

## Legal Policy of Customary Right Protection: A Case Study in Border Area of Southern Papua

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### Abstract

The recognition of State for the indigenous rights in the constitution as well as in the implementing regulations, but the land conflict between the state with the customary law communities is still common. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Land problems in Papua have led to physical violence everywhere between indigenous Papuans and the government and indigenous Papuans with non-Papuans. The type of research is a legal-normative research. The outcomes of the research indicate that the legal policy for the customary right protection of indigenous people in the border area of southern Papua by the creation of new legal regulations in order to encourage the fulfillment of the indigenous peoples' right in the border areas. Currently, the national legal system has not been able to accommodate the existence of customary rights of indigenous peoples, especially in the border areas.

**Keywords:** Customary Right, Indigenous Peoples, Legal Policy, Special Autonomy

### 1. Introduction

The 1945 Constitution in the fourth paragraph assert that one of the duties and objectives of the Unitary State of the Republic of Indonesia is to protect the whole of the Indonesian nation and to promote the common welfare.<sup>1</sup> Indeed, this is a very noble duty because welfare in life is the desire of every human being. All the Indonesian nation must be a key word that the welfare if then realized will be the right of all Indonesian people without exception.

In the context of historical and political, in fact indigenous peoples existed prior to the establishment of the Republic of Indonesia.<sup>2</sup> The presence of indigenous peoples in Indonesia is an undeniable necessity.<sup>3</sup> Van Vollenhoven in his studies once stated that the indigenous peoples living in Indonesia, hundreds of years before the arrival of the Dutch, had owned and lived in their own legal order. The legal system of indigenous people is known as *customary law*.<sup>4</sup> The diversity of the Indonesian nation has been recognized by the founders of the nation with the motto "*Bhineka Tunggal Ika*." In the slogan contained the meaning of recognition of the diversity and determination to become one nation, which is the Indonesian nation without eliminating the customary diversity. At least 5,000 groups of indigenous peoples with more than 370 million inhabitants occupy 70 countries, including Indonesia. About 1,072 diverse ethnic groups, including 11 ethnic groups with a population of over one million, Indonesia is one of the most culturally diverse countries in the world.<sup>5</sup>

In Indonesia, we should feel fortunate with the existence of indigenous peoples that probably more than a thousand groups. Their existence is a wealth of nation because it means there are more than a thousand different kinds of knowledge they have developed. There are over a thousand languages that have been utilized and can help the development of Indonesian repertoire and many other things they can contribute. The dominance of State law as part of the development of the political process over all aspects of the life of the national community has become a reality. The situation has changed, so the authority of the State is controlled and supervised more rigorously, has also made amendment articles of the 1945 Constitution which strengthens the position of customary law community.

The existence of indigenous peoples in the Indonesian constitution is regulated in article 18B Paragraph

<sup>1</sup> Fourth paragraph of the 1945 Constitution.

<sup>2</sup> National Commission on Human Rights of Indonesia in cooperation with Andalas University and Sekretariat Nasional Masyarakat Hukum Adat. (2010). *Membangun Masa Depan Minangkabau Dari Perspektif Hak Asasi Manusia*. Jakarta : Sekretariat Jenderal Dan Kepaniteraan Mahkamah Konstitusi RI, p. xxxiii.

<sup>3</sup> Hendra Nurtjahjo and Fokky Fuad. (2010). *Legal Standing Kesatuan Masyarakat Hukum Adat, dalam berperkara di Mahkamah Konstitusi*, Jakarta: Salemba Humanika, p. 40.

<sup>4</sup> The term of customary law comes from the genuine Indonesia language (is known as development from the existing language in Malay), it is only the translation of Dutch language, *het adatrecht*, and first introduced by Dutch orientalist, Snouck Hurgronje. The result of his research emerges a proportion that the sense of customary law is more accept religion law (Islam) especially in the field of private and closely related to the truth system and psychic mood of community. See: Snouck Hurgronje, *Adatrechtbundel I*, Nederland: Martinus Nijhoff, 1910, pg. 22-24; Moh. Koesnoe. (1992). *Hukum Adat Sebagai suatu Model Hukum: Bagian I (Historis)*. Bandung: Mandar Maju, pg.46-49.

