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THE EXISTENCE OF ADAT LAW COMMUNITY IN INDONESIAN LEGAL REGULATIONS

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Abstract
As a developing country, Indonesia continues to undergo such a very significant change over time. In the similar vein, globalization is shaping a new world order as a result of various enormous changes taking place in the world... *adat law community* has a different term that is used commonly. Those terms are native society, adat society, and primitive society (called Bumi Putra). *Adat law community* itself is a translation of term coming from Dutch "*adatrechtsgemeenschap."* Beside *adatrechtsgemeenschap*, there is also temr of indigenous people.
Keywords: Adat Law Community, Indonesian Legal Regulation

1. Introduction

As a developing country, Indonesia continues to undergo such a very significant change over time. In the similar vein, globalization is shaping a new world order as a result of various enormous changes taking place in the world. Values of life such as democracy and equity are always to be put as the top priority in establishing and maintaining relations among nations. Therefore, people in any nations or even those in smallerr levels of community all around the world manage profusely to translate and manifest those values their lives in accordance with cultural backgrounds and norms that have been long at their disposal.

In that relation, *adat law community* has a different term that is used commonly. Those terms are native society, adat society, and primitive society (called Bumi Putra).[405] *Adat law community* itself is a translation of term coming from Dutch "*adatrechtsgemeenschap."* Beside *adatrechtsgemeenschap*, there is also temr of indigenous people. This term has been agreed by international law to be used as a society entity that has its own characteristics due to its historical, economic, social and cultural backgrounds[406].

Article 28H of the Constitution of the Republic of Indonesia 1945 states that "every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care". This article serves as a basis for the responsibility that is expected to perform by national governance to its people, including those of a member of *adat law community* with the healthy environment. All of national government policies in concern with the environment therefore have to be able to guarantee the existence of such a healthy environment for any of its members, including those belonging to *adat law community*.

2. The Existence of *Adat law community* in Indonesian Legal Regulations

The essence of state responsibility to its people in concern with the environment management, particular with environmental use in spatial planning is to create a balance between the use of the nature and its conservation which at the same time remain to take into consideration the benefits of the nature to live of its people. In regard with that, Abrar Saleng in his speech of his professor inauguration stated that the rule of creating of life balance was all about balancing the order of a territory as the top priority. It means that certain kinds of resources may decrease in numbers or amount, but others have to be in increase to keep the balance of the quality of the order of the given territory. This rule does not deny the possibility of reducing of resources as long as the quality of the territory order continues to exist. For an instance, exploitation of natural resources of a territory has to be in balance with the increasing of human resources, social resources, economic resources, and others in order to all resources remains in balance[407]. It is furthermore said that the rule of such a balance is based on the understanding that natural resources is not only simply a matter of income, but also that of capital. Hence, the principles of effectiveness and efficiency are required in the

[405]Zainul Daulay, *Traditional Knowledge: Legal Basic Concept and its Implementation*, PT. RajaGrafindo, Jakarta, 2011, p. 40.
[406]Ibid, p.39.
[407] Abrar Saleng, *Balance Rule in Natural Resources Management*, Professor Inauguration Speech of Law Faculty of Hasanuddin University Makassar, 2007, pp. 7-8.

management of natural resources. The management has also to be directed to support the economic growth by appropriate taking the preservation of the environment function and society prosperity. The management of certain natural resources and the use of them highly require harmonization and synchronization with other natural resources[408].

As a community, *adat law community* has its typical rights and obligations to perform both individual and social rights as well as individual and social obligations. Social rights of *adat law community* are rights possessed by that community over the lands and the natural resources which exist in their *adat* territories. Those lands and natural resources have to be acknowledged and respected by the state. Those acknowledgement and respect take form in the inclusion of *adat law community* in the Constitution of the Republic of Indonesia 1945 in Article 18B (2) as the following:

> "The State recognizes and respects *adat* communities along with their traditional rights as long as they remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law."

