

## Urgency of Legal Indigenous Communities' Position in Indonesian Constitutional System

Jaja Ahmad Jayus

Faculty of Law, Universitas Pasundan Bandung, Indonesia. E-mail: [jayus\\_ahmad@yahoo.co.id](mailto:jayus_ahmad@yahoo.co.id)

---

### ARTICLE INFO

**Keywords:**

customary law  
community; regulations;  
protection

**How to cite:**

Jayus, J. A. (2020).  
Urgency of Legal  
Indigenous Communities'  
Position in Indonesian  
Constitutional System.  
JURNAL MEDIA  
HUKUM, (27)1, 79-98.

**Article History:**

Received: 18-05-2020  
Reviewed: 20-06-2020  
Revised: 26-06-2020  
Accepted: 29-06-2020

### ABSTRACT

Customary law community or Masyarakat Hukum Adat (MHA) in Indonesia has their own uniqueness and peculiarity in establishing relationships with the people and the surrounding environment. Along with the development of the era, the MHA experienced the complexity of the conflict of interest on the land tenure for business purposes or Right to Cultivate (Hak Guna Usaha) in the civil sphere, as well as conflicts within the scope of criminal law. The research analyzes legal indigenous communities' position in the protection of normative law. The method used is normative or doctrinal law research that leans to a qualitative (non-numeric) based on secondary data which is analyzed qualitatively. Recognition and protection of the MHA in Indonesia is experiencing an uneasy phase. Since the independence of Indonesia the existence of MHA has only received adequate portions in the era of reformation with the Amendment of the Constitution 1945, enshrined in the Article 18b Paragraph 2 and Article 28i Paragraph 3, eight laws, and at least 22 (twenty two) regulations of the region either in the province, or regency/city, or decree of the local head of the area that recognizes the existence of the Communities. Nevertheless, the upper position of the MHA is felt not to provide maximum assurance and protection for the Communities. The Indonesian House of Representatives (DPR) through the right of initiative encourages the draft law on MHA which currently becomes a national legislation program and become a priority in 2020 in providing recognition, protection, and empowerment of MHA. With the initiatives of the Bill, it is expected that the problems experienced by indigenous peoples are reduced drastically.

**DOI: 10.18196/jmh.20200144**

Copyright © 2020 JURNAL MEDIA HUKUM. All rights reserved.

---

### 1. Introduction

Customary law community (MHA) is defined as a group of people who live hereditary in the form of bonds of ancestral origins and/or the similarities of housing in certain geographical areas, cultural identity, customary law still observed, strong relationships with land and the environment, and value systems that determine economic, political,

social, cultural, and legal. MHA becomes an integral part of the long history of the Indonesian nation with cultural diversity, and customs in Indonesia.<sup>1</sup>

The custom is sourced from the Arabic "*Aadah*"<sup>2</sup> which means habit. Customs have similarities to customs and both have the same meaning. Customs is a system of conduct in the life of a community that is hereditary from generation to another as an inheritance in forming patterns of relationships and interactions among individuals in society as well as the legal order among them (customary law). It is simple to say the existence of customs and customary law in accordance with human journey in society.

Human life that is always dynamic and changing as it cannot be separated by change and development. It is also experienced by MHA which often pose problems because MHA which occupies a certain region recorded over 714 tribes and 1,100 regional languages divided in 19 indigenous environments as depicted by B. Ter Haar and Van Vollenhoven. The problem involves not only their own but also with other parties such as government and private sector.

From the entire indigenous peoples throughout Indonesia, an estimated 30 to 50 million are indigenous peoples whose lives are still dependent on forests, a unity of ecosystems in the form of land expanses of natural resources dominated by trees in the natural fellowship of the environment, one with the other is inseparable.<sup>3</sup> The large amount is affected by the development of a particularly degraded land for exploration of natural resources and or plantations.

Implementation of development in Indonesia, during this time, has been a lot of impact on the rights of indigenous peoples, so that there are some people rights are collectively not fulfilled.<sup>4</sup> The most noticeable impact is land disputes and land tenure of forest areas within civil sphere, as well as conflicts that lead to the scope of criminal law. Based on data from Komnas HAM (The National Commission on Human Rights) in the last five years, public complaints to the Commission shows that agrarian conflicts are becoming so fundamental problems and urgent settlement. The conflict area reaches 2,713,369 hectares and spreads across 33 provinces in various sectors. Recorded, 42.3% or 48.8 million village souls are in forest areas.<sup>5</sup>

One factor, according to the Ministry of Environment and Forestry that could favor the community in agrarian conflict is an evidence of customary land. It was said concerning cases of agrarian conflicts in forest areas that often occur between indigenous peoples and corporations. It mentions that there are two solutions to this problem.<sup>6</sup> One of the latest cases beginning in 2020 is the indigenous Pubabu people who have been settled in Pubabu or Besipae, Linamnutu Village, South Amanuban Sub

---

<sup>1</sup> Bill of Legal Indigenous Communities

<sup>2</sup> Dijk, R.V. (1960). *Pengantar Hukum Adat Indonesia*. Sumur Bandung, p. 6

<sup>3</sup> Widiastuti, S. (2008). Pengingkaran Hak Masyarakat Adat Atas Tanah Ulayat Oleh Kebijakan Kehutanan. *Jurnal Humanika*, 8(1), p. 3.

<sup>4</sup> Alting, H. (2010). *Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat atas Tanah*. LakssBang Pressindo in cooperation with Lembaga Penerbitan Universitas Khairun Ternate, Maluku Utara, p. xvii

<sup>5</sup> Catatan Akhir Tahun: Reforma Agraria Masih Jauh dari Harapan.

<https://www.mongabay.co.id/2019/12/31/catatan-akhir-tahun-reforma-agraria-masih-jauh-dari-harapan/>, [downloaded Monday, 10 February 2020].

<sup>6</sup> Konflik Agraria, KLHK Memihak Warga Jika Ada Bukti Tanah Adat.

<https://www.cnnindonesia.com/nasional/20200427200605-20-497847/konflik-agraria-klhk-memihak-warga-jika-ada-bukti-tanah-adat>, [accessed Wednesday, 22 Januari 2020].

District, South Central Timor Regency (TTS), East Nusa Tenggara (NTT) and block the stone White-Bena highway.<sup>7</sup>

HGU (Right to Cultivate) forest areas utilized by plantation and mining companies often take the MHA area. This is what later triggered agrarian conflicts. Indigenous peoples are always considered to be the wrong parties, so it is important that there is a need for advocacy for indigenous peoples to fight for their rights.<sup>8</sup> Conflict of land between the ruler and indigenous peoples often occur in central Kalimantan which is the event experienced by the indigenous people of Dayak Ma'ayan Janah Jari<sup>9</sup> where the Management of PT SIL complained 33 residents to the police of Awang Timur Regency because they allegedly has intimidated and violated against its employees.<sup>10</sup> The intimidation is due to the immaterial of the national prohibition on the Ampang group of people in the forest of Pengabungan, and it triggers the conflict of forestry for oil palm plantations in the jungles and the usage in 2004 occurred to the river Tunu which threatens the ancestral relics of Talang Mamak.<sup>11</sup>

Another case is the lawsuit using the expired forestry article, but a judge at Batulicin District Court, South Kalimantan sentenced him to four years in prison, a fine of RP15 million, a three-month subsidiary on Wednesday (26/4/17). The TS that are accompanying indigenous people of Dayak Meratus maintain indigenous territories that conflict with a PT KT company, this is declared to violate article 78 (2) of the forestry LAW.<sup>12</sup> Another case was a lawsuit from 29 gold miners against PT. IMK at the South Jakarta District Court. PT. IMK exploits the gold mining site in the sub-district of Permata Intan, Murung and Tanah Siang, Regency of North Barito. The location creates a prolonged conflict between PT. IMK and the local indigenous peoples. The indigenous people who have become gold miners have inhabited and mined gold around Mt. Muro, North Barito central Kalimantan since 1982, have been moved away, gradually.<sup>13</sup>

An overview of the territorial conflicts that often bring together indigenous and private law communities to a conflict is has been demonstrated in the national Inquisition process conducted by National Commission of Human Rights (Komnas HAM) in 2014. In that process, Komnas HAM conducts an investigation into 40 (forty) cases

<sup>7</sup> Konflik Tanah di Hutan Pubabu. Kenapa Masyarakat Adat Menolak Klaim Pemerintah?.

