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Legal Framework of Recognition of Indigenous People Rights Over Land Rights

Jenny. K. Matuankotta*, Aminuddin Salle**, Farida Patittingi***, Harustiati A. Moein****
*PhD student, Postgraduate Hasanuddin University and Lecturer at University of Pattimura, Ambon.
** Professor on Legal Science, Faculty of Law Hasanuddin University, as a Promotor.
*** Professor on Legal Science, Faculty of Law Hasanuddin University, as a Co-Promotor.
**** Professor on Legal Science, Faculty of Law Hasanuddin University, as a Co-Promotor.

Abstract
The law is not only about the rules and how to maintain it, but it is also a legal rule that must be justified by common sense, whether it is worth, (right, good, worthy) for humans (individuals or groups)... Exploitation of the natural resources has lead to many cases, causing casualties among the people and the security forces. The main cause is the violation of the rights of indigenous people on their own land. Constitutional Court Decision particularly in testing the law against the 1945 Constitution has clarified the meaning of the principle that state has preserved rights to rule the earth, water, space and natural riches contained therein which mentioned in Article 33 paragraph (3). It dose not mean that state owned it, inspite the State only formulate policies (beleid), make regulations (regelendaad), perform maintenance (bestuurrdaad), managing (beheerdaad), and control (toezichthoudendaad).Therefore, legal framework will put in 3 (three) approaches, as followings: (1) international laws; (2) national laws either in form of law or the Government Decree; and (3) the lOcal Reulation called PERDA.
Keywords: Legal Framework, Recognition of Indigeneous People Rights, and Land Rights.

1. Introduction

Indonesia as a unitary state, since the beginning of its establishment in 1945, has declared itself as a Law State. Consequences of being a Law State, it isthat the state should perform its role based on the principles of morality and justice. Besides, legislation drafting should be able to actualize justice. The law is not only about the rules and how to maintain it, but it is also a legal rule that must be justified by common sense, whether it is worth, (right, good, worthy) for humans (individuals or groups).[1] Law is a set of rule and norm, which are right, nice and helpful. The enforcement of law should be in accordance with the rules of the nobility. Treatment of value should be different from the worthless.[2] The second reason is that law regulates how humans interact towards each other and toward environment.

In terms of its form, the law is distinguished as written and unwritten laws or customs. Written law consists of laws and regulations established by state authorities which binding the society in general. While the unwritten law or custom is all the rules set which are not established by the government, but adhered by the society. They are convinced that the rule is enacted into law. Custom has a binding power and also can be a source of law.

Regulation concerning land resources according to its nature and its principle is in the hands of the central government and can be transferred to indigenous people. State regulation concerning the land resource is actually emphazised more on the aspect of mastery instead of ownership. As the basis of the state establishment that has been previously mentioned, the word "controlled" in this article does not mean "owned", moreover it means giving authority to the State, as the regulatotor of the nation. However, there are different views on the tenure aspects as a result of different interpretations of the concept of tenure since the government here as the regulator of the land resource often interpreted its power for claiming certain area. While on the other hand, indigineous people have also claims that their existence mastered land resources beforehand in the territory controlled by customary law.

The different views are due to the formulation of the controlling rights of state that is not being affirmative and explicit, causing multiple interpretations and biased in implementing legal principles in understanding their rights with regard to social issues, culture, politics and law, in governance, including in understanding the rights of indigenous people in control including the ownership of land rights in communal territories. Exploitation of the natural resources has lead to many cases, causing casualties among the people and the security forces. The

[1] Yovita Mangesti and Bernard l. Tanya, *Legal Morality*, Genta Publishing, 2014, p.17.
[2] Ibid, p.18

main cause is the violation of the rights of indigenous people on their own land. Constitutional Court Decision particularly in testing the law against the 1945 Constitution has clarified the meaning of the principle that state has preserved rights to rule the earth, water, space and natural riches contained therein which mentioned in Article 33 paragraph (3). It dose not mean that state owned it, inspite the State only formulate policies (beleid), make regulations (regelendaad), perform maintenance (bestuurrdaad), managing (beheerdaad), and control (toezichthoudendaad).[1]

Management functions (beheersdaad) is done through the mechanism of share ownership (share-holding) and / or through direct involvement in the management of State-owned enterprises or state-owned legal entity as institutional instruments, through the State, cq Government, utilizing its controlling power over the resources to be used for the greatest prosperity of the people. Similarly, the function of supervision by the country (houden daad toezicht) is carried out by the state, cq The Government, They monitor and control the process so that those protected resources are actually used for the welfare of the people.

The cornerstone of the constitutional right concerning state controlling rights is within the Article 33 (3) of the 1945 Constitution which being elaborated in Article 2 paragraph (1) BAL. According to Muhammad Bakri, the current concept of state controlling rights which is provided for in Article 2 paragraph (2) BAL, is the result of the development of the concept of customary rights of indigenous peoples. Therefore, the concept of indigenous rights and its development in the future shoud not be separated in discussing the concept of state controlling rights. [2] Article 2 (1) stated that: the earth, water and airspace, including the natural resources, contained therein are in the highest instance controlled by the State. Rights of control by the State authority is included in Article 2 paragraph (2) BAL, that is to regulate and implement the appropriation, the utilization, the reservation and the cultivation of that earth, water and air space.

This authority is related to land-use planning / land use planning or spatial either locally (provincial / district / city) or nationally. It determines and regulates legal relations among people with the earth and space. The legal relations between the people with the land create individual rights over the land. This provision authorizes the State to determine the various kinds of land rights, and regulate all matters relating to land rights, for example, regarding the rights subject, the rights object, the rights holder authority and others. It determines and regulates legal relations between persons and legal actions concerning the earth, water, and space. While the customary rights authorize indigenous people to manage, organize, and lead acquisition for the maintenance and allocation and also the use of communal land. When both rights being connected, the state controlling rights towards communal land are raised at the highest level, cover the whole parts of Indonesia. Meanwhile the communal rights are limited only to certain area of certain indigenous people. Thus there are similarities between the concept of communal rights (customary rights) and the state controlling rights over land, that both of the rights are the "mother" of other land rights. Individual rights on land could arise both on the communal land and over the state controlling rights. Communal (customary) rights have the same binding force with the state competency which is based on the state controlling rights on land.

