has its own rules that must be considered before carrying out Ngalaksa ceremony activities. Thereare at least three beginnings before carrying out ngalaksa activities, namely, Bewara, Ngahayu and Mera or Ngagunuk Bahan.

Bewara or in Indonesian referred to as this announcement is a term used by local elders to convey the date of the Ngalaksa Ceremony. Determination of dates based on the results of deliberations with figures. Ngahayu, can be interpreted as the process of inviting residents / indigenous people to be involved and participate in order to prepare the needs of materials and equipment for activities so that they are always facilitated. In the Ngahayu process, residents will usually collect a variety of agricultural products in the form of fruits, tubers, rice, coconut, rice, brown sugar and so on. Hasi tani was then escorted to the house of the chairman of Rurukan as a place to prepare for the ceremony. Mera/Ngaweuk Bahan, at that stage usually the traditional elders will distribute tasks to each member of the community involved. Such as looking for firewood, taking congkok leaves to the forest, and other tasks in facilitating traditional Ngalaksa ceremonial activities. In the nature of the Ngalaksa ceremony activities, there are several social values through local wisdom that can be learned and applied in every line of life. Through gathering activities before the implementation of the Ngalaksa event, the community will get the value of mutual cooperation. In addition, in the ceremonial session which was carried out for seven days through the accompaniment of Tarawangsa music, the community also received harmony values such as friendship, brotherhood, unity and unity, cooperation, the manifestation of gratitude to the Almighty as a tribute to the ancestors.

According to Law Number 32 of 2004, the purpose and purpose of granting regional autonomyis to accelerate the realization of community welfare through improving services, empowerment, and community participation as well as increasing regional competitiveness by taking into account the principles of democracy, equity, ad-ilan,

privileges, and specificity of a region in the NKRI system. This means that the purpose of regional autonomy is to empower regions and prosper the people.

Berdasarkan rumusan tujuan otonomi daerah yang demikian, maka tujuan otonomi daerah yang disepakati selama ini adalah, pertama, membebaskan pemerintah pusat dari beban-beban yang tidak perlu dalam menangani urusan domestik, sehingga, ia berkesempatan mempelajari, memahami, merespons berbagai kecenderungan global dan mengambil manfaat dari padanya serta berkonsentrasi pada perumusan kebijakan makro nasional yang bersifat strategis. Kedua, proses pemberdayaan daerah. Kemampuan prakarsa dan kreativitas daerah akan terpacu, So that the capability in overcoming various domestic problems will be stronger and more independent. Thus, the purpose of regional autonomy is the improvement of better community services and welfare, the development of democratic life, justice and equity as well as the maintenance of harmonious relations between the center and regions and between regions in the framework of maintaining the integrity of the Republic of Indonesia.

A region is said to be autonomous and able to contribute to the progress of the nation and national integration after implementing regional autonomy if the region has manifestly become (Noraha, 2002):

1. The unit of legal society which includes the position of regions and communities as *retchsponpersoon*, legal subjects and actors of legal acts that must be recognized, respected, and protected within the framework of human rights and democratization
2. A public economic unit that manages public goods with an economic system that is in accordance with the content of regional household affairs according to the principles of oikos and nomos principles both regarding property and public services and civil services.
3. A unit of cultural environment that has a value system, identity, history, traditions, and customs that are *uniqueness* and heterogeneous.
4. Lebensraum is the region as a living space, not a dead space so that it has the obligation to preserve nature, *natural resources decreasing* index, *human development index* through regional approach policies, rural-urban contiguum and in an atmosphere of togetherness between local government *skateholders*, namely the community, traditional stakeholders, government, and the private sector.
5. The national political subsystem is a small part of the NKRI system so that community development, national integrity, unity in

diversity, *nation* building, *character building*, *good governance* and equal distribution of justice and welfare to all people are developed

Economic, social and cultural rights in rural communities have been accommodated with the birth of Law Number 6 of 2014 concerning Villages, which regulate the establishment of Village-Owned Enterprises (BUM Desa). One the purpose of the birth of the village law is the participation of the village community to Development of Village Potential and Improving the Welfare of Village Communities and increase the socio-cultural resilience of rural communities

4. Conclusion

1. Regional economic development planning can be thought of as planning to improve the use of public resources available in the area and to improve the capacity of the private sector to create value for private resources responsibly
2. Efficient economic development requires careful planning using public resources and the sectors of farmers, small entrepreneurs, cooperatives, large entrepreneurs, social organizations must have a role in the planning process of regional economic development, a region is seen as a whole as an *economic entity* in which there are various elements that interact with each other.

The contribution of customary law to the formation of national law is in the use of principles, institutions, and approaches in law formation. To achieve its goals, the central government and local governments must carry out three functions, namely, the regulatory function, the service function, and the empowerment function. A strategy for Indonesian community empowerment programs needs to be established so that the objectives of the program can be achieved. Strategy development is carried out through the stage of collecting information on Indonesia's condition. Furthermore, an analysis of internal factors (strengths and weaknesses) and an analysis of external factors (opportunities and threats) are carried out, with reference to the legal approach in economic development there are elements that must be developed so as not to hamper the economy, namely stability, prediction, justice, and education, so that the objectives of the state's role in the welfare of society can be achieved.

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Opportunities and Challenges of Customary Justice After the Promulgation of the National Criminal Code to Realize Legal Justice

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Abstract

Indonesia has just promulgated its own Criminal Code after very long use of the Dutch Criminal Code. The promulgation of this new Criminal Code also provides space for customary law values, which are the original law of the Indonesian nation in its regulation. However, since the discussion of the Criminal Code Bill until the promulgation of this Criminal Code, there have been many debates about the law that lives as a value of customary law in the context of its implementation. Enforcement of customary law values in the Criminal Code will be difficult because it requires a separate procedural rule different from ordinary criminal procedural law. Therefore, it is interesting to discuss further some of the problem questions. First, are there opportunities and obstacles to implementing customary justice in Indonesia after the promulgation of the Criminal Code? Second, what is the right concept of customary justice to create legal justice after promulgating the new Criminal Code? Both questions will be explored more profoundly using normative research methods because they are prioritized in deepening the concept of customary justice and the provisions of legal norms related to customary justice.

Abstrak

Indonesia baru saja mengundangkan sebuah Kitab Undang-Undang Hukum Pidana sendiri setelah sangat lama menggunakan Kitab Undang-Undang Hukum Pidana peninggalan Belanda. Pengundangan KUHP baru ini juga memberikan ruang nilai-nilai hukum adat yang merupakan hukum asli bangsa Indonesia di dalam pengaturannya. Akan tetapi sejak pembahasan RUU KUHP hingga diundangkannya KUHP ini terdapat banyak sekali perdebatan terhadp hukum yang hidup sebagai nilai hukum adat dalam konteks pelaksanaannya. Penegakan nilai-nilai hukum adat dalam KUHP akan menjadi berat karena membutuhkan hukum acara tersendiri yang berbeda dengan hukum acara pidana biasa. Oleh karena itu menarik untuk dibahas lebih lanjut beberapa pertanyaan permasalahan. Pertama, apakah terdapat peluangan dan hambatan penerapan peradilan adat di Indonesia pasca pengundangan KUHP? Kedua, bagaimana konsep peradilan adat yang tepat agar terciptanya keadilan hukum pasca pengundangan KUHP baru? Kedua pertanyaan tersebut akan digali lebih mendalam dengan menggunakan metode penelitian normatif karena lebih diutamakan pada pendalaman konsep peradilat adat dan juga ketentuan norma hukum terkait peradilan adat.

Kata kunci: peluang dan tantangan, Peradilan adat, keadilan hukum.

1. Introduction

Indonesia merupakan sebuah negara hukum yang dibangun tidak hanya didasarkan pada hukum yang seragam, artinya hukum yang berlaku di Indonesia tidak hanya hukum yan dibentuk oleh negara saja. Sebelum Indonesia menjadi sebuah negara yang merdeka, sudah terdapat hukum yang berlaku dan asli milik bangsa Indonesia yaitu hukum adat. Bahkan sejak Indonesia merdeka, hukum adat tetap menjadi hukum yang berlaku di masyarakat Indonesia.

Keberlakuan hukum adat sebagai dasar pengembangan dan penegakan hukum di Indonesia dapat dilihat dari Pasal 18B ayat 2 UUD NRI 1945. Ketentuan tersebut menjadi dasar konstitusional yang menyatakan bahwa negara mengakui hukum adat sebagai salah satu sistem hukum yang berlaku di Indonesia. Penegakan akan hukum adat yang berlaku sendiri dibutuhkan sebuah lembaga peradilan adat yang memahami betul akan substansi yang terkait dengan keberlakuan norma-norma hukum adat yang berlaku dan dipatuhi oleh masyarakat hukum adat.

Peradilan adat adalah sebuah lembaga peradilan perdamaian antar para masyarakat hukum adat di lingkungan masyarakat hukum adat yang sudah ada (Muhammad, 1983, hlm. 67). Pada kesatuan masyarakat hukum adat sebetulnya tidak mengenal istilah peradilan adat namun menggunakan istilah "*sidingadat*", "*para-para adat*", "*pokara adat*", atau "*rapat adat*" (Rahman, 2019).

Keberadaan peradilan adat yang sudah ada sebelum Indonesia merdeka berangsur-angsur dan diihapuskan melalui sebuah proses unifikasi peradilan dengan Undang-Undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Smentara untuk menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil (Selanjutnya disebut dengan UU Drt 1/1951). Berlakunya undang-undang tersebut memberikan akibat hukum bahwa peradilan adat secara berangsur-angsur akan dihapuskan oleh Menteri Penghapusan tersebut diatur di dalam Pasal 1 ayat (2) huruf b Undang-UU Drt 1/151 yang berbunyi:

> *Pada saat yang berangsur-angsur akan ditentukan oleh Menteri Kehakiman dihapuskan segala Pengadilan Adat (Inheemse rechtspraak in rechtstreeksbestuurd gebied), kecuali peradilan Agama jika peradilan itu menurut hukum yang hidup merupakan satu bagian tersendiri dari peradilan Adat.*

Sejak keberlakuan Undang-Undang Nomor 14 Tahun 1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Pokok Kehakiman. Pada bagian Penjelasan Umum angka 7 undang-undang ini memberikan penegasan bahwa yang dimaksudkan peradilan adalah peradilan negara dan dimaksudkan untuk menutup semua kemungkinan adanya atau akan diadakannya lagi Peradilan-peradilan Swapradja atau Peradilan Adat yang dilakukan oleh bukan badan peradilan Negara. Dipertegas pula pada Pasal 2 ayat (3) Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman bahwa semua peradilan di seluruh wilayah Republik Indonesia adalah peradilan negara yang diatur dengan undang-undang.

Pada tahun 2023 telah diundangkan Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana yang biasa disebut KUHP nasional. Pengundangan KUHP Nasional ini memberikan sebuah peluang untuk diberlakukannya kembali peradilan adat sebagai salah satu lembaga penegakan hukum, khususnya dalam bidang hukum pidana. Ketentuan Pasal 2 ayat (1) KUHP Nasional menyatakan bahwa asasl legaliltas sebagaimana tercantum di dalam Pasal 1 ayat (1) KUHP Nasional tidak mengurangi berlakunya hukum yang hidup di masyarakat.

Dimasukkannya ketentuan hukum yang hidup di dalam KHUP nasional memberikan peluang untuk peradilan adat kembali diberlakukan sebagai lembaga peradilan untuk mewujudkan keadilan di masyarakat. Muladi (1994) berpendapat bahwa diaturnya hukum yang hidup dalam masyarakat memberikan sebuah kontribusi sebagai sumber hukum positif. Hal ini dapat diartikan bahwa suatu sifat yang dinyatakan melawan hukum tidak hanya sebatas formil yang bertentangan dengan hukum tertulis saja, melainkan juga asas-asas hukum yang hidup di masyarakat.

Topik mengenai peradilan adat saat ini masih sangat relevan untuk dibahas kembali mengingat Rencana Pembangunan Jangka Panjang Nasional 2005-2025 yaitu pembaharuan dan pembangunan hukum di Indonesia. Salah satu sasaran dalam rencana pembangunan nasional dalam RPJPN sendiri adalah membentuk sistem hukum nasional Indonesia yang mencerminkan cita-cita, jiwa, semangat, serta nilai-nilai sosial yang hidup di Indonesia. Fathor Rohman (Rahman, 2019) berpendapat bahwa dengan dihidupkannya kembali peradilan adat ke dalam sistem peradilan di Indonesia, dapat mempertegas secara yuridis normatif penghormatan dan perlindungan masyarakat hukum adat.

Pendapat yang berbeda diutarakan oleh Herlambang P. Wiratraman (2018) yang menyatakan bahwa diskursus mengenai

peradilan adat sebaiknya tidak cukup dengan menghadirkannya dalam sistem hukum nasional. Jika diskursus mengenai hukum adat hanya terbatas untuk keberadaannya di dalam sistem hukum nasional, maka hanya sekedar menghadirkan peradilan adat dengan kecenderungan formalisme.

Oleh karena itu, berangkat dari sebuah asumsi bahwa dengan diberlakukannya KUHP nasional yang memuat nilai hukum yang hidup di masyarakat menjadi sebuah peluang untuk menghidupkan kembali peradilan adat dalam sistem hukum Indonesia. Asumsi tersebut kemudian menghadirkan beberapa pertanyaan yang layak untuk didiskusikan, apakah peluang dan hambatan penerapan peradilan adat di Indonesia pasca pengundangan KUHP nasional? Bagaimana konsep peradilan adat yang tepat agar terciptanya keadilan hukum pasca pengundangan KUHP nasional?

2. Methods

Metode penelitian yang digunakan di dalam artikel ini adalah penelitian normatif. Metode penelitian normatif merupakan sebuah penelitiah yang lebih difokuskan pada analisis sumber hukum atau peraturan perundang-undangan tertulis yang masih berlaku dan terkait dengan permasalahan yang akan dibahas. Pendekatan yang dipakai dalam artikel ini adalah pendekatan perundang-undangan, pendekatan konsep, dan pendekatan sejarah.

3. Findings and Discussion

3.1. Findings

3.1.1. Peradilan adat dan tantangan pluralisme hukum di Indonesia

The living Law atau hukum yang hidup di masyarakat merupakan sebuah konsep yang dikemukakan oleh Eugene Ehrlich. Eugene Ehlich (O'Day, 1966) mengatakan bahwa hukum yang hidup di masyarakat berbeda dengan hukum-hukum yang dibuuat oleh negara dalam bentuk peraturan perundang-undangan. Lebih lanjut, dikatakan bahwa hukum yang hidup di masyarkat merupakan hasil dari interaksi timbal balik antar manusia di dalam masyarakat yang tidak pernah ada di dalam peraturan perundang-undangan.

Ehrlich (2002, hlm. 493) menyatakan bahwa *the living law* merupakan sebuah perangkat hukum yang tidak dapat dilepaskan dari masyarakat karena kelahiranyya bersamaan dengan lahirnya masyarakat. Lebih lanjut dikatakan olehnya bahwa hukum negara tidak bisa melepaskan diri dari faktor-faktor kemasyarakatan. Hukum negara

diharuskan untuk memerhatikan *the living law* yang telah tumbuh dan hidup di masyarakat sebelum negara terbentuk.

Pandangan Ehrlich sendiri tentang *the living law* ini sendiri selaras dengan pandangan dari madzhab sejarah yang dikemukakan oleh Von Savigny. Von Savignya denga teori yang dineal sebagai *volkgeist* mengatakan bahwa hukum itu tidak dibentuk melainkan lahir dari keyakinan bangsa itu sendiri (Reimann, 1989). Hukum merupakan bagian terpenting dari kehidupan sebuah masyarakat dan bangsa karena merupakan sebuah refleksi jiwa dari bangsa itu sendiri yang membedakannya dengan bangsa lainnya. Hukum hanya bisa menjadi eksis, berkembang, melemah, maupun menguat dengan mengikuti kondisi masyarakatnya (Kutner, 1972).

Kedua teori ini sangat lekat dengan kondisi sosial masyarakat Indonesia dan perkembangan hukumnya. Indonesia memiliki hukum asli yaitu hukum adat yang erat dengan pandangan Ehrlich dan juga Savigny. Hukum adat merupakan hukum yang tidak tertulis di dalam peraturan-peraturan legislative meliputi peraturan-peraturan hidup yang meskipun tidak ditetapkan oleh yang berwajib ditaati dan didukung oleh rakyat berdasarkan atas keyakinan bahwa sahnya peraturan-peraturan tersebut mempunyai kekuatan hukum (Soepomo, 1963). Berlakunya hukum adat sebagai bagian dari pembangunan hukum nasional memberikan dampak terjadinya pluralisme hukum di Indonesia

Pluralisme hukum merupakan sebuah situasi yang mengacu pada sebuah situasi dimana seseorang dapat memilih lebih dari satu seperangakat aturan atau norma yang ada secara bersamaan. Pluralisme hukum hadir dengan menunjukkan adanya sebuah koeksistensi beberapa sub-sistem hukum di dalam sebuah negara untuk melayani masyarakat yang tidak memiliki pilihan dalam menyelesaikan permasalhan hukumnya dari badan-badan hukum yang sudah ada.

Tawaran berlakunya peradilan adat dalam kajian ini bila dikaitkan dengan pandangan pluralisme hukum adalah untuk meningkatkan keteraturan sosial sebagaimana kondisi yang nyata bahwa Indonesia merupakan bangsa yang plural. Tawaran ini juga sekaligus untuk menjelaskan bahwa pada kenyataannya keteraturan yang terjadi karena internvensi negara, melalui hukum-hukum yang dibentuk oleh institusi negara, tidak menjamin adanya keteraturan. Adanya peradilan adat sebagai bentuk dari pluralisme hukum di Indonesi ini hendaknya menjadi pandangan baru dalam penegakan hukum di Indonesia bahwa masyarakat memiliki cara dan pilihannya untuk mengakses keadilan di samping melalui hukum negara.

3.1.2. Nilai Keadilan Hukum dalam Peradilan Adat

Hukum dibentuk oleh masyarakat agar tercipta sebuah ketertiban di dalam kehidupan bermasyarakat. Karena jika hukum tidak dibentuk maka akan tercipta suasana kekacauan di dalam masyarakat. Gustav Radbruch dalam tulisannya menyatakan bahwa setidaknya terdapat tiga nilai dasar yang ada di dalam hukum yaitu kepastian, kemanfaatan, dan keadilan (Rahardjo, 2000). Akan tetapi nilai keadilan adalah nilai yang paling tinggi dan utama karena merasuk dan menyentuh ke dalam seluruh aspek kehidupan manusia (baik segi sosial-budaya, politik, dan ekonomi).

Keadilan merupakan sebuah kebutuhan dasar dari jiwa manusia yang ditimbulkan oleh sebuah keputusan, kebijakan, atau tindakan yang dibuat oleh seseorang. Keadilan merupakan keadaan, ide, atau gagasan yang senantiasa berkaitan dengan hak, dan hak berhubungan dengan hukum. Keadilan bukan sebuah nilai yang bisa dinilai dengan rasio karena sifatnya yang sangat abstrak. Adil tidak identik dengan 'sama' bahkan 'sama dengan', melainkan berkaitan dengan penghargaann dan penghormatan atas hak seseorang dari orang lain (Rato & Damaitu, 2023).

Thomas Aquinas dalam pandangannya terhadap keadilan memberikan sebuah teori yang disebut sebagai teori proporsional menyatakan bahwa *'aliquod opus adaequantum alteri secundum aliquem aequalitatis modum' (Rato & Damaitu, 2023, hlm. 237)*. Thomas Aquinas ingin mengatakan bahwa keadilan merupakan sebuah keadaan untuk memberikan sesuatu yang selayaknya kepada orang lain berdasarkan kesamaan proporsional. Teori ini menggambarkan bahwa keadilan merupakan sebuah keadaan yang mengutamakan kesetaraan dan penghormatan terhadap keselarasan hak dan kewajiban

Thomas Aquinas membagi keadilan ke dalam dua kategori yaitu keadilan umum dan keadilan khusus. Keadilan umum berkaitan dengan relasi antar manusia untuk memberikan apa yang menjadi haknya. Sedangkan keadilan khusus dibagi lagi menjadi tiga kategori yaitu keadilan distributive, keadilan komutatif, dan keadilan vindicative (Rato & Damaitu, 2023, hlm. 237).

Keadilan distributive merupakan reinkarnasi pemikiran dari Aristoteles yang menyatakan bahwa keadilan yang membagi itu direfleksikan melalui pembagian hak dan kewajiban secara proporsional. Keadilan berdasarkan hukum tidak hanya diperhitungkan pada keadaan factual saja, melainkan juga wajib untuk memperhatikan keterkaitan antar unsur-unsur. Keadilan komutativa atau dengan kata lain keadilan kebersamaan merupakan keadilan yang tidak memerhatikan jenis kelamin, warna kulit, agama, ras, atau etnis.

Keadilan demikian merupakan keadilan fundamental yang merupakan perwujudan relasi interpersonal atau hubungan pribadi antar peibadi manusia di dalam masyarakat. Keadilan vindikatif merupakan keadilan yang berkaitan dengan pemberian sanksi (Rato & Damaitu, 2023, hlm. 237–239).

Para pemikir hukum adat di Indonesia memberikan gambaran hukum adat sebagai hukum yang hidup di masyarakat dan merupakan pola hidup kemasyarakatan, khususnya rasa keadilan dan kepatutan dari tempat hukum itu lahir, tumbuh dan surut, yang timbul secara langsung dari landasan pokoknya yaitu kesadaran hukum masyarakat. Hukum adat menjelmakan perasaan hukum yang nyata dari rakyat, serta proses pembentukan norma-normanya tidak bergantung pada penguasa rakyat dan senantiasa tumbuh dari kebutuhan hidup yang riil dari sikap dan pandangan hidup yang secara keseluruhan merupakan kebudayaan masyarakatnya (Poesoko, 2014a).

Nilai utama atau pandangan hidup dalam hukum adat adalah mengajak manusia untuk manunggal dengan alam, kerabat, dan sesama manusia lain. Nilai, asas, dan norma hukum adat diarahkan untuk menjaga kohesi sosial dengan memperkuat persatuan dan kesatuan diantara kerabat, keluarga, dan kebersamaan. Nilai tertinggi dari pranata hukum adat adalah harmoni sosial (Dominikus Rato, 2009).

Nilai keutamaan dari hukum adat untuk menjaga harmoni sosial ini selaras dengan nilai keadilan sebagaimana diutarakan oleh Thomas Aquinas. Harmoni sosial di dalam masyarakat berbicara tentang persaman hak yang harus dihormati dan dijaga oleh setiap individu yang ada di dalam komunitas masyarakat. Apabila keseimbangan ini terganggu maka, alam akan terganggu. Jika alam terganggu, maka kehidupan manusia tidak akan bisa berlangsung karena manusia membutuhkan alam untuk hidup.

3.2. Discussions

3.2.1. Peluang dan Tantangan Peradilan Adat Pasca Pengundangan KUHP Nasional

Peluang dan tantangan dalam penerapan peradilan adat pasca pengundangan KUHP nasional dapat dilihat secara utuh dari sisi normatif hukum maupun masyarakat. Diundangkannya KUHP nasional ini menurut hemat penulis semakin menambah optimisme keberlakuan peradilan adat sebagai sarana perwujudan keadilan hukum di masyarakat. Keadilan yang merupakan hak setiap orang untuk dihormati oleh orang lainnya dapat terwujud dengan adanya pilihan hukum ini.

Diskusi ini dimulai dari pendapat Van Vollenhoven terkait pondasi dari hukum adat yaitu masyarakat hukum adat. Van Vollenhoven berpendapat bahwa:

> *"Jika penguasa memutuskan akan mempertahankan hukum adat, padahal hukum tersebut sudah surut, maka penetapan itu tiada guna. Sebaliknya, seandainya telah ditetapkan dari atas bahwa Hukum Adat harus diganti, sedangkan rakyat masih menaatinya, maka Hakim negara pun akan tidak berdaya menghadapinya (Kartohadiprodjo, 1971, hlm. 8)."*

Pendapat Van Vollenhoven ini memberikan gambaran bahwa sekalipun peradilan adat secara normatif telah dihapuskan, akan tetapi selama masyarakat masih menaati hukum adat itu maka peradilan adat masih tetap eksis. Hanya saja, hal ini bergantung pada struktur masyarakat hukum adat itu sendiri. Jika ingin mempertahankan dan mewujudkan peradilan adat, maka tidak cukup dengan pengaturan norma yang berkaitan dengan hukum adat maupun peradilan adat secara formil saja. Melainkan perlu untuk dilakukan penguatan struktur masyarakat hukum adat yang menjadi pondasi dari hukum adat dan peradilan adat.

Herowati Poesoko (2014a, hlm. 74–79) dalam tulisannya menyatakan bahwa untuk melihat pemberlakuan peradilan adat dalam sistem hukum nasional saat ini perlu dilihat dari tiga unsur yaitu unsur idiil, unsur operasional, dan unsur aktual. Lebih lanjut Herowati Poesoko kemudian memberikan lima ukuran yang bisa digunakan untuk menjawab bagaimana peluang pemberlakuan peradilan adat ini. Ukuran yang dimaksud antara lain apakah masyarakat hukum adat yang bersangkutan sudah banyak mengalami perubahan; apakah kepala adat atau para pemuka masyarakat hukum adat masih berfungsi dan berperan sebagai petugas hukum adat; apakah ketetapan atau keputusan penyelesaian hukum adat yang serupa masih sering; apakah ketentuan-ketentuan hukum adat itu masih tetap sesuai dengan sistem hukum adat yang berlaku; apakah ketentuan-ketentuan hukum adat itu tidak bertentangan dengan Pancasila dan politik hukum nasional.

Berdasarkan lima ukuran tersebut, penulis menyatakan bahwa peradilan adat masih tetap eksis dan berlaku di komunitas masyarakat hukum adat itu sendiri. Hal tersebut masih dapat dilihat hingga saat ini pperjuangan masyarakat hukum adat dalam memperoleh pengakuan dan penghormatan kepada negara melalui RUU Perlindungan Masyarakat Hukum Adat. Selain itu, hingga tahun 2018 terdapat sekitar

kurang lebih 70 juta jiwa masyarakat hukum adat yang terbagi ke dalam 2371 Komunitas Adat (Melati Kristina Andriarsi, 2020).

Berangkat dari ukuran tersebut pula dapat kita lihat dan kita ketahui bahwa masih terdapat tantangan yang harus dilalui untuk memberlakukan peradilan adat dalam sistim hukum di Indonesia. Berangkat dari permasalahan yuridis di awal dengan diberlakukannya KUHP Nasional ini, dalam penjelasan Pasal 2 ayat (3) KUHP Nasional dinyatakan bahwa hukum adat yang dapat dijadikan sebagai landasan pemberlakuan peradilan adat ini harus ditetapkan terlebih dahulu dalam Peraturan Daerah. Artinya bahwa, tidak kemudian seluruh hukum adat yang berlaku dimasyarakat dapat dijadikan sebagai landasan pemberlakuan peradilan adat.

3.2.2. Konsep peradilan adat pasca Pengundangan KUHP Nasional untuk mencapai keadilan sosial

Peradilan adat dalam praktiknya di masyarakat banyak dipandang sebagai sarana penyelesaian sengketa di luar pengadilan. Pandangan ini tidak sepenuh salah karena secara normatif keberadaan peradilan adat sebagai lembaga judicial sudah berangsur-angsur dihapuskan, sekaligus tidak berada di bawah hirearkis kelembagaan peradilan negara.

Sidharta (2020) menyatakan setidaknya terdapat tiga tawaran posisi apabila peradilan adat ingin dimasukkan ke dalam sistem hukum nasional. Tiga tawaran posisi yang dimaksud antara lain peradilan adat yang mandiri, peradilan adat yang diintegrasikan ke dalam peradilan umum, dan peradilan adat yang tidak perlu dalam bentuk formil. Ketiga tawaran ini masih diperlukan catatan kritis dan logis agar peradilan adat pasca pengundangan KUHP Nasional dapat diwujudkan. Berangkat dari tawaran ini penulis mencoba untuk menggali lebih dalam bagaimana bentuk dan posisi peradilan adat yang paling dekat agar dapat diwujudkan.

Pertama, tidak diperlukannya bentuk formil dari sebuah peradilan adat. Pendapat ini banyak sekali diutarakan oleh beberapa ahli bahwa peradilan adat lebih tepat dalam bentuk penyelesaian sengketa di luar pengadilan. Herowati Poesoko (2014b) menyatakan bila dibandingkan dengan proses mediasi, peradilan adat dalam menyelesaiakn perkara lebih sistematis dan efektif sebagaimana pengadilan negeri. Selain itu, proses penyelesaian sengketa melalui peradilan adat lebih mencerminkan nilai hukum yang hidup di dalam masyarakat dan nilai keadilan itu sendiri. Sehingga sangat tepat jika peradilan adat dikategorikan sebagai lembaga penyelesaian sengketa di luar pengadilan. Akan tetapi, perlu diperhatikan kembali, sekalipun peradilan adat sebagai lembaga penyelesaian sengketa di luar

pengadilan terdapat beberapa kelemahan secara formil. Herowati Poesoko (2014a) menyatakan bahwa keputusan yang dihasilkan oleh peradilan adat tidak memiliki kekuatan eksekutorial sebagaimana putusan yang dikeluarkan oleh peradilan negara.