<sup>5</sup> Source: International Labour Organization. Available online at: [http://www.ilo.org/jakarta/info/public/pr/WCMS\\_116136/lang--en/index.htm](http://www.ilo.org/jakarta/info/public/pr/WCMS_116136/lang--en/index.htm). Accessed on 17 December 2015.

(2),<sup>1</sup> article 28I Paragraph (3)<sup>2</sup> and article 32 Paragraph (1)<sup>3</sup> and Paragraph (2)<sup>4</sup> of the 1945 Constitution. On this, the existence of indigenous peoples constitutes a constitutional right. Or, in Zmyvalovas' view,<sup>5</sup> it is called that implementation implies that all domestic legislation is fully compatible with the convention's principles and provisions and that the latter can be applied and appropriately enforced.

The recognition of State for the indigenous rights in the constitution as well as in the implementing regulations, but the land conflict between the state with the customary law communities is still common.<sup>6</sup> Land problems in Papua have led to physical violence everywhere between indigenous Papuans and the government and indigenous Papuans with non-Papuans. Land conflicts between indigenous Papuans and the government are linked to the dark history of land tenure by the current local government. The local government is regarded as controlling the customary lands without legal basis because as the owner of customary rights is never feels the release of customary land to an institution or government agency.

Land tenure by the government is based on the view that land is the property of the State to make the government during the new order to act arbitrarily by controlling the customary land rights of customary law communities. They are formulated in the realm of very tangible, historically constructed social and governance spaces. They are affected by the ways of governing adopted by authorities of the societies in respective states.<sup>7</sup>

The rights of indigenous peoples that have not been protected by the State include 3 (three) things; indigenous right, natural resources right, and intellectual property rights. The avoidance of these three things is not only because there is no legal regulation that specifically protects indigenous peoples, but with regulation there is still weak in its enforcement. These two factors have till now made indigenous peoples as marginal citizens and are denied the right to rights that often find violations of indigenous peoples' rights, including: proprietary rights violations, the right to adequate food and nutrition, the right to appropriate standard of living, the right to take part in cultural life, the right of self-determination, the right to enjoy the highest attainable standard of physical and mental health and much more.

The existing legal issues concerning the separation of 2 (two) areas conducted in straight lines astronomically, regardless of existing socio-cultural conditions resulted in the separation of an indigenous group separated by the State borders, the presence of land proprietary and natural resources management on the border between indigenous peoples of Papua and Papua New Guinea, the presence of same emotional, racial, and ethnic in the border area so that cross-border processes become common. Merauke district in Kampung Kondo, Naukenjerai district. People in the border area of RI-PNG requires development, if seen from the historical values, Kampung Kondo is the history of the birth of Marind's culture. This area is called as a sacred village, a place where Marind believes that their ancestors originally lived from Kampung Kondo. The village is directly adjacent to the PNG Country, a distance of more than 100 kilometers from the city of Merauke.<sup>8</sup>

The conflicts that occur between indigenous Papuans are concerns to the border/culture. Difficulties to determine the boundary due to natural boundaries such as rocks, wood, rivers and mountains have changed. With the loss of the land boundaries makes the other clans claim another land belonging to another clan. Another reason is that the absence of a map of land boundaries makes uncertainty of ownership of customary rights by indigenous Papuans. The impact of this boundary conflict is physical violence in order to maintain the land boundaries, even using supernatural powers to kill others.

The ownership of customary rights that have customary boundaries prescribed by previous deceased ancestral elders is now only an unclear basis in indigenous peoples; border conflict in southern Papua has a dualism of authority in determining regional boundaries. On the one hand using the State border and on the other hand using custom boundaries. In the context of this research which is about to be studied is about the legal

<sup>1</sup> The 1945 Constitution, Article 18B Paragraph (2) the state recognize and respect the unitary of customary law community and its traditional rights as long still live and according to the development of society and the principle of unitary State of the Republic of Indonesia, as regulated in the legislation.

<sup>2</sup> The 1945 Constitution, Article 28 I Paragraph (3) the identity of culture and the right of traditional community are respected as the development of era and civilization.

<sup>3</sup> The 1945 Constitution, Article 32 Paragraph (1) the state promote the Indonesian national culture in the midst of world civilization by assuring the freedom of society to maintain and develop their culture values.