Thus the authority of indigenous people on its territory is a material wealth that must be protected. Protection of the existence of indigenous communities is much needed consider the rights to resources, especially agricultural land within their communal territory are often not taken into account or eliminated when the land resource would be exploited by the government or the entrepreneur who obtained a permit from the government. Therefore, the state (government) has an obligation to provide protection for indigenous people as part of Indonesian citizens. The following topic will be presented regulation of legal recognition of indigenous peoples' rights over communal rights within the international legal instruments, national laws, and in local regulations.

2. Regulation of legal recognition of indigenous peoples' rights over communal rights within the international law.

[1] Desicion No. 001-021-022/PUU/2003 Judicial Review of Law of Electiricity; Desicion No. 002/PUU-I/2003 Judicial review of Law of Oil and Gas; Desicion No. 058-059-060-063/PUU-II/2004 and Desicion No. 008/PUU-III/2005 Judicial Review of Law of Water Resources.

[2] Muhammad Bakri, *the Right to Have a Land by State (a New Pradigm for Land Reform),* UB Press, 2011, p.14

The existence of indigenous people entity in international instruments is more focused on the recognition and protection of indigenous people. The highest international instrument is the Charter of the United Nations (UN). This charter made by the international community as a tool to protect human beings; because indigenous peoples are part of the human race. Various other international instruments such as ILO Convention 169 of 1989 concerning Indigenous and tribal people called *Convention concerning Indigenous and Tribal Peoples in Independent Countries*[1]. This convention recognizes the collective rights of indigenous people as a group who are the owner or the subject (beneficiaries) of the rights protected by this Convention. The Convention recognizes the collective rights of indigenous peoples in Article 7 (protect the rights of indigenous people to decide their own priorities of their life development), Article 5 (b) and 8 (b) (respect the institutions of indigenous people), Article 6 (1) (directing the government to consult with indigenous peoples through their representative institutions), and Article 13-19 (relating to the protection of land rights).

PBB Resolution Session - 61 Agenda Item 68, 2007 on *United Nations Declaration on The Rights of Indigenous Peoples* gives protection to indegineous people around the world, including in Indonesia. Paragraph 2 of the Preamble states that the indigenous people is equal toother communities, including their land' rights. Article 26 further states that:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned[2].

Thus, it can be understood that recognition and respect for customary law on land tenure in the international law perspective has also strengthens the existence of the indigenous people.

3. Regulation of legal recognition of indigenous peoples' rights over communal rights within the national law.

Consequences of the state recognition and respect for the unity of the indigenous people with their traditional rights is the recognition of the communal (customary) rights or beschikkingsrecht. Recognition and respect for the existence of the indigenous people in Indonesia included in:

3.1 The 1945 Constitution of The Republic of Indonesia.

Article 18B (2) of The 1945 Constituion states that the State recognises and respects traditional communities along with their traditional customary rights as long as these 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. Article 18B (2) of The 1945 Constituion does not explicitly mention the meaning of traditional communities. In contrast to Article 18 of the Constitution of the Republic of Indonesia Year 1945 before the amendment, which reads:

> ".... Perceive and consider the basics of deliberations in the system of the State Government, and the rights of origin in areas that are special. While in the explanation said, in the territory of the unity of

[1] Hubertus Samangan, *International Instruments for Protection Indigenous Peoples*, in Sandra Kartika dan Candra Gautama, op.cit, p.133.

[2] Sem Koroba, *Human Rights of the Indigenous Peoples (United Nations on The Rights Of Indigenous,Peoples)*, Galangan Press, Yogyakarta. 2007, p.4

> Indonesia, there are approximately 250 zelfbesturende landschappen and Volkoemeenschappen, such as villages in Java and Bali, negari in Minangkabau, village and clan in Palembang jobs. These areas have a special arrangement that is genuine ..... All state regulations regarding these areas will remind the rights of the origins of the area".

Thus the 1945 Constitution before the amendment had specified more clearly the definition of indigenous peoples.

Nevertheless, in contrast with the policy of the Dutch government, which automatically gives recognition to adatrechts gemeenschap, the Indonesian government does not automatically provide such recognition. Both in Article 28 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945 as well as various laws contain various clauses and terms that are limitedly for the recognition of the existence of customary law or by Suriaman Mustari Pide[1] and Saafroedin Bahar[2] called as conditionality on the juridical status and rights of indigenous people.

Rikardo Simarmata mentions 4 (four) requirements of the indigenous people in 1945 after the amendment has a history that can be traced from the colonial period. Requirements for indigenous people have already been mentioned in Algemene Bepalingen (1848), Reglemen Regering (1854) and Indische Staatregeling (1920 and 1929) which say that the natives and eastern foreigners who do not fall into the Civil Law of Europe, therefore legislation religion, institutions and customs of society (indigenous people) are being enacted, "as long as it does not contradict with the principles of public justice that has been recognized." Such requirement is discriminative because it is closely linked to the existence of culture. Requierement orientation that emerged was an attempt to transform the law of indigenous / local and try to direct them becoming the formal / positive / national law. On the other hand, there has also a pre-assumption that indigenous people are communities that would be "eliminated" and becoming modern society, which follow the patterns of production, distribution and consumption of modern economics[3].

Constitutionally, recognition has been formulated. However in fact the existences of indigenous communities have been underestimated because until now there have been no specific rules governing the protection of their existence and their rights over the land resources. The implications of the two interests that are less synchronized is that most likely being used by those with powers and authorities to suppress the weaker party in this case indigenous people as authorities and owners of the land resources in their communal territory.

