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ARRANGEMENT OF TRADITIONAL INSTITUTIONS IN INDONESIAN LEGAL SYSTEM

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Abstract

The establishment of the Majelis Desa Adat/Traditional Village Council (MDA) in Bali Province and the Majelis Dewan Adat Dayak Nasional/National Dayak Customary Council in Kalimantan (MADN) in Kalimantan Province are clear examples that the customary law community unit seriously shows its existence to accommodate the interests of members and create policies that can directly affect the customary law community unit. However, the existence of these two customary institutions does not yet have legal certainty in Indonesian legal arrangements that specifically discuss their position. As a result, the position of these customary institutions in the national realm is ambiguous due to the unclear status and position of legal products and the strength of the policies issued. The purpose of this research is to discuss the position of the customary village council in Bali Province and the national Dayak Customary Council in Kalimantan in the laws and regulations and the status of policies issued by customary institutions in Indonesian laws and regulations. The method used is normative legal research. Data sources consist of primary legal materials, secondary legal materials, and tertiary legal materials. In this research, the data is analyzed qualitatively and then presented descriptively to get a comprehensive conclusion. The results show that the MDA and the MADN have experienced significant developments ranging from institutional arrangements to legal products issued. Therefore, to provide legal certainty to the position of customary institutions and the status of legal products issued by Customary Institutions, it is necessary to explicitly regulate in Law Number 12 of 2011 as amended by Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation concerning the position of Customary Institutions and the resulting Legal Products so that there is no overlap of policies between positive law and customary law that is currently running.

Keywords: *authority; customary Institutions; MADN; MDA*

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Abstrak

Pembentukan Majelis Desa Adat (MDA) di Provinsi Bali dan Majelis Dewan Adat Dayak Nasional (MADN) di Provinsi Kalimantan menjadi contoh nyata bahwa kesatuan masyarakat hukum adat secara serius menunjukkan keberadaannya untuk mengakomodir kepentingan anggota dan menciptakan kebijakan-kebijakan yang dapat berpengaruh secara langsung kepada kesatuan masyarakat hukum adat. Namun, keberadaan kedua lembaga adat ini belum memiliki kepastian hukum di dalam pengaturan hukum Indonesia yang secara spesifik membahas mengenai kedudukannya. Akibatnya kedudukan lembaga adat ini di ranah nasional menjadi ambigu karena ketidakjelasan status dan posisi produk hukum maupun kekuatan dari kebijakan yang dikeluarkan. Tujuan penelitian ini untuk membahas mengenai kedudukan majelis desa adat di Provinsi Bali dan majelis adat dayak nasional di Kalimantan dalam peraturan perundang-undangan dan status kedudukan kebijakan yang dikeluarkan oleh lembaga adat pada peraturan perundang-undangan di Indonesia. Metode yang dipergunakan adalah penelitian hukum normatif. Sumber data terdiri atas bahan hukum primer, bahan hukum sekunder, dan bahan hukum tersier. Dalam penelitian ini data dianalisis secara kualitatif yang kemudian disajikan secara deskriptif untuk mendapatkan kesimpulan yang komprehensif. Hasil penelitian menunjukkan bahwa MDA dan MADN telah mengalami perkembangan yang sangat signifikan mulai dari tata kelembagaan hingga produk hukum yang dikeluarkan. Oleh karena itu, untuk memberikan kepastian hukum terhadap kedudukan lembaga adat serta status kedudukan produk hukum yang dikeluarkan oleh lembaga adat, maka perlu adanya pengaturan secara tegas di dalam Undang-Undang Nomor 12 Tahun 2011 sebagaimana telah diubah menjadi Undang-Undang Nomor 13 Tahun 2022 tentang Perubahan kedua atas Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan tentang Kedudukan Lembaga Adat dan Produk Hukum yang dihasilkan agar tidak terjadi tumpang tindih kebijakan antara hukum positif dengan hukum adat yang saat ini telah berjalan.

Kata Kunci : kewenangan; lembaga adat; MADN; MDA

I. Introduction

The progress of governance at the regional level has developed, with the increasing institutionalization of customary law community associations marked by the arrangement of local customary institutions, such as the *Majelis Desa Adat*/Traditional Village Council (MDA) in Bali⁴ and the *Majelis Dewan Adat Dayak Nasional*/National Dayak Customary Council in Kalimantan⁵ (MADN). Governance as a legal institution in carrying out

⁴ Article 1 point 24 of the Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat Di Bali which describes "Customary Village Councils, hereinafter abbreviated as the MDA, are traditional village associations (pasikian) at the Provincial, Regency/City and District levels in a tiered manner that have duties and authority in the field of the practice of customs originating from the Hindu religion and local wisdom and functioning to provide advice, consideration, guidance, interpretation and decisions in the fields of custom, tradition, culture, social-religious, local wisdom, customary law and customary economy".

⁵ Article 1 point 28 of the Peraturan Daerah Provinsi Kalimantan Tengah Nomor 1 Tahun 2010 tentang Perubahan Atas Peraturan Daerah Provinsi Kalimantan Tengah Nomor 16 Tahun 2008 tentang Lembaga Adat Dayak di Kalimantan Tengah which describes "National Dayak Traditional Council is the highest Dayak Traditional Institution which has the task of being a coordinating, communication, service, assessment and forum for accommodating and following up aspirations the community and all of its member Dayak Customary Council, domiciled in one of the provincial capitals in Kalimantan on a rotating basis".

government goals is known as *bestuursrecht*⁶ or constitutional law in a narrower sense,⁷ after the amendment to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) was mainly related to the provisions of Article 18 paragraph (7) of the 1945 Constitution of the Republic of Indonesia stipulates that the administration of regional government is regulated in the Law and Article 18B paragraph (2) The 1945 Constitution of the Republic of Indonesia which basically determines the recognition of the 1945 Constitution of the Republic of Indonesia for the existence of customary law community units.⁸ This clearly has juridical consequences that villages and traditional villages in their governance have the functions of government, village finance, village development, and receive facilities and guidance from the central government and assistance from district/city governments.⁹

The arrangement of village and traditional village arrangements can be found in Law Number 19 of 1965 concerning *Desapraja*, Law Number 5 of 1979 concerning Village Government, and Law Number 6 of 2014 concerning Villages. Further, the statutory instruments governing villages and traditional villages can be found in the structuring of local government arrangements, namely Law Number 23 of 2014 concerning Regional Government and Law Number 9 of 2015 regarding the Second Amendment to Law Number 23 of 2014 concerning Regional Government (UU Pemda). This juridical basis regulates villages and traditional villages in providing flexibility to the regions to carry out institutional arrangements for customary law community units, which are not only limited to efforts to recognize the existence of customary law community units as mandated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The constitutional basis of autonomy regions in Article 18 paragraph (6) of the 1945 Constitution of the Republic of Indonesia and the regional government authorities regulated in the Regional Government Law become the basis for the establishment of customary institutions through instruments of legislation at the regional level.

⁶ Saparin Sumber. 1974. *Tata Pemerintahan dan Administrasi Pemerintahan Desa*. Jakarta: Ghalia Indonesia, p. 22-23.

⁷ Usep Ranawijaya. 1983. *Hukum Tata Negara Indonesia: Dasar-dasarnya*. Jakarta: Ghalia Indonesia, p. 13-14.

