



Protection of the Rights of Traditional Communities in the Ownership of Traditional Land Rights for Public Interests (Study of the Drafting of Traditional Legal Community Legislation)

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Abstract

Indigenous Peoples played an important role in the founding of the Republic of Indonesia. However, until now there are still many conflicts between Indigenous Peoples with the government and private companies. So, they are negatively impacted. The conflict occurred due to the State's low level of recognition of customary rights and the neglect of the rights of Indigenous Peoples in the process of determining land functions. Indonesia does not yet have special regulations that regulate and recognize the existence of indigenous peoples. Until now, the state has not been able to fulfill the rights of indigenous peoples as part of Indonesian citizens. The existence of customary law communities needs special attention from the state. It cannot be denied that the existence of indigenous communities spread across all Indonesian provinces is not a fiction. It is time for the state to give true recognition to the existence of indigenous peoples. There is a need for a special law that deals with the problems of customary law communities, namely through the Customary Law Community Bill. The DPR RI as a people's representative institution plays a role in forming and ratifying the Bill on Customary Law Communities so that legal issues regarding violations of the rights of indigenous peoples can be resolved. This ratification also aims to provide legal certainty regarding the fulfillment of the rights of indigenous peoples.

Keywords: *Society; Customary Law; Regulations; Conflict; Rights*

Introduction

Land is one of the very basic assets of the Indonesian State, because the State and nation live and develop on land, Indonesian society positions land in a very important position, especially in customary law communities. However, until now there is no complete information available about the extent and boundaries of the areas covered by various customary laws, in this case customary rights. This research concludes that Ulayat Rights in the Indonesian legal system are recognized through the Basic Agrarian Law, namely Law No. 5 of 1960, in this case the recognition given by the State is conditional and layered because of the recognition given to customary law communities and their customary rights.

Land for human life and for a country is proven by constitutional regulation in the 1945 NRI Law Article 33 paragraph (3) that "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". The provisions of this article then became the philosophical basis for land regulation in Indonesia which is juridically regulated in Law no. 5 of 1960 concerning Basic Agrarian Regulations which later became known as the Basic Agrarian Law (UUPA), where this Basic Agrarian Law provides a different understanding between "earth" and "land". The definition of "earth" in the Basic Agrarian Law is regulated in Article 1 paragraph (4) which states that: "In the definition of earth, apart from the surface of the earth, includes the body of the earth beneath it as well as those under water." The article above provides an explanation of what is meant by the term "earth", which includes the surface of the earth (which is then called land) along with what is beneath it (the body of the earth) as well as what is under water. Furthermore, the definition of "land" is explained in the provisions of Article 4 paragraph (1) that: **"on the basis of the right to control from the state, it is determined that there are various rights to the surface of the earth, namely land which can be given and owned by people, whether alone – alone or together with other people or legal entities"**.

The government, through the DPR, has shown a signal to ratify the Indigenous Peoples Bill. The ratification of the Indigenous Peoples Bill will have the effect of suppressing the emergence of conflict and protecting the natural environment from pollution. The Indigenous Peoples Bill regulates the rights and obligations of Indigenous Peoples. The rights of Indigenous Peoples contained therein are free to regulate their customary territories, free to adhere to belief systems, able to utilize customary territories with local wisdom, able to manage and utilize natural resources, and obtain a good and healthy living environment.

Problems related to customary law communities are agrarian conflicts, recognition of indigenous communities by the State and protection for human rights *defenders*. Agrarian conflict is not something new and has occurred since colonial times. Based on complaint data received by the Indonesian National Human Rights Commission, many indigenous peoples are the subject of human rights violations. Agrarian reform is a reform agenda that must be completed by the Government during the reform period. In the era of President Jokowi, there was an agrarian reform program but in fact it was more about distributing land certificates.

Land certification does not solve the main problem, but only partially solves it by giving power to certain groups. It is felt that indigenous groups still do not receive adequate rights. Another big problem is how to recognize indigenous peoples as communal communities, not individuals. The certification carried out is only individual, even though customary law communities are characterized by a communal nature.

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Discussion

Indonesia was built from a pluralistic society (diversity); A marker as well as an acknowledgment that Indigenous Peoples existed before the Indonesian state, even before the birth of the old states in Indonesia (Kingdoms, Sultanates, etc.). Indonesia was built from the meeting of two democratic traditions, namely the communitarian democratic tradition that believes in the collective and the liberal democratic tradition that respects individual rights.

