

# IDENTIFICATION AND ANALYSIS OF THE RIGHTS OF INDIGENOUS PEOPLES IN THE STUDY OF CONSTITUTIONAL LAW

(A STUDY OF BALINESE TRADITIONAL COMMUNITY)

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## *Abstract*

The Resolution of the UN General Assembly in 2000 has mandated to discuss indigenous issues related to economic and social development, culture, environment, education, health and human rights. In national law, the recognition of the existence of traditional people with customary rights can be found in Article 18 B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. This study discusses the rights that grow and thrive in indigenous communities in Bali which are associated with the life of society and state. Also the responsiveness or recognition of Indonesia to the presence of the state constitution means the rights of indigenous peoples has grown and developed in Bali and empowerment efforts need to be done for the rights of indigenous peoples has grown and developed in Bali to be able to be a force in the life of society and state. Studies on the identification of the rights of the traditional lifestyle that are recognized in the community as well as prospective empowered in the state of life in Indonesia can be classified as a normative legal research conducted on the relevant legal materials. Legal materials and supporting information that has been gathered up with regard to research on the identification and analysis of the rights of traditional communities in Indonesian Studies State Laws (A Study of Traditional Balinese Community) Firstly the description and interpretation was carried out, or interpretation of the normative propositions found to be further systematized in accordance with discussion on the subject matter of this study. The results of this analysis are three techniques to evaluate and analyze its content according to the given arguments and conclusions of law to get a top issue in this study. States have an

obligation to give recognition to indigenous peoples based on the constitution. Responsiveness or the constitutional recognition of the existence of the rights of indigenous peoples has grown and developed in Bali are envisaged in the constitution, namely Article 18B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. The constitutional mandate must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation. While the empowerment of local people has been recognized by constitution, yet much remain to be done. The rights of indigenous peoples which has grown and developed in Bali should be legally enforced in the life of society and state.

**Keywords:** Rights, Indigenous People, Constitutional.

## I. INTRODUCTION

### A. Background

Indigenous peoples is a social fact that exists throughout Indonesia whose existence started long before the Republic of Indonesia was proclaimed in 1945. The reality of socio-cultural shows that the existence of indigenous peoples is very diverse. Such diversity shows various dynamic development. In general, indigenous peoples are often referred to as isolated communities, remote tribes, communities of indigenous, native people, shifting cultivators or wild cultivators. Institutional recognition of indigenous peoples' existence does not by it self guarantee them safety from the threat of violence and discrimination. Indigenous peoples face many challenges and their human rights are frequently violated: they are denied control over their own development based on their own values, needs and priorities; they are politically under-represented and lack access to social and other services. They are often marginalized when it comes to projects affecting their lands and have been the victims of forced displacement as a result of ventures such as the exploitation of natural resources.<sup>1</sup>

In the Constitution of the Republic of Indonesia of 1945 (the amendments), recognition and respect for indigenous peoples, among others, can be found

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<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, "Combating Discrimination against Indigenous Peoples", [http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination\\_indigenous.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx), accessed 15<sup>th</sup> April 2016.

in Article 18B (2), which reads: “The State recognizes and respects units of customary law communities along with their traditional rights along still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is regulated by law”. Another article relating to indigenous peoples is the first paragraph of Article 28 (3) of the Constitution of 1945 which states “The cultural identity and the rights of traditional communities be respected in line with the times and civilization”.

The provision of Article 18B paragraph (2) above indicates the provision of the constitutional position of indigenous peoples in relation to the state and the indigenous peoples with other indigenous peoples. Institutionally, the constitutional recognition of indigenous people is part of the community’s recognition of human rights, which was formally started in Indonesia in 1993 through the establishment of the National Commission on Human Rights. In the discourse on human rights, identified the importance of the recognition of the rights of indigenous people.<sup>2</sup> While on the other hand, this recognition is the result of a continuous struggle of the leaders of human rights in general, and fighting for the protection of indigenous peoples’ rights in particular.

Indigenous peoples is thought to be the largest element in the structure of the nation-state of Indonesia, but its existence has not been accommodated, or has even been systematically excluded from the national political agenda. Past experience has shown that when dealing with the power of the state and the power of large employers, indigenous peoples are in a weak position, either, economically, socio-culturally or legally, let alone politically. In that regard, the identification and analysis of the rights of indigenous peoples or traditional communities in Bali in the state of life is interesting and needs to be done.

Historically, indigenous peoples have a long history of development of the territory, economic life, including culture and language with them. The Indonesian archipelago has a diversity of indigenous peoples with the character and distinctiveness of its own characteristics. The existence of groups of indigenous

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<sup>2</sup> Saafroedin Bahar, “Kebijakan Negara dalam Rangka Pengakuan, Penghormatan, dan Perlindungan Masyarakat (Hukum) Adat di Indonesia”, Paper presented at “the Workshop on Research in Three Areas” Mendorong Pengakuan, Penghormatan dan Perlindungan Hak Masyarakat Adat di Indonesia” in Lombok, 21<sup>st</sup> - 23<sup>th</sup> Oktober 2008.

peoples throughout the Indonesian archipelago and in each province should be appreciated, because it is the wealth of the nation of Indonesia. As the wealth of the nation, if they are empowered they will be able to generate income for the country as well as act as a source of knowledge for researchers from around the world.