Furthermore, in Article 28 I (3) of the Constitution of the Republic of Indonesia 1945, it is stated that "the cultural identity and the traditional rights of *adat* communities are respected along with the harmony of current development and civilization."

Both of the articles in the Constitution of the Republic Indonesia 1945 as mentioned serve as constitutional bases for the acknowledgement and the respect to *adat law community* and their rights. The acknowledgement and the respect are further legally established in the Decree of The People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 which contains Human Rights Charter, stating that "the cultural identity of *adat law community*, including their communal rights of land tenure are protected, in accordance with the current development (article 41). The Law Number 5 of 1960, the Law Number 39 of 1999 concerning Human Rights[409], the Law Number 41 of 1999 concerning Forestry, and the Regulation of the Minister of Agriculture/the Head of National Land Agency Number 5 of 1999 concerning Guideline in Solving the Problem of Communal Rights.

The acknowledgement of the communal rights as addressed in Article 3 Basic Agrarian Law (BAL) is limited on only 2 (two) factors: its existence and implementation. The criterion of the existence of communal rights is not clearly and precisely regulated. The drafters and the makers of BAL have such rationale argumentation to do not regulate these communal rights either in terms of determining the criteria for its existence or its registration. They will preserve the existence of those communal rights while in fact naturally their existences tend to reduce the communal rights[410]. Based on the Regulation of the State Minister of Agriculture/the Head of National Land Agency Number 5 of 1999 concerning Guideline in Solving the Problems of Communal Right Article 1 (3) states that "*adat law community* is a group of people who are bound to the orders of their *adat* laws as citizens of the same law confederacy due to the commonality in their living places or their ancestral backgrounds."

The acknowledgement of communal rights of *adat law community* is acknowledgment under certain conditions as regulated in the Law Number 41 of 1999 concerning Forestry on the explanation of Article 67 (1), among others, a) such communities are still in kind of in Paguyuban 'familiar community' (rechtsgemeenschap); b) there is hierarchical organizations in concern with their *adat* authorities; c) there is clear adat territories; d) there is institutions and legal instruments, particularly adat courts, in which people of that community still oblige to; and e) the communities still take forest production surrounding of forest territories to meet their daily needs. The similar thing is also governed in Article 43 (1) the Law Number 21 of 2001 concerning Special Autonomy for Papua province, affirming that Provincial Government of Papua has to acknowledge, respect, protect, empower and develop the rights of *adat* law community of Papua by strictly referring to the rules coming in force at the given time.

Space territories of the Unitary State of the Republic of Indonesia both as a unitary entity of land territories, sea territories, and air territories, including those territories inside the earth along with their natural resources in each of those territories is a huge blessing God the Almighty that have to be thankful for,

[408] Ibid, p. 8.

[409] Article 6 (2) the cultural identity of adat law community, including their communal rights of land tenure are protected, in accordance with the current development.

[410] Boedi Harsono in Maria SW. Sumardjono, *Land in Economic, Social and Cultural Rights Perspective*, Kompas. Jakarta. 2008, p.171.

protected, and managed continually for the benefit of its people as addressed in Article 33 (3) of the 1945 Constitution of the Republic of Indonesia as stated in the philosophy and the state ideology Pancasila[411].

To implement the messages addressed in Article 33 (3) of the 1945 Constitution of the Republic of Indonesia, there was twelve laws that were made and established in an attempt to regulate the management of natural resources contained in each territory, such as the Law Number 5 of 1960 concerning Basic Agrarian Law, the Law Number 11 of 1967 concerning Basic Provisions of Mining, the Law Number 41 of 1999 concerning Forestry, the Law Number 7 of 2004 concerning Water Resource, the Law Number 18 of 2004 concerning Plantation, the Law Number 31 of 2004 concerning Fishery, the Law Number 25 of 2007 concerning Investment, the Law Number 27 of 2007 concerning The management of Coastal Areas and small islands, the Law Number 4 of 2009 concerning Mineral and Coal Mining, the Law Number 22 of 2001 concerning Oil and Gases, and the Law Number 30 of 2009 concerning Electricity.