Indigenous Peoples are one of the foundation stones of Indonesian state administration (Minutes of the BPUPKI session), including in establishing Indonesia's tradition of economic democracy which is based on customary rights - the Agrarian State.

"...Indonesia's original alliance is the principle of collectivism. Not collectivism which is based on centralization, but decentralization, that is, each part has the right to determine its own fate. This evidence turns out to be the nature of customary rights to land. This is the third cornerstone of genuine democracy in Indonesia. If the basic environment is broadened and adapted to the progress of the times, it becomes the basis of the broadest possible democracy, namely popular sovereignty." (Hatta)

The existence of Indigenous Peoples has been recognized in the Constitution both before and after the amendment to the 1945 Constitution of the Republic of Indonesia. Until now, the existence of Indigenous Peoples still exists with all the dynamics of change.

Customary Land Rights or known as ulayat rights are the rights of customary law communities to land in their territorial environment (territorially). In fact, customary law is unwritten, so that land rights based on customary law, namely the owner's control, are not supported by written evidence. Therefore, Indonesia issued Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, or known as UUPA.

Likewise, Article 5 of the UUPA states that the national agrarian law system recognizes the validity of the customary law system, namely a form of recognition determined based on the customary law system. This customary right contains civil aspects in the form of customary territory, apart from shared rights with the community, there are also individual rights and public aspects, namely the rights, obligations and authority of traditional authorities to manage and regulate the land.

1. Theoretical Review

Philipus M Hadjon stated that legal protection is the protection of honor and dignity, as well as the recognition of human rights possessed by legal subjects based on legal provisions against arbitrariness.

Hadjon classifies two forms of legal protection for the people based on the means, namely preventive and repressive protection. Preventive protection means that the people are given the opportunity to submit their opinions before the government's decision takes a definitive form to prevent disputes from occurring.

Then, repressive protection aims to resolve disputes. Legal protection is a guarantee provided by the state to all parties to be able to exercise their legal rights and interests in their capacity as legal subjects.

Second, Satjipto Rahardjo's theory was inspired by the legal objectives put forward by Fitzgerald. According to Fitzgerald, the aim of law is to integrate and coordinate various interests in society by regulating the protection and limitations of these various interests.

From this concept, Rahardjo defines legal protection as an effort to protect a person's interests by allocating a human right of power to him to act in the context of those interests.

Third, Soerjono Soekanto's theory that legal protection is basically protection given to legal subjects in the form of legal instruments. Furthermore, he explained that apart from the role of law

enforcement, there are five other factors that influence the process of law enforcement and its protection as follows.

1. Legal factors, namely written regulations that apply generally and are made by legitimate authorities.
2. Law enforcement factors, namely the parties involved in law enforcement, both directly and indirectly.
3. Facilities or facilities that support law enforcement, such as skilled human resources or adequate tools.
4. Community factors, namely the environment in which the law applies and is applied. Acceptance in society of applicable laws is believed to be the key to peace.
5. Cultural factors, namely as a result of work, creativity and feelings that are based on human intention in social life.

Jimly Asshiddiqie (Jimly Asshiddiqie, 2003: 32-33) interprets the meaning of the recognition of Article 18B paragraph (2) of the 1945 Republic of Indonesia Constitution towards customary law communities where this recognition is given by the state

- a) To the existence of a customary law community and its traditional rights;
- b) The recognized existence is the existence of customary law community units;
- c) The customary law community is indeed alive (still alive);
- d) In a certain environment (lebensraum);
- e) This recognition and respect is given without ignoring the measures of suitability for humanity in accordance with the level of development of the nation's existence;
- f) This recognition and respect must not reduce the meaning of Indonesia as a country in the form of the Unitary State of the Republic of Indonesia.

Legal Certainty Recognizing the Existence of Indigenous Peoples

Legal certainty according to Sudikno Mertokusumo (Sudikno Mertokusumo, 2007: 160) is a guarantee that the law is implemented, that those entitled to it according to the law can obtain their rights and that decisions can be implemented. Although legal certainty is closely related to justice, law is not identical with justice. Law is general, binding on everyone, generalizing, while justice is subjective, individualistic and does not generalize.