Pendapat tersebut menurut hemat penulis bertolak belakang dengan nilai keutamaan hukum adat tersebut. Hukum adat yang lebih diutamakan pada harmoni sosial harus dibangun di atas kesadaran untuk hidup bersama sebagai sebuah keluarga atau kerabat. Kesadaran ini pula yang kemudian menjadi dasar dalam penyelesaian di dalam peradilan adat. Sehingga sangat minim bahwa hasil keputusan dalam peradilan adat akan mendapatkan penolakan.

*Kedua,*peradilan adat yang diintegrasikan ke dalam peradilan umum. Tawaran ini menurut hemat penulis sangat lah sulit untuk dilaksanakan. Peluang untuk dibentuknya kembali peradilan adat dalam sistem hukum indonesia hanya melalui sebuah peraturan yang tidak bersifat khusus. Peradilan umum sebagaimana di atur di dalam Undang-Undang Kekuasaan Kehakiman memiliki hukum acara yang banyak diketahui dan dipelajari oleh para pelaku peradilan (hakim, jaksa, dan pengacara). Sedangkan peradilan adat juga memiliki hukum acaranya sendiri yang bersifat positif (berlaku di waktu dan tempat tertentu). Sehingga jika kemudian diintegrasikan ke dalam peradilan umum, maka justru akan menjadi permasalahan lain dari sisi hakim karir, kamar peradilan, sifat peradilan yang sementara atau permanen.

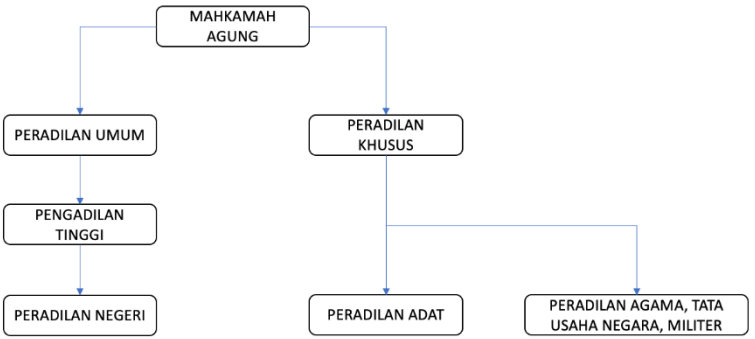
Ketiga, peradilan adat yang mandiri. Peradilan adat pada tawaran ini diposisikan sejajar dengan lemabaga peradilan lain di bawah Mahakamh Agung. Pada tawaran ini masih menyisihkan beberapa persoalan kritis dari sisi kewenangan relative maupun absolut sebagaimana terdapat di dalam peradilan negara. Akan tetapi, menurut hemat penulis, tawaran ini merupakan konsep yang lebih memungkin untuk dilakukan.

Untuk memperkuat konsep dari tawaran ini Dominikus Rato (2013) menyebutkan setidaknya terdapat delapan belas prinsip di dalam peradilan adat. Tidak secara keseluruhan dari prinsip itu akan dijelaskan, melainkan penulis melihat setidaknya ada tiga prinsip yang dapat dicermati yaitu prinsip peradilan terakhir dan berisifat mengikat para pihak; prinsip peradilan sederhana, cepat, dan biaya murah; dan prinsip komplementer.

Prinsip peradilan terakhir dan bersifat mengikat para pihak merupakan prinsip yang didasarkan demi kehormatan peradilan adat. Putusan peradilan adat yang merupakan pilihan hukum yang digunakan oleh para pihak yang bersengketa merupakan putusan yang bersifat final dan mengikat, kecuali atas pertimbangan Dewan Pertimbangan

Peradilan Adat dikatakan lain. Prinsip peradilan sederhana, cepat, dan biaya murah memiliki arti bahwa peradilan adat wajib menghindari proses yang berbelit-belit dan biaya yang mahal sehingga menghambat hak seseorang untuk memperoleh keadilan. Prinsip komplementer adalah prinsip saling mengisi dan saling melindungi antara peradilan adat dan peradilan negara.

Prinisp komplementer ini menjadi jembatan yang tepat untuk mencari posisi sekaligus kewenangan peradilan adat dalam sistem peradilan indonesia. Prinsip ini diwujudkan dengan dua aspek yaitu *unable* dan *unwilling*. Ketika peradilan adat merasa tidak mampu (*unable*) atau tidak mau (*unwilling*) untuk mengadili suatu sengketa, maka peradilan adat boleh melimpahkan sengketa tersebut kepada peradilan negara. Begitu juga sebaliknya jika peradilan negara tidak mampu atau tidak mau untuk mengadili suatu sengketa maka dapat melimpahkannya kepada peradilan adat (Rato, 2013). Hal ini sekaligus menyatakan bahwa peradilan adat juga masih tetap dalam pengawasan dan pembinaan Mahkamah Agung.



Berdasarkan prinsip tersebut, penulis mencoba memberikan tawaran konsep peradilan adat sebagai sebuah peradilan di luar peradilan negara dalam mengadili suatu sengketa di masyarakat. Secara hirarki, bila dibandingkan dengan peradilan negara yang berjenjang (dari pengadilan negeri, pengadilan tinggi, hingga mahkamah agung), peradilan adat menurut hemat penulis berada pada jenjang peradilan negeri (apabila dalam peradilan adat tersebut tidak ada jenjang hirarkis sebagaimana diatur dalam hukum adatnya).

Peletakan jenjang peradilan adat yang setara dengan pengadilan negeri menurut penulis berkaitan dengan keberlakuan dari hukum adat yang digunakan dalam penyelesaian sengketa tersebut. Sehingga apabila putusan dari peradilan adat tersebut tidak dilaksanakan

sebagaimana mestinya sehingga nilai keadilan dari hukum adat tersebut tidak terpenuhi, maka dapat diajukan upaya yang lebih tinggi melalui peradilan negara (pengadilan tinggi dan mahkamah agung).

Alasan yang dapat diberikan oleh penulis bahwa pemeriksaan yang dilakukan di jenjang Pengadilan Tinggi dan Mahkamah Agung adalah pemeriksaan yang berkaitan dengan kaidah-kaidah di dalam putusan, tidak lagi memeriksa fakta hukum. Hal ini akan selaras dengan prinsip peradilan sederhana, cepat, dan biaya murah. Selain itu, dengan adanya pemeriksaan terhadap kaidah-kaidah hukum adat juga membuktikan bahwa nilai-nilai hukum adat apakah masih selaras dengan nilai-nilai hukum Pancasila, perkembangan masyarakat pada umumnya, dan juga sebagai bentuk penghormatan negara terhadap hukum adat.

4. Conclusion

Berdasarkan pembahasan yang telah dilakukan pada bagian sebelumnya, maka dpat ditarik beberapa kesimpulan untuk menjawab pertanyaan permasalah dalam artikel ini. *Pertama*, peluang dan tantangan yang dihadapi dalam pembangunan peradilan adat pasca pengundangan KUHP Nasional sangat besar. Dicantumkannya ketentuan hukum yang hidup di dalam KUHP Nasional mempertegas peluang diberlakukannya kembali peradilan adat yang sempat dihilangkan untuk menegakkan hukum pidana materiil berdasarkan hukum adat. Selain itu berdasarkan realitas yang ada, masyarakat hukum adat masih eksis dan menggunakan peradilan adat sebagai sarana untuk menegakkan nilai-nilai hukum adat yang dipegangnya. Sehingga berdasarkan pandangan Van Vollenhoven tersebut, peradilan adat masih menjadi sebuah lembaga penyelesaian yang masih eksis dan dibutuhkan oleh masyarakat hukum adat.

Tantangan yang dihadapi dalam pembangunan kembali peradilan adat dalam sistem hukum Indonesia, tidak hanya terletak pada sisi normatif peraturan perundang-undangan saja. Perubahan struktur masyarakat yang semakin hari semakin berubah, bahkan dengan akselerasi perubahan melalui teknologi merupakan sebuah tantangan tersendiri. Perubahan struktur masyarakat ini akan memengaruhi bagaimana bentuk peradilan adat yang akan dipertahankan dan dibangun dalam sistem hukum Indonesia.

Tawaran konsep peradilan adat pasca pengundangan KUHP Nasional adalah peradilan adat merupakan peradilan yang mandiri. Peradilan adat pada tawaran ini diposisikan sejajar dengan lemabaga peradilan lain di bawah Mahakamh Agung. Berdasarkan prinsip komplementer, peradilan adat sebaiknya sejajar dengan pengadilan

negeri yang masih dimungkinkan upaya hukum lebih lanjut ke pengadilan tinggi jika putusan peradilan adat dirasa belum memberikan rasa keadilan.

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Dayak Lundayeh Krayan Customary Justice Confession and Implementation

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Abstrak

The Lundayeh indigenous peoples who live in the highlands of Borneo around the Kayan Mentarang National Park (TNKM) maintain customary law and national law in managing their live and environment. Gained confession of Ulayat Rights in 2004 so that custom developed both in terms of rules and implementation. The formulation of the problem in this paper is that the Lundayeh Customary Law Community obeys customary law and national law, and the enforcement of customary law and national law by the Lundayeh customary law community. Normative and empirical approaches are used to observed rule framework and participation to solve problems as the purpose of this writing. The Lundayeh customary law community, as the Dayak in general, organizes life by obeying customary law which is an inheritance and rules that are accepted as custom needed to customary head (traditional institution) obeyed by the community, but now it has become somewhat lax due to the openness of relations with the outside world, so sometimes community organizations that care about tradition are implemented. Indigenous peoples who are acknowledged by regional regulations (Perda) should receive support from the government as a duty due that confession. Generally customary decisions to restore balance in society or peace in customary law communities.

Keyword: Dayak Lundayeh Krayan customary justice.

1. Introduction

The Lundayeh customary law community occupies the Borneo highlands in Krayan sub-districts located on the Malaysian Indonesian border, around Kayan Mentarang National Park (TNKM), also enclosed by the Heart of Borneo (HoB).

The Plateau was just a narrow valley between mountains where agriculture and animal husbandry became commodities of foreign trade. People who are generally farmers only produce to meet the needs of family life. Open links with the outside world encourage more produce for sale, as well as animal husbandry. So in that activity many things can happen, including things that are beyond desire. If so, it raises disputes that must be resolved because it is in existing customary law regulating things such as land tenure, destruction of rice fields and crops, theft of rice and livestock even accidents caused by livestock and

so on. The desire to maintain ancestral culture in farming prompted the establishment of organic farming in Krayan. The customary law of each customary territory is highly dependent on the conditions and activities of the local community.

The border entrance and exit at Ruan Tung as the Cross-Border Post to Malaysian Sarawak, is a traditional route that connects the local community. The border is the border of the Republic of Indonesia and the Kingdom of Malaysia, so the customary territory of Lundayeh or Lun Bawang is separate. The deployment of border guards in the area is both by the Indonesian and Malaysian sides for state security, but also part of the Krayan community or next to Ba Kelalan. It also has an impact on people's lives, increasing the workload of traditional heads to handle it.

The trade route has recently become one of the choices for Indonesian workers (TKI) who do not want to be deported to return to Indonesia. The deportation of migrant workers that has always been carried out by the Malaysian side has caused new problems in Krayan sub-districts with many migrant workers entering through this route to return to Indonesia. Many returned to their hometowns, but not a few who survived and hoped to re-enter Malaysia there were also those who survived and settled in Krayan. This creates new problems that may have previously begun to decrease and now increase again.

The life of the Lundayeh people in the midst of the jungle is not safe in the silence of the forest, since the area is designated as a protected forest which ends in the National Park bringing village life in the forest faced with regulations related to the protection of forest areas. Forests and Dayaks are inseparable, but the rules applied to the area are sometimes different from the local wisdom of the community, so they clash which ends up the community feeling disadvantaged. Actually, indigenous peoples are more concerned about forests as evidenced by their environment being generally designated as protected forest areas, both in parts of Indonesia, Malaysia and in Brunei Darusalam in the *Heart of Borneo* (HoB). Likewise, the area where the Tana Luun indigenous people who lived in agriculture used to live, is designated as the TNKM Core Zone. (Marthin, 2020), showing how the condition of forests in indigenous peoples' areas. In this realm, the traditional head is no longer a protector but acts as a leader of indigenous peoples in dealing with outsiders.

The formulation of the problem in this paper is that the Lundayeh Customary Law Community obeys customary law and national law, and the enforcement of customary law and national law by the Lundayeh customary law community.

The research methods used are normative juridical approaches (Marzuki, Peter Mahmud, 2009) and empirical, especially customary law approaches. (Soepomo, 2000), Based on the existing rules , observation and participation are carried out to know and understand the problems that exist in society. It is hoped that this approach can answer legal issues as the purpose of this research.

The legality of the judiciary carried out by indigenous peoples has experienced ups and downs in its recognition in laws and regulations, even the existence of customary law communities is in fact often said to be half-hearted recognition. However, for customary law communities, customary rulings provide certainty, order and justice, therefore they still uphold and maintain them in their daily lives. Basically, adat only applies among the customary law community itself. Outsiders who come into contact with indigenous peoples must be willing to choose whether to submit to local customary law or refuse by taking it to the state court. The position of customary courts from the point of view of judicial law isreferred to as out-of-court dispute resolution.

The development of the community along with the development of border areas as the front porch of the state has an impact on the number of cases that must be brought to traditional heads for resolution. Relations with the outside world of society are increasingly intense and the next problem that often occurs is the effort to clash national law on customary law makes customary heads more dizzy with various actions and behaviors that try to leave the customary law.

Dispute resolution that occurs in customary law communities, whatever it is, is already known by various terms labeled to it so as not to be confused with terms in national courts. Stated by Tolib Setiady, customary courts are customary law rules that regulate how to act to resolve a case, peacefully to restore balance in a disturbed society. (Tolib Setiady, 2008).

Customary law communities (Kusumadi Pujosewojo, in Iman Sudiyat, 1999) are communities that arise spontaneously in a particular area whose establishment is not established or ordered by a higher ruler or other ruler, with or enormous solidarity among its members, who view non-members of the community as outsiders and use their territory as a source of wealth that can only be utilized entirely by its members. Utilization by outsiders must be with permission and certain rewards in the form of recognition and others.

Perthe Regional Regulation of Nunukan Regency No.4 Year 2004 concerning the Customary Rights of the Customary Law Community of Lundayeh Krayan, Nunukan Regency, in Article 1

number 8 gives the understanding, Customary Law Peoples (*adatrechtsgemeenschap*) are community units that are permanent, have the equipment to be able to stand alone, have legal unity, authority unity, environmental unity based on rights shared over land and water for all its members.

Customary law communities are units of indigenous peoples who still use their customary law in everyday life in addition to national law. Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia states 'The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in law.

Many regions regulate the recognition and protection of indigenous peoples, but few stipulate the recognition of certain customary law peoples by local regulations or decrees of regional heads, causing many problems. Recognition of culture and other than customary (communal) rights to their living areas does not provide protection for the existence of customary law communities.

2. Discussion

2.1. Life and Environment are governed according to Customary Law and National Law

Lundayeh customary law, which is generally only called Lundayeh custom, shows the rules that must be obeyed by the community. The conditions of the region and the customs of the people determine the customs that become role models. Violations of custom can lead to disputes that must be enforced between them.

The arrangements in these customs are not much different, (Marthin &; Wiwin Dwi Ratna F, 2015), but some regulate it simply but others to detail. Some regulate and also do not regulate. When the latter happens, it usually uses customs from other customary laws that already govern.

Existing customs are customs that have previously prevailed and maintained by the community or inherited from previous ancestors, while new rules in adat are the result of an agreement in the Indigenous Peoples' Deliberation which was deliberately held for it or used in the decision of the traditional head on a particular matter.

The Lundayeh customary law community fosters customary law which serves as a guideline and benchmark for behavior in daily life, in addition to applicable national laws. If there is a clash of laws, they are free to choose or not apply customary law if it is the authority of

national law. However, in practical terms, customary law is applied to cases that do not have a broad impact or become widespread news. Cases such as minor crimes are generally settled by custom.

In Krayan District, there used to be only one sub-district, (Marthin & Wiwin Dwi Ratna F, 2015), then it was divided into two and finally into five (5) sub-districts. However, there are only 3 (three) customs according to the closeness of the existing community or sub-tribes, (Yansen TP and Ricky Yakub Ganang, (2018), Nan Ba', Lun Tana Luun, and Puneng Krayan, namely the customary law of Krayan Darat applies in Krayan District and West Krayan District , Lower Krayan Customary Law applies in East Krayan District and parts of Krayan. and Lon Taw customary law applies to South Krayan and Central Krayan Districts. The latter is not only for Lengilo but also for the Sa'ben and Punan sub-tribes in the region.

The customary law of the indigenous people of Lon Taw Sungai Krayan, (Marthin & Wiwin Dwi Ratna F, 2015), as they name, regulates matters related to Civil Affairs such as debts, marriage, adultery, buying and selling, damage to movable property, domestic livestock, violations of customs, individual borders, customary territories. Crimes such as theft, humiliation, slander, lying, loss of life, and accidents.

Lower Krayan Customary Law regulates matters related to Civil Affairs regarding marriage, adultery, divorce, destruction, loans, accounts receivable, leasing, inheritance rights, adopted children, livestock, arable land. Relating to criminal offences concerning crimes against the life of others, stabbing, fighting, deprivation, theft, demolition, fraud, embezzlement, forgery, sale of public rights, accidents.

Lundayeh Krayan Darat Customary Law regulates civil matters such as marriage, engagement, divorce, adultery, adopted children, livestock, arable land, inheritance, property, agreements, buying and selling, loans, receivables, peace, wills, and partnerships/cooperation. Relating to criminal offenses such as loss of life of another, threatening, accident, accusing, fighting, molestation, trying, humiliation, fraud and forgery, vandalism, demolition, plunder, embezzlement, and theft.

The customary laws of the three existing customary jurisdictions are not much different from each other. One customary territory does not regulate because cases that occur rarely or never occur in its territory. If there is, it will use customary law from the customary territory that has regulated it. As Lon Taw customary law stipulates about taking agarwood in other areas or neighboring customary territories is fined Rp 300,000, - (three hundred thousand rupiah) one

person and agarwood confiscated. For outsiders who take Agarwood within the territory of the Lon Taw Indigenous People, Krayan River is subject to a customary fine of Rp 2,000,000, - (Two million rupiah) and all agarwood is confiscated.

The crime of murder has not yet been eliminated from customary law, although it can be tried in the District Court. Generally, what is still done from customary law is fines for peace. In the customary law of Lon Taw, regulating, the loss of one's life is intentionally subject to a customary fine of 10 (ten) buffaloes. Accidentally killing someone is subject to a customary fine of 8 (eight) buffaloes by bearing the cost of burial. The customary law of Krayan Hilir governs, Whoever intentionally or planned in advance to eliminate the lives of others or kill out of envy and then hold a blockade (ngabang) so that there is a murder with sharp weapons, then fined as many as 10 (ten) buffaloes and 1 (one) pig (berek) size 8 (eight) kilan for peace. While the customary law of Krayan Darat governs, a person intentionally takes the life of another person is subject to a fine of ten buffaloes (10-12 females who have given birth), burial costs, one pig nine kilan for peace. The cost of burial and peace are not much different, that is, there are costs incurred for burials and peace events. At the event, both sides were reconciled so as not to demand retribution.

Marriage is a church authority, as the Lundayeh customary law community generally adheres to Protestant Christianity. Marriage customs govern how a marriage can take place. One of the most important things in the Lundayeh custom is Furut / Purut (bride wealth) which is dowry. The customary law of Lon Taw, Krayan Darat, and Krayan Hilir determines the same, namely 3 (three) buffaloes. Purut officially has 3 (three) buffaloes and applies equally to people within the indigenous community and outsiders of the Lon Taw Indigenous People, Krayan River. The official Furut of 3 (three) buffaloes applies to people inside and outside the traditional environment of Lower Krayan. Every marriage performed within the customary jurisdiction of Krayan Darat applies a dowry of three female buffaloes that have given birth. The dowry is excluded by agreement of both parties. Before being regulated by customary law, in marriage custom, furut was the determinant of whether or not a marriage would be. In relation to the amount used to ensure that the family can guarantee a better material life, not to become a laborer to improve the economy of the man's family. So that it becomes a tool to select preferred candidates. The social function of furut is to bind large families to distant descendants to relate to each other, because it also asks for receding. A family member who asks for furut from the male side must give a toast

(the wedding gift from the bride's side, to pay back some furut).

Adultery is the most detailed case regulated because it deals with many laws and regulations outside of customary law and can be committed by anyone. Some cases of adultery are harmed, but both are equally sanctioned. Men get harsher punishments. The differentiating factors are marital status, being responsible for marrying or marrying, age, religion, impact on pregnancy, death and so on. Soldiers, police or employees serving in indigenous peoples' territories were affected by the case. They prefer settlement by customary law rather than national law or other legislation. Although it may be heavy, it does not extend to the position or employment status.

Customary law in the Lundayeh customary law community regulates all aspects of life that are considered to disturb peace, peace and order. Liquor is not regulated, now there is a traditional chief ruling that imposes heavy fines on sellers. The latest case that was to be submitted to the traditional chief, but was rejected, namely Narcotics and dangerous drugs abbreviated as Narkoba. As for the reason, it doesn't know much about drugs, let the police know the law and have the authority to handle it. Lately there has been a desire to include drugs in customary law affairs, good luck and soon to protect the community, especially the younger generation.

Violations of customary law that guide customary law communities do not have to be brought to the customary head, if voluntarily it can be resolved either between parties or with the assistance of other parties so that it can be resolved. The customary chief will take legal action against violations concerning public interest. Such as poisoning and electrocuting fish in rivers, taking rare protected birds, exploitation of forest products or timber and other mining products. Even tourists entering without the permission of the Indigenous People's Institution of Lon Taw Sungai Krayan in their respective places are fined customary Rp 2,000,000, - (Two million rupiah) for each person and tourists immediately leave the area. Burning forests or fields or gardens—thus causing. Large area fires are subject to customary fines of Rp. 2,500,000.- (Two million five hundred thousand rupiah).

Some disputes that have been experienced by the community and did not reach the traditional chiefs such as, A grandfather gifted a buffalo to his grandson. The grandson who lived in another city could not have brought a buffalo, he sold it. The price paid by the buffalo buyer is below the market price. Hearing about the incident, the grandfather went to the buyer and said, "Although you have agreed to the price, but you know that he is a child you should pay according to

the market price." And the buyer added the price to the grandfather without objection. It's a different story if the grandson is old enough.

In another case, a farmer, a retired teacher, objected because the rice in his rice plot had been eaten by buffaloes. He asked for compensation for the amount of money he spent planting the rice. The buffalo owner objected and only wanted to reimburse the price of rice that was usually produced from the plot. The farmer accepts, because it is customary.

Some cases that have been reported and handled by traditional heads include: a. The disappearance of a buffalo caused the owner of the fog to look for him. Buffalo trails are not out of the yard (a grazing ground). The owner only sees the mark of the boot but once the inside of the mark shows the weight of the wearer. It was later discovered that the buffalo was wearing two pairs of boots. b. The video camera is gone. It turned out to be found already in a state of discard. It turned out that the thief was known, because he didn't know to operate it finally broke down. c. Punish the spouse of adultery with a punishment more severe than the punishment usually imposed, evenif the basis of their consideration is becausethey commit adultery in the style of the city people, not wearing clothes.

Debts related to buffalo are a lot of problems, both between villagers, between villages and even with traders from Malaysia, especially Sarawak and Brunei Darusalam. In addition to the buffalo trade, buffalo theft, buffalo killing and destruction by buffalo became the business of traditional chiefs. Buffalo is the main trade commodity (export) from Krayan District besides adan rice.

Theft categorized as a crime is also reported to the traditional head, but not the traditional head who is looking for the thief, usually the thief is already known to the owner of the goods. Buffaloes, chickens, rice, money, cameras, laptops and so on became objects of theft.

Threatening to kill with a machete can also be brought to the traditional chief, the threat of just pulling a small machete from the scabbard will be heavier than brandishing a machete in front of the person concerned. The basis for his consideration of the intention behind the act is understood that brandishing a machete only scares, but touching the machete shows the seriousness of the threat.

Adultery or fights or other violations committed by soldiers or police on duty in Krayan sub-district cannot be separated from the punishment of traditional chiefs. Although they objected, they were willing to be resolved based on custom rather than criminal law and civil service sanctions or the code of ethics of their corps. Resolved by

the application of customary law to prevent dissatisfaction by the community by obtaining compensation for fines paid.

Even in the region, customary law still followed, a member of the Lundayeh indigenous community who was a civil servant was caught committing adultery. Family settlements, through the church assemblies of which they belong, as well as by the agencies in which they work, all these efforts were unsuccessful. Finally it was resolved by the traditional chief by punishing the two.

The death of a policeman in a community activity, namely circumventing an animal in order to catch it or hunting deer together, was shot. The case was handled by law enforcement and led to the Tarakan District Court. A sentence of 4 (four) years in prison for causing death, namely shooting, has been handed down by the judge. In that case, the traditional head still settled customarily by requiring the provision of a buffalo by the family of the convict for a peace party. The goal is that there ispeace and no longer take revenge.

Lundayeh customary law has also evolved, adapting to the development of zaman and the development of general rules. Like buffalo cattle, once free to roam, newly planted rice fields must be fenced, if you want to secure from buffalo disturbances. At that time every rice field owner had to have a bamboo forest to stock up on rice field fencing materials. Now, it has been agreed in customary law that buffalo must be kept in a fence or tied up. Because not only rice was disturbed, the village yard was dirty with the presence of free buffaloes.

Lundayeh customary law changes or develops according to the needs of the community, through a mutual agreement, usually at a large deliberation of the customary law community. Following the prevailing laws and regulations requires intensive socialization. This is the duty of government officials, village heads and sub-districts. Usually, traditional heads are included so as not to experience rejection.

National law applies to citizens, and customary law communities are no exception, as good citizens must obey it. There is not much problem in the enactment of the two laws. Lundayeh customary law received recognition with Regional Regulation No. 04 of 2004. Customary law uses many principles and norms of national law, adat is local and regulates more practical matters in the field. Chief Besar Krayan Darat used to say, however, as Indonesian citizens we should know, understand and implement the national laws where we live. (Marthin, 19).

The rules in the applicable laws and regulations are addressed in various ways. Enacting fully, adopting into customary law and against the contrary can be made choice or enacted in layers.

The prohibition against hunting protected animals or birds is accepted in customary law through customary deliberation. The prohibition of the free circulation of alcoholic beverages by local regulations was also followed by a customary chief's ruling that punished the perpetrators customarily, indicating the application of the law from the general rules by customary rulings.

Civil matters such as land, marriage and so on can be made choices.

Criminal matters are carried out in layers, minor crimes are resolved by traditional heads, severe crimes when handled by law enforcement officials there are also decisions made by adat or adat to handle and solve them. If law enforcement continues to handle it, it is no longer a customary matter.

2.2. Enforcement of customary law and national law by indigenous peoples

Law enforcement is carried out by the Head of Adat (Lembaga adat), adat is obeyed by the community, but now it has become somewhat slack due to the openness of relations with the outside world. Another option is to use national law because access that has now become smooth is an effort to avoid custom or other legal remedies such as settlements by law enforcement officials because it is also their authority.

The existence of traditional chiefs in the Lundayeh customary law community has long been known. Legally by decision of the Regent, if submitted. Even without a decision from the government, if it is recognized, the public will be able to carry out their duties without hesitation. Usually followed by a report to the government to be known or get a decision letter related to benefits provided by the government.

Perda No. 4 of 2004, in chapter IV of Dispute Resolution, in article 11 there are 3 paragraphs regulated concerning the settlement of customary disputes carried out outside the court, by customary institutions of the Lundayeh customary law community, based on customary law in force as long as it does not conflict with laws and regulations. Traditional heads in carrying out their duties and functions, coordinate with government officials, village traditional heads with village heads, large regional customary heads with sub-districts (Annex to Regional Regulation No. 4 of 2004).

The local regulation clearly provides a legal basis for customary disputes that occur in customary law communities, but the facts are broader than just disputes. This has become common because the community needs legal protection, the judiciary that should be

authorized, cannot be reached because it is far and expensive, practically the traditional head becomes the last focus. Customary sanctions or customary punishments are sometimes more effective in imprisoning perpetrators and appeasing the community.

