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Iwan Erar Joesoef

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ABSTRACT. The Customary Law Community (*Masyarakat Hukum Adat*, MHA) as part of the Customary Law System is recognized for its existence and its implementation in the National Land Law (*Hukum Tanah Nasional*, HTN). In the Explanation of the Basic Agrarian Law (UUPA) it is stated that the function of Customary Law as the main source in the development of HTN, although such recognition is accompanied by conditions as long as in reality they still exist and in accordance with national and state interests. This paper analyses and examines the problems of MHA in the concept of regional representative council. The problem on this paper come up from various problems concerning to *ulayat land* and its conflict between indigenous people and government. The research emphasized that the main problem is the inequality of perception between the Executive, Judiciary and Legislative institutions in the consistency of compensation payments resulting in the re-claim of Tanah Ulayat (*Adat*), there is no basis for a multi-dimensional approach (anthropology, sociology and others besides the juridical approach). This means that the formal juridical approach alone does not achieve effective results. The question is whether the constitutional MHA can have representation in the Regional Representative Council (DPD) and what forms of democracy are appropriate and can channel the aspirations of the MHA.

KEYWORDS. Indigenous People; Customary Land; Representative Council; MHA; *Ulayat* Land; Democracy

The Idea of Customary Law Community Representations in the Regional Representative Council

Iwan Erar Joesoef*

Introduction

Indigenous Peoples (*Masyarakat Hukum Adat*, hereinafter called as MHA) are recognized for their existence in positive Indonesian law, in national and regional dimensions,[2] included in the Indonesian State Constitution,[3] and the Decree of the People's Consultative Assembly,[4] as well

* Faculty of Law Universitas Pembangunan Nasional 'Veteran", Jakarta, Indonesia. The previous version of this paper has been presented at National Seminar of Law at Universitas Negeri Semarang. Legal Practitioner in Contracts, Construction, and Insurance. Corresponding email: iwan.erar@gmail.com

2 Maria S.W. Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi Sosial Dan Budaya*, Jakarta, PT. Kompas Media Nusantara, 2009, pp. 156-164. *See* also Gede Marhaendra Wija Atmaja, *Politik Pluralisme Hukum dalam Pengakuan Kesatuan Masyarakat Hukum Adat dengan Peraturan Daerah*. Dissertation, Malang, Universitas Brawijaya, 2012.

3 1945 Constitution Second Amendment (Year 2000), in Article 18 B Paragraph (2) states "the State recognizes and respects the customary law community units along with 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 is regulated in law" [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]. In Article 28 I Paragraph (3) states "Cultural identity and traditional community rights are respected in accordance with the development of time and civilization" [Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban].

4 TAP MPR No. IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management.

as Sectoral Laws,[5] and also in the regional dimension, namely Regional Autonomy.[6] In Article 3 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) it is stated that the implementation of customary rights and similar rights from the MHA, as long as in reality there must still be in accordance with national and State interests and legislation higher invitation.[7] In addition to the national and regional dimensions, from the global dimension, attention to the importance of respecting and protecting customary rights has been manifested by the commitment of the international community which includes various international conventions that began with The United Nations Charter in 1945.[8]

Translations from recognized as long as in fact there is still seen that the legislators have no plans or programs to preserve the MHA so that it seems marginalized. Prof. Boedi Harsono interpreted that the Customary Law in the MHA as a complement to written law, so that the norms of Customary Law according to Article 5 of the BAL will experience purification or "*saneering*" of its non-original elements.[9] Of course the

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5 (a). Law No. 23 of 1997 concerning Environmental Management, (b). Law No. 39 of 1999 concerning Human Rights, (c). Law No. 41 of 1999 concerning Forestry, (d). Law No. 25 of 2000 concerning the National Development Program (Propenas) of 2000-2004, (e). Law No. 22 years concerning Oil and Gas, (f). Law No. 20 of 2002 concerning Electricity, (g). Law No. 7 of 2004 concerning Water Resources, (h). Law No. 39 of 2014 concerning Plantation, (i) Law No. 31 of 2004 concerning Fisheries, (j) Law No. 38 of 2004 concerning Roads, (k). Law No. 27 of 2007 concerning Management of Coastal Areas and Small Islands.

6 Law No. 21 of 2001 concerning Special Autonomy for the Province of Papua.

7 Article 3 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

8 (a). The United Nations Charter (1945), (b). The Universal Declaration of Human Rights (1948), (c). The United Nations Convention on the Prevention and Punishment of the Crime Genocide (1951), (d). Recommendation 104: ILO Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957), (e). ILO Convention 107: Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957), International Labor Organization (ILO), (f). The International Convention on the Elimination of All Forms of Racial Discrimination (1966), (g). The International Covenant on Civil and Political Rights (1966), (h). The International Covenant on Economic, Social and Cultural Rights (1966), (i). Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989), International Labor Organization (ILO), (j). Rio Declaration on Environment and Development (1992), (k). Technical Review of the UN Declaration on the Rights of Indigenous Peoples, as Agreed Upon the Members of the Working Group at its Eleventh Session, UN Doc. E / CN.4 Sub.2 / 1994 / Add.1 (April 20, 1994).