While it is constitutional, Indonesia has declared itself as a state of law. This assertion can be found in the fourth paragraph of the Preamble of the Constitution of 1945. Article 1 paragraph (3) the Constitution of 1945, Third Amendment states that “Negara Indonesia adalah negara hukum.” (Indonesia is a state of law). The concept of a state of law that has historically grown and developed in the Western world experienced a modification in Indonesia to conform to the legal ideals and aspirations of Indonesia based on Pancasila, so it is also termed the “State of Law (*rechtsstaat*) by Pancasila.”<sup>3</sup> Regarding the type of state of law adopted by Indonesia is not in a formal sense, but a state of law in the sense of material that is also termed the Welfare State.<sup>4</sup> The goals to be achieved by the Indonesian State of Law is to achieve a just and prosperous society both spiritually and materially based on Pancasila, so it “is also known as the State of Law which has the characteristics of an independent”<sup>5</sup>.

In a state of law, the protection of human rights becomes a necessity, since it is one element of a state of law as stated by the HR Sri Soemantri Martosoewignjo and H. Bagir Manan. Adopted by Sri Soemantri Martosoewignjo as expressed in his writings, known as “*Bunga Rampai Hukum Tata Negara Indonesia*”, on the elements mentioned what consists of state of law: <sup>6</sup>

- a. The government in carrying out its duties and obligations should be based on law or regulations;
- b. The guarantee of the rights of human (citizens);
- c. The division of power in the state;
- d. The supervision of the judicial (*rechthsterlijke controle*).

<sup>3</sup> Sjachran Basah, *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia*, Bandung: Alumni, Cet., 1985, p. 11; see also Padmo Wahjono, *Sistem Hukum Nasional Dalam Negara Hukum Pancasila*, Jakarta: Rajawali, 1983, p. 2.

<sup>4</sup> E. Utrecht, *Pengantar Hukum Administrasi Negara Indonesia*, Bandung: FHPM Universitas Padjajaran, 1960, p. 21-22.

<sup>5</sup> Rukmana Amanwinata, “Pengaturan dan Batas Implementasi Kemerdekaan Berserikat dan Berkumpul Dalam Pasal 28 UUD 1945”, Dissertation, Post Graduate Padjajaran University, Bandung, 1996, p. 109.

<sup>6</sup> R. Sri Soemantri M., *Bunga Rampai Hukum Tata Negara Indonesia*, Bandung: Alumni, 1992, p. 29.

With a slightly different arrangement, Bagir Manan suggests the minimal characteristics of the state based on law, namely:

- a. All actions must be based on law;
- b. There are provisions that guarantee basic rights and other rights;
- c. No institutional freely to assess the actions of the public authorities (judicial bodies is free);
- d. No division of power<sup>7</sup>.

The instruments for protecting and realizing human rights is both written constitutional law and it's implementing regulations as well as unwritten law. This means that human rights become the ethical legitimacy of the existence of the law itself. Recognition and protection of basic human rights in a country's constitution in line with the results of the study by K. C Wheare<sup>8</sup> which shows that of the constitutions of the countries in the world, almost all of them load on the protection of "human rights" in its constitution. This means basic human rights should be regulated in the Constitution of 1945. Furthermore, the legislation that is lower than Constitution of 1945 merely regulates the implementation or enforcement mechanisms. In other words, in principle and rules, then basic rights should be regulated in the Constitution of 1945. Meanwhile, further guidance on enforcement agencies and the basic rights of the relevant legislation delegated to lower, such as the decree of Assembly of Republic of Indonesia, acts and government regulations. This assertion can be found in Article 28 I of the Constitution of 1945 Second Amendment which establishes the "In order to uphold and protect human rights in accordance with the principles of a democratic constitutional state, the implementation of human rights are guaranteed, regulated, and set forth in the legislation."

Based on the above, we can see that human rights are owned by a number of human rights, for the gift of God Almighty. This right is acquired and carried in the womb until its presence in the midst of society. By the nature of his humanity, then human rights should not be revoked or seized by anyone,

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<sup>7</sup> Bagir Manan, "Dasar-Dasar Sistem Ketatanegaraan Republik Indonesia Menurut UUD 1945", Scientific Lecture Papers submitted to the Graduate Student, University of Padjadjaran 1994/1995, in Bandung on 3 September 1994, p.19.

<sup>8</sup> K.C. Wheare, *Modern Constitutional*, London: Oxford University Press, 1975, p. 33.

because if it is revoked or deprived human nature will be lost. Therefore, any person, including indigenous peoples in Bali is entitled to protection of their rights. In this regard, the research on the identification and analysis of the rights of Balinese traditional communities in Indonesia's Constitutional Law Study becomes important and the actual thing to do.

## **B. Research Questions**

The problems that can be discussed from this study are:

- (a) How is the mandate of the country's constitutional obligation to recognize and respect the existence of indigenous peoples?
- (b) How is the constitutional mandate that must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation?

## **C. Research Methods**

### **a. Types of Research**

A study of law, according to Soekanto Soerjono, can be done through normative legal research, empirical legal research or both.<sup>9</sup> Based on the classification of types of these studies, this research can be qualified as a normative legal research and intends to examine the legal materials related to the type of rights of Bali traditional communities who live in the community and prospective empowered the state of life in Indonesia. Therefore, the subject matter of this study will be based on the results of the research literature, namely the primary legal materials, secondary legal materials, and tertiary legal materials

### **b. Types of Approach**

The approach that will be applied to discuss the subject matter of this research is the conceptual approach and the statute approach. Conceptual approaches are made to find definitions of the rights of traditional communities in Bali. Further statute approaches are applied to obtain legal

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<sup>9</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Press, 1984, p. 201.

provisions that underlie the protection of the rights of traditional communities living in Bali and recognized in the community.