Dayak Lundayeh deliberations in Long Bawan took into account the Regulation of the Minister of Home Affairs No. 11 of 1984 and the Decree of the Governor of the Regional Head of Tk. I East Kalimantan No. 235 of 1992 reaffirmed the position of village Traditional Head for the village that previously did not exist. There used to be but one by one it was lost, so there lived a large traditional chief of the region. On that occasion, the Great Traditional Head of Lundayeh was also formed for the entire Lundayeh Dayak community. The latter does not receive widespread support, so it appears as a symbol only and functions more in the interests of the community in relation to parties outside the legal community such as the government and parties interested in indigenous peoples. And then the Great Dayak Lundayeh Customary Conference in 2001, because the demands of z aman and real needs were confirmed and recognized by the existence of the Great Customary Chief Lundayeh in terms of deciding cases about customary territories whose symptoms had begun to arise due to the struggle for customary forest rights between customary law community areas. He was given the authority to hold the gavel of "judge" for his indigenous people. However, there has not been a single case that actually utilizes this level as agreed upon procedure. In the past, the name of a great traditional chief was obtained by a traditional chief when so many cases were brought to him. Shows the level of public confidence in the decisions they make.

Traditional heads as customary institutions function to maintain, protect, fight for the Lundayeh customary system that applies wherever the Lundayeh indigenous people are located. Carry out the task of maintaining, protecting, fighting for indigenous interests. Fostering and preserving Lundayeh customs as an inseparable part of the nation's culture, so that the noble values of Lundayeh culture are not destroyed by outside influences in the era of globalization. Make decisions if there are disputes between traditional heads both in villages and regions if they are not resolved. Bridging with the interests of harmony or other ethnicities and with the government. Representing the interests of the Lundayeh indigenous people in relations with the Government and others.

Traditional chiefs enforce customary law or decide cases brought to them. In the past, it was sufficient by customary authorities, now it is starting to be avoided by the community, so the sub-district, police

and apparatus in the area support it, because adat has been recognized by regional regulations.

The structure of customary institutions (Marthin & Wiwin Dwi Ratna F, 2015), which exists starting from Village Traditional Heads, (in 1992) Large Customary Heads of Regions (Kecamatan) and wider areas such as Districts and Provinces as well as National to regulate working relations, both inward and outward. In 2004 it began with the Kalimantan Dayak Customary Council (DADK) which established the cooperation of traditional heads throughout Kalimantan, then changed its name to the National Dayak Customary Council (MADN) and made representatives in the province under the name Dayak Customary Council (DAD) and in 2019 it was gathered in an international network starting at the "Dayak International Justice Congress" (DIJC) in Sabah Malaysia. This collaboration strengthens the existence of the Dayak Customary Law System, in addition to strengthening the structure within each sub-tribe as well as for outbound relations in other Dayak sub-tribes. The above is an attempt to put in place a formal structure relationship, long before that in Krayan and Sarawak / Sabah Malaysia had worked together to overcome the problems of the existing traditional trade relations.

The process of resolving cases that occur

Events that occur between parties in the community that result in disputes, disputes, hostilities, or anything that disturbs the community after various efforts to reduce it are not achieved, will be brought to the traditional head to get a settlement in the form of a decision to reconcile by applying fines, default settlements, penalties and so on. Bringing before the traditional head for *besara'* (a court trial) (Ganang, Ricky, 1990), must be agreed by both parties. The consequence of bringing a case to the customary head is that in addition to the cost of the case, the implementation of the customary head's decision must be implemented, meaning that debts must be repaid, losses must be reimbursed, fines must be paid or demands must be met. (Marthin &; Wiwin Dwi Ratna F, 2015),

Some elements in carrying out the *magnitude* carried out by traditional heads are the existence of cases or parties to disputes, customary assemblies, procedures or events, decisions and executions.

Legal events that bring unrest in the community can be criminal and other acts that have a broad impact and disputes between individuals or families become things brought or handled by traditional heads. Community reports or demands of one of the parties are responded to by traditional heads. For this reason, the case is studied

and then forms a customary assembly that will handle it. *Besara* is governed by the traditional head, adjusting to the busy activities of the traditional management. Complicated cases, people will find free time so that there is enough time to solve them. Cases that demand immediate handling are sought to be handled as soon as possible. Debt-receivable disputes with parties outside the village or with parties outside the customary law community, will be submitted at the appropriate time, for example the person concerned happens to be in the village or surrounding area that can be brought for *large*. There is no obligation for the traditional head to present the parties, but the plaintiff who brings together the defendant before the traditional head. For reported matters, the traditional head is authorized to summon the reported party.

For the amount *of* the plaintiff, it is required to complete the administration and pay in the form of case registration and table money and provide consumption costs for the *duration of the amount.* The indigenous territories of Lower Krayan and Land Krayan expressly determine the cost and amount. However the Lon Taw customary territory does not govern it, but in practice it is the same.

A dispute or matter that occurs generally relates to two parties, the debtor and the debtor or the accused and the aggrieved. However, it can also involve other parties such as parents or families who have family relationships or interests associated with being parties to a dispute or case. When it comes to adultery, the aggrieved party becomes back and forth, namely the husband or wife of the adulterous spouse. The male side is always the one who is heavier at fault than the female one, because generally the one who starts is the male side. Women are also considered guilty of accepting male temptations.

Disputes are brought to the local customary head, to the village customary head for the case in the village, if between villages it can also be brought to one of the village traditional heads, but generally prefers to be brought to the large customary head of the region. The choice related to relative competence (Sudikno Mertokusumo, 2002) in national law is not a reason for traditional chiefs to refuse. The willingness of both parties, especially the defendant, to be decisive. Cases between two parties with customary jurisdiction such as Upper Krayan were brought to the Great Traditional Chief of the Land Krayan Territory on the practical grounds that more of their activities in Krayan Darat was possible. Some cases were resolved without objection from the great customary chiefs of the two regions.

The existence of a family relationship between one party, both the plaintiff and the defendant, with the local traditional head can be a reason for rejecting and choosing another traditional head.

Procedure for examining cases brought before traditional heads

There is a lawsuit before the traditional head due to a deadlock, unless it is agreed to be brought to the traditional head. (Marthin &; Wiwin Dwi Ratna F, 2015), Submission of settlement to customary institutions means that both parties are ready for any risks that will be decided by the traditional head.

There are two essential legal discussions, namely substance and procedure as in material civil law it is how to obtain rights and in formal civil law is how to defend rights.

As stated by Arief Sidharta, in order for the dispute resolution process through the judiciary to take place impartially and objectively, the process must be carried out through procedures that can guarantee impartiality and objectivity and standardized in a set of legal rules called Procedural Law or Procedural Law. Theevent is formulated in writing in legislation that must be strictly applied. This deviation from procedural rules must, in effect, be viewed as unlawful collusion. Therefore, if there is a compelling circumstance, a deviation must be made, for the realization of justice, for example, then this deviation must be accountable which is expressed explicitly in the consideration (*motivering*) of the relevant judge's decision, so that from various aspects the deviation is rationally acceptable and justified. (Arief Sidharta, 2015). In customary law, the two things come together to uphold justice, legal certainty for the peace and tranquility of the community.

Claims will be processed by the traditional chief by forming a tribunal to conduct justice or *the magnitude* that resolves the case. The obligation to pay the table money (litigation fee) used by the tribunal for consumption expenses during the conduct *of the amount'*, then all the administration of the call, schedule, and venue is determined. The call was delivered to several members of the assembly selected from elders of community members who understand about customary law. If in the past verbal calls and big time *were* made at night after returning from work in the fields or fields, now invitations are made in writing by traditional heads and traditional secretaries and *besara'* can also be done in the morning and afternoon, depending on willingness and agreement. Places to do *Besara' a*khir-lately use public facility buildings whether government or private owned which are agreed and permitted. In the past, when it was still a longhouse and there was no

public facility building carried out in the traditional chief's house. (Marthin &; Wiwin Dwi Ratna F, 2015),

The assembly that adjudicates cases brought to traditional heads is formed in accordance with the customs of each region. The Lower Krayan customary territory determines the customary assembly consisting of: A chairman, a secretary as well as the master of ceremonies, several examiners of problems, several weighers (weighers come from large customary institutions and or from village customary institutions). The session shall be chaired by the traditional head or representative or one of the appointed members of the customary institution (the appointment of a leader/chairman of the customary council must be by mutual agreement of the traditional leader and members). The Krayan Darat region determines not much differently, while the Lon Taw Adat does not regulate at all, because it has become a customary congregation led by a traditional or appointed chief.

At the appointed time and place of assembly, the assembly will be *large',* then the plaintiff or complainant will be heard without the presence of the defendant or complainant in the room. Explain the story of the background so that a dispute occurs and efforts are made to resolve the problem. Further demands are expected to be granted. After that, the plaintiff came out and the sued was summoned before the tribunal to hear the claim from the plaintiff. Further hear the chronological story of events as did the plaintiff. It can also be both presented at the same time, depending on the leadership of the customary congregation.

After hearing all the stories from the defendant, the panel began to examine the things that had been told by both parties. Call rebuttal witnesses and also hear corroborating witnesses. One after another to collect evidence. Like civil court or criminal justice.

Evidence and evidence in Lundayeh customary law are not definitive and limitative. The goal is to be clear of its truth or substance. It can happen that the defendant convoluted giving testimony so that testimony from witnesses to give confidence to the panel how it really is. Testimony can also provide an opinion in the form of community response to the case. The habits in their village towards this, how common things are in everyday life. Divide the assembly into comparisons. If in national law it can be commensurate with expert opinion.

While hearing these testimonies, the customary assembly has exchanged ideas with their respective experiences on the same case and has been decided. If it is sufficiently felt that the incident is considered based on experience and common sense according to the present

circumstances, and the case can be concluded, deliberation can make a decision.

Once it feels sufficient, the panel summons both parties to hear the verdict. The decision is in the form of a description of the case, the claim and in consideration of the decisions that have been taken by the relevant traditional head and can also be by other traditional heads, as many as are allegedly new and remembered by the parties, based on that consideration the decision handed down is no different or not much different from the decision that has been taken for the same case.

There is a difference, stated by the traditional head who has been pensiun, that in considering the taking of keputusan, it was done by taking into account the same previous decisions, then the conclusion or decision is also the same. Recently, it has been more charged to the consideration of the members of the assembly, so that the decision for the case can be different from the decision of the same previous case. Which method can give a sense of justice, requires more in-depth research.

The verdict was pronounced orally and heard by all those present without the necessity of written form. By its oral nature it will be news that everyone in the *big* will hear which each will later tell out to anyone who wants to know. The knowledge of the community becomes an archive for them with various versions of consequences in public relations. The verdict becomes a punishment for the wrong. The mistake will be remembered by society in subsequent relations with the person concerned. For society is something that must be guided, will experience the same thing when doing the same or similar actions.

The newly appointed Head of Krayan Darat in 2015, Rining Liang, said that in the future, the traditional head in examining a case should use minutes so that in examining and implementing the decision, there is black on white. The ease and habits of today's people about writing are no longer expensive activities or activities that are difficult to do.

For Lundayeh customary law, the procedure (procedural law) in customary law that is carried out as long as it places equality for both parties does not seem to be important. Procedures are necessary for all parties to enforce. As in customary law in general, procedures and substances blend into a unified activity for decision making. So that the procedure, however, develops, the importance is accepted and the substance of which is of concern to obtain justice.

Execution of customary court rulings

The nature of customary law in general is concrete and cash. It is not much different from the Lundayeh customary law community in its customary law, especially in terms of executions also carried out immediately and in cash. Cash referred to in its implementation is not as known in civil law, for example, in the law of custody at the time of the hearing, it can simultaneously apply for confiscation of bail for repayment. In the Lundayeh indigenous people, it is very different. The nature of Cash will result in things happening that according to the rules are generally difficult to understand. If the convict has to pay cash and he is incapacitated, it will be taken over by his family, whether his parents, siblings or anyone related by blood or marriage to him. This is done to maintain the dignity and dignity of the family, the matter of returning the payment may be done if the person concerned is able and willing. Or from the beginning it was mentioned as a loan between families. However, being a record for the family will be taken into account in conversations and other matters involving decision making in the family. (Marthin &; Wiwin Dwi Ratna F, 2015),

The traditional chief's complaint was that some of the traditional chief's rulings received by the loser were owed again. This means that payment is made later for a certain time or a certain circumstance. If this is the case, there is no verdict. On several occasions the results of traditional chiefs' rulings were brought to be executed by the police or sub-district or its ranks. Initially, the sub-district head or police did not want to deal with it and returned it to the traditional chief. But lately the sub-district head is willing to help as far as matters under his authority are concerned, such as withholding salaries or by the police, the goods are being withheld by his party. Neither the subdistrict nor the police did as they normally do with matters under national law. Its nature helps traditional chiefs to facilitate execution.

Persecution issometimes assisted in its implementation by community organizations that care about customs. Customary law communities that receive recognition by Regional Regulation (Perda) should receive support from the government as a duty because of this recognition. As the Head of Krayan Hilir used Laskar, a youth organization allied to adat for all matters that prepare and implement its decisions.

Generally, customary rulings whether punishing fines or other penalties mentioned are to impose a heavy burden on violators in order to be deterrent. The implementation of punishment is burdensome so that if it feels heavy it gives a lesson not to repeat the violation. If repeatedly, the more property runs out to pay the fine. Those who are

violated receive a fine payment so that the wound in the heart is treated, thus the punishment aims to restore peace and balance in the customary law community.

3. Conclusion

3.1. Customary courts in the Lundayeh Dayak Community have long been known to be based on customary law which is inherited maintained and obeyed, as well as the rules of national law are obeyed in various ways by adopting into customary law, implementing it by superimposing it with customary law, and fully submitting it to the government in upholding the lives of indigenous peoples as citizens.

3.2. The enforcement of customary law and national law is carried out by customary institutions known as traditional chiefs, entrusted with carrying out to restore peace, security and restore balance of life in the community by disturbing violations. Strengthening the structure of customary institutions through cooperation between traditional heads and organizations allied to adat and the Government.

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Legal Politics of Customary Economic Development and Welfare of the Moronene Hukaea Laea Customary Law Community

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Abstract

The purpose of this research is to find out and analyze the legal politics of customary economic development and welfare of the Moronene Hukaea Laea customary law community as well as the implications for the existence of the customary law community. The type of research is socio-legal research based on primary and secondary data. The techniques used to analyze and present the data are qualitative descriptive methods. Results show that 1. The legal politics of customary economic development and welfare of Moronene Hukaea Laea customary law community through the manifestation of customary values in the formation of policies and regulations at the regional level, in this case including access to Moronene Hukaea Laea customary law community as partners in economic development programs. 2. The implication for the existence of customary law community is that it specifically supports resilience efforts the current Moronene Hukaea Laea customary law community and generally increases the economic dimension of culture with indicators of the people having income streams as performers/sponsors of culture.

1. Introduction

Indonesian economic system according to the Constitution is oriented to the interests of the people which is often referred to by several terms, such as the Pancasila economic system or the people's economic system. This is contained in Article 33 of the Indonesian constitution of 1945 which if explored the meaning contained and then examined historically and philosophically, it will be found that the economic system related to national interests should be set forth in regulations oriented to the interests of the small people, such as farmers, fishermen, workers, or small traders. In its Indonesia's development has undergone both social and economic transformation. Policies based on the application of the values of individualism, liberalism, and capitalism that are identical to Western values are put forward in making policies related to the national economy. This situation has made many regulations not based on strong philosophical roots and often clash with the values that live in society. Development as a process is an effort of change that is planned and implemented dynamically. It is undeniable

that development has led to scientific and technological progress, economic growth, increased sophistication of means of communication and so on. However, on the other hand, development based solely on economic considerations in reality only improves the welfare of a part of the overall life of society.Economic aspects are very supportive of the progress of a nation. The economic aspect is an aspect of adaptation, in this case the economic development of the nation is very barkaitaan with the correct pattern of legal regulation so that in its implementation will create an ideal development as stated in Article 33 of the 1945 Constitution, that:

"The economy is structured as a joint venture based on family principles. The branches of production that are important to the state and control the livelihood of many people are controlled by the state. Earth and water and Natural Resources contained therein are controlled by the state and used for the greatest prosperity of the people".

Referring to the above, synchronization and harmonization are needed that can specifically regulate the Indonesian economy as a form of people's economic development so that the regulations that are born do not overlap. Regulation as the final part of the legal process is influenced by the growth and development of society itself. Artidjo Al Kostar explained that the law is substantially inseparable from the spiritual structure of the community concerned or the community that supports the law this is because law has a correlation with Culture, Thinking structure, basic values, faith, personality manifestation, nature and style of society. Law as a spiritual mental infrastructure in the process of interaction between man and his creator as well as between man and his neighbor or the environment. (Artidjo Alkostar, 1997)

Eugen Ehrlich defined the law as " derived from the current custom within society and in particular from the norm creating activities of the numerous groups in which members of society were involved" (L.B. Curzon, 1979). Living Law can be in the form of customary law that is continuously in a state of growing and developing like life itself. (Soepomo, 1983).

Moch. Koesno explained that the concept in customary law, does not recognize the views of individuals who are essentially independent. The individual is an integral part of his society. In this view, it is society that is primary. Society is an organism whose parts are parts that live in unity with others. In other words, individuals are part of society who have their own functions in order to carry out and sustain society. (Moch. Koesno, 1983).

All of societies, however , have simple concepts in the form of values, norms or rules as manifestations of the nature of Group life that

guide various behaviors of community members in interacting with each other. Public awareness of the role of customary law and customary law gave birth to the existence of social order (*social order*) which is not at all part of the *legal order* established by the state. This social order is a form of culture as a behavior that is patterned in a social system (*social system*). (sulastriyono, 2011).

According to Koentjaraningrat referred to by Wiranata states that the whole system called culture has universal elements which include religious systems and religious ceremonies, systems of social organization and society, knowledge systems, systems of vocal symbolism or language, art systems, livelihood systems and systems of equipment and technology. (Wiranata, 2005). The culture in question emphasizes the cultural aspects of learning and the way of life of humans in society that is reflected in the patterns of action and behavior. It can be said that the law in this context is a cultural product so that the law is a reflection of the culture of the supporting community. Djodigoeno stated that the law is the work of a particular society that aims at a just order in the behavior and actions of people in the relationship of self-interest and the welfare of the community itself which is the Substratum (basis/reason). (Mahdi Syahbandir, 2010).

Values, traditions, customs, cultures that grow in a society are basically also important assets or social capital in order to improve the quality of life and welfare of Indigenous Peoples. Customary law is a law that is built on paradigms or values, Kluckhon argued that value is "*a conception of desirable*" (a conception of desirable). Then the value there are several levels, namely:

1. Primary values are the values of life for a society, are abstract and fixed such as honesty, justice, nobility, togetherness and others.
2. Subsidiary value with regard to usability, because it is more talking things that are concrete. So the law is more aimed at secondary values, namely values that are useful for solving concrete problems faced by society, or individuals. The emergence of these secondary values, has been through filtering (sannering) by primary values. Secondary values can change according to needs and developments and answer the problems that exist in society.

Law, including customary law, is actually also based on primary values, and becomes the basis of secondary values because it is more real and understandable. The position of customary law and the existence of customary law communities is regulated in the Constitution Article 18b paragraph (2) and Article 28 I paragraph (3) of the

Indonesian constitution of 1945 with this arrangement requiring the state to give recognition, respect and protection. Implementation of the article include Through Law No. 39 of 1999 on Human Rights stipulates in Article 6 paragraph (1) that in the framework of the enforcement of human rights, differences and needs and indigenous peoples must be considered and protected by law, society and government. Furthermore, paragraph (2) mentions the cultural identity of indigenous peoples, including the right to protected customary land.

Land and natural resources are the source of life for Indigenous peoples so that the certainty of various forms of control and management of Natural Resources is fundamental. The moronene hukaea laea customary law society regulates the distribution of land to community members by stipulating the condition that a person gets *Lombo* or land, that is, according to the needs (number of his family), the applicant is considered worthy and able to process it/work the land, and does not have customary arrears. After receiving the approval of the customary Council submitted by the head of the custom to the applicant, it will be asked how much land is needed. Then jointly conducted a review (*Mooto Wita*) and designate the location to be processed. After the location is considered feasible, the land is given a *Petoo* (stake).

In addition to land management and utilization of Natural Resources today moronene hukaea laea Indigenous people not only collect and mix forest products for daily purposes but also for broader economic activities, namely by selling to other communities outside the community of Indigenous people. However, the economic activities carried out are still not well planned and carried out.

The law basis for the existence of moronene Hukaea Laea customary law community is the regional regulation (Perda) of Bombana Regency No. 4 year 2015 on the recognition, protection, and empowerment of Indigenous Peoples Moronene Hukaea Laea is still not enough to be a supporting system in the development of the indigenous economy and the welfare of Indigenous Peoples. Related to the empowerment of customary law communities is regulated in Article 15 which states that local governments empower moronene Hukaea Laea customary law communities covering the fields of Education, Health, Economics, and law as basic needs according to applicable legislation.

The application of the article is not significant so that the development of economic activity potential is still limited. Based on the above description, The problem in this research is how the political and legal development of the indigenous economy and the welfare of the

moronene hukaea laea customary law community and its implications for the sustainability of the moronene Hukaea Laea customary law community.

2. Methods

This study uses the method of *Sociolegal Research*, which is a study of the law by using the approach of law and Social Sciences (Sulistyowati Irianto and Shidarta, 2009). In this context, the discussion of the economy (economy) means discussing how to meet the needs and the law discusses how to ensure the implementation of the fulfillment of those needs in a fair and orderly manner. This means approaching legal issues in accordance with the realities that are lived in practical life. The nature of this study is descriptive that provides a systematic description of the object of study. The Data used is based on primary data, the data collection is done by observation and interviews of resource persons in the field against the head of the Moronene hukaea Laea Customary Law Society, head of the Rawa AOPA Watumohai National Park, Head of the Bombana Regency Local Government Law Division. for secondary data, data collection is carried out through literature review on primary materials, namely the 1945 Indonesian constitution, Law No. 39 of 1999 on Human Rights, Law No. 41 of 1999 on forestry, Bombana regional Regulation No. 4 year 2015 on the recognition, protection, and empowerment of Indigenous Peoples Morenene Hukaea Laea. Secondary legal materials in the form of books, articles and scientific journals related to research objects, and tertiary legal materials in the form of a large Indonesian dictionary.

3. Findings and Discussions

3.1 Findings

3.1.1 Politics Law Of Traditional Economic Development and Community Welfare Indigenous Law Moronene Hukaea Laea

Law as a cultural product that continues to live in society from the past until now is also related to economic behavior, namely efforts to meet the needs of living together. The culture developed in this case is mutual cooperation based on the principle of kinship.

The practice of the unity of the customary law community includes four values that have been carried out by the unity of the customary law community, which these values are in accordance with the values contained in Pancasila, which are described as follows: (Sofyan Pulungan, 2022).

First, the value of togetherness implies that economic regulation should be based on the interests of many people embodied in family values or principles. On the basis of kinship, individual values are harmonized within a large framework of mutual values. Individual rights remain recognized, but the exercise of such rights must not neglect obligations as a member of society. This means that every individual right is by nature not absolute, but always socially functional. This value is very relevant to the third precept of Pancasila: the unity of Indonesia.

Second, the value of spirituality contained in the meaning that economic regulation should be derived from morality that lives in society. For the unity of indigenous peoples, all economic activities and every involvement of community members in it are part of carrying out the value of spirituality in daily life as human beings and carrying out the orders of the forces that dominate it. This value corresponds to the first precept of Pancasila: the Supreme Divinity.

Third, the value of consensus means that economic regulation should be based on economic democracy by involving the widest possible public participation, especially stakeholders. The unity of Indigenous Peoples considers this value not only part of the dispute resolution model, but in practice it is also used since the planning stage of an economic activity. Since planning, the value of consensus deliberation is used to involve all members of the community in designing economic activities. This value is in accordance with the fourth precept of Pancasila, namely citizenship led by wisdom in consultation and representation.

Fourth, the value of balance and harmony implies that economic regulation should create humanistic and equitable legal relations. For the unity of indigenous peoples, the parties who want to do a legal relationship have the awareness to create a harmonious legal relationship as a human being, and the condition of interdependence based on the idea of Justice. This value is in accordance with the second precept: a just and civilized humanity, and the fifth precept of Pancasila: social justice for all Indonesian people.

The moronene Hukaea Laea customary law community has an agrarian character so that it can be seen that the economic activities of the community rely on agricultural activities such as rice fields, plantations (fields) and collecting and utilizing forest products based on local wisdom. It is seen in good timing starting from the moment of clearing the land and when planting. This process is carried out by mutual cooperation, all customary law communities will be involved in the process of land clearing one of the members of the customary law

community (*Humuni)*. In addition to local wisdom in agriculture, the moronene Hukaea Laea Indigenous people also have traditional knowledge related to natural medicine whose raw materials come from indigenous forests (Mansyur Lababa, 2023).

The economic activity of the moronene Hukaea Laea customary law community is still limited to being used for daily purposes with a simple lifestyle. Some practices of marketing agricultural products and selling forest products such as honey are still very small-scale. In fact, the potential of natural resources (forests) owned by Indigenous Peoples is of great economic value. The indigenous territory of the Moronene Hukaea Laea community also has a very beautiful landscape consisting of various vegetation including water cypress trees, Savanna Hills, shades of indigenous villages, indigenous forests and other uniqueness both physically and culturally. This is a great potential for the development of ecological and cultural-based tourism which will also have an impact directly or indirectly in the form of a multiplier effect for local governments and surrounding communities derived from the expenditure/spending of tourists for accommodation, Souvenirs/Souvenirs, restaurants, tourist activity services, transportation and so on. But this has not been developed due to various things. For example, the status of indigenous territories that still overlap with the Rawa Aopa Watumohai National Park area causes the relationship between the Moronene Hukaea Laea Indigenous people and the TNRAW center to have obstacles in communicating joint programs related to economic development (Ali Bahri, 2022).

According To The Bombana District Ordinance No. 4 year 2015 on the recognition, protection and empowerment of Indigenous Peoples Moronene Hukaea customary law in Article 16 which regulates that community empowerment activities by local governments carried out at the stage of planning, implementation and monitoring and/or evaluation of development policies and programs related to Indigenous Peoples Moronene Hukaea Laea can not be implemented related to the constraints of the legal status of indigenous territories which also have an impact on the allocation of funds for the development of Indigenous economic activities.

3.1.2 The Impilications for The existence of Indigenous Moronene Hukaea Laea Society

Indigenous peoples live in harmony of culture and economy which in essence both of them have an equal position and mutually support each other. The government began to measure the Cultural Development Index (GPA) by categorizing several dimensions including culture and

economy into one dimension, namely the economic dimension of Culture. Indicators used are people who have a source of income as actors / supporters of culture. However, the equality of culture and economy that support each other has not been seen in the results shown by the GPA in 2018. The economic dimension of Culture is only valued at 30.55 and the indicator has a percentage of 31%. This result shows that the cultural economy has not been optimized for its potential both by the government and by the community so that it has not made a significant contribution to development.

The practice of organizing the daily life of Indigenous Peoples is closely related to the environment and Natural Resources where the indigenous peoples are located. Hukaea Laea is an old village (*Kampo*) inhabited by ethnic Moronene as natives in Bombana Regency and is one of the first groups of people who inhabited the mainland of Southeast Sulawesi. Currently Kampo Hukaea Laea is located in the claimed area of AOPA Watumohai Swamp National Park (TNRW). Administratively since 2003 it has been the administrative area of Bombana Regency. Kampo Hukaea Laea previously consisted of two separate kampo namely Hukaea derived from the word Huka which means Malinjau tree and Ea means big, so Hukaea means big Malinjau tree. Laea comes from La which means river and Ea means big, so Laea means a big river. Between the two Kampo is the first time there is Laea, built first by Tabihi Puawa and then developed from generation to the present. while Hukaea village was first built by the Lababa family with the permission of the head of kampo Laea, but since the establishment of their customary territory as a National Park unilaterally by the government, in an effort to maintain its territory, the two kampo communities agreed to unite into kampo (Tobu) Hukaea Laea (Rekson Limba, 2015).

It appears from the origin of the moronene Hukaea Laea customary law community, it can be understood that the existence of the community is very dependent on natural resources in its territory which is also its economic source. This indigenous people form a pattern of life with a culture of farming and utilizing forest products as a fulfillment of basic needs.

The determination of the TNRAW and the zoning provisions that overlap with the territory of the moronene Hukaea Laea customary law community raises the issue of completing the legality of the status of its customary territory. Article 6 paragraph (4) of Bombana Regency Regulation No. 4 of 2015 explained that the area of customary areas and the boundaries of customary areas are further regulated after an agreement with the Ministry of Home Affairs, Ministry of Environment

and Forestry, National Land Agency of the Republic of Indonesia. Until now there has been no collective agreement as required. For Indigenous peoples legal certainty over the recognition of the existence of indigenous peoples, indigenous territories and rights/authority over it is a unity of identity.

The recognition that does not meet the elements of unity as an identity creates confusion in terms of the actualization of the identity of Indigenous Peoples.This half-hearted recognition has an effect on the practice of Indigenous economic development by the moronene Hukaea Laea Indigenous people in the TNRAW area. The traditional utilization zone established by the TNRAW is inadequate to be managed by members of this customary law community because the zone is not only intended for the customary law community but also for other communities in/around the National Park (Mansyur Lababa, 2022).