9 Boedi Harsono, *Hukum Agraria Indonesia, SejarahPembenukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Jakarta: Djambatan, 1997, pp.173-175. Understanding Customary Law also includes conceptions and legal principles, as well as legal institutions and their regulatory systems. This makes Customary Law a different law from other sets of positive legal fields, which make Customary Law unique to Indonesia.

purification refers to the philosophy of the Pancasila and the Constitution of the Indonesian State.

The process of "*saneering*" Customary Law is related to the variety of Customary Law in Indonesia that raises the question of which Customary Law applies. Conception of religious communalistic customary law, which allows individual land tenure, with rights to land that are personal, as well as containing elements of togetherness, can also result in changes in the norms and values that apply in society as they grow. Its influence can arise from inside the MHA itself or from outside the MHA such as the influence of the feudalistic, individualistic and capitalistic government of the colonial era.[10]

Even though from the formal juridical aspect, the MHA has received attention from both the national, regional and global dimensions, but in the sociological aspect of its application in the field there are still some problems, including problems regarding the recognition of the existence of customary rights and with regard to the use of customary forests. This is related to research on the results of the Seminar in solving the problems of Riau Malay MHA Ulayat Forest, which requires a Regional Regulation that can solve this problem of utilizing Ulayat Forest.[11]Then also the dispute regarding the Land of Ulayat in Papua Province, which made a claim against the Land of Ulayat from the MHA to the parties involved both the government, inter-ethnic groups and business entities such as PT. Freeport Indonesia, PT. Sinar Mas Group.[12]

Problems that arise regarding the release of the Land of the Ulayat. Inequality of perceptions between executive, judicial and bureaucratic bureaucracy in the consistency of compensation compensation results in the

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[10] *Ibid*. There are many definitions of Customary Law from legal experts such as C. Van Vollen Hoven, Kusumadi Pudjosewojo, Hardjito Notopuro. However, what is used as a reference for Prof. Boedi Harsono is a definition of Customary Law formulated in the Seminar on Customary Law and the Development of National Law, the National Legal Development Institute of the Ministry of Justice, Yogyakarta, 1975, states that Customary Law is: social and family relations, which are based on balance and filled with a religious atmosphere".

[11] Maria SW Sumardjono, *loc.cit.*, p. 169. Referring to the Seminar Paper "Hak-hak Masyarakat Hukum Adat Melayu Riau tentang Hutan Tanah Ulayat", organized by the Riau Malay Customary Institution, Pekanbaru, 26-28 February 2005. Enhanced with substance in the Seminar and Workshop "Protection and Promotion of the Rights of the Law Society Adat", organized by the National Human Rights Commission (Komnas HAM) in collaboration with the Indonesian Political Science Association (AIPI), Jakarta, on December 14, 2004.

[12] *Ibid*., P. 183-194. Referring to the Limited Discussion Paper on the Functions and Relationships of Institutional, Community and Private Institutions in the Context of Socio-Religious Pluralism and Communal Land Rights: The Papua Case, organized by the Ministry of Home Affairs, Jakarta, on 19-20 March 2003. Also referring to the Research Report on Study of Land Customary Law in Irian Jaya, Collaboration between FH UGM and BPN in 1997. Disputed data citing Source: Regional Office of BPN Papua Province, March 14, 2003.

reclaiming of Tanah Ulayat. Efforts should be made to ensure that in any legal act of relinquishment of customary land rights carried out with the party who owns the land according to the applicable Customary Law, accompanied by written evidence of the release of the land witnessed well by all parties who according to Customary Law have a legal relationship with the Customary Land , or by the authorized agency.

The issue of the release of communal land by the MHA to a Legal Entity that is accommodated by Permen Agraria/Ka BPN No. 5 of 1999 concerning Guidelines for the Settlement of Indigenous Peoples' Customary Rights Issues,[13] give impact to the conflict between the MHA with large companies and even multinational companies. So that it needs further study of the regulation because there is no mechanism of control over unbalanced contracts between the MHA and large companies that have an adverse effect on the MHA.[14] Besides that there are also conditions of ownership of information that is not balanced ("Asymmetric Information") between the MHA and large and multinational companies over the condition of Natural Resources in the Tanah Ulayat area.[15]

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[13] Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 5 of 1999 concerning Guidelines for the Resolution of Customary Rights of Indigenous Peoples. In Article 4 it is stated that the release of customary land to the Government, Legal Entity or Individuals is not a citizen of the MHA by granting rights from the State according to the LoGA by the MHA or MHA residents with the applicable Customary Law procedures.

[14] Herlien Budiono, *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia-Hukum Perjanjian Indonesia*, Bandung: PT Citra Aditya Bakti, 2015, pp. 309-310. Referring to Atiyah's view (in Atiyah PS, An Introduction to the Law of Contract, 5th Ed., Oxford University Press Inc., New York, 1995, p. 35) it is said that contracts have three basic objectives: (1) enforcing a promise and protecting reasonable expectations that arise from it, (2) prevent enrichment or efforts to enrich themselves carried out unfairly or improperly, (3) "to prevent certain kinds of harm. Besides that, Herlien Budiono added from the three objectives that the other essence of the contract objective is derived from the principle of harmony (harmony) in Customary Law, namely: (4) the fourth goal of the contract is to strike a balance between one's own interests and those of the opposing parties.