<https://www.mongabay.co.id/2020/03/12/konflik-tanah-di-hutan-pubabu-kenapa-masyarakat-adat-menolak-klaim-pemerintah/>, [accessed Wednesday, 22 Januari 2020].

<sup>8</sup> Nasib Masyarakat Adat, Pemilik Asli Bumi Nusantara yang Terpinggirkan.

<https://www.kompasiana.com/venusgazer/58c83844f29673f644bbc242/nasib-masyarakat-adat-pemilik-asli-bumi-nusantara-yang-terpinggirkan?page=all>, [downloaded Wednesday, 29 Januari 2020].

<sup>9</sup> Konflik Agraria Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan, Komisi Nasional Hak Asasi Manusia Republik Indonesia, tahun 2016. [https://www.komnasham.go.id/files/20160528-konflik-agraria-masyarakat-adat-\\$E705F0M.pdf](https://www.komnasham.go.id/files/20160528-konflik-agraria-masyarakat-adat-$E705F0M.pdf) [downloaded Monday, 10 February 2020].

<sup>10</sup> SIL Adukan 33 Warga ke Polisi. <https://metro7.co.id/sil-adukan-33-warga-ke-polisi/> downloaded Wednesday, 29 Januari 2020].

<sup>11</sup> Hilangnya Hak Masyarakat Adat dayak Ma'anyan Mengelola Sumber Daya Alamnya.

<https://tanahkita.id/data/konflik/index/170?sektor=S3&tahun=2014&tipe=&bulan=12&mmode=1>, [downloaded Monday, 10 February 2020].

<sup>12</sup> Hakim Vonis Trisno 4 Tahun, Kuasa Hukum Banding dan Laporan ke Komisi Yudisial.

<https://www.mongabay.co.id/2017/04/26/hakim-vonis-trisno-4-tahun-kuasa-hukum-banding-dan-lapor-ke-komisi-yudisial/>, [downloaded Monday, 10 February 2020].

<sup>13</sup> Gugatan Masyarakat Adat Kalah di Pengadilan. <https://www.downtoearth-indonesia.org/id/story/gugatan-masyarakat-adat-kalah-di-pengadilan>, [downloaded Monday, 10

February 2020].

representing hundreds of cases registered or previously told to Komnas HAM. These cases related to the conflict of rights of indigenous peoples with various private investments, including investments in HPH, HTI, plantation, and also mining. Komnas HAM at the end of the investigation recommended many things. One is that the DPR RI together with the government immediately ratified the BILL of recognition and protection of the rights of indigenous peoples.<sup>14</sup>

The existence of the Bill will be an attempt to minimize the conflicts and disputes by providing adequate protection against the MHA. There are three principles of recognition, protection, and empowerment of indigenous peoples. Recognition is a form of acceptance and respect for the existence of indigenous peoples and all rights and identities attached to it. While the protection as an effort to guarantee and protect the indigenous peoples and their rights in order to live grows and develops in accordance with the human dignity, and empowerment is a planned effort to advance and develop knowledge, attitudes, skills, behaviors, abilities, awareness through the determination of policies, programs, activities, and mentoring for indigenous peoples.

The three principles are aimed at providing legal certainty to the position and existence of MHA in order to grow and develop in accordance with the expectations and dignity, and provide assurance to the indigenous peoples in carrying out their rights in accordance with their traditions and customs. It also provides participation space in the political, economic, educational, health, social, and cultural aspects, preserving its traditions and customs as local wisdom and part of national culture, and increasing the resilience of socio-cultural as part of national resilience. The urgency above is contained in the Indigenous community Bill which is the initiative of House of Representatives as national priority legislation program in the year 2020.

The existence of the Law is at least expected to minimize problems on MHA. One of the issues that arise related to the weak recognition of indigenous peoples is a subject of law that has special rights and privileges. Then, there are several violations of the rights of indigenous peoples happened by the law, especially the right of *Ulayat*.<sup>15</sup> The land in the indigenous peoples have a special and important position that is the residence of the fellowship, the dwelling place of sentient the protection of the fellowship and spirit of the ancestors of an alliance,<sup>16</sup> so that the dispute over land ownership becomes the crucial point of the MHA problem that has been.

The existence of the Bill is important because the current recognition of normative law does not have imperative power because it is fragmentary in some provisions both in the central and in the region. Based on the background of the above, the issues can be identified are as follows; how does the law recognize the existence of the MHA after the political reform? Do the provisions on the MHA Bill provide adequate legal protection for *adat* society?

---

<sup>14</sup> Naskah Akademik Rancangan Undang-Undang Tentang Masyarakat Hukum Adat Pengusul Anggota Fraksi Partai Nasdem Dewan Perwakilan Rakyat Republik Indonesia Jakarta. Tahun 2020. <http://www.dpr.go.id/doksileg/proses1/RJ1-20200226-052432-5802.pdf> [downloaded on Sunday, 02 March 2020].

<sup>15</sup> Abdurrahman. (2015). *Draft of Legal Review Report on the Mechanisms for Recognition of Customary Law Communities*. Research Center and Development of the National Legal System of the National Legal Development Agency Ministry of Law and Human Rights Republic Indonesia.

<sup>16</sup> Nugroho, B.D. (2015). *Hukum Adat: Hak Menguasai Negara atas Sumber Daya Alam Kehutanan & Perlindungan terhadap Masyarakat Hukum Adat*. Refika Aditama, p. 87.

## 2. Method

Research as a scientific activity is part of the process of developing science and human intellect. Science that is, in fact, built, studied and developed to provide benefits for mankind to create a dynamic and harmonious lifestyle.<sup>17</sup> Research is a scientific design work to find, acquire, collect, and analyze data to obtain an objective and objective results that will determine the accuracy and validity of the study results. In order to obtain the results of the study, in this research use normative legal research approach by relating to the regulations that apply both central and regional. With this approach it is expected to clarify customary legal position in the normative laws that apply.

The normative or doctrinal law research studies that leaning is qualitative (non-numeric) based on secondary data<sup>18</sup> used in this study. Normative legal research is a research of library materials or secondary data that includes primary legal materials such as-law and regulations and secondary legal materials such as research reports, books relating to the results of this study, and so forth,<sup>19</sup> these results are further described to represent the state of the object or its issue and is not intended to draw conclusions that are generally valid,<sup>20</sup> so this research draws only specific conclusions about the position of MHA in normative law. While tertiary data in this study is dictionary and encyclopedias.<sup>21</sup> The data will be analyzed by using qualitative analysis to answer the issue in this research.

## 3. Analysis and Results

### 3.1. General Theory on Customary Law

Custom, as the reflection of a nation's personality, is one of the incarnations of the nation's soul that is concerned in the centuries. Therefore, every nation in this world has its own customs that each other is not the same.<sup>22</sup> Hence the process of the mergence of customary law is not present suddenly, but rather the long stage of repeated habits that will be transformed into behavior that becomes binding among human beings, slowly will become customs among society.

Thus, certainly it can be said that a habit that originally developed in private area then expanding into community will continue to become customary from community group in the region concerned. The customs will become known, recognized and respected as rules, and also obeyed by members of the community.

Custom and customary law is then historically-philosophical regarded as a manifestation or mirroring of the personality of a nation and is an incarnation of the

---

<sup>17</sup> Arliman, L. (2018). Peranan Metodologi Penelitian Hukum Di Dalam Perkembangan Ilmu Hukum Di Indonesia. *Soumatra Law Review*, 1(1), p. 113. [downloaded on 18 April 2019].

