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The Existance Of Indigenous Legal Community Rights And The Position In Indonesia Legal System

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Abstract: *This study aims to determine to The Existance Of Indigenous Legal Community Rights And The Position In Indonesia Legal System. This research was a normative research in the form of the research on the legal principles, data were collected throught the library research in the form of the primary, secondary and tertiary legal materials, all the data were analysed qualitatively. The research result indicates that. The existence or existence of customary rights (traditional rights) of indigenous peoples is still evident in the existence of communities in Indonesia. The customary rights of indigenous and tribal peoples are still recognized in the Indonesian legal system, this can be seen in the regulations in the applicable laws and regulations in Indonesia.*

Keywords: *Existance; Indigenous People; Legal System.*

INTRODUCTION

Land is one of the most important natural resources for life and the survival of humanity. Faith Sudiyat states that land is a conditio sine qua non (absolute prerequisite) for the existence of a country and the survival of its people.[1]

The relationship of the community/customary law community with the land is also very close. This relationship is not solely because community members/customary law communities need land as their source of livelihood. Moreover, for indigenous peoples the land has values that go beyond economic value. There are relationships that are emotionally charged, sentimentary, religio-magical, sometimes even irrational between community members/indigenous people and land

[1] Iman Sudiyat, *Hukum Adat, Sketsa Asas*, Yogyakarta: Liberty (1981), p. 1.

in their customary territories. This relationship is described as an eternal and irreplaceable by any other object.[2]

Mastery of territories by customary communities/communities can be found in various regions in Indonesia, although with different names, such as: 'patuanan' in Ambon, 'panyampeto/pawatasan' in Kalimantan, 'wewengkon' on Java, 'prabumian/payar 'in Bali,' tatabuan 'in Bolaang Mongondow,' limpo 'in South Sulawesi,' nuru 'in Buru,' torluk 'in Angkola,' clan land 'in Lampung,' paer 'in Lombok,' ulayat 'in Minangkabau[3], etc. Ayat Ulayat 'is the most popular term used to indicate the existence of customary land in an area controlled by a customary community/legal community.

In the 'customary law' knowledge constructed by C. van Vollenhoven, 'customary rights' is the second pillar of customary law after the 'legal alliance' (which is the first pillar) - and 'customary law territory' as the third pillar of customary law[4], etc. The existence of customary law was recognized by the Dutch East Indies colonial government as stipulated in the RR (Regerings-Reglement) - or in full: lement Regulations for the Bele der Regering van Nederlandsch Indie, 'especially the provisions contained in Article 75 (old) RR 1854[5].

Customary law, including traditional rights (customary rights) of the customary law community, even though they are valid, implemented and observed in the decisions of customary judges, have never been officially recognized in the regulations of the colonial era. As a result, in carrying out the agrarian rights of customary rights in the colonial era it was often ignored.

On August 17, 1945, Soekarno and Hatta on behalf of the Indonesian people proclaimed the independence of the Republic of Indonesia. Based on the provisions of Article II of the Transitional Rules of the 1945

[2] I Gede AB Wiranata, *Hukum Adat Indonesia: Perkembangannya dari Masa ke Masa*, Bandung: Citra Aditya Bakti, 2005, p.18.

[3] Soerojo Wignjodipuro, *Pengantar dan Asas-asas Hukum Adat*, Jakarta: PT Gunung Agung (1967), p 198 dan Bushar Muhammad, *Pokok-Pokok Hukum Adat*, Jakarta: Pradnya Paramita (Cetakan Ke-10, 2006), p. 104.

[4] R. van Dijk menggunakan istilah pilar-pilar hukum adat dengan 'tiang-tiang hukum adat' (Periksa: R. van Dijk, *Pengantar Hukum Adat Indonesia*, Bandung: mandar Maju, 2006, p. 67)

[5] Mahadi, *Uraian Singkat Hukum Adat Sejak RR Tahun 1854*, Bandung: Alumni (Cetakan Ke-3, 2003)

Constitution of the Republic of Indonesia, customary law and communal matters (as regulated by the Dutch East Indies government) continued to apply after the independence of the Republic of Indonesia until the establishment of a new regulation.