Maria SW Sumardjono states "almost most of the laws refer to Article 33 of the 1945 Constitution of the Republic Indonesia, but they differ in their orientations." Such a conclusion is drawn after some studies were conducted, regarding seven indicators used by an assessment team. Those seven indicators are orientations, utility accesses, state relations with the objects, executive authorities of the state, human relations with the objects, human rights, and good governance[412].

In concern with the orientation of the Laws, they are taking sides with public interests. However, others with those of capitalist, and the rest are siding with both of public interests and those of capitalists at the same time. In that sense, it is not surprising to find out that some laws tend to be conservative in its tone, others exploitative, and some others are in combination of conservative and exploitative. Nevertheless, they should the optimal use of natural resources for the benefit of its people to be the primer goal of the natural management as addressed clearly in Article 33 of the 1945 Constitution of the Republic of Indonesia, the interest of public then should always become the top priorities of all of those laws' orientation. However, as a matter of fact, some laws have potentials to get diverted from their expected supreme goals, that is, directing their orientations for the benefit of the people thus having potentials to marginalize the public prosperity; having potential to set limits on prosperity aspects for public; taking sides with capitals; and putting human rights as their non-first priority, as reflected in some laws, such as the Law Number 11 of 1967 concerning The Basic Provisions of Mining, the Law Number 41 of 1999 concerning Forestry, the Law Number 22 of 2001 concerning Oil and Natural Gases, and the Law Number 31 of 2004 concerning Fishery. The management of natural resources in those laws raises agricultural conflicts[413] as taking place differently in almost all regions in Indonesia.

The regulation to use land, air, and space as well as natural resources is brought benefits of society optimally as mentioned in the Constitution to implement the fundamental aim of the state establishment. The Law Number 26 of 2007 concerning Spatial Planning states that the state conducts spatial planning that its implementation of it will be conducted by the Government and the Local with respect to the everry body's rights. Based on Article 1 (1) the Law Number 26 of 2007 concerning Spatial Planning, "space is a place including land space, sea space, and air space, as well as spaces inside the earth as a whole unity of territories, a place where human beings and living things live, do their activities, and maintain their lives." Regarding to it and as an attempt to implement national territorial spaces which are safe, comfortable, productive, and sustainable at the basis of Archipelago Insight and National Defense, this law brings a very crucial mandate in order to conduct the necessary spatial management which can harmonize the natural environment and the artificial ones, and which are capable of manifesting the integration of natural resource utilities with those of artificial resource as well as is able to give protection to the functions of spaces and the prevention of negative effects towards living environment as a result of the utilities of the given space. The rules for the spatial planning must then be implemented and manifested in every process of territorial spatial management plan[414].

[411] General Explanation of Law Number 26 of 2007 concerning Spatial Management

[412] http://arsyad-ipb.blogspot.com/2009/03/uu-pengelolaan-sumber-daya-alam-tak.html accessed on August 12nd 2012

[413] Abet Nego Tarigan as National Executive Director of Indonesia Organization for Environment stated that there were 7.000 land dispute between plantation or mining company with local residents."That is all that registered, but actually more," he says to Tempo, on July 29th 2012. taken from http://www.tempo.co/read/news/2012/07/29/173419966/7000-Konflik-Agraria-Potensial-Kisruh. accessed on December 11st, 2012.

[414] See Explanatory of the Number 4 Law Number 26 of 2007 concerning Spatial Planning.

Spatial planning is part of a system along with spatial management, spatial utility, and spatial utility control which is in an inseparable integrity from one another, and it has to be implemented in accordance with the rules of spatial planning in order to: (i) be able to manifest an effective and efficient spatial management as well as is able to support sustainable living environment managements; (ii) prevent the occurrence of inefficient spatial use; and (iii) prevent the declining of the quality of any space. The spatial planning which is based on the characteristics, the supporting capacity level, and supporting accommodating level as well as proper technology will lead to an increasing of harmonization, synchronization, and balance of its subsystems.