This has implications for the ability of indigenous peoples to optimize the development of the indigenous economy in particular and the welfare of Moronene Hukaea Laea indigenous peoples in general. This condition puts Indigenous peoples in a vulnerable state.

3.2 Discussions

The natural resources as a human right is related to the issue of the right to life and defend life as stated by Article 28A of the 1945 Constitution which states that, "everyone has the right to defend his life and his life". This means that everyone must respect it and the state must guarantee that against things that threaten the right to life must be punished. It is also consistent with the principle in international law that emphasizes that the right to life is non-derogable under any circumstances (*non-derogable right*). So in the context of accessing the benefits of Natural Resources is an absolute need of every person because it is related to the need to maintain his life.

Access to natural resources that it controls as a right to life must also be protected. Article 28D paragraph (1) of the 1945 Constitution affirms, "everyone has the right to recognition, guarantee of protection, and fair legal certainty and equal treatment before the law". This provision implies that in the framework of the need to maintain life, it must receive recognition and protection in order to ensure fair legal certainty. That is, the protection of fair legal certainty over the right to Natural Resources is related to the guarantee of legal certainty over access to the benefits of natural resources that have been controlled is protected and respected by the state.

This right of control and management is also commonly referred to as Tenure Rights. Components in analyzing tenure certainty, Namely

normative tenure security, actual tenure security and perceived tenure security are all interrelated and together, although with varying degrees of influence and power create a tenure certainty situation (Myrna Safitri, 2010).

One element of normative certainty is the certainty of tenure provided by the state justice system (legal tenure security) certainty of this model is fulfilled when, (1) there are rules of law clearly regulate the recognition of the overall form of community rights to land and forest resources (bundle of rights) where property rights are the only but open possibility of other rights such, (2) the granting of these rights in a long duration so as to enable the right holder to invest time and energy to benefit from the land and Forest Resources, (3) the existence of legal protection from the state against these rights from interference from other parties, including from arbitrary acts of government officials and other State administrators. Certainty of *actual tenure security* is fulfilled if in practice the community-individually or collectively - can take advantage of their rights and benefit from their rights and access to land and forest resources in an uninterrupted manner and free from threats from other parties including from government officials. The last component in this case is related to the perception of community members, the situation of certainty as to what they idealize their rights and access to land and forest resources, it should be noted here that the perception is not formed in an empty space but rather the construction of the social experience of the community related to the application of legal norms and their interaction with their main government officials who are directly related to citizens (Myrna Safitri, 2010).

Law of No. 41 of 1999 on forestry regulates the utilization of forests and the use of forest areas, including TNRAW, which aims to obtain optimal benefits for the welfare of all communities in a fair manner while maintaining its sustainability. Basically, Indonesia's biodiversity is very important for the sustainability of the nation's life, but this is not because of its position as one of the richest countries in the world in biodiversity but because of its close relationship with the wealth of local cultural diversity owned by this nation (Abdon Nababan, 2015).

The capital basic of natural resources must be protected, maintained and can be used sustainably and sustainably for the welfare of the people of Indonesia by paying attention to conservation practices with the concept of good governance in accordance with the principles of Social Justice (*social equity*), Community Empowerment customary law, justice (*fairness*), prosperity (*prosperity*), and sustainable (*sustainable*).

The form of interaction between the moronene Hukaea Laea customary law community and the tnraw conservation area is the result of a combination of actions and reactions that arise as a result of the relationship between the two. So it can be said that the success of this relationship absolutely requires the synergy of the customary law community of Balai TNRAW and The Local Government of Bombana Regency.

The policy to be taken by the government ideally is to pay attention to related information from indigenous peoples, including values that continue to live in society, which then jointly discuss problems and make decisions in consensus. Thus the role of the community will improve the quality of policies (regulations) made by the government, which will result in the level of acceptance by the community of customary law because it is felt that the policy (regulation) is a manifestation of the noble values of the community of customary law. At this point all elements related and concerned with the management of natural resources as an economic resource will work synergistically to achieve the objectives set.

The resilience of customary law communities to date amid the onslaught of modernization demands whose economic development orientation erodes ethical and moral values is another fact of the ability of customary law communities to continue to grow in harmony with what is currently happening because in many ways it is related to life practices that have far left moral values and ethics towards natural resources.

The most fundamental issue awaited by the community is economic empowerment, not just growth. The paradigm of economic development during the New Order era, which prioritizes growth rather than empowerment and equity, has proven to have created inequality in many aspects.

One of the important events related to the recognition and strengthening of Indigenous Peoples departed from the results of the Earth Summit in Rio de Janeiro in 1992 with the issuance of the Rio (1992). Principle 22 states that Indigenous Peoples play an important role in environmental management and development because of their traditional knowledge and practices. Therefore, States must recognize and fully support their entities, cultures and interests and provide opportunities to actively participate as partners in the achievement of *sustainable development*.

4. Conclusion

Politics of law on the opportunities currently held by indigenous peoples in the management of natural resources as capital in the development of the indigenous economy and the welfare of Indigenous Peoples Moronene Hukaea Laea Indigenous law can be seen that substantially Indigenous law has regulatory material based on Indigenous knowledge. Then from the structural side, customary law has customary institutions. And in terms of culture, the lifestyle of Indigenous Peoples is influenced by the atmosphere of mysticism in the community that will always accompany the development of the community.

The law system that exists and is carried out today does not automatically exist, but is built by society along with the level of social civilization. Each country has different ideological characteristics and these characteristics will then color the legal pattern that will be built. In principle, the law that exists in a country must be in accordance with the idea or ideal of law and the reality of the society in which the law provides services. Pancasila is the idea or legal ideals of the Indonesian nation, so that the positive laws in Indonesia must be in accordance with the values of Pancasila.

Build a policy of natural resource management as an economic resource based on the principles of the law rule that refer to the values of Pancasila, namely:

1. The principle of Justice has a philosophical dimension that directs to justice in the allocation and distribution of the results of the utilization of Indonesian natural resources for the people in the regions, including the allocation and distribution of proportional results for local governments to finance regional development in accordance with the principle of regional autonomy and justice for the sustainability of life for current and future generations.
2. The principle of democracy has the dimension of equality in the relationship between government and people in decision making and policy making of natural resource management by providing a clear role and openly involving the community in making licensing decisions to investors of business actors in the field of Natural Resources.
3. The principle of sustainable dimension is the continuation of the functions and benefits of natural resources for national development and therefore the management of natural resources must be planned to maintain sustainability and ecological balance for the life of living things.

Remembering that it is an ongoing process, of course, the shortcomings that are not happy and the welfare of its people needs to be improved by providing rights for every citizen, including the right to natural resources as a source of livelihood so that the process needs to be done for the sake of improving the welfare and Justice of the entire Indonesian people, especially Indigenous peoples as supporters of a distinctive culture.

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Reformulation of Customary Justice in National Legislation Policies

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Abstract

The influence of written law customs supported through national legislation program policies is a parameter of how far law can be said to be legal and just. However, in reality, our national legislation program is still experiencing degradation, one of which is the issue of customary justice which has never been the main discussion in the national legislation program. This study was conducted through a post-positivism paradigm approach that looks at the strengthening of positive law through various aspects of legal approaches and legal theory. The results of the research show that the government in its national legislation program has neglected to formulate customary justice principles to be included in the national legislation program. This parameter is measured with a perspective that should have questioned the customs that existed before Indonesia's independence, which became the main policy in the national legislation program. On the other hand, until now, the government is still guided by the compilation law from the Dutch colonial heritage, which is clearly not in accordance with the spirit of the nation. This is where the government's responsibility becomes important to formulate existing rules in customary justice to be formulated in the form of a legal compilation as exemplified in the formulation of the Civil Code, Criminal Code and KHI through the national legislation policy arrangement.

Keywords: reformulation, customary justice and legislation

Abstrak

Pengaruh kebiasaan hukum tertulis yag didukung melalui kebijakan program legislasi nasional, sangatlah menjadi parameter sejauh mana hukum dapat dikatakan legal dan berkeadilan. Namun pada kenyataannya, program legislasi nasional kita masih mengalami degradasi yang salah satunya adalah masalah peradilan adat yang tidak pernah menjadi pembahasan utama dalam program legislasi nasional. Kajian ini dilakukan melaqlui pendekatan paradigma post positivisme yang melihat pada sisi penguatan hukum positif melalui berbagai macam aspek pendekatan hukum dan teori hukum. Hasil penelitian menunjukkan bahwa pemerintah dalam program legislasi nasionalnya telah lalai dalam memformulasikan kaidah-kaidah peradilan adat untuk dimasukkan dalam program legislasi nasional. Parameter tersebut diukur dengan sebuah perspektif sudah seharusnya peradilan adat yang telah ada sebelum indonesia merdeka, menjadi kebijakan utama dalam program legislasi nasional. Pada sisi lain sampai saat ini, pemerintah masih

memedomani kompilasi hukum peninggalan kolonial belanda yang jelas-jelas tidak sesuai dengan jiwa bangsa. Disinilah menjadi penting tanggung jawab pemerintah untuk memformulasikan kaidah yang ada dalam peradilan adat untuk diformulasikan dalam bentuk kompilasi hukum sebagaimana yang sudah dicontohkan dalam formulasi KUHperdata, KUHPidana dan KHI melalui tatanan kebijakan legislasi nasional.

Kata kunci : reformulasi, peradilan adat dan legislasi

1. Introduction

As a rule of law state which is emphasized in Article 1 paragraph (3) of the 1945 Constitution, of course legal certainty should be a top priority. In this case, the national legislation development system is a top priority in the legal development.

In the event that such a national legislation program occurs, each institution has an important role, which in this case we call the term the institution in the three branches of power, namely the executive, legislative and judicial branches (Ruhenda, 2020). these three branches in our constitutional theory greatly influence technical policies in the national legislation program which of course have very important importance as doctrines (Labuschagne, P, 2006) in guaranteeing the interests and welfare of society.

The applicability of the trias politic theory in guaranteeing the national legislation program is essential because so far the constitution has been the main reference for development (Yulistyowati, E., Pujiastuti, E., & Mulyani, T. 2017) and the progress of the country. The legal wetness of our law is very much determined by the extent to which the three branches of power understand in guaranteeing legal certainty which will lead to social justice.

But of course, even though given the mandate and authority, there are still many accelerated national legislation programs in Indonesia that are still just wishful thinking or have not yet reached achievements. Whereas on the other hand both the executive, legislative and judiciary are given the authority to determine the legislative program. Including what is said in this case the judiciary which has a role in making decisions on judicial review or law enforcement policies whose value influences national legislation policies.

In our national legislation policy, we also provide very flexible policies in the preparation of national legislation. This can be seen in the procedures for forming regulations which provide an open cumulative listing space which states that a legal product formation can be formed because it is based on situations and needs that arise at any time (Oktaryal, A. 2020).

The policy of utilizing open cumulative system space has not been fully utilized. This can be said that our national legislation program is very unresponsive (Kesowo, B. 2012) in meeting the needs of the community in law (Oktaryal, A. 2020). One of which can be demonstrated is the policy of the legislation program in the field of customary law.

In history, customary law has become one of the nation's unifying instruments (Pohan, M. N. 2018). this reason considering that customary law existed before the Indonesian state was declared. So that the state's guarantee of customary law is an absolute responsibility that must be implemented. But the fact is that the legislation program for the Law on Indigenous Peoples has not been ratified or even discussed. On the other hand, many laws and regulations are even considered to take over the policies of indigenous peoples (Sari, R. M, 2021), one of which sticks out in public opinion about the job creation law.

This condition also applies to customary justice policies. As a form of norms and values in society, customary justice is an instrument in the applicable positive law. Even in the existing norms, customary justice is a policy choice in overcoming the vacuum of national law (Sukma, D. P. 2023).

However, the alignment of customary justice is still not a priority as long as it is not under the umbrella of formal law. This means that the state, in this case, has neglected to guarantee the legal certainty of customary justice in the national legal system, which has resulted in uncertainty in our national law. Even though customary justice is the only court that is clear in accommodating legal values that live in society (Rahman, F. 2018).

2. Method

The method used in this study is critical legal thinking or critical legal study which emphasizes the whole idea of releasing the applicable positive law. Critical legal study in nature releases rules that only emphasize the level of legal research or statutory hierarchy (Khilmi, E. F. 2019). Such a method is very appropriate if it is supported by secondary data because it is based on a form of study that examines existing literature documents.

The approach through a critical legal study is then carried out in depth with qualitative data analysis. Qualitative analysis is directed at raising most of the findings which are abstract in nature (Mezak, M. H. 2006) so that they are able to answer all the questions raised.

3. Findings and Discussion

Customary justice in Indonesia was born because of social relations that created the birth of a commitment between communities. The rules in the law are of course the state's recognition (Ismi, H. 2012) of the applicable customary courts as stated in the Constitution of the Republic of Indonesia.

Considering this later, it can be said that the policy of reformulating customary justice is very important in our national legal policy. Customary law courts are local wisdom in maintaining the value system that applies and can be accepted by all parties. Acceptance of customary justice considering that social selection has been carried out by the community so that it can apply effectively as it should.

On the other hand, it can be stated that customary law courts are instruments of agreement or consensus which are unwritten in nature but have strong binding power. Strength as referred to is measured in aspects of consideration of harmony and harmony with values and norms (Laike, R. J. 2019) that are developing and should indeed apply.

In the national justice policy, even though there has been an erosion of customary justice which is not considered in making decisions (Sudantra, I. 2013), even though the structure and work procedures of our national judiciary in conducting case examinations cannot be separated from the extent to which customary law policies are used as a basis for consideration.

After the independence of the Republic of Indonesia, the policy of unification of the national justice system took place in 1951 (Simarmata, R. 2021). In its later policies, customary justice is still in effect, but its enforcement is unwritten considering that the state is only positioned on non-formal rules. This is a dilemma because on the one hand customary law is recognized but on the other hand its recognition is only limited to efforts to ignore the guarantee of legal certainty.

However, on the other hand, several judicial policies in Indonesia emphasize the guarantee of constitutional rights for indigenous peoples. This is in accordance with the decision of the constitutional court as follows:

Table 1. several decisions of the Constitutional Court regarding indigenous peoples

No	Decision	Material of the Decision
1	Decision Constitutional Court Number 10/PUU-I/2003	the decision of the Constitutional Court confirming the constitutional rights of Indigenous Peoples in the process of reviewing the Law.

2	Decision Constitutional Court Number 31/PUU-V/2007	Emphasizing related to the three characteristics of Indigenous Peoples which are then contained in Article 18B Paragraph (2) of the 1945 Constitution. Article 18B Paragraph (2) of the 1945 Constitution becomes a benchmark regarding the legal standing of Indigenous peoples submitting a law review in the Constitutional Court.
3	Decision Constitutional Court Number 35/PUU-X/2012	The Constitutional Court's decision on Law no. 41 of 1999 concerning Forestry which provides submissions with the existence of customary forests which must be separated from state forests.

Based on the foregoing, it appears that indirectly law enforcement policies in Indonesia are very adaptive to needs. It is important to note that from a law enforcement standpoint, customary justice has an important position as a consideration in making decisions. However, in practice, national legislation has not been considered a priority.

3.1 Formulation of Customary Courts in National Law

Customary justice formulation policies are very important in national law by considering and seeing the need for customary law positions to have received recognition (Laudjeng, H. 2003) by the community. The acknowledgment referred to is an acknowledgment that occurs instantly based on the process of socialization, but this acknowledgment has been valid for generations, one of which occurs because of the process of social relations that exist in society.

The formulation of customary justice in national law also takes into account the existence of community consensus to enforce customary justice norms which are binding in nature. In contrast to the old civil law and criminal law from the Dutch East Indies which were not born because of a consensus (Firdaus, W. M., Rato, D., & Setyawan, F. 2023) for every individual in society. Dutch criminal and civil law were legal norms that were forced into effect during the colonial period with the aim of ensuring that the interests of the Dutch East Indies colonizers were carried out in the archipelago.

Customary justice when formulated is almost in line with the implementation of religious justice which refers to the compilation of

Islamic law (Sukri, M. 2016). Islamic law also becomes the prevailing consensus in society and then its enactment becomes a national instrument for religious people. Religious courts were also formed through a process prior to Indonesia's independence that was valid in the archipelago (Sulaikin Lubis, S. H. 2018).

However, in the process the difference between the religious court and the customary law court is the carrying capacity of the religious court (Pramudya, K. 2018) since Indonesia was founded which has received special attention. The concern referred to is by conveying an opinion that is almost agreed upon in the first precept, namely containing the belief in one almighty God by carrying out Islamic law for its adherents (Rohman, M. S. 2013). Even though the word implementing Islamic law for its adherents was later deleted (Na'imah, H., & Mardhiah, B. 2016), the subsequent process of struggle did not stop in our national legislation.

Arguing the above, the national legislation policy towards customary justice only requires seriousness from the government in this matter to carry out. If there is no political will and alignment, or better known as political will (Hanafiah, Y. 2020) by authorized government officials, customary justice can be formulated parallel to Dutch criminal law and civil law becomes a hope that will not be possible.

The formulation applied by customary courts in national law is made in compilation form, this is not much different from the Civil Code and the Criminal Code. However, the difference compared to other compilations is of course that it will be easier for customary court compilations to be implemented because they have received recognition in the community. The support of all parties, most importantly including academics who are members of the Indonesian customary law teaching association, is very important in maximizing the intended achievement.

4. Conclusion

The national legislation policy regarding customary justice has not yet become a serious concern for the three branches of government administration, be it legislative, executive and judicial. Of course the government's awareness or political will is very important in the context of carrying out reformulation of customary justice in the choice of the Indonesian national justice system for our society. Customary justice was built because of a public awareness to apply it without coercion, this would of course be easier to formulate in national law in the form of a legal compilation.

Thank-you note
Of course, the studies carried out have received support, one of the main ones being the customary law teaching association. The role of the association is of course very important to be the only movement that supports the integration of customary law justice to apply in Indonesia.

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The Ratio Legis of Traditional Empirical Health Services in Good Health Practice

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Abstract

Every individual has the right to a prosperous life both physically and spiritually, a place to live, and to have a good and healthy environment as well as to receive health services. This article indicates that healthcare services are a part of Human Rights. The research methodology used is normative research with a conceptual approach, which analyzes through the integration theory of Talcott Parsons and a legislative approach that specifically examines the 1945 Constitution of the Republic of Indonesia. The research results demonstrate that the implementation is regulated in Government Regulation Number 103 of 2014 concerning Traditional Health Services. In order to provide a legal foundation, legal certainty, legal protection, quality improvement, safety, and benefits of Empirical Traditional Health Services and Complementary Traditional Health Services, it is necessary to regulate Empirical Traditional Health Services and Complementary Traditional Health Services through Government Regulation.

Keywords: Services, Empirical Health, Traditional

1. Introduction

Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that every individual has the right to a prosperous life both physically and spiritually, a place to live, and to have a good and healthy environment as well as to receive health services. This article indicates that healthcare services are a part of Human Rights. This provision is reinforced by Article 5 paragraph (2) of Law Number 36 of 2009 concerning Health, which stipulates that every individual has the right to access safe, high-quality, and affordable healthcare services. Article 7 paragraph (1) of Government Regulation Number 103 of 2014 concerning Traditional Health Services defines the types of traditional health services, including empirical traditional health services, complementary traditional health services, and lastly, integrated traditional health services. Article 8 paragraph (1) of Government Regulation Number 103 of 2014 explains that empirical traditional health services are traditional health services whose benefits and safety are empirically proven. Article 10 paragraph (1) of Government

Regulation Number 103 of 2014 explains that complementary traditional health services are traditional health services that utilize biocultural and scientifically proven knowledge. Article 14 paragraph (1) of Government Regulation Number 103 of 2014 explains that integrated traditional health services are health services that combine conventional traditional health services with complementary traditional health services.

The increasing demand for traditional health services does not guarantee the quality of every traditional health service, especially empirical traditional health services. There have been cases, such as the one in Brosot Village, Galur Subdistrict, Kulon Progo, where Sugiyo died after consuming illicitly prepared herbal medicine containing a mixture of honey, aromatic ginger rice, bread alcohol, and black grapes at a traditional herbal medicine stall behind the Kliwon Kranggan market, Galur (Atmasari, 2013). Article 1 number 6 of the Minister of Health Regulation of the Republic of Indonesia Number 61 of 2016 concerning Empirical Traditional Health Services explains that clients are individuals who seek consultation for health issues and/or receive empirical traditional health services. The position of patients/clients is equal to that of traditional healers, and they have legal protection for any incident that befalls them, such as negligence by traditional healers.

Complementary Traditional Medicine (Traditional & Complementary Medicine/ T&CM) has recently gained attention from health experts and decision-makers in the health sector. Globally, the World Health Organization (WHO) has shown interest in the development of proven traditional medicine by issuing guidelines for good practices and research and development in the field of traditional medicine (WHO 2012; WHO 1995). International organizations (APEC, OIC, ASEAN) have also paid attention to traditional medicine. At the national level, the government's attention is also significant. This can be observed through the establishment of the National Traditional Medicine Policy (Kotranas) (Ministry of Health of Indonesia, 2007), the development roadmap for herbal medicine coordinated by the Coordinating Minister for People's Welfare, the establishment of the Directorate of Complementary and Alternative Traditional Health Services at the Ministry of Health of Indonesia, and the Herbal Medicine Standardization Program (Ministry of Health Regulation 003/2010) (Ministry of Health of Indonesia, 2010).

Healthcare professionals in the present time often make various mistakes in healthcare treatment. This also applies to traditional healthcare practitioners. These mistakes can be categorized as malpractice. A case that occurred involved a form of traditional

medicine called Traditional Chinese Medicine (TCM) Harapan Baru. One victim's family reported that Rasiman, the husband, passed away after receiving treatment from TCM Harapan Baru. Rasiman's wife, Risma, stated that her husband seemed healthier immediately after returning from the clinic because he had been infused for four hours. Satisfied with the initial 10-day treatment, Rasiman continued the therapy for another 10 days. However, the subsequent therapy worsened his condition, and he eventually died (Amirullah, 2013). Another example is the Cryopractic case. This case gained attention in 2016 and involved a victim named Allya Siska, the daughter of former Deputy Director of Communication of the state electricity company, Alvian Helmy Hasjim. She underwent therapy at this clinic on August 6, 2015. The adjustment therapy was conducted twice in one day, at 1:00 PM and 6:30 PM. Later that night, Allya Siska complained of severe pain in her neck and was rushed to the Emergency Unit at Pondok Indah Hospital. Her condition deteriorated, and she passed away at 6:15 AM the following day. Allya Siska's sister, Elvira, reported the suspected malpractice to the Jakarta Metropolitan Police in August 2015, a week after Allya Siska's death. The case is still under investigation by both the police and a joint team from the Jakarta Health Office and the Ministry of Health (Mulya Nur Bilkis, 2016).

The legal protection regulation for patients in empirical traditional health services has shown a vertical synchronization, where the regulation of legal protection for patients in empirical traditional health services that hold a higher degree serves as a guideline for lower-level regulations, and lower-level regulations do not conflict with higher-level regulations. However, the Minister of Health Regulation Number 61 of 2016 concerning Empirical Traditional Health Services does not specifically include articles that address the rights of patients/clients who use empirical traditional health services, thus the legal protection for patients/clients is not strong (Anjani Swasthi, Alawiya, & Ulil Afwa, 2020). Therefore, in-depth research on the legislative ratio of empirical traditional health services in good health practice is needed.

2. Methods

The research method utilized is normative research with a conceptual approach, which involves analyzing using Talcott Parsons' integration theory and a legislative approach that specifically examines the 1945 Constitution of the Republic of Indonesia.

3. Findings and Discussions

Efforts to protect traditional knowledge are not as simple as turning one's hand over. One of the reasons is the differing perspectives on protection between developed and developing countries. From the standpoint of developed countries, the focus tends to be on maximizing access to traditional knowledge in order to create new products and gain significant profits through their commercialization. In contrast, developing countries, especially those with abundant biodiversity and traditional knowledge, are more concerned with establishing mechanisms for fair and equitable benefit-sharing from their utilization (Labetubun, Akyuwen, & Pariela, 2018).

Communities that have yet to fully enjoy economic development, particularly those in rural areas or living outside urban areas, including indigenous and traditional communities, face consequences due to the implementation of Intellectual Property Rights (IPR) systems. Traditional medicines and techniques that have long been part of indigenous and traditional communities are seen as valuable assets. Several well-known IPR cases revolve around disputes over traditional knowledge. Examples include the cancellation of the Shisedo patent over an Indonesian traditional formula, the basmawati rice patent case between India and a multinational corporation (MNC) from the United States, and the Turmenic patent case (1996), where the University of Mississippi Medical Centre in the U.S. obtained a patent from the USPTO (patent number 5401504) for curcuma longa, which is traditionally used in India for cosmetics, medicine, flavoring, and more (Agus Sardjono, 2004).

The healthcare system comprises both the supply side (healthcare providers) and the demand side (healthcare users) within each region, as well as the countries and organizations that contribute resources, whether human or material. In a broader sense, the healthcare system also encompasses other sectors like agriculture. It encompasses activities aimed at improving and maintaining health. This includes not only formal healthcare services but also informal ones, such as traditional medicine, health promotion, disease prevention, environmental and road safety enhancement, and health-related education. These are all integral parts of the healthcare system (Constitution of the World Health Organization, 1946).

The development of Traditional Health in Indonesia (Kestrindo) is based on three pillars: products (traditional herbal medicines or "jamu"), practices (methods/knowledge), and practitioners (healers/providers), collectively known as the "3Ps": product, practice, and practitioners (WHO, 2014). One limitation in the development of Traditional Health in Indonesia has been the focus solely on product

development. Often, these developed products are forced to fit into the conventional medical paradigm, leading to challenges in gaining recognition from the conventional medical profession. This is understandable due to the philosophical differences between conventional medicine and traditional healing. Conventional medicine tends to be materialistic and reductionist in philosophy, while traditional healing leans toward holistic and cybernetic philosophies.

The World Health Organization (WHO) has developed a framework for the healthcare system known as the "Six Building Blocks," consisting of six pillars:

a. Healthcare services;
b. Healthcare workforce;
c. Health information;
d. Medical products/vaccines/technologies;
e. Health financing; and
f. Leadership.

These six pillars form a unified structure with intermediate goals such as:

a. Access;
b. Coverage;
c. Quality; and
d. Health security, leading to outcomes like:
e. Improved health status;
f. Responsiveness;
g. Social and financial risk protection; and
h. Increased healthcare efficiency.

According to the Minister of Health Decree of the Republic of Indonesia Number 1076/MENKES/SK/VII/2003 concerning Traditional Medicine Practice, traditional medicine refers to treatment and/or care involving methods, medicines, and healers that rely on traditional experiences, inherited skills, and/or education/training, applied in accordance with prevailing norms in society. The classification of Traditional Healthcare Practitioners, as stated in Article 11 paragraph 13 of the Health Law, includes traditional herbal medicine practitioners, intercontinental traditional healthcare practitioners, and traditional healers. This classification reflects that traditional medicine involves both remedies and skills, either used individually or in combination. The status of these Traditional Healthcare Practitioners has been officially established through the Minister of Health Decree Number HK.01.07/Menkes/311/2020 regarding Intercontinental

Healthcare Practitioners as a Type of Traditional Healthcare Practitioner and Minister of Health Decree Number HK.01.07/ Menkes/592/2020 regarding Traditional Healers as a Type of Traditional Healthcare Practitioner. It is expected that the strengthening legal framework for Traditional Healthcare Practitioners will accommodate and further develop their roles.

Traditional healthcare services can be categorized based on treatment methods into those using skills and those using herbal remedies. These services are carried out based on knowledge, expertise, and/or values derived from local wisdom. Traditional healthcare services are supervised by both the Central Government and Local Government to ensure their benefits, safety, and adherence to social and cultural norms. Further regulations concerning procedures and types of traditional healthcare services are established through Government Regulations.

Effendi's research (2013) also reveals the benefits of traditional treatments sought by communities for health therapies. Factors motivating communities to use traditional healthcare services provided by public health centers include the use of herbal medicines and natural treatment methods, resulting in fewer side effects and lower treatment costs compared to modern medicine.

Regulations related to traditional medicine, also known as Battra, are stipulated in Law Number 36 of 2009 concerning Health, Chapter I General Provisions Article 1 point 16, which defines traditional medical services as treatments and/or care using methods and remedies based on empirical, generational experiences and skills that are accountable and aligned with prevailing societal norms. Individuals providing traditional medical services are referred to as traditional healers.