In fact, in practice, the existence of indigenous peoples and their customary rights is often ignored by the government. The government in carrying out development often behaves unfairly to indigenous law communities by taking customary land (ulayat land), without carrying out traditional releases. The government often does this to give companies the authority to manage communal land. In fact, communal rights are given to local indigenous people in order to manage the land they occupy for the welfare of the indigenous people themselves. This is what causes the indigenous people who depend on their livelihood for the land to lose their sources of livelihood. Starting from the description above, the problem that arises is how the existence (existence) of the customary rights of indigenous peoples and their legal position in the legal system in Indonesia.

METHOD

The approach method used is normative legal research (normative legal research), which is a library research by examining secondary data in the form of primary, secondary and tertiary legal materials relating to legal regulations regarding the existence and legal position of communal rights in the legal system in Indonesia.

The research specification used is descriptive analytical, which is to describe and analyze in full and thoroughly the problems of the existence and legal position of communal rights in the legal system in Indonesia**.**

DISCUSSION

Indigenous Community Rights

Van Vollenhoven was the first scholar to use the term ulayat rights, namely "*beschikkingsrecht*". He said that customary rights are a very old right, covering all of Indonesia, whose origins are religious in nature which belong to a tribe (*stam*) or by a combination of villages (*dorpenbond*), or usually by a village

only (but never owned by an individual.[6]

According to Boedi Harsono, customary rights are a set of authority and obligations of a customary law community that relates to land located within its territory. Such authority is included in the field of civil law, which is related to the common ownership rights to land and also includes those in the field of public law in the form of the task of authority to manage, regulate, and lead the control, maintenance, designation and use.[7]

Furthermore, Mahadi said that customary rights are land rights from legal alliances which only exist in Indonesia which cannot be released forever and have a religious basis.

In line with that Sudikno Mertakusumo said that customary rights are the controlling rights of the village within the boundary of the area, controlling the land according to their wishes for the benefit of village members or guan interests of people outside the village with compensation payments. This right is generally found throughout Indonesia and is the right to the highest (religious) objects (land). Hazairin sees the customary rights of the customary law community (*rechtsgemeenschap*) as a right to the area of the customary law community concerned that will never be alienated from other people or community groups or revoked from the customary law community concerned, but which will continue to be a collective right. customary law community over land as large as the customary law area. Between customary rights and indigenous people, there is an eternal, intertwined, and reciprocal relationship. The relationship between customary rights and individual rights to land is an eternal relationship that is interrelated (influencing influence) and from time to time deflates and expands.

In connection with the above, Ter Haar argues that the more villagers work on part of the communal land, the more he strengthens his personal relationship with the land, on the contrary if the relationship is personal the authority to manage, regulate, and

[6] Jack Reynold Ch. Ayamiseba, *Kedudukan Hak Ulayat Dalam Rangka Pengadaan Tanah Bagi Pembangunan Kepentingan Umum,* Disertasi, Bandung, 2004, p. 57.

[7] Boedi Harsono, *Hukum Agraria Indonesia (Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya),* Djambatan, Jakarta, 1995, p. 168.

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Agraria Law (*Undang-Undang Pokok Agraria mention as UUPA*) as the basis of land law that underlies customary law does not explain the meaning of customary rights. In

[8] Mahadi, *Uraian Singkat Tentang Hukum Adat Sejak RR Tahun 1945,* Jakarta, 1991, p. 66-67.

[9] Sudikno Mertokusumo,*Perundang-undangan Agraria Indonesia*, Liberty, Yogyakarta, 1982, p. 13.

[10] Hesty Hastuti, *Penelitian Hukum Aspek Hukum Penyelesaian Masalah Hak Ulayat Dalam Otonomi Daerah*, Badan Pembinaan Hukum Nasinal Departemen Kehakiman dan Hak Asasi Manusia, Jakarta, 2000, p. 41.

[11] *Ibid*.

Article 3 of the UUPA, it is stated that in view of the provisions in Article 1 and Article 2 the implementation of customary rights and similar rights from indigenous peoples, insofar as they are in reality still exist, they must be such that they are in accordance with national and state interests.