⁸ Amrina Rosyada, et.al., 2018. "Perlindungan Konstitusional terhadap Kesatuan Masyarakat Hukum Adat dalam Mewujudkan Keadilan Sosial", *Kanun Jurnal Ilmu Hukum*, 20(1): 2. <https://doi.org/10.24815/kanun.v20i1.10021>

⁹ Putri Lia Sartika. 2016. "Kewenangan Desa Dan Penetapan Peraturan Desa (Village Authority And The Issuance Of Village Regulation)", *Jurnal Legislasi Indonesia*, 13(2): 162.

Concerning the institutional existence of customary law community units, several regulations that specifically regulate this matter can be found through the Regional Regulation of the Province of Bali Number 4 of 2019 concerning Traditional Villages in Bali (Perda Desa Adat Bali), which regulates the MDA and Regional Regulations of the Province of Central Kalimantan. Number 16 of 2008 concerning Dayak Customary Council in Central Kalimantan as amended by Central Kalimantan Provincial Regulation Number 1 of 2010 concerning Amendments to Central Kalimantan Provincial Regulation Number 16 of 2008 concerning Dayak Indigenous Institutions in Central Kalimantan (Perda Dayak Customary Council) as the legal basis for the establishment of the MADN. Recently, Bali has become one of the leading provinces in accommodating traditional institutions, for example in Article 6 of the Bali Province Bill outlines that "*In the territory of the Bali Province there are traditional villages and subak which are regulated by Regional Regulations of the Province of Bali in accordance with statutory provisions*".¹⁰ A more explicit acknowledgment in this bill is an important milestone in the existence of customary institutional arrangements in the regions.

Regarding carrying out their duties and functions, both the MDA and the MADN have the authority to issue binding decisions, decrees, and legal products. In addition, the two institutions have an institutional hierarchy that starts from the village, sub-district, district/city levels, up to the province for the MDA Bali and up to the national level for the MADN Kalimantan. Because the policies or legal products issued by the MDA and the MADN are in the dimension of the customary law system, the interaction of the legal system is unavoidable. The interaction between these legal systems can be understood, given the concept of a hierarchy of norms¹¹ in Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation (UU PPP). The theory of the hierarchy of legal norms essentially states that the legal system is

¹⁰ The Draft Law on the Province of Bali was ratified at the 4th plenary session for 2022-2023 by the Indonesian Parliament on April 4, 2023. The significant impacts that will benefit from the passage of this bill are related to traditions, cultural arts, local wisdom, traditional villages, and subak. All of that will get better and more organized in the future.

¹¹ Muhammad Fikri Hanafi and Sunny Ummul Firdaus. 2022. "Implementasi Teori Hans Nawiasky Dalam Peraturan Perundang-Undangan Di Indonesia", *Sovereignty: Jurnal Demokrasi Dan Ketahanan Nasional*, 1(1): 80. <https://doi.org/10.13057/Sovereignty.V1i1.192>. See also Maria Farida Indrati. 2007. *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan (Buku 1)*. Yogyakarta: Kanisius, p. 41 and Maria Farida Indrati. 2007. *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan (Buku 2)*. Yogyakarta: Kanisius, p. 57.

arranged in stages and levels like a ladder, then the relationship between the norms governing the actions of other norms and these other norms is referred to as super relations and subordination in the spatial context.¹² This hierarchy also has an impact on the vertical relationship of statutory regulation.

If the hierarchy of laws and regulations is carefully examined, no hierarchical levels of norms can be found that can be compared with legal/policy products issued by the MDA or the MADN, which oversee customary institutions and traditional villages. In contrast to the regulations stipulated by the Village Head or at the same level as stipulated in Article 8 paragraph (1) of the UU PPP, which stipulates that: *“Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, the Minister, bodies, institutions, or commissions of the same level established by law or the government by order of law, Provincial Regional People's Legislative Council, Governor, Regency/City Regional People's Legislative Council, Regent/Mayor, Village Head or equivalent”*

This is because, referring to Article 1 point 7 of the Village Law, it has been limitedly determined that village regulations are statutory regulations stipulated by the Village Head after being discussed and agreed upon with the Village Consultative Body. In contrast to the MDA and the MADN legal/policy products which were formed based on a special mechanism (*sui generis*)¹³ in accordance with the regulations of each institution. The problems currently faced by the MDA and the MADN are related to the certainty of the MDA and the MADN legal/policy products in structuring the hierarchy of laws and regulations in Indonesia. After having existed for many years and having issued various policies and decisions, of course, a special instrument is needed that includes the legal products of this

¹² Jimly Asshiddiqie and M. Ali Safa'at. 2006. *Teori Hans Kelsen Tentang Hukum*. Jakarta: Konstitusi Press, p. 110.

¹³ J. Janewa Osei Tutu. 2011. “Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law”, *Marquette Intellectual Property Law Review*, 15(1): 164. J. Janewa defines traditional knowledge as the result of intellectual activity that is inherited between generations and associated with certain groups of people.

customary institution in arrangements that are recognized nationally. This relates to legal certainty that is enforced on legal products issued.¹⁴

Whereas, in fact, the policies issued by customary institutions have more influence on indigenous peoples. So that arrangements related to the position of legal products issued by customary institutions in Indonesian laws and regulations are important.¹⁵ As with the criticism of overlapping, unorganized and coordinated laws and regulations in Indonesia, Herman said that improving the arrangement of laws and regulations cannot be carried out effectively using a casuistic approach. Herman said that such a casuistic approach can be analogous to a fire department acting after a fire has occurred.¹⁶ Therefore, in the future, there is a need for special codification related to indigenous peoples in one law in Indonesia, where this is a form of legal protection for indigenous peoples in Indonesia.¹⁷

This study attempts to analyze in depth the position of legal products/policies of the MDA and the MADN in legislation to be very important to achieve legal certainty as one of the legal objectives conveyed by Gustav Radbruch.¹⁸ There has been no previous research related to the arrangement regarding the position of the MDA and the MADN legal/policy products in legislation. In addition, previous research, in general, only highlighted the existence of customary courts in Indonesian laws and regulations,¹⁹ and the development of indigenous peoples in Indonesia pays special attention to the rights of indigenous peoples in Indonesia.²⁰ More specifically, there has been no scientific research that examines

¹⁴ R. Tony Prayogo. 2016. "Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang", *Jurnal Legislasi Indonesia*, 13(2): 194.

¹⁵ Article 18B paragraph (2) of the Undang-Undang Dasar Negara Republik Indonesia 1945 which states that the state recognizes and respects customary law community units and their traditional rights if they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.

¹⁶ Herman and Firman Muin. 2018. "Sistematikasi Jenis Dan Hierarki Peraturan Perundang-Undangan Di Indonesia", *Jurnal Komunikasi Hukum*, 4(2): 90. <https://doi.org/10.24815/kanun.v20i1.10021>

¹⁷ Indah Anggraini Novitasari, Farina Gandryani and Fikri Hadi. "Legalitas Hak Komunal Atas Kelestarian Hutan Adat Di Wilayah Ibu Kota Nusantara", *Mimbar Keadilan*, 16(1): 10. <https://doi.org/10.30996/mk.v16i1.8008>

¹⁸ M. Muslih. 2013. " Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)", *Legalitas: Jurnal Hukum*, 4(1): 143. Gustav Radbruch combines the three classic views (philosophical, normative and empirical) into one approach with each approach used as a basic element and became the basis of Radbruch's legal approach which became known as the three basic values of law which include justice (philosophical), legal certainty (juridical) and benefits to society (sociological).