Jimmly Assidiqie, in commenting on the provisions of Article 18B of the 1945 Constitution states that, (i) this recognition is given by the state into the existence of a traditional society (indigenous people) along with its traditional rights; (ii) The existence which is being recognized is the existence of units of traditional society (indigenous people). Meaning that the recognition is given to one by one unit, and therefore that traditional society (indigenous people) must fulfill certain criteria; (iii) the traditional societu (indigenous people is still exist (live); (iv) in certain area *(lebensraum)*; (v) its recognition and respect that is given without neglecting the size of eligibility for humanity in accordance with the level of development of civilization; (vi) its recognition and respect should not diminish the meaning of Indonesia as a country that shaped as unity of the Republic of Indonesia[4].

Meanwhile F. Budi Hardiman stated that the conditional recognition has subject-centric, paternalistic, asymmetric, and monologial paradigm, such as: "The State recognizes", "State respects", "as long as these remain in existence, In accordance with the principles of the Unitary State of The Republic of Indonesia" which assume the role of the countries to define, acknowledge, authorize, legitimize the existence, as long the indigenous people is willing to obey the regulation of the state or in other words "tamed". Such Paradigms are not in accordance with the principle of equality and autonomy that exist in a democracy.

In line with the previous opinion, Satjipto Rahardjo, mentioned 4 (four) requirements of Article 18B paragraph (2) of the 1945 Constitution as a form of hegemonial of state power that determines the presence or absence of

[1] Suryaman Mustari Pide, *Dillemma of Collective Rights: Its Existence and Social Reality Post Basic Agrarian Law*, Pelita Pustaka 2007, p.146
[2] Saafroedin Bahar, *Inventarisasi dan Perlindungan Hak Masyarakat Hukum Adat,* Komisi Nasional Hak Asasi Manusia, Jakarta, 2005, p.22.
[3] Rikardo Simarmata, *Legal Recognition of the Indigenous Peoples in Indonesia*, UNDP, Jakarta, 2006, pp. 309-310.
[4] Jimmly Assidiqie, *Consolidation of UUD 1945 Manuscript After 4th Amandement*, Pusat Studi Hukum Tata Negara, Fakultas Hukum UI, Jakarta, 2002, p.24.

indigenous people. State wants to interfere, regulate everything, defining, dividing, grouping (indeling-belust), all of which are performed in the basis of the state perception along with its power. [1] The 4 (four) requirements listed in Article 18B paragraph (2) are conditional, namely: 1). As long as these remain in existence 2). In accordance with the societal development 3). In accordance with the principles of the Unitary State of The Republic of Indonesia 4). Shall be regulated by law.

Therefore, it can be understood that in real and judicial terms, those four requirements can be interpreted as: First, the recognition is given "as long as these remain in existence", means that recognition must be requested even though the existence of traditional society (indigenous people) have existed long before the State of Indonesia stands out as a country. The applicant has the burden of proof for the existence of the indigenous people by themselves. And if the evidence could not be proven then that indigenous people will not be considered (die). If so, then the state will deny the existence of its own society. Furthermore, there are two questions that arised, namely (1) what evidence could be used to determine that indigenous people were still alive or not, and (2) what criteria should be used to determine a society as traditional one (indigenous people). It becomes difficult and less relevant as the requirement is that society remain in existence as traditional society.

Then, the second requirement is that it has to be in accordance with the societal development. This provision seems likely to say that the tribes people or society in this country are not in accordance with the societal development, not recognized in this country as citizens in this country, Indonesia citizens and the subject of Indonesia law. Tribes in Indonesia like Badui in Lebak Banten, Kajang in South Sulawesi, Togutil in North Maluku, Nuaulu and Hualu in Seram Island, Middle Maluku and many other tribes, which de facto live as part of Indonesia. Denying the existence of tribal society is same with denying the Indonesian people itself. This is because the traditional society (indigenous people) is one of the important part of a state existence.

Third requirement is that it must be "in accordance with the principles of the Unitary State of The Republic of Indonesia". This provision distanced the traditional society (indigenous people) from the Unitary State of the Republic of Indonesia. This is because traditional society with the local-ethnic character dealing with countries with the nation-state character. The third provision contradict with the state philosophy namely Pancasila, which recognizes the diversity which from the legal aspect recognizes the existence of legal pluralism in the colors of national unity (Bhineka Tunggal Ika).

The forth requirement, it shall be regulated by law. This provision indicates that all behavior, rules or norms that regulate indigenous people as subjects of law must be in written form, namely the rule of law.Sementara hukum adat merupakan norma masyarakat yang tidak tertulis. It means that if the subject of customary law is not in accordance with what has been regulated in law (legislation), then it would not be recognized. Meanwhile, it the customary law live empirically, evolve and die if the people wish so or slowly abandoned and not maintained any longer. Because its naturally open and constantly changing according to the change itself.

Policies to unilaterally admit or not admitted are in the hands of central government power. Unilateral policies by the central government would ignore the legal pluralism of indigenous communities whose presence in the area. Therefore, Article 18B paragraph (2) of the 1945 Constitution still contains constitutional problem. It was stated by Simarmata because the constitution is supposed to be accommodate the basic rights of the people including the right to natural resources / environment as well as a decent living by utilizing the available resources which being limited by a number of provisions which have historically been a model inherited by the government colonial. In addition to historical reasons, conditional recognition models that have been exist for a long time suffered an obstacle to be implemented in the field[2].

Furthermore, recognition of the existence of the indigenous community is contained in the first paragraph of Article 28 (3) which states that:

> "The cultural identity and the rights of traditional communities should be respected in line with the times and civilization".

The above recognition is conditional meaning depends on the political will of the authorities.

[1] Satjipto Rahardjo, *Customary law in Indonesia (Legal Sociology Perspective),* in Hilmi Rosyida dan Bisariyadi (ed), *Inventaritation of Protection of the Rights of Customary Law Community,* Komnas HAM, Jakarta, 2006, p.62.