Land has a very important position for the community/customary law community. The close relationship between the community/customary law community and customary land is not solely due to the needs of all indigenous peoples living in the land as a source of livelihood to fulfill their livelihoods. Moreover, indigenous peoples have very close relations with their customary lands, relationships that are emotionally charged, sentiments, religio-magical values, sometimes even irrational, so that the relationship between the customary community/customary community and customary/ulayat lands is said to be eternal and is not replaced by any other object.[12]

Customary rights have two enforces, which are applied to the outside and inside. Applies to the outside contain the intention that in principle outsiders - not citizens of the fellowship - are not allowed to cultivate customary land and / or claim the results, while in effect it means that the right to reap the proceeds from land and plants and animals that live on it is done together with all citizens of the fellowship as a whole. Thus the use of customary land individually is limited and this is intended so that communal rights can continue to be sustained as a support for the life of all members of the customary community/legal community.[13]

Outsiders who are not members of the fellowship can still reap the benefits of customary land insofar as the person concerned gets permission from the customary community/legal community. Giving these permits is usually followed with the obligation of cultivators who are not members of the fellowship to pay the stake as recognition money (which is paid up front) - such as: income in Aceh or the *mesi* in Java in addition to

[12] I Gede AB Wiranata, *Loc.Cit.*

[13] Soerojo Wignjodipuro, *Loc.Cit.*

compensation money (paid in the back).[14]

The relationship of outsiders with customary rights is not in the capacity of direct relations of legal subjects with customary rights (as assets) but limited to the relationship of the use of customary land (as commodities) that will never be the same as the relationship between members of the customary community and land customary/customary rights. That is, according to the nature of cash in customary transactions, the permit is granted only to enjoy the proceeds from land use/processing and not related to the land rights.

The subject of ulayat rights is a community/customary law community, which in a traditional alliance consists of members of a community/customary community, Chair of Adat and Customary Elders. Relations between members and customary communities/communities occur due to birth/genealogy (geneology) or regional/territorial (territorial) or a combination of both. Members of the fellowship/customary law community together have the customary territory.

According to Ter Haar Bzn, in the context of the implementation of customary rights inside, members of the community/customary law community can use customary rights to collect profits from the customary land it cultivates. If a member of the community/customary law community controls and maintains continuously for a long time, then he/she has the opportunity to be recognized by all members of the community/customary community that the part of customary rights that he has cultivated is an individual right. This is referred to as the process of individualizing customary rights.

The more intensive the effort of the members of the community/customary law community to maintain the relationship, the stronger the relationship concerned with the land it cultivates, so that over time and the efforts carried out continuously, the community will eventually recognize members of indigenous peoples who cultivate the land as landowners. which he processed. However, if in the future members of the indigenous community abandoning the land that has become his property so that the

[14] Bushar Muhammad, *Op.Cit*., p. 109 and Soerojo Wignjodipuro, *Ibid*, p. 104.

land returns to its original state before it is cultivated, then his ownership rights will gradually be erased and eventually the land will again become the communal rights of the community/customary law community.

The dynamics of the relationship between the community and the customary land in customary law is known as the term mululus, which is thick-thinning or bloated-deflated. The mundane customary law mechanism helps maintain the preservation/permanence of relations between the fellowship/customary community and their customary/ulayat lands.

On the basis of the partnership/customary community relationship with customary/ulayat land, land rights are possible. These rights are born based on the real process of communication, especially by individuals (and their families) as rights holders. The growth of land rights begins with the selection of land based on select rights, namely the right of individuals of community members/customary law communities to open land by placing prohibited boundary signs such as fences on cultivated land. After the notification to the community, a previous right will be born, namely the right that is owned by the party who opened the land for the first time. Furthermore, after clearing land/forest and cultivated/cultivated land, the right to enjoy will be born. After the right of enjoyment lasts long enough and the cultivation of land is carried out continuously, then the right is changed to use rights. Finally, after the mastery and usage lasts so long that inheritance occurs to the next generation, then the use rights change into ownership rights.[15]

Meanwhile, Imam Sudiyat describes the types of individual rights of community members/customary communities to customary/customary land consisting of: property rights, select rights, rights to enjoy results, usufructuary rights, cultivation rights, compensation for office, and purchase rights[16]. Van Dijk outlines the individual rights to customary/ulayat land starting from the very top, namely property rights consisting of

[15] S. Hendratiningsih, A. Budiartha dan Andi Hernandi. "Masyarakat dan Tanah Adat di Bali," *Jurnal Sosioteknologi*, Edisi 15 Tahun 7, Desember 2008, p. 8.