¹⁹ Fahror Rahman. 2018. "Eksistensi Peradilan Adat Dalam Peraturan Perundangan-Undangan Di Indonesia", *Jurnal Hukum Samudra Keadilan*, 13(2): 325.

²⁰ Relexi Bayo, Andy Usmina Wijaya, and Fikri Hadi. 2023, "Pengakuan Masyarakat Adat Dalam Peraturan Perundang-Undangan Di Indonesia", *Wijaya Putra Law Review*, 1(1): 2.

specifically the customary institutions that already exist in Indonesia, for example, the MDA Bali and the MADN Kalimantan.

Based on this background, the author raises issues related to elaborating the position of the Traditional Village Council in Bali Province and the National Dayak Traditional Assembly in Kalimantan in the constitutional institutional structure in Indonesia and the urgency of *ius constituendum* regulation of the policies of the Adat Council in the Province of Bali and the National Dayak Customary Council in Kalimantan in relation to the position and binding power of these policies to the laws and regulations in Indonesia.

II. Methods

The arrangement of existence of customary institutions in this research will be carried out using normative legal research methods.²¹ Normative research is focused on reviewing the arrangement of policy arrangements for the Traditional Village Assembly and the National Dayak Customary Council by using a statutory approach and a conceptual approach.²² The statutory approach will be used to examine the arrangements for customary institutions in Indonesia. While the conceptual approach will look at the doctrine related to the development of customary institutions in a legal system. Therefore, this research will elaborate on laws and regulations, analyze the relationship between these regulations, explain existing problems, and provide solutions to problems that occur.²³ The type of legal material used in this study is secondary data which can be grouped into primary, secondary, and tertiary legal materials. The data obtained from the library research will then be analyzed qualitatively, in which the results of the analysis will be presented in the form of a descriptive presentation to obtain a comprehensive conclusion.

²¹ Soerjono Soekanto and Sri Mamudji. 2011. *Normative Legal Research Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada, p. 13.

²² Peter Mahmud Marzuki. 2014. *Penelitian Hukum*. Jakarta: Kencana, p. 133.

²³ Peter Jeremiah Setiawan. et.al., 2022. "Pengaturan Kedudukan Keterangan Saksi dalam Tindak Pidana Kekerasan dalam Rumah Tangga (Regulation on Witness Statements Standing in Criminal Acts of Domestic Violence)", *Negara Hukum: Membangun Hukum Untuk Keadilan dan Kesejahteraan*, 13(2): 171. 10.22212/jnh.v13i2.3247

III. Results and Discussion

A. The position of the Traditional Village Assembly in the Province of Bali and the National Dayak Customary Council in Kalimantan in Laws and Regulations

To understand the position of the MDA and the MADN institutions in the life of the Customary Law Community Unit (KMHA), it is important to first understand the characteristics of customary law in Indonesia. Otje Salman quoted Soepomo's speech as saying that the characteristics of customary law in Indonesia are communal.²⁴ This implies that the characteristics of the relationship formed between individuals and groups (institutions) are not able to face each other, because the inner atmosphere of customary groups (institutions) is identical to the individuals in that group. Such a principal can be understood through the existence of communal rights to land. It should be emphasized that communal rights and customary rights are conceptually different. Ramadhani Rahmat quoted Sumardjono as saying that ulayat rights have a public and private dimension, while communal rights have a private dimension. One clear example of ulayat rights is ulayat nagari rights in Minangkabau, while communal rights are lands controlled by tribes, peoples, families or clans/marga.²⁵ Communal characteristics are the main characteristics of KMHA in Hollemann's opinion, as quoted by Otje Salman, Hollemann conceptualizes that the four general characteristics of indigenous peoples include:²⁶

1. Religious magic is a pattern of thinking that bases its foundation on religious ideas, namely belief in something sacred. This belief implies that before indigenous peoples encountered religious law, this religiosity was manifested in a prelogical, animistic way of thinking and belief in the supernatural that inhabits an object.
2. Communal is interpreted as indigenous peoples having the principle that every individual, community member is an integral part of society. Every individual's interest must be adjusted to the interests of society, because no individual is separated from his community.

²⁴ H.R. Otje Salman Soemadiningrat. 2002. *Rekonseptualisasi Hukum Adat Kontemporer: Telaah Kritis Terhadap Hukum Adat sebagai Hukum yang Hidup dalam Masyarakat*. Bandung: Alumni, p. 122.

²⁵ Ramadhani Rahmat. 2019. "Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Pengadaan Tanah Untuk Kepentingan Umum (Indigenous Legal Communal Rights In The Land Acquisition For Public Purposes)", *Jurnal Penelitian Hukum De Jure*, 19(1): 99. [Http://Dx.Doi.Org/10.30641/Dejure.2019.V19.97-108](http://Dx.Doi.Org/10.30641/Dejure.2019.V19.97-108)

²⁶ *Ibid.*

3. Concrete in the sense that this trait is defined as behavior that is fully explicit or actual, which shows that every legal relationship that exists in society is not hidden or disguised.
4. Cash is an implied trait in terms of fulfilling achievements, that every achievement is always accompanied by other achievements that are immediately given.

The MDA and the MADN as an institution, are generally defined based on established patterns of human relations. The relationship pattern consists of an order of values. The existence of institutions is, in principle, limited by structural foundations and beliefs and ideas about the ideals of society (ideology). Structural elements refer to the relationship system regulated by an institution. While beliefs and ideals are the basic elements of an institution.²⁷ The legitimacy of political power in society is also determined by the beliefs and value systems adopted by that society. So that political power will be seen as legitimate if it is aimed at creating the values aspired to by society.²⁸ Customary institutions based on Gillin's views as quoted by Soerjono Soekanto convey the concept regarding the classification of social institutions, namely:²⁹

1. In terms of the concept of institutional development, two types of institutions can be distinguished. First, creative institutions which explain that institutions are born by themselves along with the growth and development of the community's customs. Second, enacted institutions are institutions formed based on the needs of the community to fulfill certain goals but are still based on the original values of the community. Then, the notes on the implementation of the community's original values were then systematized and arrangements were made at the enacted institution.
2. In terms of the system of values held by the community, institutions can be classified as, First, basic institutions, namely institutions that are seen as having a very important role to maintain and maintain the order of things in society. Second, subsidiary institutions, namely institutions that are seen as complementary and do not play a fundamental role in society.
3. In terms of how the acceptance of institutions by the public can be divided into two, namely, socially sanctioned institutions and unsanctioned institutions. Socially

²⁷ Rafael Raga Maran. 2001. *Pengantar Sosiologi Politik*. Jakarta: PT Rineka Cipta, p. 48.

²⁸ *Ibid.*

²⁹ Soerjono Soekanto. 2005. *Pokok-Pokok Sosiologi Hukum*. Jakarta: PT Raja Grafindo Persada, p. 211.

sanctioned institutions are institutions that are accepted by society, while unsanctioned institutions are institutions that are not accepted by society.

4. In terms of their function, institutions can be distinguished between perative institutions and regulative institutions. Perative institution, has the role of developing the strategy needed to achieve the goals of the institution. Meanwhile, regulative institutions play a role in overseeing actions that are not an absolute part of the institution.