[2] Rikardo Simarmata, op cit, p.315

Apart from a number of criticisms of the experts on the formulation of Article 18B paragraph (2) of the 1945 Constitution, shall the recognition of the most important points of these provisions be interpreted and elaborated further to promote the rights of indigenous peoples which either described in the legislation or to be implemented in the field. Thus the constitutionality of Article 18B paragraph (2) of the 1945 Constitution can be measured in the sociological validity of customary law in society.

3.2 The Law No.5 of 1960 Concerning Basic Regulations on Agrarian Principles (hereinafter BAL)

As explained previously that BAL is a State policy governing natural resources, especially land in terms of the earth's surface. The basic enactment of BAL is Indonesia customary law, as stated in Article 5 of the BAL namely: "Land law that applies to the earth, water and air space is the customary law, as long as it does not contradict with the national interest and the State, which is based on the unity of the nation, with socialism of Indonesia as well as the regulations contained in this law and other laws, and everything with the elements that rely on religious law."

Article 3 states that considering the provisions of Articles 1 and 2 regarding the implementation of communal rights and similar rights of the indigenous communities, as long in fact still exist, must be in accordance with the national interests and the state, which is based on national unity and must not contradict with the law and other higher regulations.

As the indigenous society being mentioned within BAL, basically state has given recognition toward communal rights, thus that communal rights still will be taking into consideration as long as it is still exist in that indigenous society. However in the practice, sometimes the abandoned towards indigenous society rights are still found because government policies give permission towards entrepreneurs by abandon it own society.

There are 2 (two) requirements that must be fulfilled regarding the communal rights within the Article 3, namely: 1) The Existence. The communal rights will be recognized as long as the indigenous society still exists. Therefore, those area where there are no longer indigenous society there, would loss it communal rights. 2) Reviewed from its application, if it still exist, the exercise of the communal rights should be in accordance with national and state interest., based on the unity of state. The exercise of the communal rights shall not contradict with the higher laws and regulations.

Article 3 of BAL does not explicitly mention either the definition or essential criteria of the existing of the indigenous society. Moreover, the conversion regulations of the rights of indigenous people have not been mentioned like other customary rights towards land[1]. The formulation of BAL complicates the interpretation of the rights exercise, which shall not contradict the higher laws and regulations. Such circumstances cause uncertainty of the collective rights of indigenous society towards land that will be lead to the extinction. It can even be said that Article 3 provides "recognition" though it is conditional, but at the same time rule out the possibility of the exercise of these rights if it is contradict with the higher interests. Subsequently, seen from a legal system that regulates them, the collective rights of the indigenous community is based on unwritten customary law, while BAL and other law products controlled by the national legal system are written. According to hierarchy, BAL legal position has higher position than the unwritten one.[2].

Recognition of the existence of communal rights contained in Article 3 of the BAL was addressed with ambivelen attitude by the policy makers. On one hand, national legislation recognizes the existence of customary rights, while on the others there is some sort of doubt that hinder the accomplishment of political will express in the rules implementation. The ambivalent attitude is based on the historical interpretation of Article 3 of the BAL. According to the history of the formation of the BAL, BAL does not intend to regulate land rights further because it can perpetuate or preserve its existence. Whereas communal right would be weakened through a natural process, where individual rights become stronger within the legal community concerned[3]. The previous arguments explicitly supported by Boedi Harsono stated that: "BAL does not make the formal regulations concerning customary rights (communal rights) deliberately and let the implication be applied through the local customary law. In the perspective of the legislators of BAL, regulating the communal rights will inhibit the natural development of communal land, which in fact it tends to weaken. This tendency accelerated with the increased strength of the individual rights, through its arrangement in the form of written law and registration procedure, which produce the legal evidence of their rights. Melemahnya atau bahkan menghilangnya

[1] A. Suriyaman Mustari Pide, op cit. hlm 108
[2] ibid, p.109
[3] Maria S.W Sumardjono, *Land in Perspective of the Economic, Social, and Cultural Rights,* Kompas, Jakarta, 2001, p.42.

Communal rights becoming weak and gradually eliminated. It shelter is being cultivated in the framework of state controlling rights, includes and replace the role of head of the tribal and traditional elders of indigenous society in relations with the lands own individually by its indigenous people, like in the lands of other area[1].

The process of individualization of communal land rights in terms of of land rights shall be registered as proprietary by the applicable rules. In the era of globalization, the lives of indigenous communities are unavoidable, including in Maluku where one of reasons is the low economic situation. In addition there is a presumption that the registration of land rights as property rights to obtain the certificate is also going to facilitate the rights holder to perform legal relations with the subject of specific laws for specific purposes, such as selling, renting or giving / bequeath land. Nevertheless individualization over rights of communal land does not cause them to loss their existence as part of communal society, unless the communal society has totally dissapeared. Related to this issue, Kasnoe stated that: Communal (traditional) rights is a basic foundation, therefore the function of individualization is not limited by the communal rights, instead it arise and maintain the individualization function because the existence of its communal rights. The individualization of property rights has it own role to revive the rights of its own society (gemeenschapsrecht). Thus, the function was not limited by the society rights, but developing appropriatly, within the limits of the possibilities that exist, within the framework of the community rights. Property rights are subjective rights of a person falling within the scope communal rights of the legal community. That right is not absolute rights of the individual; it is a right "to participate in" and remain within the scope of communal right or community rights. Therefore, property rights in society, should be regarded only as a function of the communal right that gives community members the opportunity to use the land in order to achieve the purpose of common life: The sustainability of these communities achieved through the provision of life and well-being of the members. Property right is not a synonym of eigendom sense, but rather a doctrine in customary law. It is a function of individualization public authority, in addition to other functions individualization[2].

Adhering to the concept from the customary law, it seems fair if the determining criteria for communal rights must fulfil three important elements stimulantly, namely:

1) The subject of communal right, that is indigenous communities that has fulfill certain characteristics;
2) The object of communal right, that is land of living space of indigenous community area (lebensraum);
3) The presence of certain powers of the indigenous communities to use and exploit their land territory, including determining relations with respect of inventory, allocation, and utilization, as well as the preservation of the environment.