[16] Iman Sudiyat, *Op.Cit.*, p. 8-17.

free ownership and confined property rights, then the right to profit from office, right to draw results, and select arbitrary rights; while the derivative rights (*afgeleide rechten*) consist of: usufructuary rights, liens, and lease rights. Finally, the rights are sticky or the right to buy.

Existence of Indigenous Community Rights in Customary Law Communities in Indonesia

The MPR Decree Number XVII of 1998 concerning Human Rights gave the right to promote and protect the existence of customary law communities including accommodating communal land (articles 30, 31 and 42) which could later be used as a reference in resolving conflicts over customary community areas in forest areas so that forest sustainability can be achieved. With the issuance of Regional Government Law Number 32 of 2004, Regulation of the Minister of Agrarian Affairs/Head of National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Customary Rights Issues of Customary Law Communities which was subsequently replaced with Minister of Agrarian and Spatial Planning/Head of BPN Number 9 of 2015 concerning Procedures for Determining Communal Rights to Land in Customary Law Communities and Communities in a Specific Area, as well as the issuance of the new Forestry Law Number 41 of 1999, it is increasingly clear that the recognition of the rights of indigenous peoples can be carried out in their respective regions and It is hoped that not only recognition will provide legal certainty but also be followed by the restoration of their rights.[17]

The existence of territories of indigenous peoples in Indonesia is stated in several literature, including:

a) According to the results of research conducted by Van Vollenhoven, long before independence in the archipelago there were 19 areas of customary law, namely regions (1) Aceh, (2) Gayo, Alas, Batak and Nias, (3) Minangkabau, Mentawai, (4) South Sumatra, Enggano, (5) Malays, (6) Bangka, Belitung, (7) Kalimantan, (8) Minahasa, (9) Gorontalo, (10) Toraja, (11) South

[17] Martua Sirait, Chip Fay dan A. Kusworo,"Bagaimana Hak-hak Masyarakat Hukum Adat dalam Mengelola Sumber Daya Alam Diatur", *Southeast Asia Policy Research Working Paper*, Number. 24, year 1999.

Sulawesi, (12) Ternate Islands, (13) Maluku, (14) West Irian, (15) Timor Islands, (16) Bali, Lombok, (17) Central Java, East Java, Madura, (18) Solo, Yogyakarta, (19) West Java, Jakarta.

b) Furthermore in the explanation of Chapter VI of the 1945 Constitution it is stated that in Indonesian territory there are approximately 250 Zelfbestuurende land-schappen and Volksgemeen-schappen, such as Villages in Java and Bali, Nagari in Minangkabau, Hamlet and Marga in Palembang and so on. These regions have an original structure and can therefore be considered as special areas.

Basically, the lives of indigenous communities are now not fully autonomous and apart from the process of integration into the nation-wide unity of life of the nation's state and national format. Formulations concerning the customary law community made in the period before independence tended to be rigid in the conditions of static indigenous peoples without the pressure of change, while the formulation of indigenous peoples made after independence was more dynamic in seeing the reality of the current customary community under the pressure of change.

According to Maria Sumardjono, the criteria for determining whether or not there are ulayat rights associated with the existence of customary rights are:[18]

a. The existence of customary law communities that fulfill certain characteristics as subjects of customary rights;
b. The existence of land / region with certain boundaries as lebensraum (living space) which is the object of customary rights;
c. The authority of customary law communities to carry out certain actions related to land, other natural resources and legal actions.

The above requirements do not need to be met cumulatively, it is an indication that customary rights to land and natural resources among indigenous peoples still exist. This criterion is expected not to be the boundary of a community is said to be not a customary law community, but it helps decision makers to accept the existence of an indigenous community.

[18] Maria S.W. Sumardjono, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, Jakarta: Penerbit Buku Kompas, 2001, p.57.