In simple terms, it can be understood that the process of forming an institution as an organization initiated by the community grew from family relationships which later developed into clans. Due to the pattern of people's life that moved to start settling in an area, clans that were originally separated became united in one organizational structure such as a village (kuria, nagari, marga, country and so on). This continues, from the village developing into a region, up to the state level.³⁰ Based on this theory, it becomes relevant if in its development KMHA or traditional villages which were originally separate from one another without eliminating the sovereignty of the community will have the right to regulate their autonomy and the original values of KMHA by deciding to organize themselves in a certain customary institution which is more universal in nature to achieve certain objectives of KMHA, as the concept of enacted institution conveyed by Gillin. Such an argument can be used as a starting point for the classification of unique arrangements of the MDA and the MADN in the system of laws and regulations in Indonesia.

1. The position of the Council of Traditional Villages of the Province of Bali

The Province of Bali continuously makes various efforts to maintain and improve the quality of governance of traditional villages, as well as improving the quality of governance of Desa Dinas. Efforts to maintain and improve the quality of governance of traditional villages were first attempted in 1979 based on the Decree of the Governor of the Level I Region of Bali Number 18/Kesra.II/C/119/1979 concerning the Council of Trustees of Indigenous Institutions (MPLA). Furthermore, it was carried out based on the Regional

³⁰ Hilman Hadikesuma. 1981. *Hukum Ketatanegaraan Adat*. Bandung: Alumni, p. 10.

Regulation of the Province of Bali Level I Number 06 of 1986³¹ concerning the Position and Function of Traditional Villages as KMHA in the Province of Bali. The same effort was also carried out by the Provincial Government of Bali based on the Regional Regulation of the Province of Bali Number 3 of 2001 concerning Desa Pakraman which was subsequently amended based on the Regional Regulation of the Province of Bali Number 3 of 2003 concerning Desa Pakraman by forming the Pakraman Village Assembly (MDP) in 2004 in the Province of Bali, Regencies/Cities, and Districts throughout the Province of Bali. Then finally, the MDP nomenclature eventually changed to the MDA since the enactment of the Bali Traditional Village Regulation in 2019. This change indirectly strengthens the position of the MDA with its characteristics as a representation of traditional values in Bali.

Examining more deeply the philosophical basis for the formation of the MDA as set forth in the Declaration (Pakupada) for the establishment of the traditional village assembly in Bali, the declaration for the formation of the MDA contains the meaning of the cosmological conception of Padma Bhuwana which is united as the *ulus* that binds the traditional villages in Bali. Traditional villages in Bali have existed, lived, and developed for centuries as KMHA, having autonomy, order, tradition, traditional rights, wealth, and manners as guidelines for relationships/relationships between everyone in the traditional village community which is united in the concept of Kahyangan Three and/or Kahyangan Village Temple. This concept plays a role in the legitimacy of traditional villages to regulate and administer their customary authority based on legal ground in the form of *Awig-Awig*, *Catur Dresta* (Kuna/Purwa Dresta, Loka Dresta, Dresta Village, and Sastra Dresta), and Traditional Village Pararem. These various legal grounds allow the traditional village to function as a self-governing community³² as well as a self-regulating community. The combination of these two functions makes traditional village have customs, traditions, art, and culture, as well as local wisdom which are the source of the values of the Balinese life order, which are based on the philosophy of Tri Hita Karana.³³

³¹ Peraturan Daerah Provinsi Bali Nomor 06 Tahun 1986 tentang Kedudukan, Fungsi, Dan Peranan Desa Adat sebagai Kesatuan Masyarakat Hukum Adat di Provinsi Bali.

³² Masyita. 2019. "Village Governance: Village Democracy in the Frame of Self-Governing Community and Local Self Government", *Meraja Journal*, 2(3): 86.

³³ Putu Cory Candra Yhani and Made Supastri. 2020. "Filsafat Tri Hita Karana Sebagai Landasan Menuju Harmonisasi Dan Hidup Bahagia", *Śruti: Jurnal Agama Hindu*, 1(1): 36.

Tri Hita Karana contains the concept of interrelationship which reflects the existence of internal interaction and interdependence between the various parts or components of the system and between the system and its environment.³⁴ Tri Hita Karana is the most essential core of culture in Bali which is dynamic in line with the dynamics of society, but changes between subsystems must synergize with each other so as to create harmony and togetherness without any conflict so that the existence or sustainability of the subsystems is always maintained.³⁵ Therefore, it can be concluded that this philosophy includes three important aspects, namely Parahyangan, Pawongan, and Palemahan. Parahyangan refers to the human relationship with God, while Pawongan refers to the relationship between humans and Palemahan relates to the human relationship with the surrounding environment. In this case, the traditional village in Bali functions as an independent community that has the ability to regulate itself and maintain a balance between human relations with God, fellow humans, and the surrounding environment. This is a source of cultural values and a unique way of life in Bali and strengthens social ties among the Indigenous Village community.³⁶

The formation of the MDA by Traditional Villages in Bali through the Declaration (Pakupada) contains a philosophical meaning that the MDA is formed on the basis of the authority of a self-governing community as well as a self-regulating community owned by a Traditional Village as KMHA. The establishment of the MDA by the Bandesa of Tampuagan Traditional Village, Batuan Traditional Village, Poh Gading Traditional Village, Kutuh Traditional Village, Bongan Puseh Traditional Village, Baler Bale Agung Traditional Village, Bongancina Traditional Village, and Sala Traditional Village acting on behalf of Traditional Villages throughout Bali has a logical consequence that Traditional Villages in Bali are bound by the MDA. This matter is reaffirmed in the provisions of Article 50 paragraph (1) of the Articles of Association/Bylaws of the Bali Traditional Village Assembly (AD/ART of the MDA) which emphasizes the relationship between traditional village and the MDA that “*A Traditional Village is obliged to: a. Respect and comply with every Decree and Decree of the Traditional Village Assembly; b. Respect and maintain the good name*

³⁴ *Ibid.* p. 40.

³⁵ Satria Adhitama. 2020. "Konsep Tri Hita Karana Dalam Ajaran kepercayaan Budi Daya", *Dharmasmrti: Jurnal Ilmu Agama dan Kebudayaan*, 20(2): 35. <https://doi.org/10.32795/Ds.V20i2>

³⁶ Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat Di Bali, p. 34.

of the MDA as Pasikian Traditional Villages throughout Bali; c. Assist in strengthening the existence of the MDA so that it becomes an institution that is respected and respected by other parties; and D. Other obligations determined by Paruman Agung." That at first glance, it seems that there is a coordinative function in the relationship between the MDA and the MADN.

The legal ground for the formation of the MDA actually originates from two legal systems (legal pluralism), namely the national legal system which is regulated based on the customary village regulations and the customary law system through the Decree of Paruman Agung for Indigenous Villages throughout Bali on August 6, 2019, at the Wantilan Temple of Samuhan Tiga, Bedulu Traditional Village, Blahbatuh District, Gianyar Regency. Structurally the position of the MDA based on Article 1 point 24, Article 71 paragraph (1) and (2) is not regulated in the Bali Traditional Village Regulation, considering that the MDA is a *pasikian* (union) formed by the traditional village as a working partner of the regional government according to the level, in the field of custom, tradition, culture, socio-religious, local wisdom, and customary economy. Furthermore, in view of the provisions of Article 7 AD/ART of the MDA further emphasizes that the MDA is a socio-religious, cultural, independent, and non-partisan institution, while based on Article 72 paragraph (3) of the Bali Traditional Village Regulation the MDA as an institution for uniting traditional villages in Bali has levels consisting of the provincial, regency/city and district levels and when viewed based on Article 9 of the AD/ART of the MDA that the organizational structure of the MDA is hierarchical, which means the MDA at the provincial level is the highest level the MDA.