[15] Morten Hviid, Chapter 4200 A.2-3, p. 1205, in Bouckaert, Boudewijn and De Geest, Gerrit (eds.), Encyclopedia of Law and Economics, Volume III. The Regulation of Contracts, Cheltenham, Edward Elgar, 2000, 1205 p. ISBN 185898 986 8, IV General Contract Law, 4200 (Long-Term Contracts and Relational Contracts, by: Morten Hvidd,The university of Warwick, Department of Economics), 4500 (Unforeseen Contingencies, Risk Allocation in Contracts, by: George G. Traintis, The university of Virginia School of Law). It is stated that the Asymmetric Information Doctrine is: "Consider a dynamic contract between a principal and an agent, where initially the productivity of the agent is not known to the principal. In any separating equilibrium, productivity of the agent will be known to the principal after the first period. For the 'bad' type of agent, separation of involves a distortion leading to a lower utility in every period of the contract than would be the case if his true type was known. If the true type is really the bad type, the distortion can be removed after the first period when the agent's type is known for sure. Hence if renegotiation is possible, it will take place - the contract is not robust against renegotiation. Moreover, since both parties want to renegotiate, it is difficult to see how the legal system can

Thus the main problem of conflict between MHA and Legal Entity (especially large multinational companies) is the perception of inequality between the Executive, Judiciary and Legislative institutions in particular in the consistency of compensation that results in the re-claim of Tanah Ulayat (*Adat*). Then there is no basis for a multi-dimensional approach (anthropology, sociology and others besides the juridical approach). It means that the formal juridical approach is just like the implementation of Agrarian Regulation No. 5 of 1999 mentioned above did not achieve effective results. From this problem, the writer proposes the idea of forming an MHA Representative in the Regional Representative Council (DPD) so that the MHA can obtain the existence and protection of Natural Resources (SDA) contained in the MHA's Ulayat Land.

This idea requires an appropriate form of Democracy and can (a) provide an objective understanding of the issues of the MHA related to State Land, Customary Land and land rights in the context of Customary Law and Positive Law, (b) take a persuasive-educative approach and not impose the will unilaterally, and (c) take a cultural-religious approach with three elements of leadership namely Indigenous leaders, Religious leaders and Formal leaders who truly understand Customary Law and Positive Law especially related to HTN.

The theoretical approach used in this paper is the view of Hegel (1770-1831) who tries to combine the notion of individual autonomy with the superior power of collective society which according to him is reflected in "the State" (model 3), not the State model where the supremacy of

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prevent this happening. Papers such as Dewatripont (1989) turn the focus on contracts which are renegotiation-proof, that is where contracts are never an incentive to renegotiation. With comprehensive contracting this is possible, because any incentive to renegotiate later could have been forced at the time of agreeing on the original contract. As is shown in Dewatripont (1989), Hart and Tirole (1988), Laffont and Tirole (1987, 1990) the possibility of renegotiation slows down the speed of revelation. Essentially this is caused by a trade-off between speedy revelation and the damaging incentive to renegotiation. " because any incentive to renegotiate later could have been forced at the time of agreeing to the original contract. As is shown in Dewatripont (1989), Hart and Tirole (1988), Laffont and Tirole (1987, 1990) the possibility of renegotiation slows down the speed of revelation. Essentially this is caused by a trade-off between speedy revelation and the damaging incentive to renegotiation. " because any incentive to renegotiate later could have been forced at the time of agreeing to the original contract. As is shown in Dewatripont (1989), Hart and Tirole (1988), Laffont and Tirole (1987, 1990) the possibility of renegotiation slows down the speed of revelation. Essentially this is caused by a trade-off between speedy revelation and the damaging incentive to renegotiation. "

individuality over collectivity (the model 2) nor is it a model of the State where the supremacy of collectivity over individuality (model 1). The two elements of individualism and collectivism are actually the antinomies that are necessary in the history of humanity's thinking about the State and society. Individual autonomy and the power of collectivity are two sides of the same coin, so that in every idea no matter what its individualism style, at the same time there is always a form of collectivism in it. Vice versa, in the idea of collectivism always contains the dimension of individuality. Both need not be disputed as static ideological choices.[16] In this conceptual article, the writer uses the normative juridical writing method.

Indigenous Law Community as A Public Government (*Pseudo-Government*)

1. Modern Government

If the State is a legal system, then all problems that arise in the general theory of the State must be translated into problems that can be understood in the general theory of law. All features of the State must be stated as characteristics of a legal system. Traditional doctrine distinguishes three elements of the State, namely: (a) its territory, (b) its people, (c) and its power. It is considered as the essence of a State that the State occupies a territorial within certain boundaries. The existence of the State depends on the State's right to a territorial that belongs to it and if understood as a real social unit, the State seems to imply a geographical unit.[17]

If we see territoriality as an element of the State, then we must also view the time of its existence as an element of the State. When it is said that no more than one State can exist in one particular place, it clearly means that no more than one State can exist in the same place and time. The second

[16] Jimly Asshiddiqie, *Gagasan Kedaulatan Rakyat Dalam Konstitusi dan Pelaksanaannya di Indonesia*, Jakarta: PT. Ichtiar Baru Van Hoeve, 1994, pp. 12-20. The dynamism of individualism-collectivism is also reflected in the relationship between fellow business entities. Business entities that reflect people's sovereignty are BUMN and Cooperatives. Whereas private-owned companies have individualism. So, if the greater the role of private-owned business entities in SOEs and Cooperatives, the greater the pattern of individualism in the implementation of people's sovereignty in the Economy, and vice versa.