**c. Source of Legal Materials**

A source of law in this study is derived from the results of the research literature in the form of secondary law. Library research conducted on legislation as well as reading materials related to the subject matter which can essentially be classified into three (3) types of legal materials, i.e. primary legal materials, secondary legal materials, and tertiary legal materials (supporting primary legal materials and secondary legal materials).

As primary legal materials, including but not limited to the Constitution of 1945, the Act Number 23 of 2014 concerning Local Governmental as well as some lesser legal products. Secondary law studies, among others, are obtained from reading materials in the field of Constitutional Law, Human Rights, and Regional Government Law relating to the protection of the rights of traditional communities living in Bali and recognized in the Indonesian community. While the tertiary legal materials from which this research was obtained are from encyclopedias, set clippings relating to the case or matter type of the rights of traditional communities living in Bali and recognized in the Indonesian community, law dictionary, as well as other supporting documents that can support and clarify the primary and secondary legal materials. The primary legal materials derived from library research at the top, supported also from the interview with the Provincial Government officials and / or District / City Government, public figures of Balinese traditional living in each region. The interview was conducted to test the truth of the literature, so it will be helpful as supporting research literature.

**d. Legal Materials Collection Techniques**

Regarding the techniques applied in the collection of the necessary legal materials is through document study that supported interview techniques. Findings of the literature conducted with the card (Card system) which is a way to record and understand the contents of each of the information

obtained from the primary, secondary or tertiary legal materials with respect to the rights of traditional communities living in Bali and recognized in the community as well prospective empowered the state of life in Indonesia. Further interviews with informants to local government officials will be done in an unstructured manner with snowball technique. Snowball technique is done by starting from the information bit to continue to explore until they run out, so as to obtain as complete information about something that is examined in this study.

#### **e. Legal Materials Analysis Techniques**

Legal materials and supporting information that has been collected with regard to the rights of traditional communities living Bali and recognized in the community as well as prospective empowered the state of life in Indonesia first made the description with decomposition proportions of legal and non-legal interpretation or interpretation encountered and normative propositions to be found for further systematized in accordance discussion on the subject matter of this study. Results of the three analytical techniques are then evaluated and an analysis based on content (Content Analysis)<sup>10</sup> and given the argument to get a conclusion on the subject matter in this study.

## **II. RESULT AND DISCUSSION**

### **A. Identify the Rights of Indigenous Peoples in Bali**

The existence of customary law communities has long been recognized in the history of Indonesia. This can be seen in the Constitution of 1945 which gives recognition to indigenous peoples. The recognition followed in some other legislation products. Ian Brownlie stated that it is not true if the rights of groups in all matters considered or guaranteed through the protection of individual rights. There are certain demands that are not adequately covered such as the provisions applicable to individuals. These include demands for positive action in order to maintain the cultural identity and language of a

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<sup>10</sup> Sumandi Suryabrata, *Metodologi Penelitian*, Jakarta: Rajawali, 1992, p. 85.



particular community, especially when members of the community concerned are territorially dispersed. Next are the demands for adequate protection of the rights over the land in traditional areas. The latter is related to the principle of self-determination which are political and legal implementation involves certain political models, including the ownership status of an independent country or a form of autonomy or the status of the union state.<sup>11</sup>

Indonesia has a noble purpose in giving recognition, protection and fulfillment of human rights to indigenous peoples. Social and cultural protection of customary law communities is an important concern for policy makers because this aspect is the pride and hallmark of Indonesia. Indigenous people in Indonesia have so much local knowledge which is admired both at regional and international levels. Hindus in Bali for example, have implemented Nyepi<sup>12</sup> every year. The ceremony is a source of inspiration for the world community to protect the environment and environmental activists have fought for it to become World Silent Day. This of course can answer the global problem of how to prevent global warming.

Various local wisdom is held by indigenous people in Indonesia and actually has been absorbed by the founding father of Indonesia in drafting the constitution, to put the concept of human rights both in the preamble and in the articles of the constitution. Constitutional rights can also be seen from the soul of Indonesia namely the Pancasila. The recognition and protection of customary law communities is implicitly enshrined in the principles of Pancasila.

Constitutional rights of customary law communities have actually possessed naturally, both in its position as individuals and as a community of indigenous environment. However, because of differences in background, interaction, characteristics and customs adopted by each customary laws community, we need a policy that is a reference in the law to give recognition and protection of customary law community in the absence of other forms of discrimination. So that customary law communities have an equal opportunity to enjoy development.

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<sup>11</sup> Ian Brownlie, *Dokumen-dokumen Pokok Hak Asasi Manusia*, translated by Beriansyah, Jakarta: UI Press, 1993, p. 93, 94.

<sup>12</sup> Nyepi is the Hindu feast where Hindus (in Bali) shall run *Catur Bratha Penyepian*. *Catur Bratha Penyepian* consists of *amati karya* (no work), *amati geni* (not allowed to light a fire), *amati lelungan* (not to be traveling), and *amati lelangan* (should not dissipate).

Violation of these customary law communities should be prevented by the spirit of the ruler in this country. To create a rule that can be a reference in providing legal protection for customary law communities, the government policy should be put in the form of law. Issued legal products can be identified as a product of substance law governing the recognition and protection of indigenous people and their legal products which have another substance but pay attention to the existence of indigenous peoples. In practice, legal products that had been made to give recognition and protection of customary law community instead marginalize the existence of indigenous peoples. In line with the views of MB Idjehar which states that perpetrators of human rights violations can be categorized into three (3) categories namely governments, groups and individuals<sup>33</sup>, then the laws that marginalize indigenous and tribal communities constitute human rights violations committed by the government.