Examining the statements contained in the Declaration (*Pakupada*) on the formation of the MDA of the Traditional Village Heads/*Kelian* Traditional Villages on behalf of the Traditional Villages throughout Bali stated in the First Dictum that "*Unanimously agreed to be loyal, obedient and obedient, and unanimous (gilik saguluk, parasparo, salunglung sabayantaka, sarpana ya) formed the Traditional Village Assembly as mandated by the Regional Regulation of the Province of Bali Number 4 of 2019 concerning Traditional Villages in Bali along with all the Stipulations and Decisions taken in the Paruman Agung of Traditional Villages*", so the Declaration (*Pakupada*) for the formation of the MDA contains meaning that the traditional villages throughout Bali agree to be bound by the

provisions (legal products) of the MDA. Furthermore, based on the Decree of Paruman Agung Traditional Villages throughout Bali in 2019 as embodied in Murdhacitta AD/ART of the MDA declared that "*The declaration of the formation of the Bali Traditional Village Assembly implies that Traditional Villages in Bali are bound in one unified cosmological conception of Padma Bhuwana which is united by one unit. Ulu, namely Besakih Temple as Lingga (Purusha) and Ulun Danu Batur and Beratan Temples as Yoni (Pradhana)*".

Traditional villages in the Bali Traditional Village Regulations as stipulated in Article 1 Number 8 defines a Traditional Village as a unit of customary law community in Bali that has territory, position, original structure, traditional rights, own assets, traditions, social manners of community life. Hereditary within the bounds of a holy place (kahyangan tiga or kahyangan desa), duties and authorities, as well as rights to regulate and manage their own household. Furthermore, Article 81 paragraph (1) of the Bali Traditional Village Regulation stipulates that in administering government, traditional villages can manage relations with various parties. The phrase "various parties" as referred to in Article 81 paragraph (1) of the Bali Traditional Village Regulation includes: a). Government; b). Provincial government; c). Regency/City Government; d). Hindu Society; e). Traditional Village Council; f). Another Traditional Village; g). Service Village or Kelurahan; h). Subak or Subak Abian; i). private; j). non-governmental organization; k). social organization; l). educational and cultural institutions. This relationship arrangement allows for a relationship between Traditional Villages in Bali and the MDA.

The characteristics of the relationship between the traditional village and the parties referred to in the Elucidation of Article 81 paragraph (1) of the Balinese Traditional Village Regulation are then reaffirmed as explained in the Elucidation of Article 81 paragraph (2) of the Balinese Traditional Village Regulation with an authoritative, coordinative nature; and/or consultative. The nature of letter a state that what is meant by authoritative relationship is the relationship between customary villages and various parties based on customary village authority to verify and validate that activity in customary village authority is in accordance with awig-awig, pararem, and/or village policies custom. Furthermore, in letter b it states that what is meant by a coordinating relationship is a relationship between traditional villages and various parties having an equal position to harmonize policies or the implementation of an activity related to the interests of traditional villages. Then in

Letter c it states that what is meant by a consultative relationship is the relationship between the Traditional Village and various parties to exchange ideas to get the best advice or advice for solving problems.

2. Dayak Traditional Council in Kalimantan Province

The existence of customary institutions in Indonesia cannot be separated from historical factors. Customary institutions are a part of social institutions that have a role to regulate matters related to customs in the jurisdiction in which the institution is located. The characteristics of customary institutions can be seen from their nature, religious relations, ethnicity to relations with the government. The Dayak Indigenous People are a tribe that lives and develops in a culture and social life on the island of Borneo. In its development, the Dayak Indigenous People realized the need for unity and togetherness between provinces in Kalimantan, so the National Dayak Customary Council was formed, which became the highest Dayak Customary Council which has the task of being an institution for coordination, communication, service, assessment, and a forum for accommodating and following up on the aspirations of the community and all Indigenous Institutions. Dayak members, based in one of the provincial capitals in Kalimantan in turn. In addition, it is also known that the term Kedamangan is headed by a Damang or Traditional Head who owns customary territory, customary community units, and customary law within the territory of the Kalimantan Province, which stands as a set of several villages/kelurahan/sub-districts/districts and cannot be separated.

Juridically, the provisions of Article 1 point 18 of the Regional Regulation on Dayak Customary Council define Dayak Indigenous Institutions as social organizations, whether intentionally formed or naturally, that have grown and developed along with the history of the Dayak indigenous peoples with their customary jurisdiction, and have the right and authority to regulate, managing and resolving various life problems by referring to Dayak customs, customs and customary law. Furthermore, the Kedamangan Institution is one of the surviving elements of Dayak Customary Council. Kedamangan is said to be a customary institution that owns customary territory, customary community units and customary law in the territory of Central Kalimantan Province, which consists of a set of several villages/urban village (kelurahan)/sub-districts/districts and cannot be separated.

Thus, the Kadamangan area does not follow the Indonesian Government's territorial structure as the Dayak Customary Council (DAD). Within this Kadamangan there is also the Density of the District Traditional Peace Mantir held simultaneously by the Damang Traditional Chief. Meanwhile, at the village/sub-district level there is also a Village/District Traditional Peace Mantir Density.

Taking into account the existence of the two Dayak Adat Institutions, it can be understood that the structure of the adat institutions established by the regional regulation on Dayak Adat Institutions is multilevel. At the sub-district level, in addition to having the Kecamatan DAD, there will also be Kadamangan. Meanwhile, at the village/kelurahan level, the Desa/Kelurahan DAD will be accompanied by the Mantir Density/LetPeace.³⁷ the MADN is at the national level while at the provincial, district, sub-district, and village levels each has its own level whose function is as a coordinating and supervising agency for DAD. At the village level, it is known as the Desa Dayak Adat Council which is a DAD that carries out the duties of the National DAD, Provincial DAD, District DAD, and Sub-District DAD as a village/kelurahan Adat Mantir Peace Council partners, to help the smooth running of the duties of the Damang Traditional Head in the village/kelurahan area. The existence of the MADN is not only an institution that deals with customary law but also provides an opportunity for a public space to occur, which can be used to discuss various problems and issues on various matters, especially those related to the lives of indigenous peoples themselves.

Within each of these indigenous councils a Dayak Indigenous People's Defense Front was created whose task was to oversee the struggle of the Dayak Indigenous People to maintain their existence, to assist the Damang in upholding customary law and to anticipate disturbances to the sovereignty of the Unitary State of the Republic of Indonesia in border areas. The existence of DAD over time continuously growing. Also from this organization, another traditional institution was formed, namely MADN which has several principles as an opportunity to create public space. This principle can be seen in the MADN Articles of Association (AD), namely Article 9.a. "*A forum for communication*

³⁷ The structure of customary institutions that were deliberately formed has a tiered hierarchy starting from the National Dayak Customary Council, Provincial Dayak Customary Council, Regency/City Dayak Customary Council, District Dayak Customary Council, Village/Kelurahan Dayak Customary Council. Its territory follows the division of government administrative areas.

between Dayak traditional institutions in uniting determination to build the welfare of the life of indigenous Dayak people" and Article 9.d. "A container for accommodating and following up on indigenous Dayak communities facilitated and coordinated by DAD". The DAD mentioned above include distinctive organizations at the local, regional (Kalimantan as a whole) and national levels. This institution also has a tiered coordination and information system due to the spread of indigenous peoples throughout the island of Kalimantan which geographically has a large area.