Criteria Indigenous peoples as legal subjects, objects of law and authority of indigenous peoples can be reaffirmed as follows:[19]

a. The subject of community rights to their customary territories (communal rights) in the national legislation used is customary law communities. The customary law community in customary law in Indonesia is a community of similarities in terorial (territory), Genealogical (descent), and territorial-genealogical (territory and descent), so that there is a diversity of forms of indigenous peoples from one place to another.
b. The object of community rights over their customary territory (communal rights) is land, water, plants and animals. The region has clear boundaries both factually (natural boundaries or signs on the field) and symbolically (the sound of the gong is still being heard). Regulating and determining relationships can be seen easily whether transactions regarding land are carried out by customary rules and institutions.
c. In addition to the national movement for the recognition of the rights of indigenous peoples, the existence of indigenous peoples is also a concern for the international community that considers the values of customary law and the rights of indigenous communities as an integral part of human rights. Indonesia also adopted the integration of human rights principles with legal protection against indigenous peoples as outlined in Law No. 39 of 1999 concerning Human Rights.

Basically, customary communities have special characteristics as groups of people living in a region for generations and continuously with a cultural system and distinctive customary rules that bind social relations between various social groups in it.

Besides that the customary law community is determined by the way in which the indigenous people identify themselves but are also bound by the ways in which the other parties, especially the state, with all their devices, treat them.

In UUPA, the existence of customary rights is still recognized as stipulated in Article 3 which states that "By keeping in mind the provisions in Article 1 and Article 2 the implementation of customary rights and similar rights are from customary law communities, as long as in fact there still must be in such a way that it is in accordance with national and state interests, which are

[19] Martua Sirait, Chip Fay and A. Kusworo, *Loc.Cit.*

based on national unity and must not conflict with higher laws and regulations ".

The mention of customary rights in the UUPA, in essence, means the recognition of these rights. Basically, customary rights will be considered, insofar as the rights are in reality still exist in the legal community concerned. One example that can be seen, for example in the granting of rights to land (eg business rights), must be heard before the opinions of the customary law community concerned, and subsequently need to give 'recognitie,' because they are entitled to receive it as the holder of customary rights . However, on the contrary it cannot be justified if based on the customary rights the legal community obstructs the giving of the right to use the business, while the provision of these rights in that area is really necessary for the wider interest.

Likewise, it cannot be justified if something of a legal community is based on its customary rights, for example rejecting the opening of forests on a large scale and regularly to carry out large projects in order to implement plans to increase the yield of foodstuffs and transfer population. Experience also shows that the development of the regions themselves is often hampered because of difficulties regarding customary rights. This is the second base of thought than the provisions of Article 3 above. The interests of the legal community must be subject to broader national and state interests and their customary rights must be in accordance with the broader interests.

According to the national land law (UUPA), customary rights are recognized as long as according to the fact that they still exist, but the customary rights that are not there will not be revived. In connection with that, for the sake of certainty regarding the existence of customary rights in certain customary law communities, it is evidenced by: (1) there is still a group of community members who feel bound by certain customary law as a common citizen of a legal community which is a customary law community ; (2) the existence of a certain area which is the legal environment and the daily livelihood of the residents of the customary law community; (3) there are still traditional rulers who

implement the legal provisions of their customary rights.

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To determine whether ulayat rights exist or not, the local government conducts research and determinations by including customary law experts, customary law communities and agencies that manage natural resources. Existence of customary land of customary communities that still exists is stated in the basic map of land registration by affixing a cartographic sign, and if possible, describe the boundaries and record them in the land register.[20]

Recognition and appreciation of indigenous communities and their traditional rights are also accommodated in the MPR Decree. No. IX/MPR/2001 concerning Agrarian Reform and Management of Natural Resources[21]. The MPR's decision was the result of pressure from various parties to make corrections to management practices (read: exploitation) of natural resources from the New Order government. The MPR's provisions provide direction and signs for the implementation of the state in the management of natural resources in the future in order to truly pay attention to, respect and protect the "customary law community".

Article 4 letter j of the MPR Decree states: "Agrarian reform and natural resource management are carried out with one of the principles of recognizing, respecting and protecting the rights of the people of customary law and the nation's cultural diversity over agrarian/natural resource resources.

According to this principle, the rights of customary law communities, including customary rights, are not

[20] Ahmad Redi, *Hukum Sumber Daya Alam Dalam Sektor Kehutanan*, Jakarta: Sinar Grafika, 2015, p. 235.

[21] Before the Decree of the MPR No. IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management, recognition and appreciation of indigenous communities and their traditional rights are also accommodated in Law No. 41 of 1999 concerning Forestry.

only recognized and respected but also protected, meaning that these rights must not be violated by anyone without a legal justification.[22]

With the second amendment to the Constitution, the recognition and appreciation of indigenous peoples' units and their traditional rights gained a strong constitutional foundation.