<sup>4</sup> The 1945 Constitution, Article 32 Paragraph (2) the State respect and maintain the local language as the national culture property.

<sup>5</sup> Zmyvalova, E.A. (2015). "Indigenous Children's Right to Learn Their Mother Tongue at School: Implementation and Realization in Russia". *Arctic Review on Law and Politics*, 6(2): 151-174

<sup>6</sup> Titahelu, J., Irwansyah, I., Awaludin, H., & Ashri, M. (2015). "Strengthening Pela-Gandong Alliance Based on John Rawls' Theory of Justice". *Hasanuddin Law Review*, 1(3), 417-429. doi: <http://dx.doi.org/10.20956/halrev.v1n3.119>

<sup>7</sup> Noemi M. Porro, Joaquin Shiraishi Neto, Robert Porro. (2015). "Traditional Communities as "Subjects of Rights" and the Commoditization of Knowledge in Brazil". *The International Indigenous Policy Journal*, 6(2). Retrieved from: <http://ir.lib.uwo.ca/iipj/vol6/iss2/8> DOI: 10.18584/iipj.2015.6.2.8 p.12

<sup>8</sup> Source: <http://suluhpapua.co/read/132721/2014/09/24/kampung-kondo-kurang-dapat-perhatian-pemerintah/> Accessed on 2 December 2015.

policy of indigenous peoples' right protection in the border area of southern Papua based on the philosophical, juridical and sociological aspects as the main requirements in legal policy to protect the existence of customary rights of indigenous peoples in the border area.

## 2. Method of the Research

The type of research is a legal-normative research.<sup>1</sup> It uses several approaches to get information about the issues, includes; the statute, the conceptual, the historical and the philosophy.<sup>2</sup> To approximate the subject matter of this research, a descriptive analytical research specification are used, a research intended to provide a detailed, systematic and comprehensive description of human and other conditions/symptoms. This research tries to illustrate the problem of law, legal system and explore it or analyze it according to the needs of the research.

## 3. Legal Policy of Customary Right Protection of Indigenous Peoples in Border Areas

The law is always changing, because it is dynamic along with the dynamics of human life and the development of era. This dynamic is influenced by the policies dimension in society derived from the rulers and produces State law in the form of legislation. All government activities realize the intended law with the objectives of *ius constitutum*, change of society, process of change of *ius constitutum* into *ius constituendum*, product as result of change process is legal policy.

Legal policy in Indonesia is the basic policy of State organizers (Republic of Indonesia) in the field of law that will, being and has been applicable, sourced from the prevailing values, the values prevailing in society to achieve the objectives of the State (Republic of Indonesia) as aspired. Moh. Mahfud<sup>3</sup> argued that legal policy or the official policy line on the law which will be enforced either by the creation of a new law as well as the replacement of the old law, in order to achieve the objective of the State. The national objective of the unitary of the Republic of Indonesia is to protect the entire Indonesian nation, promote the common welfare. Educate the life of the nation, and participate in educating the world order based on freedom, eternal peace and social justice.<sup>4</sup> Legal policy is the choice of law to be applied to achieve the State objectives.<sup>5</sup>

The purpose of national legal policy includes 2 (two) interrelated aspects: (1) as a tool and measures that governments can use to create an aspired national legal system; and (2) by the national legal system will be realized the ideals of a larger Indonesian nation. The national legal system is a union of law and legislation consisting of many interdependent components built to achieve the State objectives based on the ideals of State law contained in the Preamble and Articles of the 1945 Constitution.<sup>6</sup> Such legal system bringing the good elements of the three values system and putting it in a balance relationship, namely the balance between individualism and collectivism, *rechtsstaat* and *the rule of law*, law as a tool for advancement and the law as a reflection of values that live in society, the religion State and secular (theo-democratic) or religious nation state.<sup>7</sup>

In this context, we need to study the legal policy in terms of whether aspirations from the society are already accommodated in the formulation of the law by the State organizers or vice versa. Because a rule of law can be said good and recognized its existence by society if have validity of sosiologis, philosophical and juridical. The sociological validity (*seziologice geltung*) is defined as the acceptance of law by society means not only determined by State coercion. The philosophical validity (*filosofische geltung*) is when the rule of law reflects the living values of society and becomes *rechtsidee*. Legal validity (*juritische geltung*) is defined as the conformity of legislation with material regulated by a higher regulation.<sup>8</sup>