[17] Hans Kelsen, *Teori Umum Hukum dan Negara, Dasar-dasar Ilmu Hukum Normatif Sebagai Ilmu Hukum Deskriptif-Empirik*, Jakarta, Bee Media Indonesia, 2007, p.256.

element, according to the traditional theory is the people, namely humans who inhabit the State's territorial. They are considered as one entity. As the State only has one territory, so also the State has only one people. As territorial unity is legal unity not natural unity, so is the unity of the people is legal unity. This unity is formed by the unity of the legal system that applies to individuals who are considered to be the people of that State.[18]

With regard to the effectiveness of the national legal system for space, time, and certain individuals, questions arise about issues that can be regulated by the legal system. This is a question about the material validity of national law, which is commonly referred to as a matter of how far the state's competence is in relation to its subject. The elements of the State which include the territory and the people are the areas of territorial and personal validity of the legal system. State power is the validity and effectiveness of the rule of law, while the three "powers" or "functions" of the State (legislative, executive and judiciary) are different stages of the formation of the legal system. Like two forms of government, namely democracy and autocracy are two forms of the formation of different legal systems.[19]

Montesquieu in understanding political freedom as stipulated in the constitution and from various philosophers' definitions of the word freedom, he rejects the notion of "freedom without control", he defines "freedom" as "the power to do what we are supposed to do, and is not restricted to do what we should not do ", and also define that freedom as" the right to do whatever is permitted by law ". Thus in the distribution of power (which has also been accommodated in the constitution of the Republic of Indonesia with the dynamics of the changes), Montesquieu considers it necessary to separate executive, legislative and judicial powers, or if not, at least maintain that the judicial power remains independent.[20]

Then Van Vollenhoven (1926) in his book entitled "*Omtrek Van Het Administratef Recht*" describes his theory of the division of power/functions of government, known as "*catur praja*" consisting of: (a) "*bestuur*"/ government ("*bestuursrecht*"), (b) "*politie*"/police ("*politierecht*"), (c) "*rechtspraak*"/adjudicate, and (d) "*regeling*"/legislation ("*regelaarsrecht*"). Therefore, in every modern country, government interference with the people

[18] *Ibid*., pp. 269-286.
[19] *Ibid*., pp. 296-369.
[20] Montesquieu, *The Spirit of Laws, Dasar-Dasar Ilmu Hukum dan Ilmu Politik*, Bandung: Nusa Media, 2007, pp.186-187.

is getting bigger day by day. Many community affairs are managed by the government (the authorities), so problems often arise in the aspect of human rights.

All interventions by the authorities of the State need to be given a form so that everything is not disjointed and does not cause doubt on all parties concerned. When conflicts arise, the solution is easier. This form of law is absolutely necessary because the function of modern law is to: (a) order society, (b) regulate the traffic of people's lives, (c) prevent or resolve disputes, (d) enforce security and order, (e) measure security enforcement procedures. and order, (f) change the fabric of society, and (g) regulate the procedure for changing circumstances.[21]

The intervention of the authorities was ultimately carried out by State administration officials. These officials carry out the public interest ("public service") through government tools that can be tangible:[22]

1) An officer or government body which, based on statutory regulations, is given the authority to declare the will of the government / authority.
2) Government agencies, namely legal entities that are equipped with coercive authority tools.

In government, administrative actions can occur in the field of "public law" and also in the field of "civil law". In the field of public law is a "unilateral legal action" carried out by the government and specifically carry out government tasks based on extraordinary authority. From this understanding we can conclude that there are elements in the "State administrative actions" in "public law", namely: (1) in the form of legal actions (as legal actions, State administrative actions give birth to rights and obligations), (2) one-sided (it must regulate and force, administrative legal action is carried out unilaterally by the government in the form stipulated by the binding force of the law),[23]

In the field of "civil law", the government (state administration) also often holds legal relations ("*rechtsbetrekking*") with other legal subjects based on civil law. For example, in the case of the government renting land (Article 1457 Civil Code) or renting a house (Article 1548 Civil Code). According to Prins, the government is prohibited from acting in civil law if

[21] Safri Nugraha, et.al., *Hukum Administrasi Negara*, Jakarta, Badan Penerbit FHUI, 2005, pp. 23-25.
[22] *Ibid*.
[23] *Ibid*. p. 61-61.

the intended purpose can also be done or achieved by public law. Government participation in civil law affects civil relations that take place in the general public. This is due to the agreements entered into by the State administrative body (the government) made with the citizens and civil legal entities.[24]