Some laws, especially in the level of legislation have the potential to violate the constitutional rights of customary law communities, especially constitutional rights of indigenous villages in Bali. Traditional villages are built on the basis of the Hindu philosophy *Tri Hita Karana* which consists of *Parahyangan* (human relationship with God), *Pawongan* (relation between human beings) and *Palemahan* (human relationship with the environment). As for the rights to grow and thrive in indigenous communities in Bali these can be identified as follows:

**a. Constitutional Rights In the Realm of Parahyangan**

*Parahyangan* in the realm of philosophy of *Tri Hita Karana* is regulating the relationship between man and God. The relationship between man and God cannot be separated from religion professed by members of the indigenous village who follow Hinduism. Religion has an important meaning in the context of the law as described by Antony Allot:

*Religion is more than a system of norms. It purports to be an account of reality, of what it is why it is there, as well as being a set of rituals, practices and prescriptions which the adherent must adhere to if he is*

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<sup>33</sup> M.B.Idjehar, *HAM Versus Kapitalisme*, Yogyakarta: Insist Press, 2003, p. 128.

*to appease the supernatural power which are presumed to lurk behind and inform the observable world.<sup>14</sup>*

Constitutional rights in the realm of *parahyangan* in some provisions of the legislation are as follows:

- 1) The constitutional rights of Indigenous villages associated with the regulations in the land sector

Land is one of the essential elements in the life and livelihood of mankind primarily related to the existence of indigenous peoples. This is because the land has a spiritual and economic meaning for indigenous peoples. Spiritually, the customary law community has an obligation to the land and any object that is established on the land, to build a shrine on land and is one of the sacred elements of the universe. In the economic sense, the land is a place for fellowship following customary law which means a property is permanent and profitable.

All indigenous peoples yearn to be able to control their land. The concept of private land property rights is in fact very unfamiliar to many indigenous peoples.<sup>15</sup> Customary law communities cannot be separated from land ownership because they have a genuine right to mastery of the land. This right was the first to emerge compared with other rights settings. Rights issued by the government to indigenous peoples are a right that is recognition. Theoretically, this right cannot be requested back by the state. Close relationship and are religious magical, causing indigenous peoples to have the right to control the land. Given the importance of the position of land for indigenous peoples, then at a simple cultural level, every indigenous people, of course, has a way of setting about the land.<sup>16</sup>

As a totality, customary law community is a depiction of its citizens including the leaders / head of community (?). As a public unity, then

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<sup>14</sup> Antony Allot, *The Limits Of Law*, London: Butterworths, 1980, p. 126.

<sup>15</sup> IWGIA-Intitut Dayakologi, *Masyarakat Adat di Dunia Eksistensi dan Perjuangannya*, Jakarta: Gramedia, 2001, p. 33.

<sup>16</sup> Rizani Puspawidjaja, dalam Muladi (ed)., *Hak Asasi Manusia Hakekat Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Bandung: Refika Aditama, 2009, p. 242.

the customary law community is a ruling body that has the right to regulate public and take certain actions against citizens. As a legal entity, the people are represented by balancing the clan, the tribe, as the head of the customary and more engaged in the field of civil law. Thus, it means that the relationship between indigenous people and to the land is a public relations and civil relations, by customary law community and have mastered the land. Control and ownership of land by customary law community is termed the primordial rights, collective rights, or so-called “customary rights”.

Customary rights include all existing land within the territory of the community, either already owned by someone or not. Generally, the boundaries of customary rights of indigenous communities cannot be determined with certainty.<sup>17</sup> According to Imam Sudiyat, there are some characteristics of customary rights namely:

- a. Only the alliance itself and its legal citizens are entitled to free use of wild lands in the territory.
- b. Outsiders can only use the land with the permission of the ruler alliance: without permission, he is considered a foul.
- c. Residents of communion may take advantage of the region with the ancient rights restriction: only for the purposes of his own family: if utilized for the benefit of others, he is seen as a foreigner, so it must get permission first. While foreigners are only allowed to take advantage of the primordial right area with the permission of the head of the legal partnership as well as the payment of *upeti*, *mesi* (recognition, retribution), the legal partnership
- d. Guild of law is responsible for everything that happens in its territory, particularly in the form of action against the law, which is an offense
- e. Ancient rights cannot be released, transferred or exiled forever.
- f. Ancient rights also includes land that has been cultivated already covered individuals.<sup>18</sup>

<sup>17</sup> Boedi Harsono, *Hukum Agraria Indonesia Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaanya Jilid 1 Hukum Tanah Nasional Edisi Revisi*, Jakarta: Djambatan, 2005, p. 186.

<sup>18</sup> Rizani Puspawidaja, “Hak Sosial Budaya Masyarakat Tradisional Dalam Perspektif Kekinian; Memaknai Sengketa Hak Atas Tanah Sebagai Sebuah Hak yang Bersifat Asasi”, in Muladi (ed), *op.cit.*, p. 245-246.