In Article 18B paragraph (1) and (2) mention the following:

1) *The State recognizes and respects special or special regional government units regulated by law.*
2) *The State recognizes and respects customary law community units along with their traditional rights insofar as they are still alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, which is regulated by law.*

Furthermore, the recognition and respect for customary rights (traditional rights) is further emphasized in Article 28I paragraph (3), which states that "Cultural identity and the rights of traditional communities are respected in accordance with the times and civilizations".

From the provisions of Article 18B paragraph 2 and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it can be concluded that:

a. The state recognizes and respects customary law community units and their traditional rights. According to customary law, traditional rights of customary community units include communal rights. Recognition and respect for customary rights must also be accompanied by recognition and respect for the rights of indigenous peoples inherent in communal rights such as ulayat land.
b. Recognition and respect for legal community units and their traditional rights must fulfill two conditions, namely:
   1) As long as it's still alive (conditions of existence)
   2) In accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.
c. Recognition and respect for customary law community units and their traditional rights such as customary rights will be regulated by law.

[22] Muhammad Bakri, *Hak Menguasai Tanah Oleh Negara*, Yogyakarta: Citra Media, 2007, p. 135.

The legal status of Land Rights in the Legal System in Indonesia

Recognition of traditional rights (customary rights) of customary law communities is not just mere recognition from the government, but must be done by implementing it by regulating regulations relating to the customary rights of indigenous peoples in Indonesia.

Regulation of customary rights in the Indonesian legal system can be seen in the laws and regulations, namely, among others:

1945 Constitution of the Republic of Indonesia

Recognition and appreciation of indigenous peoples and their traditional rights have gained a strong constitutional basis through the 1945 Constitution, especially in the Second Amendment to the 1945 Constitution, namely Article 18B and Article 28I.

Article 18B paragraph (1) and (2) mention the following:

1) *The State recognizes and respects special or special regional government units regulated by law.*
2) *The State recognizes and respects customary law community units along with their traditional rights insofar as they are still alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, which is regulated by law.*

Furthermore Article 28I paragraph (3), which states "Cultural identity and the rights of traditional communities are respected in line with the development of the times and civilizations".

Basic Agrarian Principle (UUPA)

In the body of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA), there are several articles that regulate customary law and or customary rights, including:

Article 2 paragraph (4) states that "The control rights of the aforementioned state can be delegated to the Swatantra areas and customary law communities, only needed and not in conflict with national interests, according to the provisions of Government Regulations."

In Article 3, it states "Bearing in mind the provisions in Article 1 and 2 the implementation of customary rights and similar rights of indigenous peoples, as long as according to the reality there are still, must be such that they are in accordance with national and state interests , which is based on the unity of the nation and

must not conflict with the Law and other higher regulations. "

Article 56, states "As long as the Law concerning property rights as referred to in Article 50 paragraph (1) has not been established, then the provisions of local customary law and other regulations concerning rights to land which authorize as or similar to what is meant in Article 20, insofar as it does not conflict with the soul and the provisions of this Act. "

Article 58, states "As long as the implementing regulations of this Law have not been established, then both written and unwritten regulations concerning the earth and water as well as the natural resources contained therein and land rights, which exist at the start the enactment of this Law, remains valid insofar as it does not conflict with the soul of the provisions in this Act and is given an interpretation that is consistent with that. "

In the General Explanation of Roman numerals II (Basics of National Agrarian Law) number 3, stated "In connection with the relationship between the nation and the earth and water and state power as referred to in Articles 1 and 2, in Article 3 provisions concerning customary rights are held. from legal community units, what is meant is that this right will be placed in a proper place in the realm of the state today."

Human Rights Law

Law No. 39 of 1999 concerning Human Rights (HAM) has also accommodated the rights of the legal community as an integral part of Human Rights.

Article 6 states that:

1) *In order to uphold human rights, differences and needs in indigenous and tribal peoples must be considered and protected by law, society and the Government.*
2) *Cultural identity of customary law communities, including rights to customary land are protected, in line with the times.*

The provision explains that in the context of upholding human rights, indigenous peoples must be considered and protected, including their traditional rights, namely communal rights.