It means that spatial planning is able to increase the quality of the available spaces in its many kinds because the management of subsystem will have an impact of other subsystem managements which it will influence the whole system of territorial spaces on national scale. Spatial management requires the development of an integrative system as its main characteristics. For that reason, it is necessary to have such a national policy concerning spatial planning which can combine various spatial planning policies to form a whole entity of it. Therefore, the implementation of development conducted either by national government or local government, as well as society, both in national scale and local scale must be in adjustment with spatial planning that has been previously regulated. Then, it raises consequence that any spatial planning must not violate those spatial management plans formerly regulated[415].

The Law Number 32 of 2004 concerning Local Government on Article 13 and 14 sets regulation in concern with authorities that provincial government and district/city government have in power. The compulsory authority that become part of their authorities are authorities to conduct spatial management, spatial utility, and spatial utility control. To guarantee the achievability of the goal of spatial planning, legal bases are needed to serve as a guarantee for legal certainty of any attempts of managing spaces. In other words, the development which is being conducted must be in harmony with the plans already set by the national and local government. The Law Number 26 of 2007 concerning Spatial Planning, Article 11 (2) states " to give mandate to the authorized district government to conduct territorial spatial planning which includes the district territorial spatial planning, the district territorial spatial utility, and the district territorial spatial utility control."

3. Communal Rights of Adat Law Community in Spatial Planning

Regarding with the documentation of spatial planning, basically there is a certain process through which that documentation takes place. The documents include planning procedures, preliminary backgrounds, compilation reports of data, analysis reports of findings, executive summary planning reports (formula and program), map albums, and local regulations. In compiling spatial management reports, it is necessary to give some freedom to adat law community to voice their wishes or to participate in it it is associated with the adat rights or their communal rights as well as other rights over their agrarian resources. This is pivotal as a form of acknowledgment given to adat law community in concern with spatial planning which will accommodate the interests of those adat law communities in order to increase their prosperity and rights protection. The communal rights of adat law community is belong to an integral and inseparable part of Territorial Space Plan set up by government and local government is. Indeed, it is vulnerable to various kinds of conflicts coming as a result of the implementation of the spatial use.

The implementation of territorial space plan must encourage the involvement of society, particularly adat law community in concern with their communal rights. They need to be encouraged to take part in the process of planning, implementation, and monitoring as well as evaluating. However, for that matter, these are counted as big enough problems to be manifested since local government often deny the rights of adat law community to get involved or take part in the implementation of territorial space plan. Forms of acknowledgement of the rights and the obligations of adat law community in taking part or getting involved in spatial planning are getting involved in any of the processes taken of spatial planning. As we know, the meaning of the spatial planning itself is a system of process of spatial planning, spatial utility, and spatial utility control.

National spatial planning has to prepare action program in order to implement spatial territory in one and a half year since encated on April, 2007. The provincial gevenment and the district/city government also have to prepare their spatial territory 2 year and 3 year respectively.[416] It means that the time allocation for

[415] See Explanatory of the Law Number 26 of 2007 concerning Spatial Planning.
[416] Delivered by General Director of Spatial Planning, Imam S. Emawi, on Spatial Planning Dialogue on TVRI on

particularly provinces and districts/cities which are just independently given authorities to arrange their own governance and part away from its super-ordinate level of government are very limited concerning with the constraints to prepare their own spatial territory plan. Until September 2014, the numbers of territorial spatial planningt in province and district/city level which had been set as Local regulations in 25 provinces; whilst 8 provinces have not made them as local regulations yet since the former regulations were still in force. On the other hands, there were 305 districts and 77 cities that had set out to their own local regulation and 94 regencies and 16 cities had not yet.[417].