Legal certainty regarding the regulation of indigenous peoples must be able to protect the rights of indigenous peoples. If we look at the form of recognition of indigenous communities in Article 18B paragraph (2) of the 1945 Republic of Indonesia Constitution, it is stated that "the State recognizes and respects the unity of Indigenous Law Communities as regulated by law". Until now, the laws referred to in this article, regulating the existence of indigenous communities are still spread across various sectoral laws and conflict with each other, such as the UUPA; Forestry Law; UU no. 26 of 2007 concerning Spatial Planning; UU no. 32 of 2009 concerning Environmental Protection and Management; UU no. 6 of 2014 concerning Villages; UU no. 23 of 2014 concerning Regional Government; UU no. 39 of 2014 concerning Plantations.

Legal certainty can also provide guarantees for the fulfillment of indigenous peoples' rights to be equal to other Indonesian citizens. This is because there are still many legal issues that violate the rights of indigenous peoples. Rakhma, Chair of the Knowledge Management Division of the Indonesian Legal Aid Foundation (YLBHI), stated that a legal umbrella for indigenous peoples is important as the government fulfills the rights of indigenous peoples. To date, there are still many land grabs in the living space of indigenous communities by the government and companies, such as more than 300 agrarian

conflicts involving millions of hectares of land. Land that should be a living space for the community is confiscated for plantations, mining and infrastructure. Apart from that, there is still criminalization against indigenous peoples. More than 200 indigenous people are still in prison because they were accused of grabbing plantation land. They were accused of entering the forest without permission or entering a private land concession (national. kompas.com, 11 February 2019).

2. Legislation on the Recognition and Protection of the Rights of Indigenous Peoples

- Law Number 5 of 1960 concerning Basic Agrarian Principles
- PNPS Law 1 of 1965 concerning Prevention of Abuse and/or Blasphemy of Religion
- Law Number 5 of 1967 concerning Forestry Principles, as later replaced by Law Number 41 of 1999 concerning Forestry
- Mining Law Number 11 of 1967 concerning Mining, as later replaced by Law Number 4 of 2009 concerning Mineral and Coal Mining
- Law Number 1 of 1974 concerning Marriage
- Law Number 11 of 74 concerning Irrigation
- Law Number 4 of 1982 concerning Basic Provisions for Environmental Management, as replaced by Law Number 32 of 2009 concerning Environmental Protection and Management
- Law Number 5 of 1990 concerning Conservation and Biodiversity and Ecosystems
- Law Number 10 of 1992 concerning Population and Family Prosperity
- Law Number 6 of 1994 concerning Ratification of the UN Framework Convention Concerning Climate Change
- Law Number 39 of 1999 concerning Human Rights
- Law Number 21 of 2001 concerning Special Autonomy for Papua
- Law Number 22 of 2001 concerning Oil and Natural Gas
- Law Number 20 of 2003 concerning the National Education System
- Law Number 27 of 2003 concerning Geothermal Energy
- Law Number 24 of 2003 concerning the Constitutional Court
- Law Number 17 of 2005 concerning National Long Term Development Plans
- Law Number 11 of 2006 concerning Aceh Government
- Law Number 27 of 2006 concerning Spatial Planning
- Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands
- Law Number 4 of 2009 concerning Minerals and Coal
- Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination
- Law Number 41 of 2009 concerning Protection of Sustainable Food Agricultural Land
- Law Number 31 of 2004, as replaced by Law Number 45 of 2009 concerning Fisheries
- Law Number 7 of 2012 concerning Handling Social Conflicts
- Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction
- Law Number 19 of 2013 concerning Protection and Empowerment of Farmers
- Law Number 6 of 2014 concerning Villages
- Law Number 23 of 2014 concerning Regional Government
- Law Number 28 of 2014 concerning Copyright
- Law Number 39 of 2014 concerning Plantations
- Law Number 13 of 2016 concerning Patent Rights
- Law Number 15 of 2017 concerning the Advancement of Culture

3. Rights of Indigenous Peoples in Ownership of Customary Land Rights

Indigenous Peoples are a group of people who live based on their ancestral origins in a certain geographical area, have a unique system of values and social culture, are sovereign over their land and

natural resources and regulate and manage the sustainability of their lives using customary laws and institutions. Indigenous Peoples collectively and their individual members have equal rights and freedoms with all people. They have the right to be free from all types of discrimination, especially based on their rights of origin.

Indigenous Peoples have the right:

1. Master, regulate, manage and utilize the living space or customary territory along with all the natural resources within it.
2. Implementing customary law and customary institutions.
3. Carrying out and developing traditions, knowledge, cultural identity and language.
4. Adhering to and practicing religion and beliefs.
5. Obtain development services including health and education
6. A good and healthy living environment
7. Obtain clear and correct information about development agendas/plans that will be carried out by other parties and/or countries over their customary territories, and have the right to approve or reject these agendas/plans.