According to Saafroedin Bahar, recognition of the rights of indigenous people have not been consistently implemented for three reasons, namely: Lack of understanding of the central government regarding the cultural pluralism of Indonesian society and its implications, which shown in Act No. 5 of 1979 on Village Government which generalize the village administration according to the governance model village on the island of Java; The investor needs of lands since 1967, particularly in the fields of mining, plantation and forestry, which led the government along with the House of Representatives issued a series of laws that are in concreto denying the rights of indigenous people towards communal land. Either directly or indirectly, the entire law on investment since 1967 is not only revive the doctrine of res nullius and principles regalia that has imperialistic character and being a legacy since the 16th century, but also implement the concept of the Washington Consensus neoliberal models that about to revoke the function of the welfare state and handed it over to market forces. Republic of Indonesia yet does not have data on the number, location, and extent of communal land owned by the communityhave customary law.

The emergence of the tendency of centralization of government is quite strong, causing deterioration of study concerning customary law and indigenous people, because the assumption that customary law and indigenous

[1] Boedi Harsono, *Indonesian Agrarian law: Historical Form of the BAL, its Substance and Implementation*, Djambatan, Jakarta, 2008, p.193.
[2] Moh. Koesnoe, *Opstellen over hedendaagse Adat, Adatrecht en Rechtssonttwikkeling van Indonesisie,* in Herlien Budiono, *Balance Pinciple to Indonesian Treaty Law: Treaty Law Based on Principles of Indonesian Citizen*, Penerbit PT Aditya Bakti, Bandung, p.291.

people are incompatible with the spirit of nationality and they are seen as part of SARA problem (ethnic, religious, racial and inter-group) which is one the threats to national security.[1] Even only giving limited recognition, however such recognition still bring implication. According to the concept of BAL, the implication is an obligation for the third party to listen and give recognition every time they are going to give land rights on the communal lands.

3.3. The Law No.41 of 1999 Concerning Forestry

In connection with the recognition of indigenous communities, law concerning forestry only contains recognition of the existence of indigenous communities (without giving a definition of indigenous community) and not contains the recognition of the rights over their land. Law concerning forestry adheres to a different perception of customary rights. If the National Land Law addressed communal rights as the land rights including all its contents (including forests), then in the conception of forestry, forest status is divided into state forests and forest rights. Consequently, indigenous forests are not recognized as a separate entity, but indigenous forests included in the category of state forests within the territory of the indigenous community (Article 1 letters (f). Therefore, indigenous forest declared as state forest transferred to indigenous community (explanation of Article 5 (1). So the recognition of indigenous people and their indigenous forests greatly depend on the "kindness" of State who is willing to surrender its management to indigenous peoples. The country was transformed into the owner of all forests, including land. Whereas, according to the Forestry Act, the indigenous forest previously called by the communal forest, forest clan, customary forests, or other designations. Thus this law is being ambivalent, on one hand, the law does not recognize the existence of indigenous forests (the object) but on the other hand regulates of the existence of indigenous communities (subject).[2]

The consequences of the provisions regarding indigenous forest as state forest is that even though the indigenous communities are still exists, the management and utilization of forest products classified as activities conducted on the state forest which located in the area of indigenous communities. Disclaimer of the indigenous forest in practice seems unfair and sometimes creating conflict among the indigenous people as the master of the forest rights (HPH), large estate, forest tenure rights of plant industry (HPHPI) who obtained permission from the government. Like the case of legal deprivation over indigenous forest which is happening towards indigenous forest of Sepa and Noaulu (Silalaouw) di Regional od Middle Maluku, grated logging concession owned by PT BLM. It is happenong because the Indonesian Government through the Minister of Forestry has giving majority of the indigenous forest of Sepa towards the logger companywith the Decree No. SK537/Mnhut-II/2012, dated on September 26, 2012. This indigenous forest is given to the coorporation because the indigenous forest in Sepa spread out behind the indigenous village which chategorized as state forest instead of society forest. Not only in Spea, but the whole forest in Maluku is chategorized as state forest. Whereas in the forest area, has been arrange the distrubution and management of indigenous forest utilization.

In addition of the utilization of the forest results for the daily needs the whole year, forest in Sepa also contains historical value and identity for the local society. People of Noaulu still conducting cultural rituals there. For example, if there Noaulu people who died, then the indigenous community will bring the body inside the forest to be buried. By the time of procession is taking place, there should be no one blocking the way. Nowdays, if the procession is taking place, they will be blocked by the logging area and there is no longer funeral space there. The forest area that have been released in Sepa by the Forestry Minister is approximately 24.550 ha and the society just notice in 2015. This concession then being strongly rejected by the local indigenous communities with various responds of rejection.

According to the explanation of article 67 paragraph (1), the existence of indigenous community will be recognized if in fact it has fulfilled the following criteria, namely, The societies are still in the form of “paguyuban” (associations/ *rechtgemeenschap*); there are institutions in the form of customary tenure; there is a certain area of customary law[3]; there are institutions and legal instruments, in particular the indigenous justice

[1] Saafroedin Bahar, op.cit. p.80.

[2] Maria S.W Sumardjono et.al, *Regulation on Natural Resources in Indonesia among Written and Unwritten Laws (Critical Thinking on Planning Spatial and Natural Resources)*, Collaboration between Faculty of Law, GadjahMada University and Gadjah Mada University Press, Yogyakarta, 2011, p.116.

[3] Several articles in the Law No.41 of 1999 Concerning Forestry has been reviewed by The Constitutional Court with Decision No.35/PUU-X/2012. Article 1 paragraph (6), Article 4 paragraph (3), Article 5 Paragraph (1), Article 5 Paragraph (2), Aricle 5 Paragraph (3) were accepted, while Article 5 Paragraph (4) and Article 67 were rejected. The Contitutional Court rejection toward Article 67 was due to the same substance contain in Article 4 Paragraph (3) which had been accepted.

system which still be adhered; still conduct harvesting in the surrounding forest for the fulfillment of daily needs. If we take a look at the requirements, it would be difficult to apply in the field.