In practice, many people are motivated by their beliefs to seek traditional healthcare services, perceiving them as effective for treating chronic diseases. Distrust in modern medicine's efficacy is another reason why people turn to traditional healthcare. Fear of surgical procedures and dissatisfaction with modern medicine also contribute to this choice. Additionally, the perception that consuming modern medications may have negative impacts on bodily organs drives people towards traditional healthcare. Apart from being more beneficial and natural compared to modern treatments, traditional healthcare is seen as quicker, cheaper, and more holistic. However, there remains skepticism among communities towards traditional healthcare, especially since not all practices are under government supervision. Concerns about the practicality, taste, and cleanliness of traditional remedies raise questions about patient protection (Jusuf Hanafiah & Amri Amir, 2007).

1) In order to establish a practice, traditional healers must possess a registered traditional healer certificate (STPT) issued by the health department or integrated one-stop services in the respective district/city, valid for two years. Additionally, many of the herbal remedies they create have yet to obtain circulation permits.
2) He explained that conventional or modern medicine is accepted due to clear knowledge, training, and education. Conversely, traditional remedies like herbal medicine are often passed down through generations. "So, there's no formal education for it.
3) He suggested that for traditional remedies to gain scientific acceptance, there should be standardization through scientific programs or evidence-based development. "There should also be formal education. It needs to be standardized."
4) He hopes for the establishment of diploma or bachelor's programs for traditional medicine with uniform standards, providing clear information about graduates' competencies and permissible practices. The Ministry of Health notes that there are currently 280,000 traditional healthcare practitioners in Indonesia.
5) Traditional Medicine, as defined in Government Regulation Number 103 of 2014 concerning Traditional Healthcare Services, refers to materials or herbal compound substances derived from plants, animals, minerals, galenic formulations, or combinations thereof, traditionally used for healing and applied in accordance with prevailing social norms.

There are three types of Traditional Healthcare Services specified in Government Regulation Number 103 of 2014 concerning Traditional Healthcare Services:

a. Empirical Traditional Healthcare Service involves the application of traditional healthcare practices with empirically proven benefits and safety.
b. Complementary Traditional Healthcare Service involves applying traditional healthcare practices that incorporate biomedicine and biocultural knowledge, with scientifically proven benefits and safety.
c. Integrated Traditional Healthcare Service combines conventional healthcare with Complementary Traditional Healthcare Service, serving as a complement or substitute.

Government Regulation Number 103 of 2014 concerning Traditional Healthcare Services was established by President Joko Widodo on December 3, 2014, in Jakarta. This regulation was

promulgated by the Minister of Law and Human Rights, Yasonna H. Laoly, on the same day. The regulation was published in the State Gazette of the Republic of Indonesia Year 2014 Number 369. An explanation of the regulation, known as PP 103 of 2014 concerning Traditional Healthcare Services, is published as Additional State Gazette of the Republic of Indonesia Number 5643.

Health development, as part of national development, aims to increase awareness, willingness, and capability to live a healthy life for every individual, ultimately achieving the highest possible level of community health. This is seen as an investment in productive social and economic human resources. Health development, as mandated by Law Number 36 of 2009 concerning Health and Presidential Regulation Number 72 of 2012 concerning the National Health System, is implemented through various efforts in the form of healthcare services provided by Health Facilities.

Traditional healthcare services, a significant part of healthcare efforts historically and culturally in Indonesia, are directed towards creating a healthy, self-reliant, and equitable society, alongside conventional healthcare. The Basic Health Research of 2010 stated that 59.12% of the population across all age groups, genders, rural and urban areas, utilize jamu, an original Indonesian traditional medicine product. From this research, 95.60% experienced the benefits of jamu. Amidst the abundant biodiversity of around 30,000 species, there are 1,600 medicinal plant species with potential as traditional health remedies or modern medicine components.

In the context of the aforementioned biodiversity, Indonesia possesses various types of traditional healing and treatment skills. These remedies and skills are developed to maintain and enhance health, prevent diseases, manage illnesses, and improve the quality of life in alignment with the health paradigm. The government is developing traditional health services based on a holistic biocultural knowledge foundation to establish an Indonesian traditional health service system that conforms to the norms of religion and culture. This health service is rooted in the philosophy and fundamental concept of viewing humans as a whole, thereby treating patients holistically and culturally, providing them with more humane treatment. This philosophical approach makes traditional health services complementary to modern healthcare, which primarily focuses on the biomedical approach, creating synergy within Indonesia's healthcare system.

Traditional health services begin with the use of methods and techniques that draw from generations of empirical knowledge and

skills that can be accounted for and are consistent with prevailing religious and cultural norms. Subsequently, these services are developed scientifically through efforts to standardize products and practices, as well as to attain academic competence for Indonesian traditional healers as part of the healthcare workforce. This is aimed at increasing public acceptance and recognition of the benefits, quality, and safety of all components of traditional health services. The government is committed to developing traditional health services in line with the World Health Organization's (WHO) recommendations in the Traditional/Complementary Medicine 2014-2023 report, with the goal of integrating it into the national healthcare system. Therefore, this traditional health service system becomes an integral part of the national healthcare system.

In its developmental stage, the application of traditional health services results in two types of services:

a. Empirical Traditional Health Services, which have empirically proven benefits and safety.
b. Complementary Traditional Health Services, which have scientifically proven benefits and safety and incorporate biomedical knowledge.

Regarding regulations, this Government Regulation encompasses the procedures and types of both Empirical Traditional Health Services and Complementary Traditional Health Services. Based on treatment methods, these services are divided into two categories:

a. Services that use skills.
b. Services that use herbal remedies.

The government must ensure that Empirical Traditional Health Services and Complementary Traditional Health Services are properly supervised and nurtured to ensure their benefits, safety, and alignment with community religious norms.

4. Conclusions

The fundamental legal basis for the existence of Traditional Health Services in Indonesia is the empirical knowledge that can be accounted for and applied in accordance with prevailing community norms. Further regulations regarding Traditional Health Services are covered in Article 59-61 of Law Number 36 Year 2009 concerning health practitioners. Implementation details are provided in Government Regulation Number 103 Year 2014 concerning Traditional Health

Services. To establish a legal framework, legal certainty, protection, quality enhancement, safety, and utility of Empirical Traditional Health Services and Complementary Traditional Health Services, these services need to be regulated by Government Regulation.

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Hak Keperdataan Masyarakat Adat Sumba Penganut Marapu setelah Berlakunya Putusan Mahkamah Konstitusi No. 97/Puu–Xiv/2016

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Abstrak

Eksistensi Penghayat Kepercayaan telah diakui oleh negara secara de jure dan de facto, salah satunya adalah pengakuan hukum pasca terbitnya Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016, yang memutuskan bahwa kata 'agama' dalam Pasal 61 ayat (1) dan Pasal 64 ayat (1) Undang-Undang Adminduk bertentangan dengan UUD NRI 1945, dan tidak memiliki kekuatan hukum mengikat secara bersyarat sepanjang tidak termasuk 'kepercayaan'. Putusan MK ini memberi ruang bagi Penghayat Kepercayaan karena definisi 'agama' pada pasal tersebut tidak terikat pada 6 agama resmi saja, tetapi Kepercayaan terhadap Tuhan Yang Maha Esa juga masuk kedalamnya.Akibat hukum dari Putusan MK No. 97/PUU-XIV/2016 secara general membolehkan status penganut kepercayaan dimasukan dalam kolom Kartu Tanda Penduduk elektronik (KTPel). Akibat hukum tersebut memuat pernyataan bahwa MK menganggap penghayat kepercayaan memiliki hak konstitusional dalam memeluk kepercayaannya masing-masing. Namun disisi lain putusan MK akan menciptakan norma baru yang membuka kesempatan kepada penghayat kepercayaan untuk mengakses hak-haknya sebagai warga negara, seperti hak atas pengakuan perkawinan, pendidikan, pekerjaan, jaminan sosial dan kesehatan, dan hak-hak lainnya. Pemerintah juga berkewajiban untuk memenuhi pelayanan pendidikan agama, perkawinan, tempat ibadah dan lain-lain bagi para penghayat kepercayaan berikut pada layanan administrasi kependudukan.

Kata kunci: Hak Keperdataan, Penganut Marapu

1. Pendahuluan

Hukum tertinggi di Indonesia Undang–Undang Dasar Negara Republik Indonesia 1945 hasil amandemen Ketiga telah menegaskan bahwa "Negara Indonesia adalah negara hukum" (Bachtiar, 2005:8). Dalam konsep negara hukum yang memiliki ciri-ciri yaitu salah satunya adalah jaminan serta perlindungan akan Hak Asasi Manusia (yang selanjutnya disebut HAM) bagi setiap warga negaranya. HAM mempunyai tempat dalam konstitusi negara republik Indonesia yang tertuang dalam Undang–Undang Dasar Negara Republik Indonesia tahun 1945 (yang

selanjut disebut UUD NRI 1945) Pasal 28A sampai dengan Pasal 28J BAB 10A tentang HAM. Sementara itu, di dalam Pasal 29 ayat (2) UUD NRI 1945 ditetapkan bahwa "Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya masing-masing dan untuk beribadat menurut agamanya dan kepercayaannya itu". Ketentuan tersebut menggambarakan keanekaragaman agama di Indonesia.

Menurut Lubis (2017:381) ciri khas keberagamaan di Indonesia adalah dilihat dari sudut ketatanegaraan bahwa konstitusi negara tidak didasarkan pada salah satu ajaran agama tertentu sekalipun apabila dilihat dari perjalanan sejarah betapapun sumbangan yang diberikan oleh umat Islam begitu menonjol apabila dibandingkan dari umat beragama lainnya. Namun demikian, yang terjadi adalah negara memiliki jarak yang sama dengan semua agama, begitu pula hal sebaliknya.

Berbagai macam suku bangsa dan agama di Indonesia merupakan sumber kekayaan yang tidak ternilai harganya, sebelum masuknya agama-agama besar ke Indonesia ternyata di Indonesia sendiri sudah ada agama yang menjadi nilai luhur yang di pedomani dan di ikuti oleh para pengikutnya dan terbukti mampu mendorong pengikutnya menuju kehidupan yang lebih baik dan juga ajarannya mampu menggiring para pengikutnya mengikuti perkembangan zaman sehingga para pengikutnya mampu hidup dan bersaing secara sosial dan ekonomi dengan pemeluk agama besar lainnya. "Secara horizontal dalam struktur masyarakat Indonesia ditandai oleh kenyataan adanya kesatuan-kesatuan sosial berdasarkan perbedaan-perbedaan agama, adat dan perbedaan kedaerahan. Salah satu unsur dari keberagaman bangsa Indonesia adalah keberagaman keagamaan" (Yudianita, 2005:2).

Keberadaan agama di Indonesia telah ditetapkan pemerintah yang mengacu pada Penetapan Presiden Nomor 1 Tahun 1965 dalam penjelasannya disebutkan bahwa agama-agama yang dipeluk oleh bangsa Indonesia terdiri dari Islam, Kristen, Katolik, Hindu, Budha dan Khonghucu. Bahwa Penetepan Presiden tersebut pada akhirnya dijadikan sebagai Undang-Undang sebagaimana dijelaskan dalam Undang-Undang Nomor 5 Tahun 1969 tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Presiden Sebagai Undang-Undang. Namun demikian, bukan berarti agama-agama atau kepercayaan lain dilarang di Indonesia. Mereka tetap mendapat jaminan penuh oleh Pasal 29 ayat (2) UUD NRI 1945 selama tidak melanggar dari ketentuan yang ada dalam peraturan perundang-undangan. Menurut catatan di Kementerian Pendidikan dan Kebudayaan (kemendikbud), di Indonesia

terdapat sebanyak 187 aliran kepercayaan yang terdaftar dari Sabang sampai Merauke (Nadir, 2022).

Para penganut agama asli/pribumi/leluhur ini dipandang sebagai tidak mempunyai agama atau atheis dan ada pandangan juga bahwa mereka ini penganut polytheisme bahkan ada yang mengkategorikan sebagai penganut Panthaeisme. Akan tetapi, jika dikaji secara mendalam ajaran mereka ini termasuk dalam monotheisme, namun siapa yang disembah, inilah yang menjadi perdebatan. Penolakan terhadap agama asli/pribumi/leluhur ini karena yang disembah adalah roh leluhur, bukan Tuhan Yang Maha Esa sebagaimana dipahami oleh Agama Wahyu, yaitu Allah. Hal inilah yang perlu dikaji dan dipahami agar tidak ada kesalahpahaman. Beberapa dokumen Internasional tentang Hak Asasi Manusia jelas-jelas menganjurkan untuk memberikan kebebasan beragama kepada setiap anggota masyarakat (Mulia, 2007).

Eksistensi pada asli/pribumi/leluhur yang terdiskriminasi, selanjutnya Penjelasan Umum angka 2 Penetapan Presiden Nomor 1 Tahun 1965 juga menyebutkan: "Di antara ajaran-ajaran/peraturan-peraturan pada pemeluk aliran-aliran tersebut sudah banyak yang menimbulkan hal-hal yang melanggar hukum, memecah persatuan nasional dan menodai agama". Sejarah membuktikan justru ekstrimisme yang membahayakan persatuan nasional sering tumbuh subur dalam agama-agama resmi, bukan pada asli/pribumi/leluhur.

Agama-agama asli/pribumi/leluhur ini seperti memperoleh nyawa baru setelah ada Putusan Mahkamah Konstitusi No. 97/PUU–XIV/2016 yang pada intinya menyatakan bahwa kata "agama" dalam Pasal 61 ayat (1) dan Pasal 64 ayat (1) Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan sebagaimana telah diubah dengan Undang-Undang Nomor 24 Tahun 2013 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan (Lembaran Negara Republik Indonesia Tahun 2013 Nomor 232 dan Tambahan Lembaran Negara Republik Indonesia Nomor 5475) bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan tidak mempunyai kekuatan hukum mengikat secara bersyarat sepanjang tidak termasuk "kepercayaan." Akibat hukumnya adalah bahwa aliran kepercayaan termasuk agama asli/pribumi/leluhur di Indonesia diakui keberadaannya dalam arti kedudukan hukumnya sama dengan agama.

Marapu adalah sebuah agama asli Nusantara yang dianut oleh masyarakat di Pulau Sumba dan juga nama sebuah organisasi penghayat kepercayaan yang didaftarkan pada tahun 1982. Lebih dari setengah penduduk Sumba memeluk kepercayaan ini. Agama ini memiliki

kepercayaan pemujaan kepada nenek moyang dan leluhur. Pemeluk agama Marapu percaya bahwa kehidupan di dunia ini hanya sementara dan bahwa setelah akhir zaman mereka akan hidup kekal di dunia roh, yaitu di surga Marapu yang dikenal sebagai Prai Marapu.

Dari penjelasan dalam latar belakang tersebut di atas, permasalahan pokok yang akan dibahas dalam penulisan ini adalah bagaimanakah akibat hukum Putusan Mahamah Konstitusi No. 97/PUU–XIV/2016 terhadap hak keperdataan masyarakat adat sumba penganur agama Marapu sebagai agama leluhur ?

2. Metode Penelitian

Pada penelitian ini penulis menggunakan jenis penelitian kualitatif. Adapun dalam metode yang digunakan sebagai acuan dalam penelitian ini adalah deskriptif. Metode deskriptif adalah studi untuk menemukan fakta dengan interprestasi tepat melukiskan secara akurat sifat sifat dari beberapa fenomena, kelompok atau individu, menentukan frekuensi terjadinya suatu keadaan. Penelitian survei merupakan penelitian yang mengambil sebagian unsur dari populasi dengan menggunakan kuesioner sebagai alat pengumpul data primer (Effendi dan Tukiran 2012).

Penelitian ini dilaksanakan di Kampung Tarung dan Kampung Praijing Desa Wailiang, Kota Waikabubak Kabupaten Sumba Barat. Metode pengumpulan data pada penelitian ini menggunakan metode obsevasi wawancara dan dokumentasi. Penelitian ini menggunakan metode analisis data teori Miles dan Huberman (2007: 20) dengan melalui tiga tahapan yaitu Reduksi data, Display data serta Pengambilan kesimpulan dan verifikasi.

3. Hasil dan Pembahasan

Dasar pemikiran Kelsen menjadi rujukan ketika Majelis Permusyawaratan Rakyat mengadopsi gagasan membentuk Mahkamah Konstitusi melalui perubahan UUD 1945 (Palguna, 2013:98). Dalam Pasal 24 ayat (2) UUD 1945 menegaskan kedudukan MK dalam sistem ketatanegaraan Indonesia menurut UUD 1945 sebagai salah satu pelaku kekuasaan kehakiman selain Mahkamah Agung (beserta pengadilan-pengadilan di bawahnya dalam empat lingkungan peradilan, yaitu lingkungan peradilan, lingkungan peradilan peradilan agama, lingkungan peradilan militer, dan lingkungan peradilan tata usaha negara). Sebagai pengadilan, kewenangan Mahkamah Konstitusi dinyatakan secara eksplisit dalam Pasal 24C ayat (1) dan ayat (2) UUD 1945 yang berbunyi:

(1) *"Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya bersifat final untuk menguji undang-undang terhadap Undang-Undang Dasar, memutus sengketa kewenangan lembaga negara yang kewenangannya diberikan oleh Undang-Undang Dasar, memutus pembubaran partai politik, dan memutus perselisihan tentang hasil pemilihan umum;"*
(2) *"Mahkamah Konstitusi wajib memberikan putusan atas pendapat Dewan Perwakilan Rakyat mengenai dugaan pelanggaran oleh Presiden dan/atau Wakil Presiden menurut Undang-Undang Dasar;"*
(3) .....

Dengan rumusan demikian, terlihat jelas kewenangan Mahkamah Konstitusi bersangkut-paut erat, bahkan langsung berkenaan, dengan soal-soal politik. Dengan memberikan kewenangan demikian kepada Mahkamah Konstitusi berarti UUD 1945 memerintahkan agar soal-soal yang bersangkut paut atau berkenaan dengan soal-soal politik sebagaimana tertuang dalam Pasal 24C ayat (1) dan ayat (2) tersebut diselesaikan melalui proses pengadilan, bukan proses politik. Itulah sebabnya mekanisme ini dikatakan sebagai *judicialization of politics* – yang harus dibedakan dengan *politization of the judiciary*. Istilah yang disebut terakhir ini merujuk pada "rusaknya" prinsip kemerdekaan kekuasaan kehakiman atau peradilan (*the independence of the judiciary*) yang disebabkan oleh adanya internvensi politik (Below, 2019:142).

Menurut Jimly Asshiddiqie (2017) dengan menelaah secara saksama kewenangan MK sebagaimana diberikan Konstitusi, secara implisit berarti MK berfungsi sebagai penafsir Konstitusi (UUD 1945). Oleh karena itu, menurut Jimly Asshiddiqie, dalam setiap putusan atas kasus yang diajukan kepadanya, lebih-lebih dalam pengujian undang-undang terhadap UUD 1945, pada hakikatnya Mahkamah Konstitusi senantiasa melakukan kegiatan penafsiran konstitusi. Sedangkan Whittington (2019:76) menegaskan dengan memberikan fungsi sebagai penafsir Konstitusi kepada Mahkamah Konstitusi maka berarti dalam menegakkan prinsip supremasi konstitusi (yang mulai dianut setelah dilakukannya perubahan terhadap UUD 1945), Indonesia melakukannya melalui penerapan prinsip supremasi pengadilan (*judicial supremacy*). Penerapan prinsip supremasi pengadilan dalam penafsiran konstitusi, menurut Keith Whittington, adalah pilihan yang paling tepat sebab jika penafsiran konstitusi diserahkan kepada

lembaga-lembaga politik maka yang akan terjadi adalah pertikaian politik yang tak berkesudahan.

Pasal 24C ayat (1) UUD 1945 menegaskan putusan Mahkamah Konstitusi bersifat final. Hal ini juga berlaku di seluruh dunia yang melembagakan mahkamah konstitusi (atau sebutan lainnya) dalam sistem ketatanegaraannya. Artinya, tidak terdapat upaya hukum apa pun yang dapat ditempuh untuk mengubah putusan Mahkamah Konstitusi. Karena itu, sebagaimana ditegaskan dalam Pasal 47 Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi sebagaimana telah diubah terakhir dengan Undang-Undang 7 Tahun 2020 tentang Perubahan Ketiga UndangUndang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi, Putusan Mahkamah Konstitusi memperoleh kekuatan hukum tetap sejak selesai diucapkan dalam sidang pleno terbuka untuk umum. Sementara itu, dalam Pasal 57 ayat (7) Undang-Undang Mahkamah Konstitusi ditegaskan putusan Mahkamah Konstitusi yang mengabulkan permohonan wajib dimuat dalam Berita Negara dalam jangka waktu paling lambat tiga puluh hari sejak putusan diucapkan.

Ketentuan yang tertuang dalam Undang-Undang Mahkamah Konstitusi tersebut, secara hakiki menegaskan *nature* Mahkamah Konstitusi sebagai *negative legislator* jika dibandingkan dengan pembentuk undang-undang sebagai *positive legislator*. Jika undang-undang (yang merupakan produk *positive legislator*) wajib dimuat dalam Lembaran Negara, putusan Mahkamah Konstitusi (yang merupakan produk *negative legislator*) dimuat dalam Berita Negara. Baik Lembaran Negara maupun Berita Negara memiliki fungsi yang sama yaitu fungsi publikasi yang maksudnya agar setiap orang tahu. Jika undang-undang (pada umumnya) dinyatakan mulai berlaku sejak saat diundangkan dalam lembaran negara, putusan Mahkamah Konstitusi mulai berlaku sejak saat selesai diucapkan dalam sidang pleno terbuka untuk umum (dan kemudian dimuat dalam Berita Negara). Dengan memiliki kewenangan memeriksa dan memutus perkara *judicial review,* sebagaimana telah dijelaskan sebelumnya, maka kekuatan mengikat putusan Mahkamah Konstitusi sama dengan kekuatan mengikat undang-undang.

Dengan demikian, menurut sistem ketatangeraan Indonesia yang berlaku saat ini, putusan Mahkamah Konstitusi memiliki kedudukan sebagai putusan *negative legislator* dan sekaligus putusan dari penafsir Konstitusi. Sebagai putusan *negative legislator*, konsekuensinya, pelanggaran terhadap putusan Mahkamah Konstitusi sama derajatnya dengan pelanggaran terhadap undang-undang (produk *positive legislator*). Sementara itu, sebagai putusan penafsir Konstitusi maka

putusan Mahkamah Konstitusi, *c.q.* dalam pengujian undang-undang terhadap UUD 1945, pada hakikatnya adalah penafsiran Mahkamah terhadap Konstitusi yang seharusnya diturunkan ke dalam substansi undang-undang tersebut. Oleh karena itu, ketidaktaatan terhadapnya sama artinya dengan melakukan pembangkangan terhadap Konstitusi.

Aliran kepercayaan yang dinilai sebagai titik permasalahan dari berbagai kekerasan hingga bermunculan terorisme, sangatlah tidak berkeadilan. Merujuk pada Pasal 29 UUD NRI 1945, negara tidak secara terperinci melakukan pembatasan atas dasar agama yang akan dianut warganya. Disana hanya tertera kata "sesuai agama dan kepercayaannya'' disini ialah subjek dari penganut agama. Sehingga sebetulnya apapun agama dan kepercayaan yang dianut, tidak menjadikan sebuah diskriminasi oleh yang lain. Philipus M. Hadjon mengungkapkan bahwa "orang yang memiliki aliran kepercayaan bukanlah orang yang tidak beragama ataupun bertuhan, mereka memiliki Tuhan yang mereka percayai. Hubungan seorang umat pada Tuhannya merupakan hubungan vertikal yang tidak melibatkan orang lain atas apa yang mereka anut dan itu merupakan sebuah hak yang sejatinya sebagai hak mutlak yang abadi tidak ada kata tidak untuk menghormatinya". Selanjutnya dikatakan pula "pada dasarnya seseorang bebas untuk berpandangan subjektif atau objektif apapun sekalipun pada suatu agama atau aliran kepercayaan yang dianggapnya menyimpang" (Hadjon, 1987:72).

Dalam Undang-Undang Nomor 24 tahun 2013 tentang perubahan atas Undang-Undang Nomor 23 tahun 2006 tentang Administrasi Kependudukan pada Pasal 64 ayat (5) menyebutkan:

> *"Elemen data penduduk tentang agama sebagaimana dimaksud pada ayat (1) bagi Penduduk yang agamanya belum diakui sebagai agama berdasarkan ketentuan Peraturan Perundang-undangan atau bagi penghayat kepercayaan tidak diisi, tetapi tetap dilayani dan dicatat dalam database kependudukan".*

Dengan demikian, mereka yang aliran kepercayaannya belum diakui oleh negara terpaksa mengosongkan kolom agama pada Kartu Tanda Penduduknya tapi disatu sisi justru menjadi persoalan dikemudian hari seperti yang dialami Nggay Mehang Tana, beliau adalah penganut aliran kepercayaan dari komunitas marapu yang mendapatkan kesulitan ketika mengurus administrasi kependudukan. Anak-anaknya kesulitan mendapatkan akta kelahiran karena perkawinan yang dilakukan Nggay Mehang Tana dilakukan secara Adat Marapu sehingga negara tidak mengakuinya. Ia pun terpaksa

membohongi dirinya sendiri karena harus terpaksa mencantumkan agama yang diakui agar dipermudah mengurus administrasi kependudukan (Dikutip dalam Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016, hlm. 7).

Sebanyak empat penghayat kepercayaan menilai keberadaan Undang-Undang Administrasi Kependudukan (UU Adminduk) secara faktual merugikan hak-hak konstitusional mereka yang dijamin oleh UUD 1945. Nggay Mehang Tana, Pagar Damanra Sirait, Arnol Purba, dan Carlim tercatat sebagai para Pemohon perkara yang diregistrasi Kepaniteraan Mahkamah Konstitusi pada 26 Oktober 2016 silam. Permohonan yang diajukan ke Mahkamah Konstitusi tersebut diregister dalam perkara Nomor 97/PUU-XIV/2016. ”Kehadiran Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan dinilai telah merugikan para Pemohon dan penganut kepercayaan lainnya di Indonesia karena diperlakukan secara diskriminatif” (Anjarsari, 2017:13).

Para Pemohon menilai keberadaan Pasal 61 ayat (1) dan ayat (2) *juncto* Pasal 64 ayat (1) dan (5) UU Adminduk melanggar hak asasi penghayat kepercayaan dan pemohon selaku warga negara. Pasal 61 ayat (1) dan ayat (2) UU Adminduk menyatakan keterangan mengenai kolom agama pada kartu keluarga bagi penduduk yang agamanya belum diakui sebagai agama berdasarkan ketentuan peraturan perundang-undangan atau bagi penghayat kepercayaan tidak diisi, tetapi tetap dilayani dan dicatat dalam pangkalan data (*database*) kependudukan. Kedua pasal ini berpotensi menghilangkan hak warga negara untuk mendapatkan Kartu Keluarga (KK) dan Kartu Tanda Penduduk Elektronik (Anjarsari, 2017:13).

Usai menggelar beberapa sidang, Mahkamah Konstitusi (MK) memutuskan mengabulkan seluruh permohonan para penghayat kepercayaan tersebut. Putusan Nomor 97/PUU-XIV/2016 dibacakan oleh Ketua MK Arief Hidayat dengan didampingi hakim konstitusi lainnya pada Selasa, 7 November 2017,yang berbunyi sebagai berikut:

> *“Mengabulkan permohonan para Pemohon untuk seluruhnya. Menyatakan kata ‘agama’dalam Pasal 61 ayat (1) dan Pasal 64 ayat (1) UU Adminduk bertentangan dengan UUD NRI 1945 dan tidak mempunyai kekuatan hukum mengikat secara bersyarat sepanjang tidak termasuk ‘kepercayaan’. Menyatakan Pasal 61 ayat*

(2) dan Pasal 64 ayat (5) UU Adminduk bertentangan dengan UUD NRI 1945 dan tidak mempunyai kekuatan hukum mengikat."[293]

Mahkamah berpendapat, keberadaan Pasal 61 ayat (1) dan ayat (2) serta Pasal 64 ayat (1) dan ayat (5) UU adminduk telah melanggar hak warga negara untuk tidak diperlukan secara diskriminatif sebagaimana dijamin oleh Pasal 28I UUD NRI 1945. Yang menjadi rujukan mahkamah tetang pengertian diskriminasi adalah Putusan Mahkamah Konstitusi Nomor 70/PUU-II/2004, 24/PUU-III/2005, 27/PUU-V/2007, perbedaan pengaturan antar warga negara dalam hal pencantuman elemen data penduduk, menurut mahkamah tidak didasarkan pada alasan yang konstitusional. Dalam putusan itu, "pengaturan tersebut telah memperlakukan secara berbeda terhadap hal yang sama, yakni terhadap warga negara penghayat kepercayaan dan warga negara penganut agama yang diakui menurut peraturan perundang-undangan dalam mengakses pelayanan publik".