## 4. Philosophical Validity for the Customary Right Protection of Indigenous Peoples

The view of Indonesian life is Pancasila. Pancasila as the philosophy of the Unitary State of the Republic of Indonesia has noble values including how to utilize natural resources for the welfare of Indonesian people. Pancasila is a legal ideology formed based on the view of life of the Indonesian nation, then the philosophical foundation should be extracted from Pancasila which by A. Hamid S. Attamimi, Pancasila is a legal ideal or "*rechtsidee*".<sup>9</sup> As a *filosofische grondslag*, Pancasila is essentially a source of legal order in Indonesia. In its position, Pancasila as source of elaboration in the process of law drafting in Indonesia. Pancasila that it contains

<sup>1</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Pers. p. 85

<sup>2</sup> Peter Mahmud Marzuki. (2005). *Penelitian Hukum*. Jakarta: Prenada Media Group, pg.93-95

<sup>3</sup> Moh. Mahfud MD. (2009). *Politik Hukum Di Indonesia*. Jakarta: Rajawali Press. p. 9

<sup>4</sup> The fourth paragraph of the 1945 Constitution

<sup>5</sup> Moh. Mahfud MD, *Op. Cit.*, p.1

<sup>6</sup> Moh. Mahfud MD. (2010). *Membangun Politik Hukum Menegakkan Konstitusi*. Jakarta: Rajawali Pers, p. 22

<sup>7</sup> Ibid 32

<sup>8</sup> Achmad Ali. (2002). *Menguak Tabir Hukum: Suatu Kajian Filosofis dan Sosiologis*. Jakarta: Gunung Agung, pg. 114-115

<sup>9</sup> A. Hamid S. Atamimi. (1990). *Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahann Negara Suatu Studi Analisis Mengenai Keputusan Presiden Yang Berfungsi Pengaturan Dalam Kurun Waktu Pelita I-Pelita IV*. Jakarta: Disertasi, p. 308.

religious values, the value of moral law, the value of natural law, and religious value as a legal source material for the positive law of Indonesia.<sup>1</sup>

As explained above, the basis of philosophical are the views of a nations life containing the moral and ethical values of a nation, in which consist of values of truth, justice, decency and other values that are considered good by a nation. The philosophy of the life of a nation should be the foundation in the formation of the law in the life of the nation. Therefore, the rule of law that is formed must reflect the philosophy of life of the nation or at least not contrary to the moral values of the nation.

In the Preamble of the 1945 Constitution, there is a formula for the objective of the State as mandated in the fourth paragraph, namely:

*“To protect the entire nation of Indonesia and the whole of the blood of Indonesia and to promote the common welfare, to educate the life of the nation and to carry out the world order based on independence, eternal peace and social justice.”*

Protecting the entire nation of Indonesia and the whole of blood of Indonesia on this basis, the State is obliged to protect the citizens from the actions of persons who in the name of customary law impose the will to seize or impose the exit of a person on a land already having legal certainty. In addition, to protecting the Indonesian nation also provides legal certainty to the customary law community over ownership or control of land so that there is no conflict either vertically or horizontally. Protecting the whole of the blood is related to the protection of this area in the form of soil and water so that a region does not use the issue of customary rights for political commodities in separate from the Unitary State of the Republic of Indonesia. The guarantee of legal certainty on customary rights provides protection to the entire territory of the Republic of Indonesia.