<sup>18</sup> Supranto, J. (2003). *Metode Penelitian Hukum dan Statistik*. PT Rineka Cipta, p. 2.

<sup>19</sup> Iswanty, M. (2012). Pertanggungjawaban Medis Terhadap Terjadinya Abortus Provokatus Criminalis (Tinjauan Hukum Kesehatan dan Psikologi Hukum). *Jurnal Penelitian Hukum*, 1(3), p. 329.

<sup>20</sup> Marzuki. (2002). *Metodologi Riset*. BPFE - UII, p. 7.

<sup>21</sup> Supranto, J. (2003). *Metode Penelitian Hukum dan Statistik*. PT Rineka Cipta, p. 2.

<sup>22</sup> In 1960, Sukarno dissolved the lower house, the People's Representative Council, after it refused to pass the state budget. He then appointed a Mutual Cooperation People's Representative Council (DPG-GR) and reestablished the MPR in the form of a Provisional People's Consultative Assembly (MPRS).

Soul of the Nation (*Volkgeist*) of the State community concerned from time to time.<sup>23</sup> The term customary law is first mentioned in the Book of the Journal of the Indian Archipelago by James Richardson in 1890.<sup>24</sup> It was later widely known when Van Vollenhoven delivered his undergraduate lecture on 3 October 1901 at Leiden University as professor of the Constitutional and Administrative Law on the opposite land and customary law in the Dutch East Indies.<sup>25</sup>

The definitions of customary laws vary from each scholar. For example, Ter Haar has a view that customary law is born from and maintained by judges' decisions.<sup>26</sup> Meanwhile, Van Vollenhoven defines customary law as the law that are not sourced from regulations made by the Government of the Dutch East Indies or other power that become joints and held independently by Dutch rule.<sup>27</sup> R. Van Dijk presents customary law is all Indonesian morality and customs in all living fields, so also all rules about the behavior.<sup>28</sup>

R. Soepomo defines customary law as a non-statute law which is largely rooted in traditional culture and a small part of Islamic law. This law includes laws based on judges' decisions that contain principles in the ward where he decides things.<sup>29</sup> Based on the definition above, it can be concluded customary law is the law that regulates human behavior in everyday life that is born and developed from and by communities that have special characteristics that are not written, not codified, and different from one community with other communities and that may have legal consequences of criminal and social sanctions.

Customary law though is "indigenous law" but there are still adjustment due to the changing times and national politics. Customary law remains as a "second law" because national law is still considered as the main law in nation and state life, while customary law only applies to certain societies.

Such adjustments do not close the possibility of the purity of the implementation of the rules of customary law into a national law. It will shift, along to enrich and develop national law as long as the origin is not contrary to *Pancasila* and the 1945 Constitution.<sup>30</sup> The customary law will give a significant contribution in the development of the law and the development of positive law in which the Indonesian state that adheres to the law to read the system of positive law of Indonesia should depart from the most powerful legislation of the Constitution which is embodied in 1945 Constitution. Similarly, in elaborating the settings on the existence of indigenous peoples and customary law in Indonesia's legal system, the easiest thing is to first examine the arrangement in the 1945 Constitution.

---

<sup>23</sup> Setiady, T. (2008). *Intisari Hukum Adat Indonesia Dalam Kajian Kepustakaan*, Penerbit Alfabeta, p. 1.

<sup>24</sup> Asikin, Z. (2012). *Pengantar Tata Hukum Indonesia*. Rajagrafindo, p. 165.

<sup>25</sup> Hadikusuma, H. (2004). *Pengantar Antropologi Hukum* (2<sup>nd</sup> ed). Citra Adiyta Bakti, p. 19.

<sup>26</sup> Sudiyat, I. (1978). *Asas-asas Hukum Adat Bekal Pengantar* (3<sup>rd</sup> ed). Liberty, p. 6-7. Ter Haar membuat dua rumusan yang menunjukkan pendapatnya tentang hukum adat yaitu pada saat pidato dies tahun 1930 dengan judul "Peradilan *Landraad* berdasarkan hukum tak tertulis" dan orasinya tahun 1937 yang berobyek Hukum Adat Hindia Belanda di dalam ilmu, praktek dan pengajaran" Baca juga pada buku Surojo Wignjodipuro, *pengantar dan azas-azas hukum adat*.

<sup>27</sup> Wignjodipuro, S. (1973). *Pengantar dan Asas-Asas Hukum Adat*. Alumni, p.3.

<sup>28</sup> Dijk, R.V. (1960). *Pengantar Hukum Adat Indonesia*. Sumur Bandung, p. 6.

<sup>29</sup> Soepomo. (2013). *Bab-Bab tentang Hukum Adat*. Balai Pustaka, p. 3.

<sup>30</sup> Sudaryatmi, S. (2012). Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi. *Jurnal MMH*, 41(4), 572-578, p. 578. [downloaded on 18 April 2019]

Indigenous people is a group of people who are bound by the legal order as a citizen with a fellowship of the law because of the similarity of shelter or on the basis of offspring. Based on the above understanding it can be understood that customary law community is included in the sense of society, but not all people can be classified in the sense of customary law society. Indigenous law communities are bound by customary legal order that grows and develops naturally in the society so that it is a reflection of the community.<sup>31</sup>

The shifting of customary law to be part of the process of forming national law began since the independence of Indonesia in 1945. Customary law in the era of the Old Order 1945-1966 not experienced much of attention. It stated on article II Transitional rules of the 1945 Constitution all the rules of the era of the Dutch East Indies, which are still valid at the end of the Dutch Government, temporarily maintained as long as not contradicting the 1945 Constitution.<sup>32</sup> Article II of the transitional provision states that all State agencies and regulations are still valid for as long as they have not been held new ones under this Constitution.

In this phase there has been a fundamental change of state form that changed from unitary country to federal state. The basis of the change is the Federal Constitution of the Republic of Indonesia (RIS Constitution). RIS Constitution entered into force since its enactment on 6 February 1950 that provides sufficient role in the customary law as contained in article 104 paragraph 1, article 142, and article 146 (1). The provisions of the judicial decree shall contain the reasons thereof and in the case of punishment must be rules of the law and customary law to make the basis of the punishment.

One of the milestones in the recognition of customary law in the old order period is the enactment of Law No. 5 of 60 concerning the Basic Law of *Agraria* that negates the law dualism of land in our society has been abolished and most of the Western Law on land was firmly dropped and firmly stated that the customary law applies to agrarian matters. The article related to community existence is Article 2 Paragraph (4) related to the recognition of indigenous law communities, Article 3 relates to the recognition of the implementation of the rights of *Ulayat* and similar rights of indigenous peoples, as long as the fact still exists, and Article 5 which states the law of agrarian laws on Earth, water and space is customary law, as long as it does not contradict national and state interests,

Customary law of the New Order Era Memorandum on source of law order on the Decree of MPRS Number XX/MPRS/1966 stating that the source of the law Order of the Republic of Indonesia is the view of life, awareness and ideals of law and moral ideals that include the atmosphere of the decision and the character of the nation of Indonesia. Two of the New Order law products that pay attention to the state of the law and the customary environment is Law No. 5 of 1974 on Fundamentals of Local Government and Law No. 5 of 1979 on Village Governance.<sup>33</sup> One of the dictum of Law No. 5 of 1979 is the nature of the Unitary State of the Republic of Indonesia and

---

<sup>31</sup> Research Center and Development. (2015). *Draft of Legal Review and Report on the Mechanisms for Recognition of Indigenous Law Communities*. Research Center and Development of the National Legal System of the National Legal Development Agency Ministry of Law and Human Rights Republic Indonesia.

<sup>32</sup> Mahadi. (2003). *Uraian Singkat Hukum Adat: Sejak RR Tahun 1854* (3<sup>rd</sup> ed). PT Alumni, p. 78.