The implementation of these rights is also in line with international human rights standards, and respects the rights and freedoms of others. These rights are inherent in Indigenous Peoples, and are in accordance with the mandate of the Indonesian constitution which should be implemented by the state.

Customary land or ulayat land in customary law communities is referred to by various terms. This is adjusted to geographical location and local customary habits, communal land has boundaries according to the surrounding natural situation, such as hilltops or rivers.

Ulayat rights in the Indonesian legal system are recognized through the Basic Agrarian Law, namely Law No. 5 of 1960, in this case the recognition given by the State is conditional and layered because the recognition given to customary law communities and their ulayat rights is: 1) In reality it is still there are 2) Does not conflict with national interests 3) Does not conflict with statutory regulations 4) Determined by regional regulations.

The protection of the rights of Indigenous peoples in Indonesia is influenced by several views, namely the view of the historical school which says that law is a historical phenomenon, that law is one of the factors in the common life of a nation such as language, customs, morals, state administration. Therefore, law is something that is supra-individual, a symptom of society, a society is born in history, develops with history and disappears in history. Apart from the development of society there is no law at all, which is then refined by the theory of sociological jurisprudence which emphasizes its importance. law that lives in society. So up to now we still feel that customary law is still alive and developing in the State of Indonesia, furthermore it is stated in real terms in the constitution of the State of Indonesia, namely in Article 18 B of the 1945 Constitution which states that the State recognizes and respects the unity of Indonesia. the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in law, and furthermore in Article 28 I paragraph (3) of the 1945 Constitution that cultural identity and traditional communities are respected in harmony with the development of time and civilization. Internationally, the existence of customary law communities is recognized in several international conventions, including the ILO (International Labor Organization) convention no. 169 of 1989.

Recognition of the Rights of Indigenous Communities in International Human Rights Instruments

1. ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries:

“The rights of indigenous peoples to natural resources related to their lands must be specifically protected. These rights include their rights to participate in using, managing and protecting these natural resources. “

Land in ILO Convention 169 includes the concept of territory, which includes the territorial environment where people exist and use it (Article 13:2), and the government must respect certain very important relationships, especially the collective aspect in these relationships, between values and values. cultural and spiritual values with their lands and territories.

2. The right to self-determination in the Civil and Economic Convention; emphasizes two aspects:

- 1) Constitutive aspect, that all existing regulations in government must be the result of processes based on the will of the people or peoples who are regulated by it;
- 2) Continuity aspect (ongoing aspect), that all government regulations, regardless of the process of their formation or cancellation, must be regulations in which society can live and develop freely.
3. Rights of Indigenous Peoples in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP):
 - The rights of indigenous peoples to the land, territories and resources they own, whether owned individually or collectively as well as cultural and identity rights;
 - The rights of indigenous peoples to the lands, territories and resources they traditionally own, control and use, including anything they obtain for reasons of traditional ownership or traditional control and use.
 - Specifically, the Declaration asks the countries that signed this declaration (Indonesia is one of them) to provide legal recognition and protection for these lands, territories and resources, as well as establishing and implementing recognition and adjudication of the rights of indigenous peoples to land, territory and resources controlled by indigenous peoples

Conclusion

The existence of customary law communities needs special attention from the state. It cannot be denied that the existence of indigenous communities spread across all Indonesian provinces is not a fiction. Various legal problems have occurred against indigenous peoples, such as confiscation of land in indigenous peoples' living spaces by the government and companies; discrimination and violence against indigenous women; confiscation of indigenous peoples' ancestral lands; lack of representation of indigenous peoples in the bureaucracy and corridors of state power; as well as conflicts over customary land ownership. It is time for the state to give true recognition to the existence of indigenous peoples. There is a need for a special law that deals with the problems of customary law communities, namely through the Customary Law Community Bill. So far there has not been a comprehensive legal umbrella to ensure that the rights of indigenous peoples are fulfilled.

The DPR RI as a people's representative institution plays a role in forming and ratifying the Bill on Customary Law Communities so that legal issues regarding violations of the rights of indigenous peoples can be resolved. This ratification also aims to provide legal certainty regarding the fulfillment of the rights of indigenous peoples as Indonesian citizens.

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