Dampak Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 sangat berdampak terhadap hak keperdataan masyarakat adat sumba yang menganut agama Marapu sebagai agama leluhurnya. Dampak tersebut dapat diuraikan sebagai berikut :

1. Bidang Administrasi Kependudukan
   Akibat hukum merupakan suatu akibat yang ditimbulkan oleh hukum, terhadap suatu perbuatan yang dilakukan oleh subjek hukum (Ali, 2008:92). Putusan MK No. 97/PUU-XIV/2016 yang membolehkan status penganut kepercayaan Marapu dimasukan dalam kolom Kartu Tanda Penduduk elektronik (KTP-el) memberikan akibat hukum terhadap sistem hukum dan subsistem yang menyertainya. Akibat hukum tersebut yang memuat perihal diperbolehkannya status penganut kepercayaan Marapu dimasukan dalam kolom Kartu Tanda Penduduk elektronik (KTP-el) dan termasuk bagian dari agama terikat asas *res judicata pro veritate habaetur*, yakni apa yang telah diputus oleh hakim harus dianggap benar. Namun demikian ada catatan kritis terhadap Putusan MK yang diambil secara bulat oleh ke-9 Hakim Konstitusi tersebut, yakni pernyataan bahwa pasal terkait bersifat tidak mengikat justru menimbulkan akibat hukum, yakni kekosongan hukum (*rechtsvacuum*) dikarenakan keterbatasan kewenangan MK yang tidak dapat membentuk aturan-aturan hukum baru.

[293] Dikutip dalam Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016, hlm. 155-156.

Jimly Asshiddiqie pada saat menjabat sebagai Ketua MK, dia menyatakan bahwa posisi MK adalah sebagai *negative legislator* artinya MK hanya bisa memutus sebuah norma dalam UU bertentangan konstitusi, tanpa boleh memasukan norma baru ke dalam UU. MK disini kemudian hanya memiliki posisi tanpa kekuatan eksekusitorial yang dapat membantu untuk menerapkan putusannya dalam produk peraturan perundang-undangan. Namun demikian secara tidak langsung putusan MK menciptakan norma baru yang membuka kesempatan kepada penghayat kepercayaan khususnya masyarakat Sumba yang menganut agama Marapu untuk mengakses hak-haknya sebagai warga negara, seperti hak atas pengakuan perkawinan, pendidikan, pekerjaan, jaminan sosial dan kesehatan, dan hak-hak lainnya.

Keputusan MK final dan mengikat maka tidak bisa diajukan peninjauan kembali atau *judicial review* sehingga yang paling memungkinkan dilakukan revisi Undang-Undang Administrasi Kependudukan. Revisi dari Undang-Undang Administrasi Kependudukan dapat dilakukan oleh Dewan Perwakilan Rakyat, yang mana kemudian untuk memperjelas posisi dari penghayat aliran kepercayaan melalui prosedur teknis dan sebagai bagian dari interpretasi maka dapat dibentuk peraturan pelaksana dari Undang-Undang Administrasi Kependudukan hasil revisi oleh pemerintah.

Ditengah kondisi kekosongan hukum pasca putusan MK ini, ada akibat hukum lainnya yang akan dihadapi oleh pemerintah. Dengan putusan MK itu pemerintah tidak hanya memiliki kewajiban memberi pelayanan secara formal dalam bentuk administrasi penduduk. Pemerintah juga harus memenuhi pelayanan pendidikan agama, perkawinan, tempat ibadah dan lain-lain. Dalam pendidikan harus menyediakan guru penghayat kepercayaan. Kemudian, pemerintah harus menyediakan tempat ibadah bagi penghayat kepercayaan. Juga akan mengangkat Dirjen Bimas (Direktorat Jendral Bimbingan Masyarakat) penghayat kepercayaan. Kehidupan beragama di Indonesia dengan jumlah 6 agama yang diakui saja sudah sangat banyak masalah, seperti masalah pendirian tempat ibadah, masalah konflik horizontal antar pemeluk agama, dan lain-lain yang cukup sering kita saksikan.

Putusan MK ini jelas membawa perubahan besar dalam sistem kehidupan keagamaan Indonesia. Tidak bisa dipungkiri bahwa dalam konstitusi hak para penghayat ini dilindungi dengan asas *equality before the law.* Hanya saja hal ini tidak sepenuhnya bisa diterima penganut agama lain, sebab pemenuhan sebuah hak akan berpotensi bertabrakan dengan hak lain. Oleh karena itu perlu

ada perumusan norma baru yang dapat mengakomodir penghayat kepercayaan ini, tanpa menimbulkan konflik dengan kelompok penganut agama di Indonesia. Prinsipnya pemenuhan hak harus dikontrol oleh pemerintah agar tidak memicu konflik.

2. Perkawinan

Di Indonesia, perkawinan diatur dalam Undang-undang Nomor 1 tahun 1974 tentang Perkawinan (Undang-Undang Perkawinan). Pasal 1 Undang-Undang Perkawinan, menjelaskan bahwa "*Perkawinan adalah ikatan lahir dan batin antara seorang pria dan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga yang bahagia dan kekal berdasarkan ke-Tuhanan Yang Maha Esa*".

Sementara tata cara perkawinan tidak diatur secara spesifik. Perkawinan dianggap sah jika dilakukan berdasarkan agama atau kepercayaan masing-masing. Pasal 2 ayat (1) Undang-Undang Perkawinan menyebutkan, "*Perkawinan adalah sah apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya".* Terlihat frasa "kepercayaan" sudah dipakai oleh Undang-Undang Perkawinan.

Namun, sebelum adanya Undang-Undang Perkawinan dan putusan Mahkamah Konstistusi Nomor 97/PUU-XIV/2016, pada tahun 1970 penghayat kepercayaan menerima diskriminasi baik dari pemerintah dan agama-agama lain di Indonesia. Dengan adanya Undang-undang, TAP MPR dan Instruksi Mentri, penghayat kepercayaan pada saat itu tidak dapat memperoleh hak-hak sipilnya. Pada saat itu, penghayat kepercayaan di Indonesia tidak diakui. Hal tersebut menyebabkan penghayat kepercayaan tidak dilayani saat membuat Kartu Tanda Penduduk bahkan berdampak hingga tidak dilayaninya pembuatan akte perkawinan dan akte lahir pada saat itu (Shohib, 2011:27).

Sejak berlakunya Undang-Undang Adminduk, Penghayat Kepercayaan sudah dapat melaksanakan dan mencatatakan perkawinan sesuai dengan Kepercayaan sesuai dengan prosedur khusus, yang diatur lebih lanjut dalam Peraturan Pemerintah Nomor 37 Tahun 2007. Dalam perpres ini mengatur tentang prosedur pencatatan perkawinan yang dilakukan oleh Penghayat Kepercayaan, yaitu pada Pasal 81, 82, 83 Peraturan Pemerintah Nomor 37 Tahun 2007.

Namun perlu dicermati kembali pada Pasal 34 Undang-Undang Adminduk yang menjelaskan bahwa "Perkawinan yang sah menurut Peraturan Perundang-Undangan wajib dilaporkan oleh

Penduduk kepada Instansi Pelaksana….” Kalimat ‘perkawinan yang sah’ merujuk pada aturan hukum positif yang mengatur tentang perkawinan yaitu Undang-Undang Nomor 1 Tahun 1974 Pasal 2 ayat (1), bahwa perkawinan yang sah adalah perkawinan yang dilakukan menurut hukum masing-masing agamanya dan kepercayaannya. Dari pasal inilah yang masih menghambat Penghayat Kepercayaan khususnya masyarakat Sumba yang menganut agama Marapu untuk melaksanakan perkawinan dan tidak dapat mencatatkan perkawinan di Kantor Catatan Sipil.

Pasca Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 tidak hanya berimplikasi pada pembenahan administrasi kependudukan di Indonesia terkait keberadaan Penghayat Kepercayaan, namun juga perluasan makna ‘agama’ dalam peraturan perundang-undangan untuk menghilangkan diskriminasi yang mengakibatkan ketidakadilan yang dirasakan oleh Penghayat Kepercayaan.

Pasca Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 merubah status keabsahan perkawinan yang dilakukan oleh Penghayat Kepercayaan. Kalimat ‘perkawinan yang sah’ yang tercantum dalam Pasal 2 Undang-Undang Perkawinan terdapat 2 (dua) unsur hukum yang harus dipenuhi agar perkawinan tersebut dianggap sah. Yang pertama yaitu dengan dilakukan menurut hukum masing-masing agamanya dan kepercayaannya, dan yang kedua adalah perkawinan harus dicatat menurut perundang-undangan yang berlaku. Pasca terbitnya Putusan MK Nomor 97/PUU-XIV/2016 pencatatan perkawinan Penghayat Kepercayaan yang diatur dalam Undang-Undang Adminduk telah sah dah dapat dicatatkan.

Syarat ‘perkawinan yang sah’ pada Undang-Undang Perkawinan yang menyebutkan harus didasarkan pada hukum masing-masing agamanya dan kepercayaannya, harus tunduk pada Putusan Mahkamah Konstitusi 97/PUUXIV/2016. Makna ‘agama’ pada Pasal 61 ayat (1) dan Pasal 64 ayat (1) UndangUndang Adminduk bertentangan dengan UUD NRI 1945 dan tidak mempunyai kekuatan hukum mengikat secara bersyarat sepanjang tidak termasuk ‘kepercayaan’. Dalam Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 agama ditafsirkan tidak terbatas pada agama saja, tetapi juga kepercayaan merupakan penafsiran inklusif yang mengakui keanekaragaman.

Perkawinan yang dilakukan oleh Penghayat Kepercayaan Agama Marapu atau perkawinan adat masyarakat Sumba dapat menjadi sah, bila memenuhi syarat yang diatur pada Peraturan Pemerintah Nomor 37 Tahun 2007, bahwa perkawinan harus

dilakukan di hadapan Pemuka Penghayat Kepercayaan. Pemuka Penghayat Kepercayaan tersebut telah ditunjuk dan ditetapkan oleh organisasi Penghayat Kepercayaan dan kemudian didaftar pada Kementerian Pendidikan dan Kebudayaan, hal ini sesuai dengan Pasal 81 PP Nomor 37 Tahun 2007.

Keabsahan perkawinan Penghayat Kepercayaan pasca disahkan Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 membawa akibat hukum bagi pihak yang bersangkutan yaitu suami istri dan anak keturunan yang lahir pada perkawinan tersebut. Pencatatan perkawinan yang dilakukan oleh Penghayat Kepercayaan membawa dampak pada status anak yang dilahirkan dalam perkawinan tersebut. Pada pokoknya, dengan adanya akta perkawinan, maka seseorang dapat memperoleh akta kelahiran bagi anak-anak sebagai buah perkawinan dan juga pada pembuatan Kartu Keluarga. Pasca Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 yang dalam ruang lingkupnya membawa kepastian hukum pada perkawinan masyarakat Sumba yang menganut agama Marapu, merubah status hukum pula pada anak yang dilahirkan dalam perkawinan tersebut. Anak dari hasil perkawinan yang dilaksanakan oleh masyarakat Sumba yang menganut agama Marapu yang sebelum adanya Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 tidak dianggap menjadi anak sah menurut UU Perkawinan, sekarang telah mendapat pengakuan secara utuh. Kedudukan anak yang lahir dari perkawinan agama Marapu, sebelum adanya Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 hanya mempunyai hubungan perdata dengan ibunya dan keluarga ibunya sesuai dengan Pasal 43 UU Perkawinan, karena perkawinan yang dilakukan secara Penghayat Kepercayaan tidak diperbolehkan oleh negara. Namun pasca terbitnya Putusan MK tersebut, kedudukan anak berubah menjadi anak yang sah. Anak yang lahir dari perkawinan Agama Marapu dapat memiliki akta kelahiran yang syarat-syaratnya tertuang dalam Pasal 52 Peraturan Presiden Nomor 25 Tahun 2008 Tentang Persyaratan dan Tata Cara Pendaftaran Penduduk dan Pencatatan Sipil.

3. Bidang Pendidikan

Dengan adanya Putusan Mahkmah Konstitusi Nomor 97/PUU-XIV/2016 tersebut, juga mengakibatkan lenyapnya perbedaan antara agama dan kepercayaan dalam Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan dan Undang-Undang Nomor 24 Tahun 2013 Tentang Perubahan Atas UU Nomor 23 Tahun 2006 tentang Administrasi Kependudukan. Selain itu,

dengan dihapusnya Pasal 61 ayat (2) Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan dan Pasal 64 ayat (5) Undang-Undang Nomor 24 Tahun 2013 Tentang Perubahan Atas UU Nomor 23 Tahun 2006 tentang Administrasi Kependudukan maka ketentuan pengosongan kolom agama di Kartu Keluarga (KK) maupun Kartu Tanda Penduduk (KTP) bagi penghayat kepercayaan dihapus. Dengan demikian kolom agama bagi Penghayat Kepercayaan di Kartu Keluarga dan Kartu Tanda Penduduk diisi sesuai dengan kepercayaan yang dianut. Dengan diisinya kolom agama di Kartu Keluarga dan Kartu Tanda Penduduk bagi penghayat kepercayaan, semakin memperkuat eksistensi penghayat kepercayaan.

Akta kelahiran yang dimiliki oleh anak Penghayat Kepercayaan akan membawa dampak yang luar biasa pada kehidupannya di masa mendatang. Pada bidang pendidikan, anak-anak penganut Agama Marapu dapat menempuh pendidikan agama sesuai dengan ajaran yang dianut oleh kedua orang tua nya, yaitu Agama Marapu. Hal ini diatur pada Peraturan Menteri Pendidikan dan Kebudayaan Republik Indonesia Nomor 27 Tahun 2016 tentang Layanan Pendidikan Kepercayaan Terhadap Tuhan Yang Maha Esa. Dalam Pasal 1 ayat 3 menyebutkan definisi dari peserta didik Penghayat Kepercayaan yang selanjutnya disebut Peserta Didik adalah peserta didik pada pendidikan formal jenjang pendidikan dasar dan menengah dan pendidikan kesetaraan yang menyatakan dirinya sebagai Penghayat Kepercayaan Terhadap Tuhan Yang Maha Esa.

Akibat hukum lainnya pasca Putusan Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 terkait perkawinan penganut agama Marapu adalah permasalahan harta bersama dan permasalahan waris. Masyarakat Sumba yang menganut agama Marapu yang telah meninggal dunia akan menimbulkan permasalahan hukum terkait harta benda yang ditinggalkan nya, dengan perkawinan yang sah maka akan jelas siapa saja ahli waris dari pewaris yang meninggal tersebut.

Akibat hukum dari perkawinan masyarakat Sumba yang menganut agama Marapu pasca Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 telah dijelaskan diatas, terlihat sederhana tetapi membawa dampak yang sangat besar bagi kehidupan masyarakat Sumba yang menganut agama Marapu. Putusan MK tidak hanya menjelaskan dan memutus tentang perluasan makna ‘agama’ dalam peraturan perundang-undangan, namun juga membenahi sistem administrasi kependudukan di Indonesia terkait pendataan Penghayat

Kepercayaan. Putusan MK ini juga merupakan upaya negara dalam memberikan perlindungan hukum bagi seluruh rakyatnya tanpa terkecuali, menciptakan keadilan secara sejajar antara Penghayat Kepercayaan dan pemeluk Agama atas dasar kemanusiaan dan menghilangkan diskriminasi atas dasar perbedaan keyakinan terhadap Tuhan YME.

4. Penutup

Putusan Mahkamah Konstitusi Nomor: 97/PUU-XIV/2016, dalam pertimbangan hukumnya, Mahkamah Konstitusi menyetarakan Kepercayaan dengan Agama, bukan memasukkan Kepercayaan ke dalam Agama, sedangkan Indonesia hingga saat ini kepercayaan yang diyakini setara agama belum diatur secara yuridis formal. Adanya putusan Mahkamah Konstitusi ini, posisi agama *Marapu* sebagai kepercayaan orang Sumba seharusnya setara dengan agama lainnya yang telah diakui oleh negara khususnya di bidang administrasi kependudukan.

Akibat hukum dari Putusan MK No. 97/PUU-XIV/2016 secara general membolehkan status penganut kepercayaan dimasukan dalam kolom Kartu Tanda Penduduk elektronik (KTPel). Akibat hukum tersebut memuat pernyataan bahwa MK menganggap penghayat kepercayaan memiliki hak konstitusional dalam memeluk kepercayaannya masing-masing. Namun disisi lain putusan MK akan menciptakan norma baru yang membuka kesempatan kepada penghayat kepercayaan untuk mengakses hak-haknya sebagai warga negara, seperti hak atas pengakuan perkawinan, pendidikan, pekerjaan, jaminan sosial dan kesehatan, dan hak-hak lainnya. Pemerintah juga berkewajiban untuk memenuhi pelayanan pendidikan agama, perkawinan, tempat ibadah dan lain-lain bagi para penghayat kepercayaan berikut pada layanan administrasi kependudukan. Pada kesimpulannya terdapat hak-hak yang harus dipenuhi dan kewajiban-kewajiban yang harus dilaksanakan oleh berbagai pihak akibat dikeluarkannya putusan tersebut .

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Pengakuan dan Perlindungan Hukum Masyarakat Adat dalam Perpektif Perundang-Undangan di Indonesia

(Recognition and Protection of The Law of Indigenous Peoples in the Legal Perspective of Indonesia)

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Abstrak

Pemerintah telah mengakui keberadaan masyarakat adat sudah sejak dahulu, yang diatur dalam Pasal 18 B ayat 2 dan Pasal 281 ayat 3 Undang-Undang Dasar 1945, yang dimaknai sebagai amanat konstitusi. Terdapat peraturan perundang-undangan lain yang mengatur masyarakat adat, namun undang-undang tersebut tumpang tindih dalam hal pengaturannya dan baru bersifat deklaratif. Metode penelitian menggunakan metode yuridis normatif, Hasil penelitian menjelaskan dari beberapa peraturan perundang- undangan yang mengatur dan mengakui masyarakat hukum adat, terdapat beberapa penyebutan masyarakat hukum adat yang berbeda. Perbedaan istilah ini terjadi dikarenakan belum adanya payung hukum yang mengatur mengenai masyarakat hukum adat yang dapat dipakai sebagai pedoman bagi pembuat kebijakan/ aturan untuk mengatur masyarakat adat. Selanjutnya, Perlindungan kepada masyarakat adat merupakan kepastian pemenuhan hak-hak masyarakat adat. Intervensi pemerintah sudah sepatutnyalah bertujuan untuk memberikan perlindungan hukum kepada masyarakat adat dan tidak memaksa masyarakat adat untuk masuk dalam sebuah sistem yang sangat rasional, sistematis, dan malah akan menyusahkan masyarakat adat. Tiga Permasalahan perlindungan masyarakat adat yaitu: identification , relasi dan Self determination yang berkaitan dengan aspek politik. Perlindungan hukum terhadap masyarakat adat berkaitan dengan bentuk negara kesejahteraan, tujuan negara kesejahteraan adalah ketercapaian perwujudan keadilan sosial yang pelaksanaannya bergantung pada struktur proses-proses ekonomi, politis, sosial, budaya, dan ideologis. Semua peraturan perundang undangan dan kebijakan haruslah mengandung penciptaan struktur sosial yang adil, mekanisme pendistribusian yang adil, dan solidaritas terhadap yang lemah sebagai unsur dari keadilan sosial guna mewujudkan kesejahteraan rakyat sebagai tujuan perlindungan Masyarakat adat.

Kata kunci: Pengakuan, Perlindungan, Masyarakat Adat, Perundang-undangan

Abstract

The government has recognized the existence of indigenous peoples for a long time, which is regulated in Article 18B paragraph 2 and Article 281 paragraph 3 of the 1945 Constitution, which is interpreted as a constitutional mandate. There are other laws and regulations that regulate indigenous peoples, but these laws overlap in terms of regulation and are only declarative in nature. The research method uses normative juridical methods, the results of the research explain of the several laws and regulations that regulate and recognize customary law communities, there are several different mentions of customary law communities. This difference in terms occurs because there is no legal umbrella governing indigenous peoples that can be used as a guideline for policy/rule makers to regulate indigenous peoples. Furthermore, protection for indigenous peoples is a certainty of fulfilling the rights of indigenous peoples. Government intervention should aim to provide legal protection to indigenous peoples and not force indigenous peoples to enter into a system that is very rational, systematic, and will even make it difficult for indigenous peoples. Three problems protecting indigenous peoples, namely: identification, relations and self-determination related to political aspects. Legal protection for indigenous peoples is related to the form of the welfare state, the goal of the welfare state is the achievement of the realization of social justice whose implementation depends on the structure of economic, political, social, cultural and ideological processes. All laws and policies must contain the creation of a just social structure, a fair distribution mechanism, and solidarity with the weak as elements of social justice in order to realize people's welfare as the goal of protecting indigenous peoples.

Keywords: Recognition, Protection, Indigenous Peoples, Legislation

1. Introduction

Hukum adat adalah hukum yang bukan bersumber dari dan tertulis dalam undang-undang, namun sebagai hasil konstruksi sosial budaya suatu masyarakat hukum adat. Oleh karena itu hukum adat selalu manunggal dengan masyarakat pendukung, sebab dimana ada masyarakat disitu ada hukum. Cicero , seorang ahli hukum Yunani dengan mengatakan '*ubi sosietas ibi ius'* (Dominiko Rato,2009). Masyarakat adat sebagai subyek yang mendukung hukum adat telah mempertahankan berlakunya hukum adat, hingga sampai saat ini.

Unesco mencatat ada sekitar 370,500 juta anggota komunitas masyarakat adat di seluruh dunia, yang tergabung dalam 5.000 kelompok berbeda, dan tersebar di 90 negara dan menempati hampir seperempat wilayah bumi (sekitar 22 %). Bank Dunia mencatat meski jumlah warga asli hanya 5% dari seluruh populasi bumi komunitas adat menyumbang 15% dari jumlah warga dunia yang mengalami kemiskinan ekstrem.(Praga Utama, 2021).Masyarakat Adat ditemukan

di setiap wilayah di dunia, tetapi sekitar 70% dari mereka tinggal di Asia.(Bappenas, 2013)

Indonesia terkenal dengan keragaman budaya dan masyarakatnya hingga saat ini masih terdapat komunitas- komunitas masyarakat adat yang hidup dan berkembang dengan mempertahankan adatnya. Keberagaman, kekayaan peradaban, kebudayaan yang merupakan warisan bersama umat manusia merupakan kontribusi dari Masyarakat Hukum Adat (MHA) tidak dapat hilang atau rusak karena pembangunan, hal ini dicantumkan dalam konsideran Deklarasi PBB MHA pada suatu Deklarasi mengenai Masyarakat Hukum Adat yaitu *United Nation Declaration on the Right of Indigeneous People* (Deklarasi PBB MHA) oleh Perserikatan Bangsa-Bangsa (PBB) dan telah disepakati Majelis Umum pada tahun 2007.

> *The cultural diversity that exists in Indonesian society is brought into the law of kinship, with the mapping of 19 traditional law (adatrecht) in Indonesia by Cornelis Van Vollenhoven based on their religions, each region with its distinctive characteristics. The pluralism of law in this traditional law is interesting, with the culture possessed in each area than in one area with another area will be found indigenous peoples who have different customs both in kinship system, forms and marriage system, and its inheritance system* (B.Rini Heryanti, Amri P Sihotang, Aga Natalis, 2020)

Mengenai yang dimaksud dengan masyarakat adat yakni Komunitas (paguyuban) sosial manusia yang merasa bersatu karena terikat oleh kesamaan leluhur dan atau wilayah tertentu, memiliki kekayaan sendiri, dipimpin oleh seorang atau beberapa orang yang dipandang memiliki tata nilai sebagai pedoman hidup. Serta tidak mempunyai keinginan untuk memisahkan diri. Dengan demikian mayarakat adat dapat dikatakan ada jika terdapat unsur-unsur di dalamnya yakni : Ada komunitas manusia yang merasa bersatu, terikat oleh perasaan kebersamaan karena kesamaan keturunan (genealogis) dan atau wilayah (teritorial); Mendiami wilayah tertentu dengan batas-batas tertentu; Memiliki kekayaan sendiri; Dipimpin oleh seseorang atau beberapa orang; Memilik tata nilai; Tidak ada keinginan memisahkan diri dan Mempunyai corak yang komunal.

Melati Kristina Andriansi (2020) menyatakan bahwa berdasarkan data dari Aliansi Masyarkat Adat Nusantara (AMAN) terdapat sekitar 70 juta masyarakat adat yang terbagi menjadi 2.371 komunitas adat tersebar di 31 provinsi Tanah Air. Adapun sebaran Komunitas Adat terbanyak berada di Kalimantan dengan jumlah

mencapai 772 Komunitas Adat dan Sulawesi sebanyak 664 Komunitas Adat. Adapun di Sumatera mencapai 392 Komunitas Adat, Bali dan Nusa Tenggara 253 Komunitas Adat, Maluku 176 Komunitas Adat, Papua 59 Komunitas Adat dan Jawa 55 Komunitas Adat. Seluruh Komunitas Adat tersebut tergabung dalam Aliansi Masyarakat Adat Nusantara.

Keberadaan komunitas masyarakat adat di Indonesia ada jauh sebelum negara Indonesia merdeka, keberadaan masyarakat ini telah diakui oleh negara dengan dicantumkannya dalam Undang-Undang Dasar R.I 1945 (amandemen ke-dua) dalam Pasal 18 B ayat (2) Sebagai penjabaran dari Pasal 18 B ayat (2) dan Pasal 281 ayat 3 maka dikeluarkanlah Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, salah satu pasal yang mengatur tentang penghormatan hak masyarakat hukum adat ada di Pasal 6 ayat 1 (Zanibar, 2008:7).

Negara Indonesia adalah negara hukum, Emmanuel Kant berpendapat bahwa tujuan negara adalah membentuk dan mempertahankan hukum, yang menjamin kedudukan hukum dari individu-individu didalam masyarakat dan berarti pula bahwa setiap warga negara mempunyai kedudukan hukum sama dan tidak boleh diperlakukan sewenang-wenang oleh pihak penguasa (Mia Kusuma Fitriana, 2015). Konsepsi negara hukum yang diinginkan oleh *founding father* sejak awal perjuangan kemerdekaan ini terlihat jelas dengan dimuatnya pokok-pokok pikiran dasar dalam pembukaan UUD Tahun 1945, yaitu kemerdekaan, keadilan, kemanusiaan dan pernyataan bahwa pemerintah negara berkewajiban untuk melindungi segenap bangsa dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum (Opiani & Zainal Mubaroq, 2020).

Berkaitan dengan pengaturan masyaraka adat, terdapat beberapa peraturan yang telah mencantumkan istilah masyarakat adat dengan istilah yang berbeda-beda. Perbedaan istilah yang dipakai dalam produk hukum baik legislasi maupun putusan pengadilan akan menimbulkan konsep dan makna yang berbeda jika ditekankan pada aspek-aspek tertentu dari kelompok masyarakat tertentu.Hingga sekarang persoalan pengakuan dan perlindungan masyarakat hukum adat baik dalam pengaturannya secara khusus maupun dalam implementasinya masih diperdebatkan dan menyisakan persoalan yang belum dapat terselesaikan, di satu sisi Rancangan Undang-Undang Masyarakat Adat yang harapannya segera disahkan dapat menyelesaikan carut marut persoalan masyarakat adat. Namun sejak pembuatannya pada tahun 2014, berhenti pada tahun 2015 – 2017 dan mulai masuk dalam Program Legislasi Nasional (Polegnas) pada tahun 2018. Sejak ahun 2020 sudah diusulkan dan masuk dalam Badan Legislasi DPR

(BALEG), pada tanggal 4 September 2020 namun hingga sekarang ini belum pernah dibahas diparipurna. Berdasarkan latar belakang yang telah diuraikan, maka *focus* penelitiaan ini adalah , **"**Analisis pengakuan dan perlindungan hukum masyarakat adat dalam perspektif perundang-undangan di Indonesia".

2. Methods

Metode Penelitian ini adalah yuridis normatif dengan Spesifikasi penelitian yang akan dipergunakan adalah diskriptif analitis. Sumber data akan digunakan dalam penelitian hukum normatif. data ini mengandung bahan hukum yang dapat diperinci dalam berbagai tingkatan yaitu bahan Hukum Primer, bahan hukum sekunder dan bahan hukum tertier. Teknik pengumpulan bahan hukum yang digunakan dalam penelitian ini adalah studi dokumen atau bahan pustaka. Analisis data yang digunakan dalam penelitian ini adalah metode analisis kualitatif.