3.4 The Law No.39 of 1999 Concerning Human Rights

A number of provisions relating to the existence of indigenous communities in this law regulated in Article 5 (3), Article 6 paragraph (1) and paragraph (2)

1) Article 5 paragraph (3), "All members of disadvantaged groups in society, such as children, the poor, and the disabled, are entitled to greater protection of human rights".
2) Article 6 paragraph (1), "In the interests of upholding human rights, the differences and needs of indigenous peoples must be taken into consideration and protected by the law, the public and the Government".
3) Article 6 paragraph (2), "The cultural identity of indigenous peoples, including indigenous land rights, must be upheld, in accordance with the development of the times".

Article 5 paragraph (3) broadly regulates groups with specific characteristics compare to the other society in general. The differences are the social relations, politics, and ecology towards nature. Other disadvantaged groups such women, children, and the disabled.

Within article 6 paragraph (1) of Human Rights Act, customary rights which in fact still exist, being implemented and respected in the unity of indigenous societ, shall be respected and protected in terms of human rights protection and enforcement in those societies in accordance with applicable regulations. While article 6 paragraph (2) being more specific in mentioning the various types of rights indigenous people which shall be protected by the state which are cultural identity and communal rights.

Furthermore, Article 6 of the Human Rights Act is in fact also stressed the necessity for the law, society, and government to respect the diversity of identity and cultural values prevailing in the local indigenous communities. Denial of plurality, such conducting homogenization of values against them constitutes a violation of human rights, especially if the denial is accompanied by acts of harassment, violence, and coercion. Such acts definitely can be categorized as serious crimes. Human rights are fundamental rights inherent in human beings by nature, are universal and eternal, and therefore must be protected. respected, maintained, and should not be ignored.

3.5 The Law No. 32 of 2009 Concerning Protection and Management of the Environment

Article 1 paragraph 31 defining indigenous (traditional) community as a group of communities living traditionaly in a specific geographic area because of binding in origin of ancestor, strong relations with the environment as well as system of values determining economic, political, social, and legal structures.

Based on the previous definitions then drafted four criteria for defining the criteria of a indigenous community namely: group community hereditary living in a particular geographic area; Ties to the ancestral origins; The existence of a strong relationship with the environment; The existence of a value system that determines the regulation of economic, political, social and customary law.

3.6 The Law No.6 of 2014 Cocerning Village

Regulation concerning village has been spesifically ruled within Act No.6 of 2014 replacing the Act No.5 of 1979 concerning village, Act No.22 concerning regional autonomy, and Act No.32 of 2004 concerning regional autonomy. Regulation concerning village area is contained within the Act No. 6 of 2014 which is based on the principles of: a) recognition, b) subsidaritas, c) diversity, d) togetherness, e) mutual cooperation, f) family, g) deliberations, h) democracy, i) independence, j) participation, k) equality, and I) empowerment and sustainability.

The types of village under Act No.6 of 2014 consist of village and traditional village. The name is based on the local area. Article 96 stated that : Government, Provincial Government, and Local Government District / City structuring law community unit and is set to be the Traditional Village. Article 97 stated that :

1) Determination of Indigenous Village referred to in Article 96 are eligible:
   a. unity of traditional society with a real traditional rights is still alive, whether they are territorial, genealogical, or functional;
   b. unity of traditional society with traditional rights deemed in accordance with the development of society; and
   c. unity of traditional society with traditional rights in accordance with the principles of the Republic of Indonesia.
2) Unity of traditional society with surviving traditional rights referred to in paragraph (1) letter a must have at least the area and meet one or a combination of elements of existence:
   a. society that citizens have a feeling shared in the group;
   b. traditional governance institutions;
   c. wealth and / or custom objects; and / or
   d. the norms of customary law.
3) The unity of traditional society with traditional rights referred to in paragraph (1) letter b is deemed in accordance with the development of society if:
   a. existence has been recognized under the law applicable as a reflection of the development of values that are considered ideal in today's society, both laws are general and sectoral; and
   b. the substance of the traditional rights recognized and respected by the community unit concerned citizens and the wider community and not in conflict with human rights

Thus this Village Act requires that in order to become a traditional village, it should be assigne in advance by the government, with a variety of requirements that must be fulfilled in accordance with the provisions of this law and its implementing regulations.

3.7 The Law No. 18 of 2004 concerning Plantation which being replaced by the Law No. 39 of 2014.

Article 1 paragraph 6 defining Customary Law Society is a group of people who for generations living in certain geographical areas in the Republic of Indonesia because of ties to ancestral origin, a strong relationship with the land, territory, natural resources have traditional governance institutions and legal order customary in their traditional territory. Article 1 pararaph 5 stated that:

> "Land Rights is the authority of indigenous people to organize jointly utilization of land, territories, and natural resources that exist in the area of indigenous peoples in question is the source of life and livelihood".

Article 12 paragraph (1) Act of Plantation stated that:

> "In the case of land required for the Plantation Business Land Land Rights Indigenous Peoples, business communities Plantation should be consulted with Indigenous Peoples Land Rights holders to obtain agreement on the delivery of land and compensation".

The previous provision means that the development in the plantation sector utilize the indigenous communities rights of communal lands, therefore the government and businesses actors can not arbitrarily impose its will by force, however they must approach and deliberate to obtain the consent of concerned society and also openly determine recognitie which given to a partnership or individual as a sign of recognition for using or exploit those lands. Thus people do not lose their land rights, and until agreement terminates or expires, the land rights of indigenous communities will be restored.

Article 12 paragraph (2) stated that:

> Meeting with Indigenous Peoples Land Rights holders referred to in paragraph (1) shall be implemented in accordance with the provisions of the legislation.