<sup>33</sup> Risdiarto, D. (2018). Legalitas Dekrit Presiden 5 Juli 1959 Dan Pengaruhnya Bagi Perkembangan Demokrasi Di Indonesia. *Jurnal Legislasi*, 15(1), p. 59 - 68.

then the position of the village government as far as possible is serialized, by the heed of the diversity of State of the village and customs provisions that still apply to strengthen village governance. Other legal product during the New Order period is Law No. 11 of 1974 on Water Resource Development that determines that the implementation of the rights of mastering the State in the field of water management remains respectful of the rights owned by local indigenous peoples, as long as it does not contradict national interests.

The Reformation Era of 1998 changed the legal and political order of the nation. One of which is the amendment of the 1945 Constitution. The amendment has given a fresh wind to the existence of customary law. It is seen in Article 18B Paragraph 2 and Article 28I verse 3. Article 18B Paragraph 2 states, "State recognizes and respects the unity of indigenous peoples and their traditional rights throughout the life and in accordance with the development of the society and principles of the Unitary Republic of Indonesia, which is governed by law." While Article 28I Paragraph 3 also states "Cultural identity and traditional peoples ' rights are respected in accordance with the development of the times and civilizations."

Article 18B Paragraph (2) 1945 Constitution as one of the constitutional foundations of indigenous peoples declare a declarative acknowledgment that the state recognizes and respects the existence and rights of customary legal community. But such recognition provides limitations or requirements for a community to be recognized as a customary legal community. There are four requirements of the existence of indigenous peoples according to Article 18B paragraph (2) 1945 Constitution among others: (a) throughout the life; (b) In accordance with community development; (c) The Unitary State principles of the Republic of Indonesia; and (d) governed by law.<sup>34</sup> The above provisions, clearly visible form of the arrangement that the existence of indigenous peoples and traditional society is recognized only if it meets the required criteria that is, the indigenous peoples are still alive, in accordance with the principles of the unity of the RI, its existence is governed by legislation, the identity of culture and the rights of traditional people, and in accordance with the development of society and civilization.

The recognition of the MHA in the juridical legal framework must be in the above five elements. First, the admission of MHA should be evidenced by the exact customary law still valid, growing and developing in society. Such existence is seen that local people still respect and implement the principles of local customs that govern behavior and society. Secondly, the position of MHA encourages similarities with the principles of the unitary state of Indonesia, but one, *Bhineka Tunggal Ika*. Not vice versa, the existence of MHA will bring up sentiment area which in the end will break the unity of the nation.

Third, MHA requires the legality of guarantees of its existence which is governed by laws that have an impact on legal certainty. This is the basis for the establishment of the MHA protection Bill above which is currently being discussed and includes the national legislation program in 2020. The existence of these regulations as the foundation/basis of implementation, is in accordance with the principles of the law

---

<sup>34</sup> Warman, K. Peta Perundang-undangan tentang Pengakuan Hak Masyarakat Hukum Adat. [http://procurement-notices.undp.org/view\\_file.cfm?doc\\_id=39284](http://procurement-notices.undp.org/view_file.cfm?doc_id=39284), [downloaded on Sunday, 02 March 2020].



country listed in the 1945 Constitution which mentions the state of Indonesia is the state based on the rule of law.<sup>35</sup>

Fourth, MHA as a community fellowship that has customs as the identity of cultural and traditional rights of people that specifically. The customs arranged patterns and arrangements between them which were constructed by D Hollemann with 4 (four) traits of magical religious, communal, concrete and direct,<sup>36</sup> of which four traits are inherent and become a pattern of indigenous peoples. Fifth, MHA is required to adapt to community development. Change is natural law encourages all aspects of life to experience change adjusting to the change.

The recognition of indigenous peoples' rights to the forest is gaining reinforcement by the provision of judicial review on the provisions of indigenous forests in the Law No. 41 of 1999 of the 1945 Constitution. In the decision of the Constitutional Court No. 35/PUU-X/2012, the Court argued that customary Law society is constitutionally recognized and respected as the subject of law that can bear the right and be burdened. As a subject of law, indigenous peoples should be concerned with other legal subjects when the law is to regulate the allocation of life resources, including forests.<sup>37</sup>

Strengthening the existence of MHA as a matter of application for testing Law No. 31 of 2007 about the Establishment of Tual city in Maluku Province in Constitutional Court Decision No. 31/PUU-V/2007. Consideration of the ruling which essentially provides an interpretation of Article 18B Paragraph (2) of 1945 Constitution *Juncto* Article 41 Paragraph (1) Letter B Law No. 24 of 2003 concerning the Constitutional Court, with respect to the presence or absence of MHA law, namely:<sup>38</sup>

1. A unity of the legal community is in the de facto still alive (actual existence), either territorial, genealogical, or functional, at least-whether it contains elements;
2. There is a community whose citizens have a feeling of group (in-group feeling), existence of customary government, existence of wealth and/or indigenous objects; the presence of customary legal norms devices; and special to the unity of customary indigenous peoples, there is also an element of certain territories;
3. A unity of ADAT Law Society and its traditional rights are seen according to the development of society when the unity of customary law community;
4. Its existence has been recognized under the laws that apply as a reflection of the development of values that are considered ideal in society today, whether the laws are general or sectoral, such as the field of agriculture, forestry, fisheries, and others and in local regulations;
5. The substance of the traditional rights is recognized and respected by the citizens of the Community in question and wider society, and does not contradict human rights;

---

<sup>35</sup> Nugroho, B.D. *op.cit* p. 18

<sup>36</sup> Alting, H. *op.cit*, p. 46.

<sup>37</sup> Cahyaningrum, D. (2015). Implikasi Putusan Mahkamah Konstitusi Mengenai Status Hutan Adat Sebagai Hutan Hak. *Jurnal DPR Kajian*, 20(1), p. 5.

<sup>38</sup> Pembuktian Masyarakat Hukum Adat Pada Gugatan Pengadaan Tanah Untuk Kepentingan Umum. <http://leip.or.id/pembuktian-masyarakat-hukum-adat-pada-gugatan-pengadaan-tanah-untuk-kepentingan-umum/>, [downloaded Wednesday, 22 Januari 2020].

6. A unity of *Adat* Law Society and its traditional rights in accordance with the principles of the Indonesian People's unity if indigenous peoples' unity does not interfere with the existence of the Unitary State of the Republic of Indonesia as a political unity and legal unity, namely: its existence does not threaten the sovereignty and integrity of the unitary State of the Republic of Indonesia; and the substance of legal norms are appropriate and not contrary to statutory regulations.

The arrangement of the customary law of post reform has at least 8 (eight) laws governing the law and customary rights, among others Law No. 39 of 1999 on Human rights, Law No. 41 of 1999 about Forestry which also guarantees customary law society as long as the fact still exists and recognized its existence, Law No. 26 of 2007 on spatial arrangement, Law No. 32 of 2009 on Environmental Protection and Management affirms customary Law Society is a group of communities that gradually reside in certain geographic regions because of the bonds to the origins of ancestors, a strong relationship with the environment, and the existence of a value system that determines economic, political, social, and legal aspect.

Law No. 6 of 2014 about the Village also guarantees indigenous peoples who are authorized to organize and manage government affairs, the interests of local communities based on Community initiatives, the right of origin, and/or the traditional rights recognized and respected in the government system of the unitary Republic of Indonesia. In addition, Law No. 23 of 2014 on Local Government and Law No. 39 of 2014 concerning Plantation and Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands.

Local government waves are also local regulations. There are at least 22 (twenty two) Regulations or regional provisions, either provincial, or Regency/city, or decree of regional head governing the MHA. For example, Local Regulation of West Sumatera Province No. 16 of 2008 about *Ulayat* land and its utilization, Special regional Regulation of Papua Province No. 23 of 2008 on Customary Rights of *Adat* and indigenous peoples' rights of indigenous peoples' citizens of the land, governor of Central Kalimantan No. 4 of 2012 concerning amendment to Governor Regulation No. 13 of 2009

The fact shows that since the 1998 political reform there have been many rules of abuse that are born to acknowledge the existence and rights of indigenous peoples on land, natural resources and other fundamental rights. Various legislation products touch all levels ranging from the Constitution to the regulations of the village.<sup>39</sup> The regulation provides a formal legal basis on the position of MHA itself.