Forestry Law

Regulations on customary rights are also seen in Law No. 41 of 1999 concerning Forestry, which states that the state still pays attention to the

rights of indigenous peoples. Article 4 paragraph (3) states that forest tenure by the state continues to pay attention to the rights of indigenous peoples, as long as the reality is still present and acknowledged, and does not conflict with national interests.

Article 37 states that:

> *(1) The use of customary forests can be carried out by the customary law community concerned in accordance with their functions.*
> *(2) The use of customary forests which function as protection and conservation can be carried out as long as they do not interfere with their functions.*

Furthermore Article 67 states that the customary law community insofar as according to its status still exists and is recognized as being, has the right:

> *a. collecting forest products to fulfill the daily needs of the indigenous people concerned;*
> *b. carry out forest management activities based on applicable customary law and do not conflict with the law;*
> *c. get empowerment in order to improve their welfare.*

This provision provides an understanding that in the framework of forest management (including customary forest), there is recognition of indigenous peoples and their traditional rights.

Special Autonomy Law

The presence of Law No. 21 of 2001 concerning Special Autonomy for the Papua Province (hereinafter referred to as the Papua Special Autonomy Law), issued hopes that the Papuan customary community would be more prosperous from the use of rich natural resources in Papua. All development activities including natural resource management must be community-based by recognizing and respecting and involving local customary law communities, so that the rights of customary law communities are guaranteed strong legal protection.

The Papua Special Autonomy Law does regulate all development issues in all fields, such as economics, social, political and cultural, so that overall it can be said that the Papua Special Autonomy Law restores the basic rights of indigenous Papuans. In the explanation of the Papua Special Autonomy Law, authority is also given to the Papua Province and the Papuan people to organize and take care of themselves within the framework of the Unitary State of the

Republic of Indonesia. Thus, it is hoped that the Papua Provincial Government can better utilize wealth in Papua, including by empowering the socio-cultural potential found in Papua.

The rights of indigenous and tribal peoples, including customary rights as mentioned above, need to be clearly regulated in the laws and regulations. In Article 1 letter s of the Special Autonomy Law, Papua states that communal rights are alliance rights possessed by certain customary law communities which constitute the environment of its citizens, which includes the right to use land, forests and water and its contents in accordance with the laws and regulations. The regulation regarding the recognition and respect for ulah (traditional rights) of indigenous peoples is seen in the Papua Special Autonomy Law as listed below.

Chapter X regulates the Economy, which consists of 5 (five) articles, namely Article 38, Article 39, Article 40, Article 41 and Article 42. This provision regulates economic enterprises that utilize resources nature and investment in the Papua Province, must be carried out while paying attention and respecting the rights of indigenous peoples.

This is clearly seen in Article 38 paragraph (2) which states "Economic enterprises in the Papua Province that utilize natural resources are carried out while respecting the rights of indigenous peoples, providing guarantees of legal certainty for entrepreneurs, and principles of environmental preservation , and sustainable development whose arrangements are stipulated by Local Act or (peraturan daerah khusus) ".

Furthermore, in Article 42 states:

(1) The development of a populist economy is carried out by providing the widest opportunity to indigenous peoples and / or local communities.
(2) Investors who invest in the territory of the Papua Province must recognize and respect the rights of local indigenous peoples.
(3) Negotiations conducted between the Provincial, Regency / City Government and investors must involve the local indigenous people.
(4) Provision of business opportunities as referred to in paragraph (1) shall be carried out within the framework of empowering indigenous peoples so that they can play a role in the economy as widely as possible.

The provisions in Article 42 provide enforcement that economic development in the Papua Province is carried out based on society by providing the widest possible opportunity for indigenous peoples in the context of empowering customary law communities. Recognition and respect for customary law communities and their traditional rights (*communal rights*) must be done by investors who want to invest in Papua.

Chapter XII regulates the Protection of the Rights of Indigenous Peoples, which among other things regulates the obligation of the Papua provincial government to recognize, respect, protect, empower and develop the rights of indigenous peoples as well as the protection of intellectual property rights.