2. Customary Law Communities as Pseudo Government and Representatives

Ethnology science today has been able to determine a clear picture of the "native" understanding of the solid and orderly unity of the society, which is symbolized by human form with two parts, namely the great realm (cosmos) and the human realm. Then there are 4 composition of the people in the customary law community, namely: (1) legal communities in the community and its special forms, (2) the environment of the kings, (3) traders as outsiders of the community, and (4) arrangement of "governor".[25]

First, to understand the form and composition of legal alliance among the people of the archipelago, people must especially be aware of the meaning of the "territorial" (regional) factor and the "genealogical" (hereditary) factor for the emergence and sustainability of society. Legal society, where the "territorial" factor, which is shared together is bound to a particular area, is rare and if there is, the situation is meaningless. For example, the Gayo tribe, consisting of "clans" who live scattered or spread and are only bound to one another by "clan" relations. Then in its development such a situation changed. Among many tribes there is a sign that they are also bound by "clan" ties, regardless of whether they inhabit the same area or not.

Such a society might be a mere "territorial" society but not a legal society, although it might be important to look at it from another angle. Or if the term "not a legal community" is also not the case, it means it can also be called a legal community ("*rechtsgemeenschaappen*") but which is very backward social position as a legal community. For example, there are

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[24] *Ibid*. pp. 67-68. If the adjustment can be more fulfilled by using "civil law", there is no harm in using it. Especially if there is no "public law" instrument available as an alternative route. In such circumstances, it is the "civil law" that serves as the government's instrument to achieve policy objectives. The teachings of General Law that support Paul Scolten's theory and modified by Wiarda consider "civil law" as general law ("*lex generalis*") which always applies as long as it does not contradict or be prohibited by a provision (*public law*).

[25] B. Ter Haar Bzn, *Asas-asas dan Susunan Hukum Adat*, Jakarta, Balai Pustaka, 2017, pp. 6-22.

actions to go out together and regularly only on the anniversary of fellow ancestors whose tombs are a sign of continuation for all of them.[26]

These factors, namely "genealogical" factors and "territorial" factors determine the shape and composition of "*uma*" in Mentawai, "*euri*" in Nias, "*huta*" and "*kuria*" in Batak, "*nagari*" in Minangkabau, "clan" and "Hamlets" in parts of South Sumatra, "tribes" in Kalimantan, "hamlets" and combined areas in Toraja, in the Greater East and Timor Islands. So, it's important to understand the results of the local blend of these two factors. Regarding "genealogical ties" first arises the opposite of the arrangement of "*vaderrechtelijk*" (the inheritance law of the father) and "*moederrechtelijk* (the inheritance law of the mother), the arrangement of" parental "(the inheritance law of the father and mother), and" *alternerend* "(the inheritance law of the father) and the mother in turn). Regarding "territorial arrangement" can be described by distinguishing three parts, which does not mean making three classes which will be able to cover the real situation, but rather those three parts mean three centers, each of which becomes the center of various fixed forms and transitional forms. The three types are: (1) "hamlet" community, (2) "area" community and (3) combined hamlet ("*de dorpsgemeenschap", de streekgemeenschap ", en" de dorpenbond* ").[27]

Second, it is the person of the "king" who is seen in front of the circle of people in small legal societies, he is also the owner of power, the focal point of the riches in the kingdom, along with institutions (kingdoms), royal jewels are what called "ceremony". These include "aristocrats" and "high-ranking employees" as well as those who run the government over the population, who deliver orders and who receive and carry on paying taxes. The "subordinate" clerks in the interior gained the character of the "chief of the people" ("*volkshoofd*").

Third are the "merchants", namely strangers in society ("*gemeenschapsvreemden*"), also foreigners outside the realm of "kings". They reside as foreign individuals (towards the community), interfering with people from other ethnic groups in places of government residence and ports.

The last is the fourth, namely the "governor" where between the lives of "native" legal societies and the legal order of the "kings" and of the "governors" as there are known to be certain conflicts. These societies, if not oppressed or oppressed, still stand alone as the legal spheres, out of the legal

[26] *Ibid*.
[27] *Ibid*.

order that surrounds them. The tension or conflict is caused because both are related to the same object.[28]

There are 3 types of territorial legal alliances, namely: (a) village alliances, (b) regional alliances, (c) several village alliances. But alliances that are only based on territoriality are rarely found, for example: genealogical alliance in Gayo (South Aceh, initially they were descendants or "clans" then began to recognize territorial ties), territorial alliances "*dusun*" (South Sumatra), "villages" (Madura). There are also those that are based on both factors (genealogical and territorial), but two conditions must be fulfilled: (1) must be included in one genealogical unit, and (2) must reside within the relevant fellowship area. While legal alliances that are only genealogical in nature, there are 5 types of alliances, for example in one village there is only one "clan", or several different "clans", and the combination of these "clans" who joined in one territory. Then Van Vollenhoven concluded the structure of the legal alliance in Indonesia as:[29]

1) Group I: Legal alliance in the form of genealogical unity;
2) Group II: Legal alliance in the form of territorial units with genealogical units in it;
3) Group III: Legal alliance in the form of territorial unity without genealogical unity in it, but with or not with smaller territorial unity;
4) Group IV: Legal alliance in the form of a territorial unit in which there are alliances or legal entities that are deliberately established by its citizens.