3. Findings and Discussions

3.1. Pengakuan masyarakat adat dalam perundang-undangan di Indonesia.

Terjemaah dari Rechtsgemenschap yang diperkenalkan oleh Van Vollenhoven yang didefinisikan oleh Ter Haar sebagai kesatuan-keasatuan yang mempunyai tata susunan yang teratur dan kekal serta memiliki pengurus dan kekayaan sendiri, baik materiil maupun imateriil. Beberapa istilah masyarakat adat dalam perundang-undangan

a. Undang-Undang Dasar Republik Indonesia 1945 Pasal 18 B, mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia.
b. Undang-Undang No1 Tahun 2023 KUHP, Pasal 2 (1) Ketentuan sebagaimana dimaksud dalam Pasal 1 ayat (1) tidak mengurangi berlakunya hukum yang hidup dalam masyarakat yang menentukan bahwa seseorang patut dipidana walaupun perbuatan tersebut tidak diatur dalam Undang Undang ini. (2) Hukum yang hidup dalam masyarakat sebagaimana dimaksud pada ayat (1) berlaku dalam tempat hukum itu hidup dan sepanjang tidak diatur dalam Undang Undang ini dan sesuai dengan nilai-nilai yang terkandung dalam Pancasila.
c. Undang-Undang Republik Indonesia Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup mencantumkan Masyarakat Hukum Adat adalah kelompok

masyarakat yang secara turun temurun bermukim di wilayah geografis tertentu karena adanya ikatan pada asal usul leluhur, adanya hubungan yang kuat dengan lingkungan hidup, serta adanya sistem nilai yang menentukan pranata ekonomi, politik, sosial, dan hukum.

d. Undang-Undang Republik Indonesia No 20 Tahun 2003 tentang Sistem Pendidikan Nasioanal dalam Pasal 5 ayat 3 (3) Warga negara di daerah terpencil atau terbelakang serta masyarakat adat yang terpencil berhak memperoleh pendidikan layanan khusus.
e. Undang-Undang Republik Indonesia No 24 Tahun 2003 tentang Mahkamah Konstitusi dalam Pasal 51 huruf b (1) Pemohon adalah pihak yang menganggap hak dan/atau kewenangan konstitusionalnya dirugikan oleh berlakunya undang-undang, yaitu: a. perorangan warga negara Indonesia; b. kesatuan masyarakat hukum adat sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan.
f. Undang – Undang Republik Indonesia tentang Perkebunan dalam Pasal 9 ayat 2 "Dalam hal tanah yang diperlukan merupakan tanah hak ulayat masyarakat hukum adat yang menurut kenyataannya masih ada, mendahului pemberian hak sebagaimana dimaksud dalam ayat (1), Penjelasan: Ayat (2) Masyarakat hukum adat yang menurut kenyataannya masih ada, jika memenuhi unsur: a. masyarakat masih dalam bentuk paguyuban (rechtsgemeinschaft); b. ada kelembagaan dalam bentuk perangkat penguasa adat; c. ada wilayah hukum adat yang jelas; d. ada pranata dan perangkat hukum, khususnya peradilan adat yang masih ditaati; dan e. ada pengukuhan dengan peraturan daerah.
g. Undang-Undang Republik Indonesia No 22 Tahun 2001 tentang Minyak Dan Gas Bumi, Pasal 11 ayat 3 huruf p (3) Kontrak Kerja Sama sebagaimana dimaksud dalam ayat (1) wajib memuat paling sedikit ketentuan-ketentuan pokok yaitu: p. pengembangan masyarakat sekitarnya dan jaminan hak-hak masyarakat adat.
h. Undang-Undang Republik Indonesia No 5 Tahun 1994 tentang Pengesahan United Nations Convention On Biological Diversity (Konvensi Perserikatan Bangsa-Bangsa Mengenai Keanekaragaman Hayati) Tidak ada pasal yang mengatur Keputusan Presiden Republik Indonesia No 111 Tahun 1999 tentang Pembinaan Kesejaheraan Sosial Komunitas Adat Terpencil, Pasal 1 ayat 1 (1) Dalam Keputusan Presiden ini yang dimaksud dengan komunitas adat terpencil atau yang selama ini

lebih dikenal dengan sebutan masyarakat terasing adalah kelompok sosial budaya yang bersifat lokal dan terpencar serta kurang atau belum terlibat dalam jaringan dan pelayanan baik sosial, ekonomi, maupun politik.

i. Undang –Undang Republik Indonesia No 27 Tahun 2003 tentang Panas Bumi, Pasal 16 ayat (2) huruf a Kegiatan Usaha Pertambangan Panas Bumi tidak dapat dilaksanakan di : a. tempat pemakaman, tempat yang dianggap suci, tempat umum, sarana dan prasarana umum, cagar alam, cagar budaya, serta tanah milik masyarakat adat.
j. Undang- Undang Republik Indonesia No 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria, Pasal 2 ayat 4. Hak menguasai dari Negara tersebut diatas pelaksanaannya dapat dikuasakan kepada daerah-daerah Swatantra dan masyarakat-masyarakat hukum adat, sekedar diperlukan dan tidak bertentangan dengan kepentingan nasional.
k. Undang-Undang Republik Indonesia No.41 Tahun 1999 tentang Kehutanan, Pasal 1 angka 6. Hutan adat hutan negara yang berada dalam wilayah masyarakat hukum adat. Pasal 4 Ayat 3. Penguasaan hutan oleh Negara tetap memperhatikan hak masyarakat hukum adat, sepanjang kenyataannya masih ada dan diakui.
l. Undang-Undang Republik Indonesia No.39 Tahun 1999 tentang Hak Asasi Manusia Pasal 6 Ayat 1. Dalam rangka penegakan hak asasi manusia, perbedaan dan kebutuhan dalam masyarakat hukum adat harus diperhatikan dan dilindungi oleh hukum, masyarakat, dan Pemerintah. Pasal 6 Ayat 2. Identitas budaya masyarakat hukum adat, termasuk hak atas tanah ulayat dilindungi, selaras dengan perkembangan zaman.
m. Undang-Undang Republik Indonesia No.7 Tahun 2004 tentang Sumber Daya Air, Pasal 6 Ayat 2. Penguasaan sumber daya air sebagaimana dimaksud pada ayat (1) diselenggarakan oleh Pemerintah dan/atau pemerintah daerah dengan tetap mengakui hak ulayat masyarakat hukum adat setempat dan hak yang serupa dengan itu, sepanjang tidak bertentangan dengan kepentingan nasional dan peraturan perundang-undangan.
n. Undang-Undang Republik Indonesia No 11 Tahun 2020 tentang Cipta Kerja dalam Pasal 18 menyebutkan bahwa masyarakat yang dimaksud dalam pasal ini , terdiri atas Masyarakat Hukum Adat, Masyarakat Lokal, dan Masyarakat Tradisional yang bermukim di Wilayah Pesisir dan pulau-pulau kecil.

Dari beberapa peraturan perundang- undangan yang mengatur dan mengakui masyarakat hukum adat, terdapat beberapa penyebutan masyarakat hukum adat yang berbeda yakni, Masyarakat Hukum Adat, Masyarakat Adat, Komunitas Adat Terpencil, Masyarakat Terasing, Masyarakat Lokal, dan Masyarakat Tradisional yang tentunya mempunyai subtansi yang berbeda-beda. Perbedaan istilah ini terjadi dikarenakan belum adanya payung hukum yang mengatur mengenai masyarakat hukum adat yang dapat dipakai sebagai sebagai pedoman bagi pembuat kebijakan/ aturan untuk mengatur masyarakat adat.

3.2. Perlindungan masyarakat adat yang diberikan oleh pemerintah dikaitan dengan perundang-undangan di Indonesia.

Perlindungan bagi masyarakat hukum adat didasarkan pada pemahaman mengenai budaya dan pemahaman masyarakat tersebut. Perlindungan masyarakat adat menjadi sangat penting untuk memastikan pemenuhan hak-hak mereka. Masyarakat adat masuk dalam kelompok minoritas memiliki pendapatan dan pendidikan rendah, Serta memiliki kebudayaan yang unik atau khas. Berdasarkan hal tersebut sudah sepatutnya masyarakat hukum adat dilindungi hak-haknya yang mana memerlukan peran aktif oleh pemerintah (Muh Afif Mahfud, 2020).

Tujuan Intervensi pemerintah adalah memberikan perlindungan hukum kepada masyarakat adat dan tidak memaksa untuk masuk dalam sebuah sistem yang rasional, sistematis, dan menyusahkan masyarakat adat. Sistem tersebut tentunya sangat baik apabila dibuat sederhana dan berbasis partisipasi publik. Hal ini selaras dengan pendapat G. Brent Angell dan Judith M. Dunlop bahwa pemerintah perlu mengubah strategi dalam membuat kebijakan mengenai masyarakat hukum adat karena kebijakan yang tidak partisipatif hanya akan melahirkan kesenjangan bahkan konflik antara Masyarakat adat dan pemerintah (Sumadi dkk, 2022).

Permasalahan yang mendasar menyebabkan masyarakat hukum adat belum dilindungi secara maksimal adalah penggunaan paradigma positivisme oleh pemerintah dalam menangani masyarakat hukum adat. Bentuk paradigma positivisme ini adalah realisme naif, yakni realitas yang bersifat eksternal (Danggur Konradus, 2021). Beberapa cara pandang dari paradigma positivisme dan dampak hukum bagi masyarakat adat yaitu empirisme, reduksionisme dan universalisme Adapun penjelasan dari ketiga aspek tersebut adalah sebagai berikut :

Empirisme memaknai hukum hanya sebagai yang tampak, yakni peraturan perundang-undang, hal ini bukan hanya berkaitan dengan

hukum formil melainkan juga hukum materiil. Padahal masyarakat hukum adat tidak memahami hukum dalam konteks yang demikian karena masyarakat hukum adat memahami hukum bersifat tidak tertulis, tidak bersifar prosedural, mengedepankan musyawarah dan keadilan substantif guna menciptakan keseimbangan antara manusia, Tuhan, dan alam. Hal ini tentu menunjukkan kosmologi dari masyarakat hukum adat.

Reduksionisme keberagaman bangsa Indonesia yang berdasarkan Unesco mencatat ada sekitar 370,500 juta anggota komunitas masyarakat adat di seluruh dunia, sekitar 70% dari mereka tinggal di Asia. kelompok etnis yang sebagian merupakan masyarakat hukum adat yang memiliki sistem hukumnya sendiri direduksi menjadi hukum nasional. Hal ini tidak hanya mengejala, tetapi terjadi di Indonesia yang menganut weak legal pluralism dan minimnya pengakuan terhadap masyarakat hukum adat.

Universalisme bermakna hukum tersebut berlaku di seluruh wilayah Republik Indonesia tanpa memperhatikan konteks ruang dan waktu di mana hukum tersebut berlaku, di Indonesia hampir setiap wilayah memiliki kearifan lokal dan pemaknaan serta pemahaman hukum yang berada dan universalisme ini tidak akan memberi ruang bagi hukum-hukum adat untuk tetap eksis dan menciptakan keadilan substantif bagi masyarakat hukum adat itu sendiri

Bentuk paradigma positivisme yang demikian mendasari epistemologi paradigma positivisme, yakni dualis/ objektivis, pemerintah dan masyarakat hukum adat merupakan dua entitas yang terpisah dan tidak ada interaksi antara keduanya guna menjaga objektivitas. sehingga, dapat dipahami bahwa tidak terdapat ruang penafsirana bagi para penegak hukum dalam paradigma positivisme. Pemerintah sebagai pihak yang berwenang tanpa melibatkan membuat perundang-undangan masyarakat hukum adat sehingga tidak terdapat partisipasi publik. Padahal, masyarakat hukum adat memiliki alam pikiran partisipatif. Dengan kata lain, pola pembuatan kebijakan terkait masyarakat hukum adat adalah top down atau dari atas ke bawah, Masyarakat hanyalah menjadi objek dari kebijakan pemerintah.

Epsitemologi dualis/objektivis dalam paradigma positivisme mendasari metodologi eksperimental/manipulatif yang bermakna para penegak hukum dalam menjalankan perannya hanya melakukan verifikasi fakta hukum terhadap peraturan perundang-undangan. Penegak hukum pun hanya menjadi corong undang-undang. Penegakan hukum layaknya sebuah mesin sehingga pelaksanaan penegakan hukum hanya terbatas pada pencocokan peraturan perundang-undangan terhadap apa yang disebut dengan fakta hukum. Kondisi ini

menyebabkan keadilan yang timbul adalah keadilan prosedural tekstual yang berbeda dengan pemahaman masyarakat hukum adat yang menghendaki pada keadilan substantif yang bahkan di dalamnya terdapat aspek religio magis.

Penggunaan paradigma positivisme yang dipilih oleh pemerintah dalam menangani masyarakat hukum adat menimbulkan tiga kesenjangan antara hukum adat dan hukum nasional yaitu kesenjangan konsep, kesenjangan kesadaran dan kesenjangan fungsi Konsep. Adapun penjelasan ketiga aspek tersebut adalah sebagai berikut :

Kesenjangan konsep perbedaan antara hukum nasional dengan pemahaman yang terdapat dalam masyarakat hukum adat. Perlu dipahami bahwa konsep hukum nasional sebagian berasal pada hukum Romawi yang diterapkan pada masyarakat hukum adat yang menempati lokasi dan kebudayaan yang berbeda serta memiliki konsep hukumnya sendiri.

Kesenjangan kesadaran berkaitan erat dengan budaya hukum Masyarakat adat yang berbeda dengan Masyarakat hukum lainya. perbedaan pemahaman mengenai hukum ini menyebabkan hukum-hukum nasional yang tidak selaras dengan pemahaman masyarakat hukum adat akan ditolak oleh masyarakat hukum adat. Sebaliknya, jika masyarakat hukum adat menganggap sesuai dan selaras dengan budaya hukum dari masyarakat hukum adat maka hukum nasional akan diterima.

Kesenjangan fungsi Konsep ini mengarahkan masyarakat untuk bertindak dalam pola tertentu guna mencapai maximum of human interest dengan minimum friksi dan hal-hal yang tidak perlu. Hal ini berbeda dengan masyarakat hukum adat yang cenderung statis dan menghendaki adanya status quo untuk memelihara tradisi yang telah berlangsung secara turun-temurun.

Permasalahan perlindungan hukum masyarakat adat dapat dibagi menjadi tiga kelompok, yaitu:

1) Perlindungan identification

Merupakan masalah penentuan kriteria dan penetapan masyarakat hukum adat Perlu dipahami bahwa sampai saat ini belum terdapat undang-undang yang secara khusus mengatur mengenai masyarakat hukum adat. Salah satu masalah yang dihadapi oleh masyarakat hukum adat adalah mengenai pengakuan serta penetapan masyarakat hukum adat. Saat ini pengakuan dan penetapan masyarakat hukum adat diatur dalam Peraturan Menteri Dalam Negeri No. 52 Tahun 2014 tentang Pedoman Pengakuan dan Perlindungan Masyarakat Hukum Adat. Pada Pasal 1 peraturan ini dinyatakan bahwa penetapan pengakuan dan

perlindungan masyarakat hukum adat merupakan kewenangan yang dimiliki oleh bupati/ wali kota.

Pengakuan akan diberikan apabila masyarakat hukum adat memenuhi beberapa syarat, yakni: sejarah masyarakat hukum adat; wilayah adat, hukum adat, harta kekayaan dan/atau benda-benda adat, dan kelembagaan/sistem pemerintahan adat maka bupati/wali kota akan menerbitkan Surat Keputusan Bupati/Walikota.

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 8/Permen-KP/2018 tentang Tata Cara Penetapan Wilayah Kelola Masyarakat Hukum Adat dalam Pemanfaatan Ruang di Wilayah Pesisir dan Pulau-Pulau Kecil merupakan dasar hukum penetapan masyarakat hukum adat pada wilayah pesisir dan pulau-pulau kecil. Tidak jauh berbeda dengan Permendagri, kewenangan dalam pengakuan dan perlindungan masyarakat hukum adat juga berada dalam kewenangan bupati/wali kota.

Kewenangan bupati/wali dalam melakukan pengakuan dan perlindungan masyarakat hukum adat juga menjadi masalah karena bupati/wali kota juga memiliki kewenangan dalam mengeluarkan perizinan bagi beberapa sektor industri seperti kehutanan yang tidak jarang berada pada lokasi atau wilayah yang ditempati oleh masyarakat hukum adat. Hal ini tentu akan menempatkan bupati/wau kota dalam posisi dilematis antara mengakui eksistensi masyarakat hukum adat beserta hak ulayatnya yakni hak untuk mengelola wilayahnya sendiri yang merupakan kepentingan sosial/budaya atau memberikan izin bagi industri untuk melakukan kegiatan di wilayah tersebut yang dapat memberikan keuntungan bagi daerah yang bersangkutan.

Merujuk kepada teori Sibernetik yang dikemukakan oleh Talcott Parsons maka keadaan ini pemerintah akan memilih untuk mengedepankan kepentingan ekonomi dan mengorbankan perlindungan terhadap masyarakat hukum adat. Peraturan ini juga mengedepankan dualisme atau keterpisahan antara pemerintah dan masyarakat hukum adat karena struktur organisasi panitia masyarakat hukum adat hanya terdiri atas pihak pemerintah.

Pasal 3 ayat (2) Peraturan Menteri Dalam Negeri No. 52 Tahun 2014 tentang Pedoman Pengakuan dan Perlindungan Masyarakat Hukum Adat mengatur bahwa struktur organisasi panitia masyarakat hukum adat adalah: (a) Sekretaris daerah kabupaten/kota sebagai ketua; (b) Kepala Satuan Kerja Perangkat Daerah yang memiliki tugas pokok dan fungsi berupa pemberdayaan masyarakat menjabat sebagai sekretaris; (c) Kepala Bagian Hukum Sekretariat Kabupaten/Kota sebagai anggota; (d) Camat atau sebutan lain sebagai anggota: dan (e)

Kepala Satuan Kerja Perangkat Daerah yang tugas pokok dan fungsinya memiliki keterkaitan dengan masyarakat hukum adat.

Apabila Permendagri No. 52 Tahun 2014 tentang Pedoman Pengakuan dan Perlindungan Masyarakat Hukum Adat hanya melibatkan unsur pemerintah daerah dalam pengakuan dan perlindungan masyarakat hukum adat, Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 8/Permen-KP/2018 tentang Tata Cara Penetapan Wilayah Kelola Masyarakat Hukum Adat Dalam Pemanfaatan Ruang di Wilayah Pesisir dan Pulau-Pulau Kecil memiliki susunan yang lebih kompleks atau terdiri dari beragam unsur yang disebut dengan tim masyarakat hukum adat. Adapun tim ini terdiri atas Kementerian Kelautan dan Perikanan; Kementerian Dalam Negeri; pakar; Tokoh masyarakat; Pemerintah Daerah Provinsi; dan Pemerintah Daerah Kabupaten/Kota.

Pada Peraturan Menteri Kelautan dan Perikanan ini diketahui maksud dari tokoh masyarakat apakah tokoh dari masyarakat hukum adat atau berasal dari tokoh masyarakat selain dari masyarakat hukum adat tersebut. Hal ini menunjukkan bahwa penetapan masyarakat hukum adat belum membuka ruang yang optimal bagi partisipasi masyarakat hukum adat dan menempatkan masyarakat hukum adat hanya sebagai objek atau bersifat subordinat.

2) Perlindungan relasi

Permasalahan relasi antara masyarakat hukum adat dengan sumber daya alam baik tanah, hutan, ataupun perairan. Hal ini disebabkan sumber daya alam tersebut merupakan tempat di mana masyarakat hukum adat menggantungkan kelangsungan hidupnya. Salah satu kewenangan yang dimiliki oleh masyarakat hukum adat adalah hak ulayat, yakni kewenangan yang dimiliki oleh masyarakat hukum adat dalam melakukan pengelolaan atas wilayahnya.

Secara terminologis, hak ulayat berasal dari kata wilayat dalam bahasa Minangkabau. Hak ulayat berisikan serangkaian kewenangan dan kewajiban terhadap tanah, termasuk perairan, tumbuh tumbuhan, dan binatang dalam wilayah masyarakat hukum adat tersebut dan sumber daya tersebut menjadi penopang kehidupan dari masyarakat tersebut. Dalam hal ini, terdapat berbagai peraturan perundang-undangan yang menyebabkan masyarakat hukum adat tidak dapat menggunakan hak ulayatnya. Salah satu undang-undang yang membatasi hal tersebut adalah Undang-Undang No. 41 Tahun 1999 tentang Kehutanan.

Pasal 1 angka 6 undang-undang ini mengatur bahwa hutan adalah bagian dari hutan negara yang terletak dalam lingkungan masyarakat

hukum adat. Pengaturan ini setara dengan Pasal 5 ayat (2) yang menyatakan bahwa hutan negara dapat berupa hutan adat. Kedua pasal ini diangap telah meniadakan kewenangan masyarakat adat dalam pengelolaan hutannya atau menunjukkan adanya sentralisasi pengelolaan terhadap hutan adat kepada pemerintah. Hal ini memungkinkan bagi negara untuk memberikan hak atas tanah terhadap tanah ulayat masyarakat hukum adat tanpa meminta persetujuan masyarakat hukum adat terlebih dahulu. Penetapan hutan adat sebagai hutan negara telah dibatalkan dalam Putusan Mahkamah Konstitusi No. 35/PUU-X/2012 dalam pengujian Undang-Undang No. 41 Tahub 1999 tentang Kehutanan.

3) Perlindungan Self determination yang berkaitan dengan aspek politik.

Putusan Mahkamah Konstitusi menunjukkan bahwa kebijakan negara mengenai pelayanan publik belum menyentuh masyarakat hukum adat dan tidak adanya perlindungan bagi masyarakat terkait self determination. Self determination adalah hak masyarakat untuk secara bebas menjalankan hak politiknya, memajukan hak sosial, ekonomi, dan budaya, serta keamanan di dalam memenuhi kebutuhan hidupnya.

Pelanggaran terhadap self determination ini tampak dari perampasan lahan atau wilayah kelola masyarakat hukum adat oleh perusahaan-perusahaan perkebunan dan adanya Undang-Undang No. 18 Tahun 2004 tentang Perkebunan yang telah memungkinkan tindakan pemanfaatan perkebunan oleh masyarakat adat dipidanakan. Hal ini tampak dari ketentuan dalam Pasal 55 Undang-Undang Perkebunan yang mengatur bahwa secara tidak sah dilarang untuk melakukan pengerjaan, penggunaan, pendudukan dan/atau penguasaan lahan perkebunan.

Putusan Mahkamah Konstitusi No. 31/PUU-V/2007 dinyatakan bahwa pasal tersebut bertentangan dengan Undang-Undang Dasar 1945 selama tidak dipahami sebagai tidak termasuk anggota kesatuan masyarakat hukum adat. Hal ini menunjukkan bahwa terjadi pelanggaran atas self determination dari masyarakat hukum adat. Salah satu yang menjadi masalah mengenai Masyarakat hukum adat adalah legal standing masyarakat hukum adat dalam mengajukan gugatan kepada Mahkamah Konstitusi.

Pasal 51 ayat (1) Undang-Undang No. 24 Tahun 2003 tentang Mahkamah Konstitusi telah ditentukan para pihak yang memiliki kewenangan konstitusional yang dirugikan dan dapat mengajukan gugatan ke Mahkamah Konstitusi, yakni: perorangan warga Negara Indonesia; kesatuan masyarakat hukum adat sepanjang masih hidup dan

sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dalam undang-undang; badan hukum publik/privat; dan lembaga negara

Putusan Mahkamah Konstitusi No. 06/PUU-III/200s dan Putusan No. 11/PUU-V/2007, kata mengalami kerugian dalam Pasal 51 ayat (1) dianggap dipenuhi apabila memenuhi beberapa syarat, yakni (1) adanya hak dan/atau kewenangan konstitusional pemohon (masyarakat hukum adat) yang didasarkan pada UUD 1945. Dalam hal ini, haruslah diuraikan kewenangan konstitusional yang dimiliki berdasarkan UUD 1945; (2) masyarakat hukum adat tersebut hak dan/atau kewenangan konstitusionala dirugikan karena berlakunya undang-undang; (3) adanya kerugian hak dan/atau kewenangan konstitusional yang spesifik (khusus) dan aktual atau potensial akan terjadi; (4) terdapat hubungan kausalitas antara kerugian konstitusional dan undang-undang yang diujikan; dan (5) apabila permohonannya dikabulkan maka kerugian hak dan/atau kewenangan konstitusional tidak akan terjadi.

Banyaknya syarat yang harus dipenuhi oleh masyarakat mukum adat untuk melakukan pengujian terhadap undang undang yang merugikan hak dan/atau kewenangan konstitusionalnya, minimnya pengetahuan masyarakat hukum adat mengenai hukum acara di Mahkamah Konstitusi dan sulitnya pengakuan masyarakat hukum adat oleh pemerintah daerah tentu akan menghalangi masyarakat hukum adat untuk mengajukan gugatan apabila hak dan/ atau kewenangan konstitusionalnya dirugikan.

Berdasarkan data yang dirilis oleh Badan Pusat Statistik pada tahun 2022, sebanyak 26,36 juta jiwa dari penduduk Indonesia yang hidup di bawah garis kemiskinan hidup di daerah pantai dan pedesaan. Di tengah kemiskinan dan pendidikan yang rendah, masyarakat adat dalam melakukan kewajibannya, terutama di dalam melakukan penangkapan ikan di wilayah pesisir sebagai suatu pekerjaan yang telah dilakukan secara turun-temurun saat ini harus dilakukan berdasarkan izin lokasi.

Pasal 20 undang-undang ini diatur bahwa masyarakat adat wajib untuk mengurus izin lokasi dan izin pengelolaan dalam melakukan pemanfaatan terhadap wilayah pesisir walaupun pemerintah dan pemerintah daerah wajib memfasilitasi pemberian izin lokasi dan izin pengelolaan kepada masyarakat adat. Berkaitan dengan hal ini, walaupun difasilitasi, tetapi masyarakat adat harus melakukan pengurusan berkas-berkas administrasi padahal masyarakat adat memiliki tingkat ekonomi yang rendah, pendidikan yang minim, ketidak mampuan berkomunikasi dalam bahasa Indonesia serta akses yang jauh bagi masyarakat adat dalam melakukan pengurusan

administrasi. Hal ini tentu akan menghalangi masyarakat tradisional dalam melakukan pengurusan izin lokasi dan izin pengelolaan.

Di satu sisi, masyarakat adat tidak dapat melakukan aktivitasnya yang telah dilakukan secara turun-temurun apabila tidak memiliki izin lokasi dan izin pengelolaan. Hal ini disebabkan pada pasal 75 undang-undang ini diatur bahwa apabila seseorang termasuk masyarakat tradisional melakukan kegiatan pemanfaatan di perairan pesisir tanpa izin lokasi akan diancam dengan pidana penjara maksimal tiga tahun dan denda paling banyak lima ratus juta rupiah.

Apabila masyarakat adat tersebut tidak memiliki izin pengelolaan dalam melakukan kegiatan produksi garam, biofarmakologi laut, bioteknologi laut, pemanfaatan air laut selain energi, wisata bahari, pemasangan pipa dan kabel bawah laut, serta pengangkatan benda muatan kapala tenggelam maka masyarakat adat tersebut diancam dengan hukuman penjara selama empat tahun dan denda maksimum mencapai dua miliar rupiah.

Adanya kewajiban bagi masyarakat adat untuk memiliki izin lokasi dan izin pengelolaan akan memberatkan masyarakat adat di pantai. Padahal secara teoretis masyarakat adat yang hidup dalam kemiskinan dan pendidikan yang rendah sudah sepatutnya diberikan kemudahan dan dilindungi aktivitasnya dalam melakukan kegiatan di wilayah pesisir. Apalagi masyarakat adat adalah masyarakat yang memiliki budaya yang bersifat turun-temurun yang perlu dilindungi serta kosmologi yang berbeda mengenai wilayah pesisir dan lautan dari masyarakat pada umumnya. sehingga, dapat disimpulkan perlu perlindungan dan kemudahan bagi masyarakat hukum adat dalam melakukan kegiatannya di wilayah pesisir.

Kewajiban negara dalam memberikan perlindungan terhadap masyarakat hukum adat berhubungan dengan bentuk negara Indonesia sebagai negara kesejahteraan. Pembukaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945) dinyatakan bahwa tujuan negara adalah memajukan kesejahteraan umum, mencerdaskan kehidupan bangsa dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi, dan keadilan sosial. Kesejahteraan sebagai salah satu tujuan negara dapat dicapai melalui perwujudan keadilan sosial sebagain landasan utama penyelenggaraan negara.

Hubungan antara keadilan sosial dalam Pancasila dan kesejahteraan memang sangat erat bahkan Kaduanya menyatakan bahwa keadilan sosiala adalah *core values* dari negara kesejahteraan, sehingga mewujudkan kesejahtera rakyat haruslah melalui keadilan.

Keadilan sosial dapat didefinisikan sebagai keadilan yang pelaksanaannya bergantung pada struktur proses-proses ekonomi, politis, sosial, budaya, dan ideologis. Struktur-struktur itu merupakan struktur-struktur kekuasaan dalam dimensi- dimensi utama kehidupan masyarakat. Mengusahakan keadilan sosial sama halnya mengubah atau membongkar struktur-struktur ekonomis politis, budaya, dan ideologis yang menyebabkan segolongan orang tidak dapat memperoleh apa yang menjadi hak mereka.