C. Van Vollenhoven in *Miskeningin in het Adatrecht and De Indonesier en zijn ground* mentions the six traits of customary rights that alliance and its members are entitled to use the land, picking up the results of everything that is there in the ground and grown and live on these communal lands, these characteristics include:

1. The rights of individuals are also covered by the right of association.
2. The Governing alliance may determine to declare and use certain areas of land designated for public purposes and against this land is not allowed to be placed individual rights.
3. Foreigners who want to draw the results of these communal lands must first request permission from the head of the alliance and have to pay admission, after the harvest have to pay rent,
4. Guild is responsible for everything that goes on top of the customary environment,
5. Prohibition to alienate land including communal land so that the alliance completely lost authority over the land.<sup>19</sup>

Individual rights are also covered by the right of association as mentioned in the first characteristic above, Ter Haar explains the theory called the theory of the ball. According to this theory, the relationship between individual rights and the right alliance is reciprocal, which means the stronger individual rights over a plot of land, then the weaker the right of association on the ground and conversely the weaker individual rights on the land plot.<sup>20</sup>

The Act of Republic of Indonesia Number 5 of 1960 recognizes the customary rights. Recognition was accompanied by two (2) terms, namely regarding its existence and as to its implementation. Based on the article The Act of Republic of Indonesia Number 5 of 1960, land rights are recognized “along by the fact still exist”. Thus, communal land cannot be transferred to land ownership rights when the communal land is for example evidenced by the customary law community concerned or

<sup>19</sup> Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*, Bandung: Mandar Maju, 1992, p. 75.

<sup>20</sup> Dewi Wulansari, *Hukum Adat Indonesia Suatu Pengantar*, Bandung: Refika Aditama, 2010, p. 81-82.

the head of the relevant customs. By contrast, communal land can be diverted into land ownership rights, when the communal land in reality does not exist or its status has changed to “former communal land”.<sup>21</sup>

Communal land can be used as individual property rights when the communal land status has become “land state”. The former communal land is land that is no longer owned by the customary law community, for this, based on the Act of Republic of Indonesia Number 5 of 1960, land is automatically controlled directly by the state. In practice the administration of state land uses designation. State land can be transferred into private ownership. Communal Land can be changed to the status of a private property if the land has become a state land as described previously. The procedure of transfer of rights on state land became the property as stipulated in the Regulation of the Minister of State for Agrarian Affairs / Head of National Land Agency Number 9 of 1999 (Permenag/ KBPN No. 9/1999). According to article 9, paragraph (1) jo. Article 11 Permenag / KBPN No. 9/1999.<sup>22</sup>

About the change of customary rights into new individual rights can occur when taken following ways:

- a. Where an environmental customary leader declared himself as a supporter of indigenous rights and consequently, the leadership of communal environment which is usually king, declared himself because of his power as the owner of land under his control.
- b. When members of the community search for people outside to cultivate forest land vacant by holding the payment in advance.
- c. If members have drawn a customary fee if they wish to authorize the land.<sup>23</sup>

The possibilities provided in law (national law and customary law of land) on conversion of communal land into land owned can lead to the commercialization of the communal lands. As a result of customary law communities can lose the lands previously mastered. Related to

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<sup>21</sup> Mutiara Putri Artha, “Tanah Ulayat”, <http://www.hukumonline.com/klinik/detail/cl6522>, accessed 28 February 2016.

<sup>22</sup> *Ibid.*

<sup>23</sup> Dewi Wulansari, *op.cit.*, p. 86.

the previous discussion, that land tenure issues related to the spiritual members of indigenous communities, the loss of these lands will release a spiritual connection.

2) The constitutional right to religious and cultural implementation

In Article 28E paragraph (1) of the Constitution of 1945 states that “Everyone has freedom of religion and to worship according to their religion, to choose education and teaching, employment, to choose citizenship, to choose a place to stay in the territory of the country and left , as well as the right to return.” Hereinafter Article 28E paragraph (2) of the Constitution of 1945 states that every person has the right to freedom of belief to believe. In addition Article 28 paragraph (1) of the Constitution of 1945 also recognized that the right to religion is a human right. Article 29 paragraph (2) of the Constitution of 1945 also states that the State guarantees the independence of each population to religion. More so in the traditional Hindu Balinese society still emphasizes harmony and harmonious relationship between man and God (Brahman), humans with god, and man’s relationship to the holy spirits.

**b. Constitutional Rights in the Realm of *Pawongan***

In the teachings of Hindu philosophy *Tri Hita Karana*, also includes the setting *pawongan*, namely the relationship between man and man. The relationship between human beings is conceived in some phrases such as *asah, asih, asuh* (equality, love, care). The constitutional right of indigenous people in Bali is the right to culture as forms of intellectual property rights. Intellectual property rights is the term born and developed in Indonesia as a result of the association of the Indonesian nation with the developed countries, especially in trade. According to David I Bainbridge, intellectual property rights are property rights derived from intellectual work of men, the rights stemming from the creative result is the ability of human thought expressed in various forms of work that are beneficial and useful to support human life and have economic value.<sup>24</sup>

<sup>24</sup> Muhamad Djumhana R. Djubaedah, *Hak Milik Intelektual (Sejarah Teori dan Prakteknya di Indonesia)*, Bandung: Citra Aditya Bakti, 1993, p. 16.

Indigenous people in Bali have a great potential in economic development. They have a high level of culture through their traditional skills and knowledge of art, including dance, carvings, sculptures, weavings, paintings, various culinary skills, architectural design, geographical indications, plant breeding knowledge and knowledge of plant medicines. These potentials are an attraction in tourism development in Bali and also become the intellectual property rights owned collectively by the Balinese people.