Ter Haar in his book "*Beginselen en stelsel van het Adatrecht*" describes the state of the arrangement of legal associations according to various forms found in various social structures throughout Indonesia, which can be described in general lines or grounds:[30]

a) All legal alliance bodies are led by heads of the people;
b) The nature and composition of the leadership are closely related to the nature and composition of each type of legal association body concerned.

For example in the Tapanuli region, in each of the above regional alliances, there is a village alliance called "huta" and the head of the

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[28] *Ibid*.
[29] Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat*, Jakarta, PT Toko Gunung Agung, 2014, pp. 78-85.
[30] *Ibid*., pp. 87-100.

country/curia and head of the *huta* is one of the "clans" of origin ie a descendant of the land opener and the opening of the *huta* in the area concerned (Head of the Curia is called Raja Panusunan). Other clans that take up residence in the area or in the village (this clan in South Tapanuli is called "*parripe*") has a representative in the regional leadership and the head of the village is taken from the clans of their people. The representative of the oldest people's clan (the first clan of the people who lived) became the first assistant of the regional head or head of the village, and was called the king "*imboru*" in Central Tapanuli, "bajo-bajo" in South Tapanuli).

Another example in the Koto Piliang area (Tanah Datar and Fifty Koto, West Sumatra), families who are members of the so-called "*kampuang*" unite in the so-called "tribal" ties. Each tribe is headed by a "Chief". This chief is the most important "leader of *andiko*", the head of a prominent family from a prominent village. The Chief of this Tribe always consulted with *andiko* princes from his own tribe, he was assisted by three people, namely: (a) "*manti*" for civil service affairs, (b) "*dubalang*" for police affairs, and (c) "*malim*" for religious matters. Each *nagari* consists of 4 *suskus* and the *nagari* administrator consists of the chiefs of the tribe with the chiefs of *andiko* throughout the *nagari* under the leadership of a head called "*nagari* shoots".

From this, it can be concluded that the activities of the head of the people are:[31]

1) Actions regarding land affairs are related to the close relationship between the land and the fellowship that governs the land;
2) The implementation of the law as an effort to prevent violations of the law, so that the law can run as it should (preventive guidance);
3) Carrying out law as a legal correction after the law was violated (repressive guidance).

The task of maintaining or carrying out the law of the people's heads covers the entire field of customary law. The head of the people can carry out legal actions to assist in marriage, buying and selling, completing marriages as peace judges including legal actions in the form of concrete actions in the form of decisions, rejections or preventive and recovery actions (preventive and repressive) with a concrete decision ("*gestaltung*") to what lives in the village community as a sense of justice or sense of justice of the people.

[31] *Ibid*.

The traditional atmosphere of the village community can also be concluded that: (a) religious, (b) Communal, and (c) democratic. The democratic atmosphere in the Decree of the Law Society is in harmony with the communal and communal nature of Indonesian people's lives where the common interests must take precedence over the rights and interests of the individual. Democracy in the village atmosphere can be described where the head of the people in carrying out their duties always consult with his friends who sit in the village administration, even in many cases he deliberates at village meetings with villagers who are entitled to participate in deliberation in certain matters. For example, in Minangkabau, the princes of "*andiko*" and the "chiefs" are "*nagari* density", gather at Balai to settle all *nagari* affairs. Also present at the meeting were the clever and if the religious issues discussed by the scholars also participated in deliberations. Decisions are made on the basis of "*sakato*" (agreed). Thus, the leadership of the alliance always runs under the supervision and direct influence of the people.[32]

These legal alliances (village, nagari, family, clan and others) are legal entities that can act as legal subjects.[33]As a legal subject, the alliances can act both within the scope of civil law and public law. For example, in the Ulema Rights of the MHA there are aspects of civil law (i.e. shared ownership rights to land with members or citizens), and public legal aspects (ie containing duties to manage, regulate and lead control, maintenance, designation and use).[34]

From the above studies it can be concluded that the MHA meets the elements of modern government (the author gives the term as "*Pseudo Government*"). The scope of the area can be in one province or even across provinces. Includes *Tanah Ulayat* coverage from MHA. The difference lies in the nature of the law, where MHA based on unwritten law or "living law" (understand "natural law"),[35] while modern government is based on positive law (understand "legal positivism").[36]Then associated with positive Indonesian law including HTN and LoGA, the existence of the MHA is legally recognized. Strengthened by the many conflicts over *Tanah Ulayat* which harm the MHA as research conducted by Maria SW

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[32] *Ibid*.
[33] *Ibid*.
[34] Boedi Harsono, *loc.cit.,* p. 177.
[35] MDA Freeman, Lloyd's Introduction to Jurisprudence, Seventh Edition, London: Sweet & Maxwell LTD, 2001, pp. 89-196.
[36] *Ibid*., pp. 199-515.

Sumardjono,[37]MHA should get a representative in the DPD. So that MHA Representatives in the DPD can (a) provide an objective understanding of MHA issues related to State Land, Ulayat Land and land rights in the context of Customary Law and Positive Law, (b) take a persuasive-educative approach and not impose a unilateral will, and (c) take a cultural-religious approach with three elements of leadership namely Adat leaders, Religious leaders and Formal leaders who truly understand Customary Law and Positive Law, especially related to HTN.