The customary right peoples *Malind Anim* which is one of the tribes in South Papua. Name *Malind* comes from the word “Mayo” or “Maloh”. Name *Malind* is *verbastering* of *Malohend* meaning person from “Mayo” so that all tribes that embrace the system of “Mayo” or “Totemisme” called *Malind* which in its development then all tribes that have characteristic of Papua-Melanesia race are also called “*Malind-anim*.”<sup>2</sup> According to the legend of the origin of the ancestors in the version of *Mayo* teachings that nature at the beginning of creation, the universe is still covered by the mist that enveloped the earth and then the earth was still a fluid mud of life that swayed. When the creator or called “*Ala-Alawi*” flies in the air between the thick fog and flows it neck with a bag of chunks of land or “*wan*”.<sup>3</sup>

The view of *Malind Anim* customary law about *Totemism* can be said to be the relationship between humans and various phenomena. Any object, whether inorganic, organic, natural events, events related to humans, dreams, etc. can be made a totem by humans. Apparently, *Totemism* is a typical way of human interaction with various phenomena of life from the usual level to the cult. Certain mottoes (*hunting yell*) can be said *Totemism*, though, rather than in the form of material objects that can be touched. In *Totemism*, it takes a psychological connection by man to his *Totem* object. *Totemism* is common in the use of family names associated with natural phenomena such as stars, mountains, water, sea, rivers, plants, animals, and others. *Totemism* is strongly found in the tribes who have put Totem object into kinship and his/her family. In Totemism it applies a claim of private ownership to the phenomenon of life that although the phenomenon of life is generally accepted. Totemism is a cultural imaging of the phenomenon of life.<sup>4</sup>

The presence of indigenous peoples’ beliefs in the ownership of customary rights is very strong and cannot be separated from beliefs and cultures that have existed before. They always consider everything to be a customary right that must be protected with all their lives. Border areas in the border of Merauke believed to be a sacral area that exist in the livelihood of indigenous peoples associations so that in the customary law, the community in Merauke is very thick and cannot be arbitrary to exploit it. Philosophically, all creatures even the existing land in the area has a soul and spirit that must be maintained and preserved existence.

## 5. Juridical Validity for the Customary Right Protection of Indigenous Peoples

The 1945 Constitution of the Republic of Indonesia has affirmed the existence of indigenous peoples as a constitutional right. Recognition of this existence needs to be complemented by the recognition and right protection that accompany the existence of indigenous peoples. Customary law is only one aspect of the socio-political completeness of this society, so it is not appropriate if the group is reduced merely as a customary law community. In the same way, we cannot use the term “Indonesian legal society” to the general Indonesian society, because the State law is only one aspect of the life of Indonesian society.

<sup>1</sup> Andi Bau Inggit AR, A. Pangerang Moenta, Marwati Riza, Hamzah Halim. (2017). “Local Regulation Review in Realizes Legal Order of the Local Governance.” *Journal of Law, Policy and Globalization*, Vol.59, pg. 214-219

<sup>2</sup> Yul Bole Gebze, Gereja Katolik di Antara Penduduk Marind-Anim, pg. 26-27.

<sup>3</sup> Dendi Sofyandi. (2010). *Kearifan Lingkungan Masyarakat Adat Malind Anim Dalam Pengelolaan Sumber Daya Alam di Kabupaten Merauke Propinsi Papua*, UGM-Yogyakarta: Tesis, p. 99.

<sup>4</sup> Frumensius Obe Samkakai, *Malind Anim Dahulu, Sekarang, dan Masa Datang*, Paper presented on Kongres Pemuda Marindanim, 17 July 2009, p. 7.



In the context of universal, Indonesia has also ratified a number of international human rights instruments, became signatories to several others, as well as supporting for others. International Covenant on Civil and Political Rights; International Covenant on Economic, Social, Cultural Rights; The Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Universal Declaration of Human Rights, UN' Declaration on the Rights of Indigenous Peoples are a number of international human rights instruments in question. The first four have been ratified by the State of Indonesia. The ratified international human rights instruments clearly affirm the States' obligation to fulfill the citizen'.

In addition, the "conditional recognition," another issue that needs to be highlighted is the nature of the rights recognized in Indonesian law. Whether laws are sourced from international human rights instruments or other legislation, there is no explanation of the collective rights that are one of the pillars of indigenous claims. Thus, it is clear that a recognition with the requirement given, there is still traditional traits equivalent to saying that there is no difference in development between different societal groups and cultures in the world throughout the history of the world. Such recognition has two sides of implications. on the one hand it is to say that when the "traditional" society has developed to the same stage that is now called "modern" then they need not be recognized as a traditional society (or as an indigenous peoples) anymore. This way of thinking saying that "modern" culture today will never grow more "advanced" so that at one time all societies will be equally modern and nothing else "traditional". One another hand, in other ways of thinking, we can say that as long as there are differences in the development of the various societies and cultures of this world, there will always be "traditional" and "modern" ones. Thus, the "traditional" automatically must be recognized as it will always be there.