In Article 43 states:

(1) The Government of the Papua Province is obliged to recognize, respect, protect, empower and develop the rights of indigenous peoples based on the provisions of applicable legal regulations.
(2) The rights of indigenous peoples as referred to in paragraph (1) cover the customary rights of the customary law community and the individual rights of the residents of the customary law community concerned.
(3) The implementation of customary rights, insofar as they are in reality still exist, is carried out by the customary authorities of the customary law community according to the provisions of local customary law, by respecting the control of former communal land rights obtained by other parties according to the rules and regulations.
(4) Provision of communal land and individual land of indigenous peoples for any purpose, is carried out through deliberations with the customary law community and the concerned citizens to obtain an agreement regarding the surrender of the land needed and the compensation.
(5) Provincial, Regency / City Governments provide active mediation in an effort to settle disputes on ulayat land and former individual rights fairly and wisely, so that an agreement that satisfies the parties concerned can be reached.

The provisions of Article 43 affirm that the government of the Papua Province is obliged to recognize, respect, protect, empower and develop the rights of indigenous peoples both in groups and individuals. Utilization of communal land and private land of indigenous

peoples for development must be carried out in consultation to obtain an agreement.

In the explanation of Article 43, it is stated that recognition, respect and protection also includes the recognition, respect and protection of parties who have obtained legal rights to the former land rights according to the applicable laws and regulations, and therefore cannot be sued again. by his heirs for legal certainty.

Furthermore, the regulation of customary rights is regulated in Chapter XIX concerning Sustainable Development and the Environment, where in Article 64 paragraph (1) states "The Papua Provincial Government is obliged to carry out environmental management in an integrated manner by taking into account spatial planning, protecting biological natural resources, non-natural resources , artificial resources, conservation of living natural resources and their ecosystems, cultural heritage, and biodiversity and climate change by paying attention to the rights of indigenous peoples and to the greatest possible welfare of the population.

This provision mandates that local governments in managing the environment must always pay attention to the rights of indigenous peoples. this is because every activity/business that utilizes the customary land rights (Papuan) must be aimed at the welfare of the customary law community.

Other Regulations

Regulations on customary rights can also be found in other implementing regulations such as the Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 5/1999 on Guidelines for Resolving Customary Rights Issues of Customary Law which are subsequently replaced with Minister of Agrarian and Spatial Planning/Head of BPN No. 9 2015 concerning Procedures for Determining Communal Rights on Land of Customary Law Communities and Communities in Certain Areas.

In addition, the regulation of customary rights is also regulated in regional regulations, where the Papua Province is regulated by the Special Regional Regulation (*Perdasus*) of the Papua Province. In order to

reinforce the customary rights law of the customary law community, the Government of Papua Province in 2008 issued 2 (two) Perdasus whose purpose was to recognize, respect and protect customary rights of indigenous peoples, namely Perdasus Number 22 of 2008 concerning Protection and Management of Resources Nature of the Papuan Customary Law Society and Perdasus Number 23 of 2008 concerning Customary Rights of the Customary Law Community and the Individual Rights of the Indigenous Peoples of the Land Law.

Perdasus Number 22 Year 2008 regulates the obligation of the Provincial Government or Regency/City Government to give recognition to customary law communities. The government recognition must not be carried out by interfering with the material or content of the leadership system, institutional system, and customs that are owned by each customary law community. In addition to the above arrangement, this Perdasus also regulates the obligation of the Regency / City Government to assist customary law communities in conducting mapping.

Perdasus Number 23 of 2008 broadly regulates the recognition of regional governments regarding the existence of customary rights of customary law communities, where such recognition is based on the results of research conducted by research committees consisting of experts in customary law, customary institutions/traditional elders/adat rulers who authorities, non-governmental organizations, BPN, Legal Office of Regents/Mayors and related agencies.

In its implementation, the regulation of Perdasus Number 23 of 2008 concerning Customary Rights of the Customary Law Society and Individual Rights of the Indigenous Peoples of the Land Law, has not been implemented properly because there are many things that are unclear so that they can lead to diverse interpretations. The Perdasus needs to be elaborated in a comprehensive manner, so as not to cause multiple interpretations.

CONCLUSION

1. The existence or existence of customary rights (traditional

rights) of indigenous peoples is still evident in the existence of communities in Indonesia.

2. The customary rights of indigenous and tribal peoples are still recognized in the Indonesian legal system, this can be seen in the regulations in the applicable laws and regulations in Indonesia.

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