**c. Constitutional Rights in the Realm of Palemahan**

*Palemahan* in the concept of *Tri Hita Karana* means arrangements regarding man's relationship with the environment. Humans and the environment are integral and inseparable. Humans need to have a place in his environment. This provides a legal obligation for humans to maintain the environment. The constitutional rights in the realm of *palemahan* are as follows:

1) Constitutional Rights in Forestry

The forest is a unique ecosystem, which has potential significance in supporting life on this earth. The potential significance of the forest is related to three main functions, namely the function of conservation, protection and production as defined in Article 6 paragraph (1) the Act of Republic of Indonesia Number 41 of 1999 concerning Forestry. Forests as an ecosystem not only save natural resources such as timber, but also have a lot of potential for non-timber that can be taken by society through the cultivation of agricultural crops on forest land.

The Act Number 41 of 1999 concerning Forestry classifies indigenous forests as state forests. The explanation that accompanies the act explains that the state forest is forest land that was previously unencumbered rights to land, as defined in the Act Number 5 of 1960. Further details outlining that these qualifications are derived from the basic principle of the unitary state used the state as an organization with the power of



people.<sup>25</sup> A recognized indigenous forest in Bali is Tenganan customary forest. Thus Tenganan forest can only be used by local indigenous village, whereas, in the indigenous village in Buahans forests, the National Forest of West Bali and so on cannot take advantage of forest products. Indigenous peoples can only use the forest, once the forest status as “indigenous forests”

## 2) Constitutional Rights in Natural Resources

Natural resources are the raw materials for man to continue his life therefore the management of natural resources must be done properly and in an integrated way. In the provision of Article 33 paragraph (3) of the Constitution of 1945 reads that the “earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.” Thus, the control and governance of natural resources are carried out by the state.

According to James Crawford as quoted by Rachmat Bowo Suharto the rights of the state as a community of people who are moderated by governments of these countries means that these rights are given to the human collectivity which organize themselves in the country. Rachmat bowo<sup>26</sup> states that recognition of the people as subjects of rights, serves as collateral for the people to benefit natural resources and the right to deny him his own government when in managing natural resources to act contrary to the interests of the people.

This guarantees the recognition of customary law communities as described previously regulated in Article 18B paragraph (2) of the Constitution of 1945 and internationally in various international legal instruments like the International Covenant on Civil and Political Rights, Convention of Biodiversity, Convention on the Elimination of All Forms of Discrimination, the Convention on the Elimination of All Forms of Racial Discrimination, Indigenous and Tribal Peoples Convention, and others.

<sup>25</sup> Supriadi, *Hukum Kehutanan & Hukum Perkebunan di Indonesia*, Jakarta: Sinar Grafika, 2010, p. 466-467.

<sup>26</sup> Rachmat Bowo Suharto, *Perlindungan Hak Dunia Ketiga Atas Sumber Daya Alam*, Yogyakarta:Tiara Wacana, 2001, p. 51.

## **B. Legal Responsive Recognition of Indigenous Peoples**

Construction of law requires law-making to be responsive to meet the needs of indigenous peoples. Responsive law proposed by Nonet and Selznick were split into three basic classifications of law in society, namely the repressive rule of law as a servant (repressive law), law as a separate institution that is able to tame the repression and to protect the integrity of his (autonomous law), and the law as a facilitator of various responses to the needs and aspirations of social (legal responsive).<sup>27</sup>

Responsive law believes that law designed to offer something better than procedural justice. Good laws must be competent and fair. Such laws should be able to recognize the public desire and commitment for the achievement of substantive justice.<sup>28</sup> The concept of responsive law is a response to criticism that the law is often separated from social reality and the ideals of justice. This concept is also an attempt to integrate legal theory, political philosophy and social study.<sup>29</sup> Responsive law relies on two major doctrines of law which should be functional, pragmatic, and rational purpose and competence as a standard evaluation of the implementation of the law.<sup>30</sup> Legal order responsive emphasis is on:

- a. Justice as the basis for the legitimacy of the substantive law.
- b. The regulation is a sub-Ordinary of the principles and policies.
- c. Consideration of the law should be goal-oriented and due to injustice in society.
- d. The use of discretion is recommended in decision making permanent law with goal-oriented.
- e. Cultivate liability system instead of the system of coercion.
- f. Morality cooperation as moral principles in carrying out the law.
- g. Power utilized to support the vitality of the law in serving the community.
- h. Rejection of the law should be seen as a lawsuit against the rule of law.
- i. Access opened wide public participation in the context of legal advocacy and social integration.<sup>31</sup>

<sup>27</sup> Philippe Nonet & Philip Selznick, *Hukum Responsif*, Bandung: Nusa Media, 2008, p.33.

<sup>28</sup> Bernard L. Tanya, Yoan N. Simanjuntak dan Markus Y. Hage., *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, 2010, p. 84.

<sup>29</sup> A. Mukthie Fadjar, *Teori-teori Hukum Kontemporer*, Malang, Setara, 2013, p. 49.

<sup>30</sup> Bernard L. Tanya, et.al., *op.cit.*, p. 207.

<sup>31</sup> *Ibid.*

Historically, recognition and respect for customary law communities started from the enactment of the *Algemene Bepalingen van Wetgeving* (AB) in the Dutch colonial period. In Article 11 the AB confirmed that “the laws applied to indigenous people (and the Foreign East) is religious law, institutions and customs of the people, as long as not contrary to the principles of justice and common decency, unless they subject themselves voluntarily to the law European civil and commercial law”. Recognition and respect of indigenous communities in the Dutch colonial period became the forerunner of the existence of the community until now.