Article 13 stated that:

> "Customary Communities as referred to in Article 12 paragraph (1) shall be determined in accordance with the provisions of the legislation."

It is obvious that the new plantation Act regulates explicitly or implicitly on the impartiality regarding the plantation and indigenous communities. However, the existence of indigenous communities again is based on the rule of law. The problem is which legislation is being intended. If it is BAL (Article 3 and Article 5), then the existential the indigenous communities again become meaningless.

3.8 Regulation of Agrarian Minister/ Head of BPN No.5 of 1999 Regarding The Guideline Concerning The Dispute Settlement for Problems of Communal Rights of Indigenous People

This regulation defining communal rights in Article 1 paragraph (1) within its consideran, stated that:

a. Indonesia National Land Law recognizes the communal rights from the indigenous people as long as it still exist, in accordance with Act No.5 of 1960 Concerning Basic Regulations on Agrarian Principles.
b. In fact, nowdays there are still plenty of lands in the area of indigenous people which its management, control, and use are in accordance with the local customary law and being recognized ny the indigenous community as their communal land.

Article 1 paragraph (1) stated that:

> "Communal rights and similar rights of the indigenous people (hereinafter called as communal rights) is the authorities which in accordance to customary law owned by certain indigenous community in certain area of living space where its people utilize its natural resources, including land in that area, for the life sustainability which emerge from the heredity and uniterrupted relations among the indigenous community with that certain area.

Article 2

1. Communal rights could be exercise as long as it still exists and done by its indigenous community in accordance with the local customary law.
2. Communal rights are still being considered to exist if:
   a) There is a group of people bound by the same customary law as part of certain legal allinace, who recognize and apply the customary provisions in their daily life
   b) There is certain communal land which becoming living space for its people and being utilized to fulfilled people daily needs, and
   c) There is customary law regarding the management, ownership, use of communal land which being applied and respected by its people.

Article 4 paragraph (1) stated that: Tenure which includes areas of land including communal land as referred to in Article 2, things that can be done by individuals and legal entities are:

a) By the concerned indigenous people regarding the land management in accordance with the applicable customary law if desired by rights holders, rights can be registered as the appropriate rights to land under the terms of the BAL.
b) By the concerned government agencies, legal entities or individuals who are not part indigenous communities, with the rights to land under the provisions of BAL, in accordance with the process of rights granting from the state after the indigenous communities release its land in accordance with the procedure of customary law.

The release of customary land referred to paragraph 1, letter b for agricultural purposes and other purposes that require leasehold or right to use, can be done by indigenous people by surrender the use of land for a certain period of time, thus after that period has expired or after the soil disused or abandoned leasehold or right to use the concerned removed, the subsequent use must be in accordance with the new approvals of the relevant indigenous communities as long the customary rights of indigenous communities are still exist pursuant to Article 2.

Although the previous regulations are technical, but there are terms of customary rights, customary land and indigenous community standard. Article 5 (2) stated that: Communal Land is an area of land on which there is a communal right of a particular indigenous communities. Customary law explicitly mentioned in Regulation of Agrarian Minister/ Head of BPN No.5 of 1999 that the criteria of communal land is in accordance with the existence of its indigenous community who are being recognized as the legal subject of rights of land, the area of the communal rights (as the object of the rights) and customary institutions adhered by its people. However through Regulation of Agrarian Minister/ Head of BPN No.5 of 1999, perspective of the concerned parties both government and entrepreneur could not interpreted only by using their interest, it should be in accordance with the regulations thus in practice, it does not ignoring the existence and rights of indigenous communities. Sometimes local government intend to generalize customary land as state land if there are conflict of interest between the interest of indigenous communites and public interest.

To be able to fulfill the criteria of communal land, tehrefore article 5 of the Agrarian Minister Regulation require to conduct research that evolve the customary law experts, the concerning indeigenous community, non-

governmental organization and other institutions which manage the natural resources. Majority in maluku is the indigenous society which dominate and own the land of petuanan. It can be seen after the study has been conducted from 2005 to 2008, by a team from the Faculty of Law of the University of Pattimura, Ambon in collaboration with district or local governments.

After fifteen years since the enactment of Regulation of Agrarian Minister/ Head of BPN No.5 of 1999, the government published the regulations governing indigenous community, that is the Regulation of the Minister of Agrarian and Spatial Planning / Head of National Land Agency (BPN) No. 9 of 2015 Concerning Determination Procedures of the Rights of Indigenous People and the society who live in certain area towards the area of Communal Land.

In considerations letter (b) of the government regulation, state that: Indonesia National Land Law recognizes the presence of the communal rights and any other rights of the indigenous people as long as it still exist in accordance with the article 3 of BAL.

From several national legistlations as previously stated, could be understood that regulations concerning indigenous community and rights of land, region, and other natural resources are sectorally arrange in accordance with each department/minister interest. The consequences of sectoral arrangement will complicate the indigenous community who has communal land that is being the object of development of either government or investor. If the problems arised, it will connect several institutions.

4. Regulation Concerning The Recognition of Customary/Communal Rights in The Province of Maluku

From the perpective of this regulation, a legal product must at least reflects three essential foundation in its establishment process, namely 1) Philosophical basis, 2) Sociological basis, and 3) Judicial basis. The philosophical basis means that the things to be regulated must be in accordance with the idea, hopes, and desires of the society instead of ruler. Next, the sociological basis is the reflection of reality among the society currently and is not made up. While judicial basis starts from the recognition of previous legal products. It is relating with the legal principles and norms horizontally or vertically. Regional regulation in Maluku regarding the indigenous community is Maluku Provincial Regulation No. 14 of 2005 concerning the Re-establishment of State as Unity of Indigenous People in The Province of Maluku.

The desire of government of Maluku to compose the regional regulation concerning the existence of indigenous community could be found in the consideration of regional regulations, namely (a) status, position, and existence of indigenous community have been recognized constitutionally in the 1945 Constitution along with its implementation regulations. While (b) recognition of status, position and existence of indigenous community called “Negeri (state)” or any other names which have been known long time ago and still exists and develop from time to time.