Merubah struktur ekonomi dan mekanisme pendistribusian yang tidak adil maka perlu diperhatikan kepentingan terhadap yang lemah. perlindungan terhadap yang lemah ini merupakan bagian dari keadilan sosial. Berkaitan dengan hal ini, Franz Magnis Suseno menyatakan bahwa negara bukanlah institusi yang netral. Negara harus melakukan keberpihakan kepada golongan ekonomi lemah untuk mengatasi kemiskinan. Sehingga, keadilan dapat dimaknai sebagai penciptaan struktur sosial yang adil, mekanisme nendistribusian yang adil, dan perhatian terhadap yang lemah. Guna mewujudkan keadilan sosial maka pemerintah memiliki dua kewajiban utama, yaitu memajukan kemakmuran sosial bagi semua rakyat dan menjamin tingkat kemakmuran dasar bagi setiap orang.

Peran aktif negara dalam mewujudkan keadilan sosial guna menciptakan kesejahteraan rakyat ini menunjukkan bahwa Indonesia adalah negara kesejahteraan (*welfare state*). kesejahteraan dapat dirumuskan baik secara negatif dan positif. Secara negatif manusia disebut sejahtera bila dari rasa lapar dan kemiskinan, dari kecemasan akan hari esok, bebas dari rasa takut, dari penindasan dan perlakuan yang tidak adil. Secara positif, manusia dapat disejahterakan apabila dapat hidup sesuai dengan cita-cita dan nilai-nilanya sendiri. Berkaitan dengan hal itu maka dalam menciptakan kesejahteraan umum nilai-nilai moral masyarakat haruslah didukung dan dilindungi melalui penciptaan kondisi yang memungkinkan pengembangan nilai-nilai tersebut. kesejahteraan umum adalah keseluruhan prasyarat prasyarat sosial yang memungkinkan atau mempermudah manusia untuk mengembangkan semua nilainya.

Pembangunan ekonomi haruslah dipandang sebagai pencegahan terjadinya kemiskinan dan perbaikan terhadap akses sumber daya. kebijakan pembangunan ekonomi dan sosial yang didasarkan atas ketentuan Pasal-Pasal 28, Pasal 32, Pasal 33 dan Pasal 34 UUD NRI 1945 akan menciptakan kesejahteraan sosial. Pasal 33 ayat (3) UUD NRI 1945 diatur bahwa tujuan nengelolaan bumi, air, dan ruang angkasa adalah untuk sebesar-besarnya untuk kemakmuran rakyat. Substansi Pasal 33 ayat (3) UUD 1945 tersebut seharusnya mendasari

semua kebijakan di bidang agraria. Semua peraturan perundang undangan dan kebijakan haruslah mengandung penciptaan struktur sosial yang adil, mekanisme pendistribusian yang adil, dan solidaritas terhadap yang lemah sebagai unsur dari keadilan sosial guna mewujudkan kesejahteraan rakyat sebagai tujuan dari negara kesejahteraan.

4. Conclusion

Perlindungan kepada masyarakat adat merupakan upaya pemenuhan hak-hak masyarakat adat. Tujuan intervensi pemerintah adalah memberikan perlindungan hukum kepada masyarakat adat dan tidak memaksa masyarakat adat untuk masuk dalam sebuah sistem yang sangat rasional, sistematis, dan mempersulit masyarakat adat. Bentuk paradigma positivisme dapat dipahami bahwa tidak terdapat ruang penafsirana bagi para penegak hukum. Epsitemologi paradigma positivisme mendasari metodologi eksperimental/manipulatif yang bermakna para penegak hukum dalam menjalankan perannya hanya melakukan verifikasi fakta hukum terhadap peraturan perundang-undangan. Penggunaan paradigma positivisme pemerintah dalam menangani masyarakat hukum adat menimbulkan tiga kesenjangan antara hukum adat dan hukum nasional yaitu: kesenjangan konsep, kesenjangan kesadaran dan kesenjangan fungsi konsep mengarahkan masyarakat untuk bertindak dalam pola tertentu guna mencapai *maximum of human interest* dengan minimum friksi dan hal-hal yang tidak perlu. Hal ini berbeda dengan masyarakat hukum adat yang cenderung statis dan menghendaki adanya *status quo* untuk memelihara tradisi yang telah berlangsung secara turun-temurun. Tiga perlindungan masyarakat hukum adat yaitu: masalah *identification*, masalah relasi dan masalah *Self determination* yang berkaitan dengan aspek politik. kewajiban negara dalam memberikan perlindungan hukum terhadap masyarakat adat bertalian dengan bentuk negara kesejahteraan. Kesejahteraan sebagai salah satu tujuan negara dapat dicapai melalui perwujudan keadilan sosial Keadilan sosial dapat didefinisikan sebagai keadilan yang pelaksanaannya bergantung pada struktur proses-proses ekonomi, politis, sosial, budaya, dan ideologis. Merubah struktur ekonomi dan mekanisme pendistribusian yang tidak adil maka perlu diperhatikan kepentingan terhadap yang lemah. Perlindungan terhadap yang lemah ini merupakan bagian dari keadilan sosial. Pembangunan ekonomi haruslah dipandang sebagai pencegahan terjadinya kemiskinan dan perbaikan terhadap akses sumber daya kebijakan pembangunan ekonomi dan sosial. Semua peraturan perundang undangan dan kebijakan haruslah mengandung penciptaan struktur

sosial yang adil, mekanisme pendistribusian yang adil dan solidaritas terhadap yang lemah sebagai unsur dari keadilan sosial guna mewujudkan perlindungan hukum masyarakat adat.

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The Rights Of Indigenous Peoples: a Comparative Study the 1945 Constitution and The United Nations Declaration

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Abstrak

Tulisan ini mencoba mengevaluasi dan menjelaskan hak-hak adat istiadat masyarakat dalam UUD NRI tahun 1945 UUD dan dalam Deklarasi PBB tentang Hak-Hak Bea Cukai Masyarakat. Penelitian bersifat normatif dan dilakukan dengan menggunakan bahan dan hukum yang relevan untuk teori-teori yang diangkat dalam penelitian ini. Temuan penelitian ini menunjukkan bahwa suku-suku asli tertentu menggunakan konstitusi pasal 18 b ayat 2 dan deklarasi PBB menghormati hak secara berbeda. Hak adat dalam Deklarasi PBB hanya dapat dilakukan jika UUD 1945 juga mengatur tentang masyarakat adat. Hukum adat tidak ada. Memungkinkan pemerintah Republik Indonesia untuk menyusun konvensi yang menggabungkan perspektif masyarakat adat dan hukum adat. Itu bisa digunakan sebagai pribumi.

Kata kunci: Deklarasi PBB , Hak, Masyarakat Adat, UUD 1945

Abstract

This paper tries to evaluate and explain the rights of the community customs in the UUD NRI 1945 year constitution and in the UN Declaration on the Rights of the Community Customs. The research is normative and was conducted using the relevant materials and laws for the theories raised in this research. The findings of this research show that certain indigenous tribes use the constitution's article 18 b verse 2 and the un declaration respecting rights differently. Customary rights in the United Nations Declaration can be made only if the constitution nri years 1945 additionally regulates indigenous community. Indigenous law does not exist. Allow the government of the Republic of Indonesia to draft a convention that incorporates indigenous peoples' perspectives and customary law. That can be used as indigenous.

Keywords: United Nations Declaration, Rights, Indigenous Peoples, UUD 1945

1. Introduction

Indigenous peoples' rights are inherent rights of everyone as indigenous

peoples or as stakeholders of rights and obligations, as well as a manifestation of human rights in general (Patittingi, 2012). Indigenous peoples who dwell in a certain place and have customary laws that serve as guides and foundations for their existence. Indigenous peoples' rights in question include environmental management and utilization rights, spiritual rights, economic, social, and cultural rights, and a variety of other rights (Sabardi, 2014).

The Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries was founded in 1989 (Muhdar & Jasmaniar, 2020). The Distinctive Contributions of Indigenous and Tribal Peoples to the Cultural Diversity and Social and Ecological Harmony of Humankind are stated in mukaddimah, and hence their basic rights must be realized. Unlike previous treaties, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries is founded on the fundamental premise that indigenous peoples have the freedom to govern their own cultural development. The government is required to fulfill two obligations:

1. Ensure the participation of affected communities in all indigenous peoples development processes.
2. The convention ensures indigenous peoples' rights to define for themselves their own development goals and to monitor their own economic, social, and cultural development in any development process that would influence their distinctive features and traits.

The Convention also requires governments to respect the cultural elements and values of the people who use the land, territory, or both, particularly the collectivity aspect of the connection. There had lived and evolved sovereign socio-political units before the concept of a royal state or sultanate was known in all corners of the archipelago (part of which became Indonesian territory). They rule and care for themselves autonomously, as well as manage the land and other natural resources in their own ecosystems (Nugroho, 2016).

These societies have evolved rules (laws) as well as institutional systems (political / governmental systems) to maintain balance between community citizens and the surrounding nature (Nugroho, 2014). This group of people who live based on the ancestors' origins is known globally as indigenous peoples, and in Indonesia is known by various mentions with their respective meanings such as indigenous people, indigenous people, and indigenous people generally have differences between one community and another community around it. This diversity of local systems is frequently seen within a single tribe

or ethnicity, or even within the same sub-tribe, which also possesses an indigenous language and belief system.

2. Methods

Normative research was used, which is research conducted by gathering legal materials pertinent to the difficulties stated in this study. Literature research is an endeavor to further investigate and investigate a topic by studying relevant legal norms or doctrines in order to uncover rules that have different meanings from other norms.

3. Discussions

The origins of UNDRIP can be traced back to Augusto Wiliemsen Diaz, a UN Human Rights official in Geneva. Augusto emphasized the necessity of indigenous peoples' rights being recognized in UN institutions. The campaign for this declaration began in 1982, when the Working Group on Indigenous Populations (WGIP) was founded and the Declaration was produced. The proposal was worked on for 11 years before being submitted to the Sub-Commission in 1993. In 2006, the proposal was presented to the UN Human Rights Commission. The UN Human Rights Commission established the Working Group on the Draft Declaration of Human Rights (WGDD).

The United Nations Declaration on the Rights of Indigenous Peoples was adopted on September 13, 2007 by the United Nations General Assembly in New York. The Declaration addresses indigenous peoples' individual and communal rights, as well as their rights to culture, identity, language, work, health, and education, among other things. The Declaration also emphasizes their right to preserve and strengthen their institutions, cultures, and traditions, as well as their right to development in order to meet their needs and ambitions. It also forbids discrimination against indigenous peoples and encourages their full and effective participation in all areas relating to their difficulties, as well as their right to remain distinct and pursue their own vision of economic and social development.

The Declaration is made up of 46 articles. The United Nations General Assembly formulated 24 fundamental considerations. The following is the rationale behind these considerations:

1. Adhere to the aims and principles of the United Nations Charter and have a solid belief in the fulfillment of the commitments assumed by States under the charter.
2. Reaffirm indigenous peoples' equality with all other peoples, while also recognizing everyone's right to be different, to view themselves as distinct, and to be appreciated for their differences.

3. Reaffirm that all groups of people contribute to the diversity and depth of civilization and culture, which is humanity's collective legacy.
4. Affirms that all doctrines, policies, and practices based on or promoting the superiority of a community group or individuals on the basis of community origin, racial, religious, ethnic, or cultural differences are racist, scientifically flawed, legally incorrect, morally repugnant, and socially unjust.
5. Reaffirms that indigenous peoples must be free of all types of discrimination when exercising their rights.
6. Recognizing that indigenous peoples have a history of injustice as a result of, among other things, colonization and the confiscation of their lands, territories, and resources, preventing them from exercising their rights to development in accordance with their needs and interests.
7. Indigenous peoples' inherent rights, derived from their political, economic, social, and cultural systems, religious traditions, histories, and philosophies, particularly their rights to lands, territories, and resources.
8. Recognizing the critical need of respecting and promoting indigenous peoples' rights as acknowledged in constructive treaties, agreements, and arrangements with states.
9. Applauds indigenous peoples for banding together to enhance their political, economic, social, and cultural standing, as well as to put an end to all types of discrimination and injustice that exist everywhere.
10. Convinced that indigenous peoples' sovereignty over development impacting them and their lands, territories, and natural resources will allow them to conserve and strengthen their institutions, cultures, and traditions, as well as encourage development that is in line with their aspirations and needs.
11. Recognizing that respect for traditional indigenous knowledge, culture, and customs contributes to sustainable and equitable development, as well as effective environmental management.
12. Highlight the contribution of military occupation of indigenous peoples' lands and territories to peace, economic and social growth and development, mutual understanding, and friendly ties among peoples and around the world.
13. Recognizing, in particular, indigenous families' and communities' right to preserve shared responsibility for their children's care, training, education, and welfare in accordance with the rights of the child,

14. Recognizing that the rights asserted in treaties, agreements, and other constructive arrangements between states and indigenous peoples are a source of concern, responsibility, and international engagement in some circumstances.
15. Recognizing that treaties, accords, and other constructive determinations, as well as the relationships they reflect, form the foundation for the recognition of indigenous peoples and states cooperating.
16. Recognizing that the United Nations Charter, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, all affirm the fundamental importance of the right of self-determination for all groups of peoples, on the basis of which they are free to determine their political status and free to pursue economic development, social and cultural development, and human rights.
17. Ensure that nothing in this Declaration can be used to deny the rights of any group of peoples to exercise their right to self-determination in accordance with international law.
18. Believes that the acknowledgement of indigenous peoples' rights in this Declaration would foster concord and constructive relations between states and indigenous peoples, based on the values of justice, democracy, human rights respect, non-discrimination, and trustworthiness.
19. Encourage states, through consultation and collaboration with indigenous peoples, to comply with and effectively execute all duties applicable to indigenous peoples under international agreements, particularly those relating to human rights.
20. Reaffirms the United Nations' vital and ongoing responsibility in promoting and preserving indigenous peoples' rights.
21. Considers this Declaration to be an essential step forward in the context of the recognition, promotion, and preservation of indigenous peoples' rights and freedoms, as well as the development of relevant United Nations initiatives in this area.
22. Recognize and reaffirm that indigenous peoples are recognized, without difference, in all human rights recognized in international law, and that indigenous peoples have collective rights that are essential to their life and existence as a community.
23. Recognizing that the condition of indigenous peoples varies by location and country, and that different national and regional

particular histories and cultural backgrounds should be considered.

24. Solemnly proclaims the United Nations Declaration on the Rights of Indigenous Peoples as a goal to be met in a spirit of cooperation and mutual respect.

According to the Declaration, specialized organs and agencies of the United Nations system, as well as other international organizations, shall contribute to the full fulfilment of the principles of this Declaration by mobilization, including financial cooperation and technical assistance.

Human rights and basic freedoms must be respected when exercising the rights outlined in this proclamation. The exercise of the rights enshrined in this declaration shall be limited to the constraints imposed by law, in compliance with international human rights commitments. Such constraints, however, must not be discriminatory and must only be aimed at ensuring the acknowledgment and respect of others' rights and freedoms, as well as fostering fair and beneficial conditions for a democratic society.

This statement also includes the procedures that a government must take to implement the item. These countries' commitments are as follows:

1. Article 8
   Indigenous peoples and their peoples have the right not to be subjected to forced cultural mixing or cultural destruction.
   The State's Initiatives
   a. States must establish effective systems to prevent and compensate for the following:
   1) Any act that serves a purpose or resulting in the loss of a person's integrity as a distinct group of people, cultural values, or ethnic identity.
   2) Any act aimed at or resulting in the loss of their rights to their land, territory, or resources.
   3) Any form of population transfer with the intent or effect of violating or weakening their rights.
   4) Any sort of forceful cultural blending or merging with other civilizations.
   5) Any sort of propaganda that encourages or incites racial or ethnic hostility directed directly at them.
2. Article 11
   Indigenous peoples have the right to practice and revitalize their cultural practices. This includes the right to preserve, protect,

and develop their past, present, and future forms of culture. Steps taken by the state States shall undertake remedies, including restitution, with respect for indigenous peoples' cultural, intellectual, religious, and spiritual property that has been taken without their free and conscious consent or that violates their laws, traditions, and customs.

3. Article 12
   Indigenous peoples have the right to realize, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies, as well as the right to preserve, protect, and freely access their religious and cultural sites, the right to use and control over their ceremonial objects, and the right to have their human remains repatriated.
   The state has taken action.
   States will seek access to and/or return ceremonial artefacts and burial sites to indigenous peoples through transparent and effective methods created in response to the concerns of the indigenous peoples involved.
4. Article 15
   Indigenous peoples have the right to have their cultures, traditions, histories, and ambitions respected and reflected in all forms of education and public information.
   States shall adopt effective efforts, in conjunction with the indigenous peoples involved, to combat prejudice and eliminate discrimination, as well as to foster tolerance, mutual understanding, and good relations between indigenous peoples and all other parts of society.
5. Article 21
   Indigenous peoples have the right to better their economic and social situations, including education, employment, training, vocational education, housing, cleanliness, health, and social security, without discrimination.
   States must take effective measures and, if required, extraordinary measures to ensure that their economic and social conditions continue to improve. The elderly, women, young people, children, and the undocumented will be given special consideration.
6. Article 26
   Indigenous peoples have rights to lands, territories, and resources that they have historically owned or occupied, as well as lands, territories, and resources that they have used or acquired. The state's initiatives Such lands, territories, and

resources shall be legally recognized and protected by the State. Such acknowledgement must be made in accordance with the sacrifice of indigenous peoples' cultures, traditions, and land tenure systems.

Based on the foregoing, the author can state:

1. In general, the United Nations Declaration on Indigenous Peoples calls for the legal preservation and fulfillment of indigenous peoples' rights as part of human rights.
2. The phrase "indigenous peoples" is used only once in this declaration, not "indigenous peoples."
3. Every country must carry out all of the provisions of the Declaration.

Human rights are not new in Indonesia, a country born of hundreds of years of colonialism. As a result, the Indonesian people have a thorough understanding of the meaning and nature of human rights. As evidence, the preamble of the NRI Constitution of 1945 declares a determination to eradicate colonialism from the earth's surface because it is incompatible with humanity and justice. As a result, Indonesia is dedicated to realizing and safeguarding human rights. The Universal Declaration of Indigenous Peoples is a supplement to the Universal Declaration of Human Rights.

Article 33 paragraph 3 of the NRI Constitution of 1945 clearly illustrates the acknowledgment that the law of the state is supreme and all other laws are inferior to the law of the state. The article establishes the state as the sole actor in natural resource management in Indonesia. For more than three decades, the New Order regime, in particular, has actively twisted the fundamental meaning of the concept of control and usage of natural resources as referred to in the 1945 NRI Constitution. There are two major points to consider:

1. The New Order regime interpreted state terms narrowly and uniformly. The government and the people are the main components of the state, but during the New Order rule, the state was interpreted primarily as aa government (government). Neither as a people nor as a government. As a result, instead of the paradigm of state-based resource management intended by article 33 paragraph 3 of the NRI Constitution of 1945, a paradigm of government-dominated natural resource management was formed (government-dominated resource management).
2. As a result, in the practice of state management as described above, the people are not equal to the position of the government,

because a connection is established that sets the people as inferior and the government as superior.

Based on these two factors, the marginalized indigenous peoples' position will respond to resistance, causing the conflict to escalate. Legal development plans aimed at attaining legal unification in order to establish national law as the only law that applies to all residents across Indonesia, on the other hand, tend to neglect legal systems that exist in society. There is significant legal plurality as well as weak legal pluralism. Strong legal pluralism is the result of social scientists, in this instance scientific findings regarding the fact that there is a plurality of legal regimes that exist in all sections of society, and there is no hierarchy that shows one legal system is higher than the law of another.

According to Article 33 of the NRI Constitution of 1945, "the State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the unitary state principles of the Republic of Indonesia, which are stipulated in law."

1. Indigenous Peoples
   The fact that the article only applies to indigenous peoples distinguishes it from the UN Declaration, which only applies to indigenous peoples.
2. For the Rest of Your Life
   Making observations from the outside as well as the inside, by delving into the feelings of the local community (participatory approach).
3. In accordance with societal development
   This circumstance has the potential to impose significant interests in the name of "community development." It does not allow for the dynamics of the local population to be freely processed.
4. In compliance with the Republic of Indonesia's Principles
   This worldview has evolved through time to regard the Republic of Indonesia and indigenous peoples as two distinct and face-to-face antiquities.
5. Legally mandated
   Indonesia is a law-based country; if everything in such a country is left to the law, daily life will be unproductive. The law that constantly attempts to regulate its own area and believes it is capable of doing so has failed (if other social phenomena are not involved).

Several laws govern these customary law groups as a result of the execution of article 18 b paragraph 2 of the NRI Constitution of

1945, including the following:

1. Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles.
   The existence of indigenous peoples, as well as their legal values and standards, is recognized in Law No. 5 of 1960, often known as UUPA. The occurrence of legal dualism in the control of national land law, namely the existence of territories subject to Western law and lands subject to customary law, prompted the formation of UUPA. The UUPA was adopted to eradicate dualism in Indonesian land law, resulting in the creation of a national land law.

   Because the UUPA is the embodiment of article 33 paragraph 3 of the NRI Constitution of 1945, the concept of agrarian is understood not only in the form of land alone, but also in a broad sense, namely agrarian is understood as earth, water, and space (BARA).

   Article 3 of the UUPA expressly recognizes the adoption of the concept of customary law, stating:

   Keeping in mind the provisions of articles 1 and 2, the exercise of indigenous peoples' customary rights and similar rights, to the extent that they exist, shall be in accordance with national and state interests based on national unity and shall not conflict with other higher laws and regulations.

   Article 5 of the UUPA declares that the law that applies to earth, water, and space is customary law as long as it does not contradict with national and state interests. The application of customary law notions to natural resource management is a significant step forward in Indonesian law.

2. Law No. 6 of 2014 concerning Village Government
   Law No. 6 of 2104 relating to village government, which was previously governed by the Law. NO. 5 of 1979 established a national template for the form and structure of village governance. The New Order administration forced regions with distinct features to undergo a process of homogenization. In light of section b of the statute, it is stated:

   In accordance with the nature of the Unitary State of the Republic of Indonesia, the position of village governments is as uniform as possible, taking into account the diversity of village conditions and the provisions of customs that are still in force to strengthen village government in order to be more capable of mobilizing the community in their participation in development and

carrying out increasingly widespread and effective village administration.

The fundamental goal of this law can be observed in general explanation number 4, which is consistency of the form and structure of village administration with a national pattern that assures the achievement of pancasila democracy in actuality. Despite the diversity of indigenous peoples and indigenous governments, the law ensured national consistency of government at the village level. According to this rule, everything within the municipality is referred to as kelurahan, whereas everything outside the municipality is referred to as a village. The goal of this law is to unify the bottom-tier government under the sub-district level.

As a result of this law, village-level governance systems in diverse regions were converted into a uniform village structure that served as a model of community organizing according to the Java system.

The village is an area occupied by a number of residents who have the lowest government organization directly under the sub-district has the right to manage their houses in the historical development of statehood and governance till now. Sociologically and philosophically, the legislation does not take into account the reality that Indonesian society is plural, although Hazairin in Nurul Firmansyah claims that:

These customary law peoples laid the groundwork for indigenous kingdoms, colonial powers, and the Republic of Indonesia. The kingdoms' power may be lost, colonial power may fall, and the unitary state of the republic of Indonesia may be obliterated, but the peoples of customary law will live on. It is apparent that customary law peoples are more ingrained above the authority of the homeland. As a result, the Republic of Indonesia has an obligation to preserve, nourish, and remember the countryside.

3. Law No. 2 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law No. 2 of 2014 concerning Amendments to Law No. 23 of 2014 concerning Local Government into Law and Amendments to Law No. 32 of 2004 concerning Regional Government.

Since independence, the concept of autonomy has been proposed as an alternative to the selection of a federal state. At the time of the 1945 Constitution's development, autonomy was one of the topics under consideration. The village is a legal community unit that has

territorial boundaries that are authorized to regulate and take care of the interests of the local community, based on local origins and customs that are recognized and respected in the government system of the Republic of Indonesia, according to Law No. 32 of 2004 concerning local government.

With the passage of Law No. 2 of 2015 amending Law No. 23 of 2014 concerning regional governance, which contains restrictions on village autonomy, there is hope for the empowerment of regions, particularly the existence of customary law communities. The autonomy of the village shall be returned to its beginnings, namely the customary government, as required. This is one of the driving forces for the growth of customary law.

The presence of indigenous peoples is not explicitly stated in Law No. 2 of 2015, which amends Law No. 23 of 2014 on local governance. The general provisions of Law No. 23 of 2014, article 1, explain that villages are legal community units with territorial boundaries that are authorized to regulate and manage Government Affairs, the interests of local communities based on community initiatives, rights of origin and / or traditional rights that are recognized and respected in the government system of the country.

4. Law No. 19 of 2004 concerning Forestry Amendments to Law No. 41 of 1999 concerning Forestry.
   The existence of customary law communities is likewise regulated by Law No. 41 of 1999 on forestry, as stated in article 67 paragraph 1 which specifies that the presence of customary law communities meets the following elements:
   1) The community still exists as a community (rechtgemenschap).
   2) An institution exists in the shape of traditional mastering tools.
   3) A clear customary jurisdiction exists.
   4) There are institutions and legal mechanisms that are still followed, particularly customary courts.
   5) Collect forest items in the nearby woodland region to supplement their everyday life.

The following factors are used to determine the presence or absence of customary rights linked with the existence of customary rights:

1) The presence of customary law communities that meet specific criteria as customary law subjects.

2) The presence of land/areas with defined borders as living space (lebensraum), the subject of customary rights.

3) The existence of local government control over land, other natural resources, and legal acts.

5. Law No. 39 of 1999 concerning Human Rights (HAM).
   The presence of customary law communities in connection to the protection of indigenous peoples' human rights is enshrined in Human Rights Law No. 39 of 1999. Article 6 of legislation No. 39 of 1999 stipulates that:
   1) In order to safeguard human rights, indigenous peoples' distinctions and needs must be observed and protected by legislation, communities, and governments.
   2) Customary law communities' cultural identities, including customary land rights, are safeguarded in accordance with the times.

   The implementation of development must take into account indigenous peoples' land tenure rights over their customary land. In essence, the community is not opposed to development, but what must be done is to implement the principle of Prior informed consent for customary law communities whose customary territory will be used for development purposes.

6. Law No. 26 of 2007 concerning Spatial Planning on Amendments to Law No. 24 of 1992 concerning Spatial Planning.
   This privilege is founded on statutory provisions or applicable customary and common law.

   Appropriate compensation is given to aggrieved persons as holders of land rights, natural resource management rights, such as forests, mines, excavated materials or space that can prove directly disadvantaged as a result of the implementation of development activities in accordance with spatial planning as a result of spatial planning. This right is based on statutory provisions or on the basis of applicable customary and customary law.

   The statutory basis for the enactment of colonial-era customary law that is still in effect today is 131 paragraph 2 sub b IS. There are two critical points based on these provisions:
   1) The provision is a codification item, which means it comprises a legislative duty according to IS. Ordinance makers will codify private law for indigenous Indonesian and foreign eastern law groups. The law that will be codified is their customary law, which will be altered if possible.
   2) As long as the redaction of article 131 paragraph 2 sub b of IS is in effect, which it has been since January 1, 1920

(between January 1, 1920 and January 1, 1926, the redaction of article 131 IS applies as a new redaction of article 75 RR 1854), the codification ordered to the ordinance maker has not yet occurred. Article 131 IS solely mentions legislative duties in this regard.

In this regard, article 131 paragraph 6 IS specifies the role of the judge in resolving private cases involving native Indonesians. According to IS Article 131 paragraph 6, both civil and commercial law now apply to both types of law. So, as long as there is no codification for the two groups, customary law will continue to apply, as determined by article 75 paragraph 3 of the old redaction of RR 1854 before to January 1, 1920. The codification required by article 131 paragraph 2 sub b IS has yet to be completed. As a result, the rule is still in effect.

Based on the existence of customary law communities governed by sharing laws and regulations, as described above, the theories of agreement and implementation are employed as the theoretical foundation for this study. Despite the fact that the Declaration comprises general and formal provisions, the parties agree to exercise some discretion in the future. As a result of the declaration, Indonesia, as a United Nations member state, enacts laws and regulations that safeguard indigenous peoples.

Based on the foregoing, the author can deduce:

1. The phrase "customary law communities" rather than "indigenous peoples" is used to describe the rule of law in Indonesia, both in the NRI Constitution of 1945 and in its regulations.
2. As a result, customary law peoples are further controlled in Indonesia in order to preserve and recognize their rights.
3. The rule of law in Indonesia differs from the UN Declaration in terms of the protection and realization of indigenous peoples' rights.

4. Conclusion

The use of the phrase for the unity of specific groups, particularly indigenous peoples, differs between the UN Declaration on the Rights of Indigenous Peoples and Article 18 B, paragraph 2 of the NRI Constitution of 1945. The UN Declaration on the Rights of Indigenous Peoples can only be proclaimed if the NRI Constitution of 1945 also regulates indigenous peoples, not customary law communities. The government of the Republic of Indonesia must draft a constitutional convention that incorporates indigenous and customary law peoples' common perceptions. Is it possible to use the phrase indigenous peoples as defined in the United Nations Declaration

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