### **3.2. The Urgency of Indigenous Laws**

Various issues arise with the weak recognition of indigenous peoples as the subject of law that had special rights and privileges. Then, there is also the rise of violations of the rights of indigenous peoples by the law, especially the right of *Ulayat*.<sup>40</sup> It is a fact that the existence of customs and customary law has an important role in the life of the nation and state. Along with the time, the role of indigenous people has gained

---

<sup>39</sup> Research Center and Development. (2015). *Draft of Legal Review and Report on the Mechanisms for Recognition of Indigenous Law Communities*. Research Center and Development of the National Legal System of the National Legal Development Agency Ministry of Law and Human Rights Republic Indonesia.

<sup>40</sup> *Ibid.*

assurance and protection from the provisions of the Constitution to local regulations. The assurance and protection of the indigenous people is proven by the existence of various provisions governing the customary law and indigenous rights in the community as above.

Abdon Nababan mentions there are many categories of rights related to indigenous peoples. At least there are four indigenous peoples' rights as follows:

1. The right to "possess" (possess, control) and manage (utilize) land and natural resources in its territory;
2. The right to govern the society in accordance with customary law (including customary judiciary) and customary rules jointly agreed upon by indigenous peoples;
3. The right to take care of itself based on the customary system of management/institutional;
4. Rights to identity, culture, belief systems (religion), knowledge system and native language.<sup>41</sup>

These rights have at least been one of the focuses in the draft of law on indigenous peoples. The House of Representatives (DPR) RI has officially authorized the bill on the National Legislation Program (*Prolegnas*) Priorities 2020. The ratification was conducted through the DPR plenary meeting in the Jakarta Parliament complex,<sup>42</sup> and 50 draft of legislation (Bill) that entered into the national legislative program priorities for the year 2020.<sup>43</sup> One of which is the Bill on Indigenous Law Society (MHA).

The Bill which is the initiative of the House of Representatives is basically based on the existence of indigenous peoples in many ways still not fully institutionalized. It rises some several problems that are experienced by indigenous peoples. First, the existence of indigenous peoples as minority groups during this vulnerable and weak position of various aspects of life (economics, law, socio-cultural and human rights). Secondly, indigenous peoples are marginalized in the development process because they have not been fully given recognition of customary land/*ulayat* belonging to indigenous peoples. Thirdly, indigenous peoples are often subjected to conflict, between indigenous peoples, between indigenous peoples and other indigenous peoples, as well as between society and the government. Fourth, in resolving problems related to indigenous peoples, there is often a collision when the customary law is faced with Indonesian national law.<sup>44</sup>

The inclusion of the Bill on MHA becomes its own historical record because the Bill is almost as long as two board membership periods. Customary law has been known as a law that is unwritten and not systematically conditioned in a book of laws, but still

---

<sup>41</sup> Budianto, E.T. (2016). Implementasi Kebijakan Hak-Hak Masyarakat Adat (Studi Masyarakat Adat di Kecamatan Lindu Kabupaten Sigi). *E Jurnal Katalogis*, 4(4), 137-145 .

<sup>42</sup> DPR Sahkan Prolegnas Prioritas. 2020 <https://mediaindonesia.com/read/detail/285060-dpr-sahkan-prolegnas-prioritas-2020>, [downloaded Wednesday, 22 Januari 2020].

<sup>43</sup> Tok! DPR Sahkan 50 RUU Prolegnas Prioritas Tahun 2020, ini Daftarnya. <https://www.suara.com/news/2020/01/22/162202/tok-dpr-sahkan-50-ruu-prolegnas-prioritas-tahun-2020-ini-daftarnya>, [downloaded Wednesday, 22 Januari 2020].

<sup>44</sup> Naskah Akademik Rancangan Undang-Undang Tentang Masyarakat Hukum Adat <http://www.dpr.go.id/doksileg/proses2/RJ2-20200226-052432-5515.pdf> [downloaded on Sunday, 02 March 2020].

alive and becomes part of the life of society. Therefore, customary law, as a law, lives in society (the Living Law). The conception of "the Living Law" for the first time developed by Eugen Ehrlich in his book *Grundlegung der Sociologie des Rechts*<sup>45</sup> in reaction to the view on the science of the law.

In the same way, the view on the position of *Adat* law not is only to be the living law, but also becomes a trusted law, which is recognized gradually and become a belief and trust in society. In addition, belief in customary law is always maintained as a reference in the development of positive or *ius constitutum law* or a court ruling.

Although its existence as a law is not written, but it grows and lives in the belief of society so that although it is difficult to find its existence in codified one, but it still becomes a guideline in society. This unwritten law is intended to be customary law and or customary law. In the terminology of legal sciences between the terms of *adat* law and the customary law, there are two understanding, the first there is distinguishes between the term *adat* law and customary law. Among others, E. Utrecht sees that *adat* law is a form of law sourced from ancestors and it is sacred. While the customary law of a form of the result of unity of two different cultures, it can be given an example here which is customary law and customary law, for example in the case of marriage law based on the structure of motherhood society is by making Semendo, to the human society with an honest marriage, and to the community of parenting with free marriage. In the customs law, it can be found legal institution "warranty". Warranty as a legal institution born because of customs not because of customary law

This customary law was born from growing habits, and then gained legality in the local community. In other words, customary law is the behavior of individuals who get the legality of the community about what is permissible and what is forbidden that lasts continuously so that it becomes customary for local people.

Some definitions of customary law are submitted by some experts, among others, Soekanto who finds out a complex of regulations that are not defined, not codified, and coercion have sanctions (from it law), so have the consequences of the law.<sup>46</sup> Djodjodigono opines customary law is a law that is not subject to regulation. While the law is a series of *ugeran* (norm) regulating the relationship of society. A *Ugeran* (norm) is a law that imposes obligations and restrictions.<sup>47</sup> While Soediman Kartohadiprodjo expressed that customary law is a certain type of unwritten law that has a distinctive rationale that is different from other written laws. Customary law is not customary law because the form is not written, but the customary law is customary law because it is arranged with a particular premise of thought that is different from the basis of Western law thought.<sup>48</sup> From this view, it can be concluded that customary law is the law that regulates human behavior in everyday life that is born and developed from and by communities that have special characteristics i.e. unwritten, uncodified, and different from one community with other communities and which has the consequences of criminal and social sanctions.

---

<sup>45</sup> Hadi, S. (2017). Hukum Positif Dan The Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat). *DiH Jurnal Ilmu Hukum*. 13(26), p. 261 , [downloaded on 18 April 2019].

<sup>46</sup> Soekanto, S. (1981). *Maninjau Hukum Adat Indonesia*. Rajawali, p. 18.

<sup>47</sup> Djodjodigono. (1958). *Asas-asas Hukum Adat*. Yayasan Badan Penerbit Gajah Mada, p. 5.

<sup>48</sup> Wulansari, D. (2012). *Hukum Adat Indonesia suatu Pengantar* (2<sup>nd</sup> ed). Refika Aditama, p. 5.

The draft law of the MHA shall later be referred to as law does not mean the existence of customary law directly into written and codified law as often as modern law. Codification of law according to R. Soeroso in his book "Introduction to Law" is the law book keeping in a set of laws in the same material, while the purpose of codification of the law is to be acquired by a *Rechtseenheid* (a legal entity) and a *rechtszakerheid* (legal certainty).<sup>49</sup> The enactment of the Bill will strengthen the existence and standing of customary law in positive law in Indonesia.