In the development of national law, recognition and respect for customary law communities is set in the written constitution of the Indonesian nation. Article 18B paragraph (2) of the Constitution of the Republic of Indonesia in 1945 stated that “the State recognizes and respects units of traditional society where all the traditional rights are still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is set in Constitution.”

The recognition of indigenous people in the constitution means that the state recognizes the diversity of the nation of Indonesia. It is also associated with the function of the constitution itself as proposed by William G. Andrews stating that “The constitution imposes restraints on government as a function constitutionalism; but it also legitimizes the power of the government. It is the documentary instrument for the transfer of authority from the residual holders-the people under democracy, the king under monarchy to the organ of state power.”<sup>32</sup>

Recognition and respect for customary law communities as stipulated in the basic law of Indonesia provides the juridical consequences of the determination of the constitutional position of indigenous communities in relation to the state. This article is also a constitutional basis for state officials at the same time laying a moral obligation for state officials to take measures to protect the communities of indigenous peoples. Azmi Siradjudin A.R. in scientific publications, provides

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<sup>32</sup> William G. Andrews, *Constitutions and Constitutionalism* 3rd ed., New Jersey: Van Nostrand, 1968, p. 23.

opinions regarding the juridical consequences of the application of Article 18 paragraph (2) of the Constitution of 1945 which is as follows:

Thus the article is a declaration about; (a) the constitutional obligation of the state to recognize and respect indigenous peoples, as well as (b) the constitutional rights of indigenous peoples to gain recognition and respect for traditional rights. What is contained in Article 18B paragraph (2) that, as well as a constitutional mandate that must be obeyed by state officials, to regulate the recognition and respect for indigenous peoples in some form of legislation.<sup>33</sup>

Another article in the Constitution of 1945 relating to indigenous peoples is Article 28I paragraph (3) which states “The cultural identity and the rights of traditional communities be respected in line with the times and civilization”. Recognition and respect not only to cultural identity but also to the existence of traditional communities as legal subjects. Recognition of customary law communities, traditional rights and cultural identity which is owned, in accordance with the development of society is seen when the unity of the presence of indigenous communities is set in legislation, not contrary to *Pancasila* and human rights.

The Decree of Assembly of Republic of Indonesia Number XVII / MPR / 1998 on Human Rights affirmed that recognition and protection of indigenous people is part of the respect for human rights. It is seen in Article 32 which states:

Every person has the right to have private property and property rights should not be taken arbitrarily, then the Article 41 stated that the cultural identity of traditional communities, including indigenous land rights are protected, in tune with the times.

Recognition and protection of indigenous communities is a concept that is absolutely in a state of law. Implicitly criteria of a society can be regarded as customary law communities can be explored from the elucidation of Article 67 the Act Number 41 of 1999. The aforementioned article stated that indigenous people be recognized, if in reality they meet the elements, among others:

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<sup>33</sup> Azmi Siradjudin AR, “Pengakuan Masyarakat Adat dalam Instrumen Hukum Nasional”, <http://www.ymp.or.id/content/view/107/35/>, accessed 28 February 2016.

- a. People still in the form of association (*rechtsgemeenschap*);
- b. No institution in the form of the customary authorities;
- c. There is a clear area of customary law;
- d. Existing institutions and legal instruments, in particular indigenous justice, which is still adhered to; and
- e. Still conduct harvesting in the region surrounding forest to meet the needs of everyday life.

To determine whether indigenous villages become customary law communities who are then recognized or not, it should be analyzed through the above characteristics. *Paguyuban* is a form of common life in which members are bound by an inner relationship which is pure and natural and eternal. The basic relationship is love and a sense of inner unity which is predetermined. The life is also called real and organic.<sup>34</sup> Tonnies identifies the characteristics of the community, among others:

- a. Intimate, thorough intimate relationship.
- b. Private, personal relationships, which is special for some people.
- c. Exclusive, these relationships are for “us” only and not for others outside of “us”.<sup>35</sup>

An indigenous village is a community. An indigenous village also has an institutional device in the form of customary rulers. This traditional rulers device is termed “*prajuru adat*”. In Article 1 paragraph 12 Bali Provincial Regulation No. 3 of 2001 concerning Customary Community mentioned that “*prajuru pakraman / banjar pakraman* is caretaker in Bali.” An indigenous village is led by *Prajuru* that was elected by the members of the village and or set by Customary Community manners according to the rules set out in customary regulation respectively.

An indigenous village has clear jurisdiction. The territorial boundaries of the traditional village are normatively defined in the rules of the traditional village. It also has indigenous village institutions and legal instruments, in particular indigenous justice, which is still adhered to by indigenous peoples. Customary

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<sup>34</sup> Ferdinand and Charles P Loomis dalam Soerjono Soekanto, *Sosiologis Suatu Pengantar*, Jakarta: RajaGrafindo Persada, 2005, p. 132.

<sup>35</sup> *Ibid.*, p. 134.

law provisions are written in the traditional village rules. Under the provisions of Article 5 of Bali Provincial Regulation Number 3 of 2001, *awig awig* is “the rules made by the member of customary village used as a guideline in the implementation of *Tri Hita Karana*”

Traditional authorities as the leader of the indigenous villages have judicial functions. This function can be seen from the village board duties as stipulated in Article 8c Bali Provincial Regulation Number 3 of 2001 which states that traditional authorities have the task to work for peace and the settlement of customary disputes. Traditional authorities’ existence of indigenous customary dispute resolution is recognized and adhered to by the members. The members even tend to resolve disputes amicably before courts. For an indigenous village that still has a forest area, the surrounding communities still use the forest for their daily needs. Forest harvesting by customary law community is offset by forest security obligations as conceptualized jointly by the Forest Service through self-managed forest program.