The MADN as a traditional institution with a top-level structure led by a leader with the position of President of the MADN. Then DAD covers the entire Kalimantan region such as DAD at the provincial level (Central Kalimantan, West Kalimantan, East Kalimantan, and South Kalimantan), DAD at the regency/city level, DAD at the subdistrict level, and DAD at the village/kelurahan level. Likewise with the Dayak Indigenous Peoples Defense Front (BATAMAD) from the provincial level to the village/kelurahan level in Central Kalimantan. Some interesting things about this institution are the rules and norms in these institutions that carry out the principles of public space. The MADN together with DAD, are institutions that prioritize traditional principles which are still very relevant in the current context. These principles include a culture of deliberation that is used in making joint decisions and building public opinion deliberations in the Dayak community are often carried out to resolve various problems that arise in society, ranging from conflicts, repairs, conflicts, and so on. This causes the existence of the MADN and DAD to have a very strategic position in people's lives in Kalimantan.

The interesting thing related to the explanation above is regarding the existence of DAD in Kalimantan, especially in Palangkaraya, Central Kalimantan. The position of the MADN as an institution that has function as a public space, of course, has various values, rules and mechanisms to support the existing public space. It is this condition that supports public space, which then provides an opportunity for discourse to occur in order to reach a common understanding or consensus. The understanding or consensus formed in the framework of the public contained in traditional institutions does not only stop at consensus or common understanding. The result of the process of running the public space then becomes communal joint action by the Dayak people themselves. The use of the results of existing public spaces can take various forms, depending on the needs of the

indigenous peoples themselves. The decision to issue a statement of refusal is not solely issued by DAD and the MADN, which have the authority to provide direction and coordination, but also through a discussion process in deliberations with indigenous peoples. This deliberation process, then, if it is based on traditional principles, is a public space contained in traditional institutions and indigenous Dayak communities in Central Kalimantan.

The MADN and DAD, together with the Damang can make customary laws that are set forth as regulations for the Dayak community. These provisions are outlined in Article 10 of the regional regulation on Dayak Adat Institutions, which describes that "*The Damang Head of Adat has the right and authority to stipulate Damang Regulations, make decrees, ratify statements, make certificates of customary land and or customary rights on land*". These provisions are in the form of statutory regulations as sub-delegated regulations, which means that the authority to make their own regulations is based on the orders of the implementing regulations of the law stipulated by the institution they lead. In terms of inter-institutional inter-institutional the MADN Dayak Kalimantan based on the Appendix to regional regulations on DAD, it can be understood that the MADN oversees all DAD in Kalimantan which include Central Kalimantan Province DAD, Regency/City DAD, District DAD and Village/Kelurahan DAD hierarchical and coordinative.

Based on the normative review of the position of the MDA and the MADN in the above laws and regulations, it can be concluded that the existence of the MDA and the MADN is based on the awareness of KMHA to organize themselves at a broader level and KMHA's need for media coordination between Indigenous Villages as KMHA, government partners, and resolution of customary conflicts, as well as supporting the growing complexity of KMHA legal requirements. Talking about the position of the MDA and the MADN as customary institutions in laws and regulations, the MDA and the MADN do not qualify as Village Community Institutions (LKD) or Village Traditional Institutions (LAD) as stipulated in the Village Law j.o Ministry of Home Affairs Regulation Number 18 of 2018 concerning Institutions Village Community and Traditional Institutions (Permendagri 18/2018). As determined under Article 94 paragraph (2) of the Village Law that LKD is a forum for the participation of the Village community as a partner of the government, while LAD as Article 95 paragraph (2) stipulates that LAD is an institution that carries out customary functions

and is part of the original composition of the Village which grows and develops on the initiative of the village community.

Unlike the LKD and LAD, the MDA and the MADN are not located at the village level but have levels up to the provincial level for the MDA and tiered up to the national level for the MADN. The MDA and the MADN are institutions that are *sui generis* in nature; that is, they cannot be compared with traditional institutions that have existed before. This can be understood as the theory of social institution classification presented by Gillin in the previous discussion. Gillin emphasized that the development of social institutions is divided into two, namely creative institutions which explain that institutions are born by themselves along with the growth of the customs of the community and enacted institutions are institutions formed based on the needs of the community to fulfill their goals, certain goals, but still based on the original values of the community. Based on this theory, the MDA and the MADN fall into the category of enacted institutions. A number of these descriptions indicate that the structuring of customary institutions especially the MDA and the MADN has not been accommodated in the system of laws and regulations in Indonesia.

B. The Urgency of Regulating the *Ius Constituendum* Against the Policy of the Customary Council in the Province of Bali and the National Dayak Customary Council in Kalimantan in Relation to the Position and Binding of the Policy in Indonesian Laws and Regulations

Placing certainty regarding the position of the MDA in Bali and the MADN in the institutional structure becomes a necessity to be able to determine the hierarchical level of legal norms that will be issued in a structural-formal view of legal norms. Structurally, the understanding of the hierarchy of legal norms as envisioned by Hans Kelsen and Hans Nawiasky does indeed have an impact on the institutional structure of state organizations which consist of various institutions of state, government, and positions outside the official structure of state organizations in general, but their positions are created based on legal norms country.³⁸ Discourse on the doctrine of the hierarchy of legal norms in an orderly structure of a legal product becomes the foundation for being able to legitimize a legal

³⁸ Jimly Asshiddiqie. 2020. *Teori Hierarki Norma Hukum*. Jakarta: Konstitusi Press, p. 187-189.

product related to the hierarchy in a regulation which has implications for the binding power of a legal norm. The view of assessing legal norms structurally is indeed commonly applied in the Indonesian context, but in fact this is interesting to see how the context is in a structural-formal perspective in viewing the position and binding power of legal norms that are institutional in nature.

In the context of the existence of the MDA and the MADN, they are still trapped in doubts about their position which also has an impact on the binding power of legal norms created through their own legal products. Even though there have been legal standing created by regional governments through their authority to make regional regulations, the legality of the MDA and the MADN in the state organizational structure is still questionable. On several occasions, the MDA has issued several legal products related to life, both socially and religiously, which are an integral part of the life of the Balinese people and in Kalimantan, for example, through the Decree of the Bali Province Traditional Village Assembly Number 08/SK/MDA-PBali/X/2020 concerning Restrictions on Demonstration Activities at Wewidangan Traditional Villages in Bali During the Great Gering Covid-19 or through the Joint Decree of Parisada Hindu Dharma Indonesia Bali Province and Decree of the Council of Traditional Villages of Bali Province Number 07/SK/MDA-P-Bali/XII/2020 and Decree of the Bali Province Traditional Village Assembly Number 106/PHDI-Bali/XII/2020 concerning Restrictions on Activities for Carrying Out the Non-Dresta Sampradaya Teachings in Bali.