The function of the DPD is to draft legislation related to natural resources and regional autonomy as Article 248 of Law No. 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council and the Regional People's Representative Council.[38] It is expected that representatives of the MHA can channel their aspirations for the progress of regional development (MHA) as mandated by Article 33 paragraph (3) of the 1945 Constitution, namely SDA (earth, water and natural resources contained therein) controlled by the State and used for the greatest prosperity of the people) and certainly in line with the spirit of Regional Autonomy.

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[37] See Maria SW Sumardjono, *Pluraisme Hukum, Sumber Daya Alam dan Keadilan dalam Pemanfaatan Tanah Ulayat*, Yogyakarta: Universitas Gadjah Mada Yogyakarta, 2018. In his book discussing fair compensation for the use of Customary Land Communities, the case study of "Merauke Integrated Food and Energy Estate "(MIFEE).

[38] Law No. 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council and the Regional People's Representative Council. Where Article 248 states that the DPD has the function:

a. submission of draft laws relating to regional autonomy, central and regional relations, formation and expansion and merging of regions, management of natural resources and other economic resources, and relating to the balance of central and regional finances to the DPR;
b. participate in the discussion of the draft law relating to regional autonomy, the relationship between the center and the regions, the formation, division and merger of regions, management of natural resources and other economic resources, and financial balance between the center and the regions;
c. giving consideration to the DPR for a draft law on state revenue and expenditure budgets and a draft law relating to tax, education and religion; and
d. supervision of the implementation of laws concerning regional autonomy, the formation, expansion and merging of regions, relations between the center and regions, management of natural resources and other economic resources, implementation of the state budget, taxes, education, and religion.

Representatives of Indigenous and Collective Interest Communities in Democracy That Gives Balance of Individual and Collective Interests

1. Democracy as People's Sovereignty

Indeed, democracy with representative institutions to some extent results in or suggests discrimination. Because not all citizens can directly involve themselves in political processes to seize positions that can be utilized to influence the processes of making political and public policies. This can be seen in the case of Papua as research from Maria SW Sumardjono.[39] So only those who for some reason can be more able to push forward to gain political access to build influence, then a new discrimination, between those who are political elite and those who are ordinary laymen has occurred.[40]

Democratization is a process that starts from an effort to realize and / or perfect democratic life, and emerges as needs and problems if the life of the state which is aspired to be the life of the state which is aspired to be a democratic state life. But this has not materialized as expected. Of course this democratization, both in its meaning as an effort and in its meaning as a process, must first be interpreted as an effort and process that wants to overcome discriminatory boundaries, such that there will be many citizens and groups or layers of society, without being hindered by their social status becoming participatory in public and government affairs.[41]

As such, it has in fact been a fundamental right for every community member to carry out activities independently and to choose freely to certain extent. All of that is part of their human expressions. Every activity that will be devoted to the interests of the homeland and the nation will be carried out in earnest, not because of external coercions and coming from above the "state centered", but on the basis of their own willingness and choice, both individually and collectively in organization. This is as part of the

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[39] *Ibid*.

[40] Soetandya Wignjosoebroto, *Hukum, Paradigma, Metod dan Dinamika Masalahnya*, Jakarta: ELSAM and HUMA, 2002,pp. 523-531. Even though here formally all those who are said to have obtained political rights are no exception, but in reality, not all citizens will have the same opportunity to make these rights effective as part of their daily activities.

[41] *Ibid*.

manifestation of the independence of the citizens who are also citizens of a free and responsible nation.[42]

The history of post-independence democracy, in the view of state constitutional law experts, is divided into three periods: (a) the period of Liberal Democracy (1945-1959), (b) the period of Guided Democracy (1959-1966), and (c) the Pancasila Democracy period (1967 - present). During this period there were three constitutional texts: (a) the 1945 Constitution (the 1945 Constitution), (b) the Constitution of the United States of Indonesia (RIS Constitution), and (c) the 1950 Constitution (UUDS 1950). In these three periods there has been a shift from the individual interests to collective interests and vice versa.

In Jimly Asshiddiqie's research, developments in the three periods of democracy have divided the notions of popular sovereignty in the "political sphere" on the one hand and popular sovereignty in the "economic sphere" on the other. In the period of Parliamentary Democracy (Liberal), all legislative products that contain the idea of popular sovereignty only emphasize the political aspects, as well as the Guided Democracy, the economic field has the concept of economic development based on the idea of popular sovereignty. Although the political and economic fields are both "Guided", the period separates "*Guided Democracy*" as a political concept from the concept of "Guided Economy" economics. The same thing happened in the period of "Pancasila Democracy". Policy in the political field continues to develop in the natural atmosphere of collectivism,[43]

2. Democracy provides a balance between individual interests and collective interests

Seeing the conflict between the MHA and large and multi-national companies related to Tanah Ulayat, especially in Papua Province where natural resources exist, it is necessary to find solutions both for the interests of the MHA itself (which are collective) and also large and multi-national companies (which are individualist-capitalist). For this reason the idea of combining the values of balanced individual and collective interests in a democratic harmony of the people's sovereignty as Hegel (1770-1831) is the solution that should be achieved so that the dualism between individual and

[42] *Ibid*.
[43] Jimly Asshiddiqie, *loc.cit,* p. 219.

community (collective) interests in popular sovereignty must be eliminated by formulating the concept of the State.