The basis of the establishment of this Act is based on 4 (four) things, first, the existence of MHA as a minority group during this vulnerable and weak position of various aspects of life (economics, law, social culture and human rights). MHA's bargaining position is not comparable to modern society because of the development of science and development of the times, demanding the existence of MHA to stay awake

Secondly, the existence of MHA is marginalized in the development process because it has not been fully given recognition of customary land/*Ulayat*. The existence of MHA with all its traditional rights has always been in a marginal position. This violation of MHA's rights occurs in almost all areas of life, whether in economics, politics, and law, as well as in social and cultural areas.<sup>50</sup> Jahawir Thontowi et.al comments to the situation that the marginalized MHA is certainly impossible without cause. On the one hand, indigenous nature prioritizes magical elements, direct, concrete and flexibility that can function effectively when the value of honesty, togetherness, mutual cooperation, still instituted. On the other hand, the state as a power and also the entrepreneur further bases its claim on rights in domination by the rules of law with the evidence is in formal and written. Against the differences in the character of society and its laws, MHA and society in general never, there are policies that can find a way out.<sup>51</sup>

Third, there is often experiencing conflicts between members of MHA, between MHA and MHA, or between MHA and other parties. The conflict is due to seizure of the land of *Ulayat* and other agrarian resources by the state and also entrepreneurs on the basis of permits from the state often and always occur. The seizure and violation of customary rights in the name of the development-then often triggered a vertical conflict between the MHA and the state and the businessman, as well as a horizontal conflict with fellow MHA, especially related to the issues of mastery and management of natural resources.<sup>52</sup>

Fourth, in resolving problems related to the MHA, often there is a collision when the customary law is faced with Indonesian national law. Conflict of the MHA is an implication of the implementation of a set of rules of abuse in the field of religious and

---

<sup>49</sup> Perbedaan Kodifikasi dengan Unifikasi Hukum.

<https://www.hukumonline.com/klinik/detail/ulasan/lt59492221a0477/perbedaan-kodifikasi-dengan-unifikasi-hukum/>, [downloaded Wednesday, 22 Januari 2020].

<sup>50</sup> Aziz, N.M. (2011). *Final Report of the Monitoring Team and Inventory Development of Customary Law of the National Legal Development Agency*. Ministry of Law and Human Rights Republic Indonesia National Legal Development Agency.

<sup>51</sup> Thontowi et al. (2012). *Aktualisasi Masyarakat Hukum Adat (MHA): Perspektif Hukum dan Keadilan Terkait Dengan Status MHA dan Hak-hak Konstitusionalnya*. Pusat Penelitian dan Pengkajian Perkara, Pengelolaan Teknologi Informasi dan Komunikasi Constitutional Court of Republic Indonesia in cooperation with Centre for Local Law Development Studies (CLDS) Fakultas Hukum Universitas Islam Indonesia, .p. 6.

<sup>52</sup> Noor M. Aziz, *op.cit*

overlapping, inconsistent, and that is not at all concerned about the rights of the people.<sup>53</sup>

There are at least some important things that contain in the Bill. First, state recognition about the MHA that is still alive and growing in the community in accordance with the principles of the Unitary Republic of Indonesia. Each local government can form the Committee for the *Adat* Law of the district/city to conduct identification, verification, and validation of the MHA which is in 1 (one) region to establish MHA. The results will then be validated and liquied with the decree of the Minister.

Second, the protection and guarantee of MHA rights. The protection includes customary areas, as the subject of law, the return of customary territory to be managed, utilized, and preserved in accordance with its customs, obtaining compensation for the loss of MHA rights, development and preserving local culture and wisdom in order to preserve the functioning of the environment, and preservation of local wisdom and traditional knowledge, as well as preservation of conservation of wealth

Third, recognition of communal nature of indigenous territories they possess, occupy, and manage hereditary. Indigenous territories as intended are communal and cannot be transferred to other parties. Fourth, having the right to manage and utilize natural resources in the indigenous territories in accordance with local wisdom. If in this area there are natural resources that have an important role in fulfilling the life of the crowd, the state can conduct management after through deliberation with the people of *Adat* law to achieve mutual approval. The distribution of the MHA area will get compensation given in the form of money, substitute land, resettlement, share ownership; or other forms approved by both parties.

The fifth is the customary institutionalization. The organizers of customary law and customs that functioned, managed, and resolved various issues of the life of *Adat* Law Society.

Sixth, Internal MHA dispute resolution mechanism. Internal disputes in *Adat* Law Society are settled through the *Adat* Institute in deliberations and consensus to obtain the decision of the customary institution. The customary institution's verdict is final and binding.

The existence of the Bill is in line with Savigny's view suggesting that the law as a historical phenomenon, so that the existence of each law is different, depending on the place and the validity time of the law. The law must be seen as an incarnation of the soul or spiritual of a nation (*volksgeist*).<sup>54</sup> Many people still follow the *Hambaliyyah*, although the view is experiencing debate to date especially for the follower of *Hambaliyyah* positive law. The sociological aspect of law is important, and is a social institution which is a set of values, conventions, and patterns of behavior that revolves around the basic needs of human beings.<sup>55</sup> The law that can be accepted by the community indicates an element of acceptance voluntarily by the public to submit to a mutual agreement which is contained in the law which will bear sanctions for those who break it.

---

<sup>53</sup> *Ibid.*

<sup>54</sup> Soemadiningrat, O. S. (2002). *Rekonseptualisasi Hukum Adat Kontemporer*. Alumni, p. 2-3.

<sup>55</sup> Soekanto, S. (2014). *Pokok-pokok Sosialogi Hukum*. Rajawali Pers, p. 4.

Although the Bill will strengthen the position of MHA, but there are at least three weaknesses expressed in the Bill. First, the existence of the article that stating the elimination of the existence of MHA and customary land into state land. Article 23 (1) suggests in the case of indigenous territories there are natural resources that have an important role in fulfilling the lives of the crowd, the state can manage the approval of indigenous peoples. (2) for the management by the State as referred to in paragraph (1), the indigenous peoples shall be entitled to compensation.

From the entire indigenous peoples throughout Indonesia, an estimated 30 to 50 million are indigenous peoples whose lives are still dependent on forests, a unity of ecosystems in the form of land expanses of natural resources dominated by trees in the natural fellowship of the environment, one with the other is inseparable.<sup>56</sup> It demonstrates the dependence of MHA on *Ulayat* soil.

Second is registration or registration process. The Bill contains chapters on the registration of indigenous peoples.<sup>57</sup> The recognition of the MHA states through four (four) stages, namely identification, verification, validation, and determination. Before the stage is implemented every MHA will be conducted logging against the indigenous peoples must meet the requirements:

1. Having a community that lives in groups in a form of group, has an affinity for the similarities of heredity and/or territorial;
2. Inhabiting a customary area with a certain boundary;
3. Have the same local wisdom and cultural identity;
4. Have an institution or legal device and obey its group as a guideline in the life of indigenous peoples; and/or
5. Has the customary Institution that is recognized and functioned.

These terms open an opportunity, but not all MHA will be able to fulfill these data and requirements. If not fulfilled, then the state can acknowledge the rights of the *Ulayat* and submitted by the other parties concerned. This is often the case as in Sintang District that in 2014, there are 38 companies that already have a license of oil palm plantation business, and one of them is PT. Sinar Sawit Andalan that has received permission plantation business in the location of  $\pm$  20,000 hectares in area of sub-district of Sintang District, and since 2012 it has been doing oil palm plantation activities. In the location of the land that has been granted Plantation business license to PT Sinar Sawit Andalan, it is still found a customary land called "*Kelohkak*".<sup>58</sup> However, with the registration of MHA, the ownership of indigenous law community is increasingly less gaining state recognition.

The existence of indigenous peoples is a sociological fact that cannot be denied. To acknowledge and protect them, the government only needs ethnographic guidance on the customs of indigenous peoples in the region concerned. In this context, it should

---

<sup>56</sup> Setiati Widiastuti, *o.cit.* p.3.

<sup>57</sup> Enam Catatan Koalisi untuk RUU Masyarakat Hukum Adat. <https://www.hukumonline.com/berita/baca/1t5ba8bf30391c4/enam-catatan-koalisi-untuk-ruu-masyarakat-hukum-adat?page=3>, [downloaded Wednesday, 22 Januari 2020].