The two decisions issued by the MDA are two of the many decisions issued since the inception of the MDA itself since the enactment of the Customary Village Regulation in Bali. Therefore, it is interesting to see the position and binding power of the legal products issued by the MDA from the perspective of structuring the hierarchical structure of regulations in Indonesia that have not been regulated at this time. In legislative practice, it is clear that the orientation of the paradigm of the hierarchy of legal norms used by Indonesia is the theory put forward by Hans Kelsen and Hans Nawisky; this, is clearly shown in historical studies that A. Hamid S. Atimimi tries to compare Nawisky's theory and apply it to administrative structures law in Indonesia. Atimimi clearly illustrates this

comparison through the shape of a pyramid.³⁹ In fact, when examined from a structural-formal perspective in the study of the two figures, the hierarchy of legal norms automatically causes an absolute institutional hierarchy. This logic clearly cannot be juxtaposed with the position of the MDA or related customary organizational forms in other parts of Indonesia which should be viewed in a *sui generis* organizational setting.

This resulted in efforts to nationalize legal products that used Kelsen and Nawiasky's formal structural logic. The hierarchy of legal norms as stated in Kelsen and Nawiasky's theory does not have to be understood as if it definitely determines the institutional hierarchy of state organizations. This is because the understanding of the hierarchical system of legal norms in the national and customary contexts in the hierarchical direction of legal products in Indonesia must be reconstructed more precisely in order to fulfill and respect the nature of customary law communities represented through customary, religious and societal forms of organization. In fact, before moving into a new construction of structuring national and customary legal products in the hierarchical structure of legal norms in Indonesia, it is necessary to look at what can be improved in the conceptual arrangement put forward by Kelsen which in the course of time has failed to adapt to existing needs. As a result, this failure indirectly has an impact on the power crisis of legal products issued by customary institutions in order to maintain the harmony of life on a customary and regional basis.

Basically, Kelsen discusses the validity of legal norms by describing them as a chain of validity that ends in a constitution. The validity of the first constitution is the last presupposition, the final postural on which all norms in the rule of law depend. This clearly illustrates the formal structural logic described by Kelsen in determining the validity of a very formal and structural norm. However, Kelsen misses some of the norms that are outside the structure of formal logic, as stated by Hari Chand in the fifth chapter of modern jurisprudence, which specifically discusses the Pure Theory of Law.⁴⁰ Chand states, that there are sources of law such as customs, statutes and precedents of which one cannot be said to be superior to the other. In addition to norms, in the legal system there are also standards, principles, policies, and principles that are as important as norms but are not

³⁹ Hamid S. Atamimi. 1990. *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara*. Dissertation, University of Indonesia, Indonesia, p. 287.

⁴⁰ Jimly Asshiddiqie and M. Ali Syafaat, *Op. Cit.*, p. 167.

specifically considered by the Kelsen.⁴¹ Therefore, the criticism of Kelsen's theory can be used as a form to re-position the position and binding power of legal products issued by the MDA and other similar organizations.

Legal norms in terms of function requirements as institutional authority are clearly important to straighten out. Whereas legal norms actually function as the legal basis for the authority of the institution/organization concerned, and legal norms function as objects of carrying out the duties and authorities of said institution/organization. The position of legal products issued by customary institutions is currently unclear. The absence of special arrangements regarding the status of issued policies creates legal uncertainty regarding legal rules formed and issued by customary institutions. Even though the formation of legal rules and policies originates from the indigenous peoples themselves and is in harmony with the development of these indigenous peoples. But unfortunately, so far, it seems that the government's efforts to protect KMHA have not been systematically and structured. As a result, policies issued by KMHA are more enforceable than national law. The existence of the MDA and the MADN is a form of participation that is more active in independent initiatives from the community but is not supported by public policies as a leveraging factor.

The government's efforts to protect the interests of indigenous and tribal peoples through their legal products must progress from the paradigm of a formal-structural hierarchy to a hierarchy of legal norms materially, substantially, and functionally. Formal-structural hierarchy, the level of the hierarchy of regulatory norms, depends on the arrangements that are formally or officially determined by or based on the laws in force in a country. This is what makes it difficult to synergize the MDA and the MADN legal products in the formal-structural hierarchy in Indonesia. This is a reflection of the arrangement of the legal system and structure in Indonesia until now, it continues to be problematic and not properly accommodated and incomplete in determining the ideal legal system to inherit a legal system that is stable, effective, sociologically accommodative and truly just in the future. Therefore, the rearrangement of the legal hierarchical system in the revision of the UU PPP in the future needs to be improved. Strictly speaking, the system of

⁴¹ C.K Allen dalam Jimly Asshiddiqie and M. Ali Syafa'a. *Op. Cit.*, p. 167.

legal norms developed by Hans Kelsen and Hans Nawiasky needs to be studied and refined in a dynamic development in the Indonesian context.

In the context of legal products issued by the MDA Bali and the MADN Dayak Kalimantan, they have been regulated through the provisions of Regional Regulations and local customary decisions. For example, in a study of Bali's the MDA, the basis for its existence rests on the regional regulations on indigenous villages and the customary law system through the Paruman Agung Decree on Indigenous Villages throughout Bali on 6 August 2019, and its authority rests on Article 76 paragraph (1) and paragraph (2) of the Bali Traditional Village Regulation. The constitutional basis for delegating authority through regional regulations to regulate their regions from the lowest unit level to the highest has been expressly determined in the provisions of Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which outlines that "*Provincial, regency and city regional governments regulate and manage government affairs themselves. according to the principle of regional autonomy*". The authority in the phrase "to regulate and manage government affairs themselves" is a direct attribution of the Constitution itself, not a delegation based on law (delegation of rule-making power). Therefore, the provisions of the Bali Customary Regional Regulation must be interpreted as "auto" and "namos" through Bali's the MDA independently.

On the other hand, in the form of structuring the legal system in Indonesia, there is a mutually influential relationship between the institutional hierarchical system and the hierarchical system of legal norms can be seen in the provisions of Article 18 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which outlines that "*The Unitary State of the Republic of Indonesia is divided into regions Provinces and provinces are divided into regencies and cities, each of which has regional administrations regulated by law*". In the description of the phrase, an institutional form is hierarchical, namely central government; provincial government; and regency/city regional government. However, these three hierarchies can actually be expanded further through the concept of a structure that is separate in nature, which is still within the scope of the Unitary State of the Republic of Indonesia. This separate structure is in the form of village and sub-district administrations. In practice, customary institutions are known as the MDA Bali or the

MADN Dayak Kalimantan, so this form also deserves to be considered for its existence as an object of study on the hierarchy of legal norms in Indonesia in future developments.

Therefore, the arrangement of the hierarchy of legal norms in sociological developments in the order of diversity needs for the recognition of legal pluralism in each region must be accommodated. The normalization of the position of the MDA and the MADN legal products must be separated from a single formal structural hierarchy to material, substantial and functional hierarchies. Normalization of provisions on legal products in order to gain legal legitimacy must be included in the amendments to Article 8 paragraph (1) of the UU PPP as a form of affirmative action provisions⁴² towards certain people or groups who are weak and have special characteristics in this context are organizations/institutions/communities that are customary and regional in nature. For a country with a plural society in terms of race, ethnicity, religion, and views, it will form minority and majority groups. The majority group has greater power and opportunity than the minority group. Thus, minority groups will experience difficulties obtaining their rights as citizens. So affirmative action is an option for the state as an answer to discriminatory social conditions in society.