The balance between the interests of individuals and society (collective) will provide maximum results as the legal and economic conceptions of Robert Cooter and Thomas Ulen with the fundamental concepts: "maximation", "equilibrium" and "efficiency". The first conception is humans as "rational actors" (companies maximize profits, politicians maximize voter votes, bureaucrats maximize the country's revenue). The second conception is the balance in social interactions ("equilibrium") that occurs in markets, elections, companies or marriages. The third conception is from the conception of "efficiency". These three conceptions will produce maximum productivity, which in this case is known as "pareto efficiency".[44]

In this balance, Alfian also tries to understand Indonesia's political development based on a "consensus and conflict" framework. In every political system there must be a reasonable balance between consensus and conflict, and in Indonesia the balance is reflected in an ideal political system called "Pancasila Democracy". The main problem in Indonesia's political development is how to change political culture so that it can fill the ideal system framework. From his research, it was stated that the 1971 General Election was considered a milestone that marked the beginning of the first stage of political culture change for the implementation of the Pancasila Democracy in accordance with the 1945 Constitution as the constitution of the Indonesian State.[45]

The changing dynamics of the interests of individualism and collectivity in democracy in the political and economic fields have occurred since the formation of the 1945 Constitution until now. There have been interesting experiments and experiments since independence in which there have been attempts to creatively combine the ideas of popular sovereignty. The balance between the individual and society, between individuality and collectivity, and between structure and content and harmony between the development of political and economic democracy, experiences its own dynamics which are not fully in accordance with what is desired by the founder of the republic of Indonesia.

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[44] Robert Cooter and Thomas Ulen, Law and Economics, Third Edition, USA: Addison Wesley Longman, Inc., 2000, pp. 10-12.

[45] Mochtar Mas'oed and Colin Mac Andrews, *Perbandingan Sistem Politik*, Yogyakarta: Gadjah Mada University Press, 1982, pp. 207.

The pragmatic attitude mentioned above will offer the option to simply follow the general trends that are taking place. In the political field, a liberalization process will take place that can bring Indonesia's state thinking towards extreme liberalization and individualism and its boundaries are not clear. Whereas in the economic field, there will be liberalization and privatization which direct the Indonesian economic system to be capitalistic based on the understanding of extreme individualism. Both tendencies will complement each other, which can then direct the understanding of Indonesian state out of the path of the ideals of independence.

To overcome this tendency, the path that must be taken is a combination that leads to balance. Liberalism in the political field must be done merely to overcome the tendency of collectivism which was too strong during the Pancasila Democracy period. Instead what must be done in the economic field is collectivization. This balance will produce maximum results for the State in implementing Democracy, especially in the empowerment of the MHA. So that natural resources in the area of the MHA can be used as much as possible for the prosperity of the people, as mandated by Article 33 paragraph (3) of the 1945 Constitution.

Conclusion

The MHA is a legal association that has territorial territory, communities and self-government systems which in Indonesia's positive national legal system are recognized as long as in reality they still exist and are in accordance with national and state interests. In its existence in the national development of Indonesia, it was seen that the MHA was marginalized by the many conflicts related to the Ulayat Land of the MHA with large and multinational companies which were detrimental to the MHA. Besides the problem of having an unbalanced information possession ("Asymmetric Information") between the MHA and large and multinational companies over the condition of Natural Resources in the Tanah Ulayat area, there is also no MHA participation in the Democracy process that can represent the aspirations of the MHA. Academically MHA can qualify as a government based on MD3 law (MPR, DPR, DPD and DPRD) Number 17 of 2014 and Election Law Number 7 of 2017. It means that MHA is a pseudo government has area coverage (*Tanah Ulayat*) within the province and even

across provinces. So it should have representation in the DPD to realize the aspirations of the MHA in line with Article 33 (3) of the 1945 Constitution.

To realize the formation of MHA representatives in a system of Democracy, it is necessary to combine ideas of balanced individual and collective interests in a democratic harmony of the people's sovereignty. This is a solution that should be achieved so that the dualism between individual and community (collective) interests in popular sovereignty must be eliminated by formulating the concept of the State. With the existence of an MHA constitutionally able to have representation in the DPD based on a democratic system, it will be able to (a) provide an objective understanding of the MHA issues related to State Land, Customary Land and land rights in the context of Customary Law and Positive Law, (b) conduct persuasive-educative approach and not imposing unilateral will, and (c) take a cultural-religious approach with three elements of leadership, namely Customary leaders, Religious leaders and Formal leaders who truly understand Customary Law and Positive Law especially related to HTN. This MHA representative in the DPD can also fight for the existence of Ulayat Land which has extraordinary abundant natural resources to be registered and certified in the Land Office to obtain legal certainty of Ulayat Land ownership for MHA.

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