<sup>58</sup> Victor Emanuel, V. (2017). *Perlindungan Hukum Atas Tanah Adat dalam Kaitan dengan Pemberian Izin Usaha erkebunan Kelapa Sawit di Kecamatan Serawai Kabupaten Sintang*. *Jurnal Nestor Magister Hukum*, 1(1), p. 1.

the state be only tasked to register/record the existence and/or recognition of the rights owned by the MA.<sup>59</sup>

Thirdly, the Bill's approach is oriented towards recognition subjects. In this context the initiator is trapped in the view of the MHA/MA as a political entity solely (which is already accommodated in the village law), and does not pay attention to the complex of the federal dimension of indigenous people's rights in which each type of rights (land, politics, etc.) may refer to diverse subjects.<sup>60</sup> For the Balinese communities are grouped into six communities namely Wargi/Wangsa/Color/Soroh, Pakraman, Pengsan/Dadia, attachment to the early village, Subak, Sekehe. In the community of Ambon divided into rumor, Uku, Soa, Hena and Aman, state, and Uli,<sup>61</sup> while in the community of Minangkabau, there are Paruik, Tribe, and Nagari,<sup>62</sup> and Marga in the Batak Toba community. Nowadays, the mastery of land is traditionally centered on the unity of kinship alone as above, while the dimension of a complex civil law on the rights of diverse indigenous peoples who also need protection in the Bill.

Despite the weakness, the presence of the Bill gives hope to the protection and recognition of the MHA that has been neglected. It will also complement and refine the prevailing legal provisions that have not been contained in a single provision of individual entrances that will be the basis of protection, recognition and empowerment of the MHA so that the state or the other party does not necessarily ignore the rights that have been hereditary.

#### 4. Conclusion

Recognition and protection of MHA in Indonesia is experiencing an uneasy phase. Since the independence of Indonesia, it was then obtained adequate portions in the era of reform with the Amendment of the 1945 Constitution. Article 18B Paragraph 2 and Article 28I Paragraph 3 explicitly reveals the importance of existence of MHA and customary law. There are at least 8 (eight) laws and the 22 (twenty-two) local regulations. It proves the importance of MHA for the Indonesian nation.

The existence of the above terms is felt not to provide maximum assurance and protection against MHA. The DPR through the right initiative encourages the draft law on MHA which currently becomes a national legislation program and it becomes a priority in 2020. Recognition, protection, and empowerment of indigenous peoples aims to provide legal certainty to the position and existence of indigenous peoples in order to grow and develop in accordance with the expectations and dignity, to provide assurance to the indigenous peoples in carrying out their rights in accordance with their traditions and customs, providing participation space in the aspects of politics, economics, education, health, social, and culture, preserving its traditions and customs as local wisdom and part of national culture and increasing the resilience of social culture as part of national resilience.

---

<sup>59</sup> Zakaria, R. Y. Sembilan Kelemahan RUU Masyarakat Hukum Adatm. <https://www.indonesiana.id/read/127202/sembilan-kelemahan-ruu-masyarakat-hukum-adat>, [downloaded Monday, 10 February 2020].

<sup>60</sup> *Ibid*

<sup>61</sup> Effendi, Z. (1987). *Hukum Adat Ambon Lease*. Pradnya Paramita, p.25-31.

<sup>62</sup> Anwar, C. (1997). *Hukum Adat Indonesia; Maninjau Hukum Adat Minangkabau* (1<sup>st</sup> ed). PT Rineka Cipta, p. 9-22.



Although the Bill will strengthen the position of MHA, but there are at least three weaknesses expressed in the Bill. First, the existence of the article that stating the elimination of the existence of MHA and customary land into state land. Second is registry or registration process. In the Bill, it contains a chapter on the registration of indigenous peoples implemented will impact not all MHA is done fulfilling the predetermined requirements. Thirdly, the Bill's approach is oriented towards recognition subjects. In this context the initiator is trapped in the view of the MHA as a political entity solely, and does not pay attention to the complex-dating dimension of indigenous peoples' rights, in which each type of rights may refer to diverse subjects.

## References

### Books:

- Abdurrahman. (2015). *Draft of Legal Review Report on the Mechanisms for Recognition of Customary Law Communities*. Research Center and Development of the National Legal System of the National Legal Development Agency Ministry of Law and Human Rights Republic Indonesia.
- Alting, H. (2010). *Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat atas Tanah*. LakssBang Pressindo in cooperation with Lembaga Penerbitan Universitas Khairun Ternate, Maluku Utara.
- Anwar, C. (1997). *Hukum Adat Indonesia; Maninjau Hukum Adat Minangkabau* (1<sup>st</sup> ed). PT Rineka Cipta.
- Asikin, Z. (2012). *Pengantar Tata Hukum Indonesia*. Rajagrafindo.
- Aziz, N.M. (2011). *Final Report of the Monitoring Team and Inventory Development of Customary Law of the National Legal Development Agency*. Ministry of Law and Human Rights Republic Indonesia National Legal Development Agency.
- Dijk, R.V. (1960). *Pengantar Hukum Adat Indonesia*. Sumur Bandung.
- Djojodigono. (1958). *Asas-asas Hukum Adat*. Yayasan Badan Penerbit Gajah Mada.
- Effendi, Z. (1987). *Hukum Adat Ambon Lease*. Pradnya Paramita.
- Hadikusuma, H. (2003). *Pengantar Ilmu Hukum Adat Indonesia* (2<sup>nd</sup> ed). Mandar Maju.
- Hadikusuma, H. (2004). *Pengantar Antropologi Hukum* (2<sup>nd</sup> ed). Citra Aditya Bakti.
- Mahadi. (2003). *Uraian Singkat Hukum Adat: Sejak RR Tahun 1854* (3<sup>rd</sup> ed). PT Alumni
- Marzuki. (2002). *Metodologi Riset*. BPFE - UII.
- Nasroen, M. (1967). *Falsafah Indonesia*. Bulan Bintang.
- Nugroho, B.D. (2015). *Hukum Adat: Hak Menguasai Negara atas Sumber Daya Alam Kehutanan & Perlindungan terhadap Masyarakat Hukum Adat*. Refika Aditama
- Setiady, T. (2008). *Intisari Hukum Adat Indonesia Dalam Kajian Kepustakaan*, Penerbit Alfabeta.
- Soekanto, S. (1981). *Maninjau Hukum Adat Indonesia*. Rajawali.
- Soekanto, S. (2011). *Hukum Adat Indonesia*. Rajawali Press.

- Soekanto, S. (2014). *Pokok-pokok Sosiologi Hukum*. Rajawali Press.
- Soemadiningrat, O. S. (2002). *Rekonseptualisasi Hukum Adat Kontemporer*. Alumni.
- Soepomo. (2013). *Bab-Bab tentang Hukum Adat*. Balai Pustaka, , , .
- Sudiyat, I. (1978). *Asas-asas Hukum Adat Bekal Pengantar* (3<sup>rd</sup> ed). Liberty.
- Supranto, J. (2003). *Metode Penelitian Hukum dan Statistik*. PT Rineka Cipta.
- Wignjodipuro, P. (1987). *Pengantar dan azas-azas hukum adat*. CV. Haji Masagung.
- Wignjodipuro, S. (1973). *Pengantar dan Asas-Asas Hukum Adat*. Alumni.
- Wulansari, D. (2012). *Hukum Adat Indonesia suatu Pengantar* (2<sup>nd</sup> ed). Refika Aditama.