The urgency of the implementation of its regional regulation is that the government would like to promote the people of Maluku, including its indigenous community, because the regulation concerning the local indigenous communities in this province is not only related to theirs stautus as unity of indigenous people but also related to management of government and natural and land resources asldo other development aspects[1].

The general explanation of this regional regulation stated that society development and other development in general are moving forward. Customary law and the society culture must adjust to these developments. Because of the re-establishment of the unity of indigenous people in the Maluku, require justification of the elements attached to the unity of its indigenous people.

Furthermore in general explanation stated that the effort to re-establish the Unity of Indigenous Community in Maluku must be regulated within Regional Regulations of The Province of Maluku, in order to:

1) Accommodate the diversity of cultures and customs as well as open space for the recognition of unity of indigenous communities wich is still live, grow, develop and maintain in the area of Maluku.
2) Provide juridical legitimacy of the units of Indigenous People which in principle would become a reference for further adjustment into various Regional Regulations.

[1] Jenny. K. Matuankotta, **State in Frame of “SASI” Customary Law Community**, *Jurnal Ilmiah Fakultas Hukum Universitas Pattimura Ambon*, Vol.11. No. 4, 2005, p.296

3) Prevent the emergence of various issues relating to the status and position of the Unitary of Indigenous People or by any other names and units subordinate arising from the implementation of Law No. 5 of 1979.
4) As a regulation and legal structure tool in accordance with the applicable rules.

This regional regulations defining "Negeri" (indigenous people) as: "The unity of indigenous people who has limit and area, authority to regulate and manage its business in accordance with local culture and behavior. It must be located in Indonesia". Meanwhile, the criteria to be called "Negeri"contained in article 5 which stated that :

"In order to be re-established as indigeonous people, the unity of indigenous society must fulfilled certain criteria, namely:

a) Element of indigenous peoples;
b) Element of certain area;
c) Element of traditional institutions;
d) Element of relation between society and region;
e) Element of social institutions;
f) Elements of traditional symbols
g) Other elements in accordance with the customs and culture of the local community

In the explanation of article 5 stated that:

> Elements of indigenous people, are the presence of a group of people who are still bound by the order of its customary law due to genealogy and territorial factors as citizens along with a certain unity of indigenous people and therefore acknowledge and also apply the provisions of customary law in their daily life.

Elements of certain area, is the presence of host area along with the individuals rights in that host area which still implied the customry law.

a. Element of Indigenous Institutions, are exist and still being maintained such as Latupati, King, Rat, Pati, The Rich, Saniri, Soa, Eyes House, Kewang and others in the Unity of Indigenous People.
b. Element of relation between society and region, is the presence of the order of customary law regarding the maintenance, control and land use also the rights of Petuanan which still exist and obeyed by the citizens of the Unity of Indigenous People.
c. Element of Social Institutions, is the presence of institutions of civil society, which carry out the functions related to social welfare in the Unity of Indigenous People, for example sasi in Central Maluku, Ambon, Aru, East Seram, West Seram, Buru, Sweri in West Southeast Maluku District, Hawear in Southeast Maluku and so forth.
d. Element of Indigenous symbol, contained and maintain certain signs that being used in Unity of Indigenous People, for example Baileo, Pamale Stone, Traditional Clothing, Indigenous languages and so on.
e. Other element, is that presence and sustainability of customary behaviors within indigenous society, like king, and the rich which is believed, derived from certain breeds, traditional ceremonies related to marriage, adoption, way of dressing, language, and so forth. Another element is the definition of other elements by customs and the cultures of local society that is not mentioned in the previous criteria (a to g).
f. Element of indigenous community, element of certain area, element of traditional institutions, and element of relation between society and region relating to the management, ownership, and use of communal land which is still exist, in accordance with previous statement in letter a, b, c, and d in this article. From the author perspective, it is absolute, which means if one of the criteria is not fulfilled, then the unity could not be chategorized as indigenous community. For example the elements in letter (d) which must be fulfilled is the relation between society and region where there order of customary law regulating the management, ownership, and use of land and other customary rights that must be followed and respected. This element is one of the existential criteria of indigenous rights in accordance with Regulation of Agrarian Minister/ Head of BPN No.5 of 1999 Regarding The Guideline Concerning The Dispute Settlement for Problems of Communal Rights of Indigenous People. Regulation of Agrarian Minister/ Head of BPN No.5 of 1999 is not the basis of the establishment of Regional Regulation of Maluku, however by recognizing the existence of indigenous people in the norm of positive law, it must also recognizes the regulation of rights of land and other agrarian resources in this country in accordance with customary law. The recognition of indigenous community existence without the indigenous rights of land could not be chategorized as indigenous

community. The relation among indigenous community and land also agrarian resources have magic-religious relation and cosmic in nature. Overall, it is the totality linked to one another creating relations of land tenure and ownership. Relation between tenure and ownership rights of land utilize for community life, family continuously and sustainability for the life of next generation.

The previous issues are very important and require attention of the government in regulating the area of law in order to create legal certainty and certainty of tenure and ownership rights over communal land. Regulation concerning the determination of the status, position and existence of the traditional community (indigenous people) of Maluku in regional legislation is legitimate rules or state substance recognition as a unity of indigenous community in order to ensure legal certainty and justice, but not regarding the communal region and traditional rights which embedded within it. It is necessary to follow up on matters concerning:

a. The control and ownership of Petuanan territory land that is recognized;
b. Indigenous rights that exist in petuanan;
c. Traditional institutions that support the control and ownership of territory and indigenous rights; and
d. Provisions regarding recognitie if the land will be used by the parties

5. Conclussion

In broad outline, legal recognition of indigenous people on communal right can be done within 3 (three) dimensions, within the dimensions of international law, the dimensions of national law in the form of laws and government regulations, as well as the dimensions of local regulations as part of the smallest and integrated part a the regulatory process.

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