Article 28H paragraph (2) of the 1945 Constitution of the Republic of Indonesia outlines, *"Every person has the right to receive convenience and special treatment to obtain equal opportunities and benefits in order to achieve equality and justice"*. Thus, affirmative policy can be applied in Indonesia to certain groups that are deemed necessary to be given special treatment and convenience. In addition, affirmative policies in Indonesia are provided by the government in certain areas to provide more opportunities to individuals or groups of individuals in society who are the most disadvantaged in terms of social structure, political conditions, and economic structure. Clause Article 8 paragraph (1) UU PPP contains the following all forms of statutory law products issued by institutions/organizations/customary law community units are recognized and have binding legal force as long as they are ordered by higher legislation or formed based on authority.

⁴² Masnur Marzuki. 2009. "Affirmative Action Dan Paradoks Demokrasi" *Jurnal Konstitusi*, 2(1): 10. Affirmative action can be interpreted as a provision or policy that requires it to be imposed on certain groups based on considerations of race, skin color, gender, religion and culture. Providing compensation and privileges in certain cases to achieve more professional representation in various institutions and occupations. This action is a positive discrimination that is carried out to accelerate the achievement of justice and equality. One of the most important means of implementing it is that laws and guarantees must be in the constitution and laws.

This hierarchy of regulations applies formally by using binding power and coercive power by the state or local territory based on the principle of "praesumptio iustae causae" namely that a regulation is valid and is assumed to be fair and correct until it is decided by the competent authority not to happen again. In addition to the legitimacy of the new position of organizational/institutional/community legal norms that are customary and regional in nature are accommodated through the concept of affirmative action, there is also political justification for statutory law that the provisions of organizational/institutional/community legal norms that are customary and regional in nature are theoretically known as participant political culture as stated by Morton R. Davies and Vaughan A. Lewis. This concept refers to a political culture characterized by the existence of individual behavior in society who considers himself or others as active members in political life and a political culture that promotes public involvement in public decision-making.⁴³ Conceptually, participation can be classified as participation as a policy, participation as a strategy, participation as a communication tool, and participation as a dispute resolution tool.⁴⁴

Regulations on legal products issued by organizations/institutions/communities that are customary and regional in nature that have been formulated in a unitary legislation will indirectly bind to a certain territory according to the locus of the organization/institution/community that is customary and regional in nature. The binding power of these regulations will be binding when a legal product has been promulgated/legalized by the relevant local officials who are given delegation authority. In order to avoid conflicts between legal products and what is actually the community's need, the legal products of the MDA Bali or the MADN Dayak Kalimantan, in this case, must be known in advance by the community regarding their substance through customary deliberations forums before it is finally agreed upon. The agreement in establishing the legal product of the MDA Bali and the MADN Dayak Kalimantan is essentially an implementation of the value of acknowledging community sovereignty socio-culturally. The enactment of a statutory regulation is based on the formal validity of the said statutory

⁴³ Benedict Hestu Cipto Handoyo. 2014. *Prinsip-Prinsip Legal Drafting & Desain Naskah Akademik*. Revised Edition. Yogyakarta: Penerbit Universitas Atma Jaya, p. 155-156.

⁴⁴ Jazim Hamidi, et al. 2008. *Pembentukan Peraturan Daerah Partisipatif*. Jakarta: Prestasi Pustaka Publisher, p. 48-49.

regulation. This validity is also known as validity. This behavior exists when the norm is formed by a higher norm or an institution authorized to form it.⁴⁵

In general, it can be stated that there are 4 (four) possible factors that cause legal norms in statutory regulations to be valid.⁴⁶ First, philosophical validity can be equated with the concept of evaluative validity of the rules of a law, that, is, the rules of a rule are seen by the public as having or embodied in important values. Therefore, everyone will feel and be obedient to follow it because there is an awareness of its importance for the sustainability of their behavior and social life.⁴⁷ Second, juridical applicability is the enforceability of a legal norm with its binding power to the public as a dogma seen from considerations that are technically juridical. Juridically, a legal norm is said to be valid if the legal norm itself is indeed determined as a legal norm based on a higher legal norm; it is determined as a legal norm according to the applicable legal formation procedure; and determined as a legal norm by an institution that is authorized to do so. If these three criteria have been properly met, then the relevant legal norm can be said to be legally valid.⁴⁸ In this regard, every rule of law must be derived from the legal system without regard to that rule.⁴⁹

Third, Sociological validity prioritizes an empirical approach with several choices of criteria, namely recognition criteria, which recognize the existence and binding power and obligation to comply with the relevant legal norms, acceptance criteria which, in essence, with regard to public awareness to accept the binding power, regulatory power, and coercive power of these norms, the criteria of legal facticity which emphasizes the extent to which legal norms are truly effective in people's lives.⁵⁰ Fourth, a legal norm can be considered valid if its enactment is supported by real political power factors. The political power of parliament greatly determines the political power of the enactment of statutory regulation. Therefore, the applicability of political norms is closely related to the theory of

⁴⁵ Maria Farida Indrati. *Op. Cit.*, p. 39.

⁴⁶ Jimly Asshiddiqie. 2011. *Perihal Undang-Undang Di Indonesia*. Jakarta: Rajawali Press, p. 241.

⁴⁷ J.J. H. Bruggink. 1996. *Reflections on Law (Translation Arief Sidharta)*. Bandung: Citra Adiya Bakti, p. 153.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* p. 150

⁵⁰ Asma Dayanto and Karim. 2012. *Peraturan Daerah Responsif: Fondasi Teoretik dan Pedoman Pembentukannya*. Yogyakarta: Main Budi, p. 66.

power⁵¹ which gives legitimacy to a norm, namely the regime of power. Regardless of the form of political interest that is normalized, both in terms of process and substance, it is enough justification for the enactment of a norm in the state structure.⁵²

IV. Conclusion

The nature of the MDA and the MADN in the institutional structure is sui generis in the sense that these two institutions cannot be compared with pre-existing customary institutions. This is based on the comparison and matching of the positions of the MDA and the MADN against the provisions of the applicable laws and regulations. The characteristics of the formation of the MDA and the MADN are the result of the need for KMHA in the framework of coordinating between traditional villages as KMHA, government partners, and resolving customary conflicts, as well as supporting the growing complexity of legal requirements for KMHA. This is in line with the classification of institutions described by Gillin as enacted institutions which means institutions formed based on the needs of the community to fulfill certain goals, but still based on the original values of the community. However, the regulations related to the MDA and the MADN only describe the position in a structural/level sense and with a relationship of a certain nature to the government, villages and traditional villages. In addition, the normalization of the position of the MDA and the MADN legal products must be separated from a single formal structural hierarchy to material, substantial and functional hierarchies. Normalization of provisions on legal products in order to obtain legal legitimacy must be included in the amendment to Article 8 paragraph (1) of the UU PPP as a form of affirmative action provisions against enacted institutions. The existence of definitive arrangements in the law will have a significant impact on the position of customary institutions accompanied by justice, benefits and legal certainty from the legal products issued.

⁵¹ Miriam Budiardjo. 1998. *Dasar-dasar Ilmu Politik*. Jakarta: Gramedia Pustaka Utama, p. 35. Power according to Miriam Budiardjo is the ability of a person or group of people to influence the behavior of another person or group in such a way that the behavior is in accordance with the wishes and goals of the person or the state.

⁵² *Ibid.*

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