#### **Journal Articles:**

- Arliman, L. (2018). Peranan Metodologi Penelitian Hukum Di Dalam Perkembangan Ilmu Hukum Di Indonesia. *Soumatera Law Review*, 1(1), 112-132, [downloaded on 18 April 2019].
- Budianto, E.T. (2016). Implementasi Kebijakan Hak-Hak Masyarakat Adat (Studi Masyarakat Adat di Kecamatan Lindu Kabupaten Sigi). *E Jurnal Katalogis*, 4(4), 137-145 .
- Cahyaningrum, D. (2015). Implikasi Putusan Mahkamah Konstitusi Mengenai Status Hutan Adat Sebagai Hutan Hak. *Jurnal DPR Kajian*, 20(1), 1-16.
- Hadi, S. (2017). Hukum Positif Dan The Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat). *DiH Jurnal Ilmu Hukum*. 13(26), 259-266, [downloaded on 18 April 2019].
- Iswanty, M. (2012). Pertanggungjawaban Medis Terhadap Terjadinya Abortus Provokatus Criminalis (Tinjauan Hukum Kesehatan dan Psikologi Hukum). *Jurnal Penelitian Hukum*, 1(3), 386-406, [downloaded on 18 April 2019].
- Ridwan, Dimiyati, K., & Azhari, A.F. (2019). Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi Hingga Konservasi. *Jurnal Jurisprudence*, 6(2), 106-115 . <http://journals.ums.ac.id>, [downloaded on 18 April 2019].
- Risdiarto, D. (2018). Legalitas Dekrit Presiden 5 Juli 1959 Dan Pengaruhnya Bagi Perkembangan Demokrasi Di Indonesia. *Jurnal Legislasi*, 15(1), 59-68.
- Sudaryatmi, S. (2012). Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi. *Jurnal MMH*, 41(4), 572-578, [downloaded on 18 April 2019].
- Widihastuti, S. (2008). Pengingkaran Hak Masyarakat Adat Atas Tanah Ulayat Oleh Kebijakan Kehutanan. *Jurnal Humanika*, 8(1), 1-14, [downloaded on 18 April 2019].

#### **Paper:**

- Konflik Agraria Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan, Komisi Nasional Hak Asasi Manusia Republik Indonesia, tahun 2016.

<https://www.komnasham.go.id/files/20160528-konflik-agraria-masyarakat-adat-E705F0M.pdf> [downloaded Monday, 10 February 2020].

Naskah Akademik Rancangan Undang-Undang Tentang Masyarakat Hukum Adat Pengusul Anggota Fraksi Partai Nasdem Dewan Perwakilan Rakyat Republik Indonesia Jakarta. Tahun 2020. <http://www.dpr.go.id/doksileg/proses1/RJ1-20200226-052432-5802.pdf> [downloaded on Sunday, 02 March 2020].

Naskah Akademik Rancangan Undang-Undang Tentang Masyarakat Hukum Adat <http://www.dpr.go.id/doksileg/proses2/RJ2-20200226-052432-5515.pdf> [downloaded on Sunday, 02 March 2020].

Research Center and Development. (2015). *Draft of Legal Review and Report on the Mechanisms for Recognition of Indigenous Law Communities*. Research Center and Development of the National Legal System of the National Legal Development Agency Ministry of Law and Human Rights Republic Indonesia.

Thontowi, J., Rachman, I.N., Mardiyah, N.Q., & Anindyajati, T. (2012). *Aktualisasi Masyarakat Hukum Adat (MHA): Perspektif Hukum dan Keadilan Terkait Dengan Status MHA dan Hak-hak Konstitusionalnya*. Pusat Penelitian dan Pengkajian Perkara, Pengelolaan Teknologi Informasi dan Komunikasi Constitutional Court of Republic Indonesia in cooperation with Centre for Local Law Development Studies (CLDS) Fakultas Hukum Universitas Islam Indonesia.

Warman, K. Peta Perundang-undangan tentang Pengakuan Hak Masyarakat Hukum Adat. [http://procurement-notices.undp.org/view\\_file.cfm?doc\\_id=39284](http://procurement-notices.undp.org/view_file.cfm?doc_id=39284), [downloaded on Sunday, 02 March 2020].

Zakaria, R. Y. Sembilan Kelemahan RUU Masyarakat Hukum Adat. <https://www.indonesiana.id/read/127202/sembilan-kelemahan-ruu-masyarakat-hukum-adat>, [downloaded Monday, 10 February 2020].

#### **Internet:**

Catatan Akhir Tahun: Reforma Agraria Masih Jauh dari Harapan. <https://www.mongabay.co.id/2019/12/31/catatan-akhir-tahun-reforma-agraria-masih-jauh-dari-harapan/>, [downloaded Monday, 10 February 2020].

DPR Sahkan Prolegnas Prioritas. 2020 <https://mediaindonesia.com/read/detail/285060-dpr-sahkan-prolegnas-prioritas-2020>, [downloaded Wednesday, 22 Januari 2020].

Enam Catatan Koalisi untuk RUU Masyarakat Hukum Adat. <https://www.hukumonline.com/berita/baca/lt5ba8bf30391c4/enam-catatan-koalisi-untuk-ruu-masyarakat-hukum-adat?page=3>, [downloaded Wednesday, 22 Januari 2020].

Gugatan Masyarakat Adat Kalah di Pengadilan. <https://www.downtoearth-indonesia.org/id/story/gugatan-masyarakat-adat-kalah-di-pengadilan>, [downloaded Monday, 10 February 2020].

Hakim Vonis Trisno 4 Tahun, Kuasa Hukum Banding dan Laporan ke Komisi Yudisial. <https://www.mongabay.co.id/2017/04/26/hakim-vonis-trisno-4-tahun-kuasa>

hukum-banding-dan-lapor-ke-komisi-yudisial/, [downloaded Monday, 10 February 2020].

Hilangnya Hak Masyarakat Adat dayak Ma'anyan Mengelola Sumber Daya Alamnya. <https://tanahkita.id/data/konflik/index/170?sektor=S3&tahun=2014&tipe=&bulan=12&mmode=1>, [downloaded Monday, 10 February 2020].

Indigenous Peoples at the United Nations. <https://www.un.org/development/desa/indigenouspeoples/about-us.html>, [downloaded Monday, 10 February 2020].

Konflik Agraria, KLHK Memihak Warga Jika Ada Bukti Tanah Adat. <https://www.cnnindonesia.com/nasional/20200427200605-20-497847/konflik-agraria-klhk-memihak-warga-jika-ada-bukti-tanah-adat>, [accessed Wednesday, 22 Januari 2020].

Konflik Tanah di Hutan Pubabu. Kenapa Masyarakat Adat Menolak Klaim Pemerintah?. <https://www.mongabay.co.id/2020/03/12/konflik-tanah-di-hutan-pubabu-kenapa-masyarakat-adat-menolak-klaim-pemerintah/>, [accessed Wednesday, 22 Januari 2020].

Nasib Masyarakat Adat, Pemilik Asli Bumi Nusantara yang Terpinggirkan. <https://www.kompasiana.com/venusgazer/58c83844f29673f644bbc242/nasib-masyarakat-adat-pemilik-asli-bumi-nusantara-yang-terpinggirkan?page=all>, [downloaded Wednesday, 29 Januari 2020].

Pembuktian Masyarakat Hukum Adat Pada Gugatan Pengadaan Tanah Untuk Kepentingan Umum. <http://leip.or.id/pembuktian-masyarakat-hukum-adat-pada-gugatan-pengadaan-tanah-untuk-kepentingan-umum/>, [downloaded Wednesday, 22 Januari 2020].

Perbedaan Kodifikasi dengan Unifikasi Hukum. <https://www.hukumonline.com/klinik/detail/ulasan/lt59492221a0477/perbedaan-kodifikasi-dengan-unifikasi-hukum/>, [downloaded Wednesday, 22 Januari 2020].

SIL Adukan 33 Warga ke Polisi. <https://metro7.co.id/sil-adukan-33-warga-ke-polisi/> downloaded Wednesday, 29 Januari 2020].

Tok! DPR Sahkan 50 RUU Prolegnas Prioritas Tahun 2020, ini Daftarnya. <https://www.suara.com/news/2020/01/22/162202/tok-dpr-sahkan-50-ruu-prolegnas-prioritas-tahun-2020-ini-daftarnya>, [downloaded Wednesday, 22 Januari 2020].