One of the problems faced by the government nowadays to deal with territorial spatial plan is the occurrence of problems regarding lands, which further cause land conflicts, later on accumulating over time into anarchy actions, such as robbery and occupation of plantation lands, forests, rights for mining enterprises, and rights for Forest Management. Those kinds of conflicts are familiar enough in Java, Sumatra, Kalimantan, Sulawesi, and Papua. On the hand, in the sociological-empirical discourse, these conflicts of behaviors of those people of adat law community are viewed as a manifestation of their protests against injustice and inequality beyond themselves. These kinds of actions for that matter aim to claim for the restorations and acknowledgements of their rights since relying on the laws to guarantee their rights did not bring any satisfactory results, for the laws per se are incapable of it. From the face of it, such land conflicts will be increasing in its intensity and its number as they are getting worse as a result of the incomprehensive, incomplete, and partial or sectorial solutions offered to those people in conflict[418].

Land conflicts keep growing in numbers year by year. In 2014, the total numbers of land conflict cases were reported to be at least 472 cases as released by Agrarian Renewal Consortium in all over Indonesia regions with lands under conflict were 2.860.977.07 square meters in size, involving at least 105.887 households[419]. The highest conflict occurrences took place in infrastructure construction with 215 agrarian conflicts were recorded or which approximately reached 45.55%. Plantation sector was in the second position to contribute the conlict with 185 agrarian conflict (39.19%), agriculture conflicts came in the third place with total cases was 20 conflicts or reaching 4.24%, mining conflicts came next after agriculture conflicts with 14 conflict cases in total or around 2.97%, and sea conflicts with 7 conflict cases or approximately 1.48%[420]. Based on the conflicts of claims regarding lands and natural resources in various places in Indonesia regions, it can be said that those conflict can be classified into conflicts between local community against private companies for 221 conflict cases: local community against government both national and local for 115 conflict cases; local community against other local community for 75 conflict cases; local community against states enterprises as many as 46 conflict cases, and local community against capitals or enterprises owned by TNI/POLRI as many as 18 conflict cases.[421] Form all of those various conflict cases involving adat law communitis, they always become the victim of all those conflicts resulting from the implementation of all the activities.

Adat law communities become the victims of agrarian conflicts and natural resource utilities either state or private enterprises. The Government, which are empowered with its rights to fully control the use of land, water, and space as well as all the natural resources, have the authorities to determine the way to use all the spaces and private enterprises as the capital owners have the potentials and powers to collaborate with government in making use of those spaces by ignoring the rights of the people, particularly those of adat law communities. People are not always involved as subjects of the developmental processes taking place in their own countries, regardless their important status as one of the fundamental aspects of a state. This condition create various conflicts as a result of government ignorance to them either in planning process, utility process, monitoring process, or evaluation process of the states.

As what happened in regency of Teluk Bintuni where society in there, particularly adat law community are denied to to participate in its local development. This condition created some conflicts in mining in 2014 in which there existed delay in the installation of three refineries due to the barring from adat law community in there. The same incident also took place in regency of Manokwari where some delays in cement factory

December 22nd 2007, Spatial Planning Bulletin the 12nd Edition 2007.

[417] BKPRN Secretary Presentation Matter, on September 25th 2014.

[418] http://sertifikattanah.blogspot.com/2009/09/pembaharuan-hukum-agraria-dan. html, accessed on November 24th 2012.

[419] See Yearly Reported by Agrarian Renewal Consortium issued on December 23rd 2014 in Jakarta, p. 8.

[420] Ibid.

[421] Ibid. pp. 16-17.

construction by Chinese investors due to the not knowing of the concerned society concerning with their territory utility. Adat law communities basically have their own wisdom to deal with their traditional spatial planning. Therefore, from the description of all the phenomena, it can be concluded that adat law communities does not get involved in the implementation of spatial planning both in planning, implementing, monitoring, and evaluation.

4. Conclusion

The regulation in concern with the existence of adat law community of Indonesia has been regulated in some various national legislations. Those legislations are manifested in various sectorial regulations in concern. In the context of adat law community, it also involves the acknowledgment of communal rights in spatial planning. Eventhough, in fact, in most of cases, they are ignored to contribute and particpate in in the implementation of spatial planning both in planning, implementing, monitoring, and evaluation.

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