Acknowledging the existence of indigenous villages where the juridical consequences indigenous villages has the legal capacity to own and control property, making your own rules or termed *awig awig*, implementing these rules, adjudicate and resolve conflicts in the village through the institutions “Kertha Village” as well as perform their own security through *pekemitan*, *pegebagan*, and *pecalangan*.

### **C. Empowerment Efforts Needs to do Public Rights for Bali**

The existence of customary law communities has long been recognized in the history of the Indonesian state. This can be seen in the Act of 1945 (1945 Constitution) which gives recognition to indigenous peoples. The recognition followed in some other products of legislation. However, in reality a customary law community is still a part of vulnerable groups, when linked with the fulfillment of Human Rights. It cannot be separated from the problems often faced by customary law community with regard to civil and political rights

and economic, social and cultural.<sup>36</sup> That condition requires steps to empower indigenous communities in creating a civil society

The ideal description of the traditional village is in its form as “*Sima swantantra*” or village civil. As a village which emphasizes the life of civil society, then customary community must meet the substance, namely:

- a. Society based on sovereignty of the people with equal rights is democratic.
- b. Having a social maturity with a high level of legal compliance and capable of displaying an independent attitude and to respect the independence of others.
- c. Autonomous, namely have space and public discourse that cannot be intervened by outside parties.
- d. Independent in solving existing problems and suspected there would be (politic, economy, social and culture) using local genius.<sup>37</sup>

Empowerment for a traditional village unit of indigenous people in Bali is very necessary and thus relevant instruments shall be set out in law. I Made Suasthawa Dharmayuda argues that “the empowerment of the indigenous villages in the preservation of the environment should continue to be pursued through the issuance of legal instruments such as regulation and legislation that serves as recognition, strengthening and development of the indigenous villages as well.”<sup>38</sup> Article 13 of Regulation of Bali Provincial No. 3 of 2001 mentioned that:

- (1) Empowerment and preservation of traditional village directed to the following matters:
  - a. community development in accordance with Balinese culture;
  - b. the realization of cultural preservation in the traditional village;
  - c. the creation of a culture of Bali in rural areas who are able to selectively filter out foreign cultural values;
  - d. the creation of an atmosphere which could encourage an increase in the role and functions of the traditional village in an effort to:
    - 1) enhance the dignity and identity;
    - 2) actively participate in the implementation of development in all areas;

<sup>36</sup> Ministry of Social Affairs Republic of Indonesia, “Lokakarya Nasional Masyarakat Hukum Adat”, <http://www.depsos.go.id/modules.php?name=News&file=article&sid=1099>, accessed 28 February 2016.

<sup>37</sup> I Made Suasthawa Dharmayuda, *Desa Adat Kesatuan Masyarakat Hukum Adat di Propinsi Bali*, Denpasar: Upada Sastra, 2001, p.7.

<sup>38</sup> *Ibid.*, p. 39.

- (2) In conducting empowerment and preservation of indigenous villages as referred to in paragraph (1), should encourage the creation of:
  - a. Democratic attitude, fair and objective among devices and villagers respectively.
  - b. Preservation of customs and culture by not closing the influence of other cultures are positive values.

Efforts that can be made to empower an indigenous village in the fulfillment of their traditional rights are:

- a. Set the traditional rights into legal instruments at a local level.
- b. Increase understanding of the local government for the rights of indigenous communities (traditional village).
- c. Customary law community development by local authorities on an ongoing basis.
- d. Activating function of traditional village council in resolving the cases related to the traditional rights of indigenous peoples.

A traditional village is a self-contained unit or a small country that has a democratic government. To that end, the substance of civil society in realizing the need to elaborate on the spiritual values, social and natural environment in accordance with the philosophy of *Tri Hita Karana*. A traditional village is assembled and contains citizens to realize the value of togetherness teachings “salunglung sabayantaka, sagilik saguluk and paras-paros” or concord, harmony and propriety born of philosophical “tat tvam asi” (I was you and you are me).

### III. CONCLUSIONS

- a. States have an obligation to give recognition to indigenous peoples based on the constitution. Responsiveness or the constitutional recognition of the existence of the rights of indigenous peoples has grown and developed in Bali are envisaged in the constitution, namely Article 18 B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. The recognition of indigenous communities as a customary law unit in Bali who have a constitutional right stipulated in the Bali Provincial Regulation



No. 3 of 2001 on Customary Village. The recognition of *parahyangan* by the State can be found in a constitutional rights relating to Land Law which taking into account religious and cultural aspect in its implementation. Constitutional rights in the realm of *pawongan*, namely skills and their traditional knowledge of art, including dance, carvings, sculptures, weavings, paintings, various culinary, architectural design, geographical indications, plant breeding knowledge and knowledge of plant medicines are accomodated in intellectual property rights owned collectively by the Balinese. Also constitutional rights in the realm of *palemahan*, ie constitutional rights in forestry and natural resources.

- b. The constitutional mandate must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation. While the empowerment of local people has been recognized by constitution, yet much remain to be done. The rights of indigenous peoples which has grown and developed in Bali should be legaly enforced in the life of society and state. There is a set of traditional rights into legal instruments at a local level, local government will improve the understanding of the rights of indigenous peoples, fostering of indigenous communities by the local government on an ongoing basis and enable the functions of traditional village council in resolving a case related to the traditional rights of indigenous peoples.

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