It is clear from a juridical perspective, and based on the logical interpretation of the above chapter that both the completeness of social and political for self-preservation, and from the perspective of the development of civilization in which there is a "traditional" and "modern" dichotomy, indigenous peoples need to be legally recognized in the system of government of the Unitary State of the Republic of Indonesia.

The number of laws and regulations governing customary rights, none of the above-mentioned laws and regulations on the protection of the rights of indigenous peoples, whereas Indonesia is a State participating in the United Nations (UN) which signed the treaties International on indigenous peoples. The border area law also does not explain concretely to the border area. The border area referred to under the border area law is the inner territory of the boundary of the State border agreement which is the sovereign territory of the State of Indonesia, the lack of clarity of this law because the existing situation in Indonesia has customary areas controlled by indigenous peoples separated by state boundaries, but still have customary boundaries in terms of ownership of customary rights, one example is the ownership of customary rights separated by border of State territory.

## 6. Sociological Validity for the Customary Right Protection of Indigenous Peoples

Indigenous peoples are a community group that represents what in Article 18 of the 1945 Constitution (pre-amendment) and its elucidation is referred to as a society that has original structure with origins right. In the literature of customary law, this community group is referred to as the customary law community or in article 18 of the 1945 Constitution (pre-amendment) the explanatory section number II is referred to as the original structure which has origin right and special, such as the village in Java and Bali, Nagari in Minangkabau, and so on.

The origin right is a right which in the concept of legal policy is known as the inherent right to be understood in its confrontation with the given-right. According to R. Yando Zakaria,<sup>1</sup> by referring to the village as the original structure, the village is a "social, economic, political, and cultural alliances" are distinct essentially with an "administrative alliance" as meant by "village administrative" in the various laws and regulations. Hence, as an original structure, villages often manifest themselves as *Ter Haar* as *dorps republic* or "small country", as opposed to the "big country" which refers to a modern *state order*.

Regarding to the recognition of this village autonomy, in the discourse of legal-policy, there are two kinds of rights concepts based on their origins. Each of the rights is different from each other. First, the given-rights, and the second is the innate-right and inherent in the history of the origin of the unit that has autonomy (*innate rights*). Using these two distinctions, it is classified that the regional autonomy that many people are talking about today is given-autonomy. Therefore, the discourse shifts from rights to authority. Authority is always a gift, which always has to be accounted for. In addition, the concept of missing household affairs was replaced by the concept of public interest. Thus, local autonomy is the authority of regional governments to regulate the interests of the people in the regions.

In contrast to the innate-rights has grown and maintained by an institution to administer its own household affairs. In the 1945 Constitution, the concept of the innate right is attached to a "special region" which has a

<sup>1</sup> R. Yando Zakaria. (2004). *Merebut Negara*, Yogyakarta: Lapera Pustaka Utama dan KARSA, p. 78

“right of origin”. Therefore, in contrast to “local government”, villages with village autonomy, which arise as a result of the recognition of the right of origin and hence the special have innate rights.

The innate rights of the peoples with the original structure include at least the territory right (later referred to as the territory of customary rights). The existing social organizing system in the region concerned (the leadership system in it), rules and rules-making mechanisms in the region concerned, which govern all citizens (“natives” or migrants) covered in the territory of the village concerned. With such a concept, it is internally an original structure represented by the village, county, clan, and so on, can govern its life in a number of affairs or known as “autonomy” as a limited translation of the concept of self-determination. In other words, the concept of freedom, security and democracy is universal and interconnected among the three. But in the level of implementation, it requires wisdom so that all values are balanced.<sup>1</sup>

In recent decades, conflicts between indigenous peoples and the State and third parties have occurred in many parts of Indonesia. The case of Jenggawah, Kedung Ombo, and protest farmers in Garut, Kasepuhan-Kasepuhan in Pegunungan Halimun Salak, the case of Rimba People and National Park of Kerinci Sebelat, the case of Amungme People with Freeport is just a small sample of thousands of conflicts between communities on the one hand and the State and companies on the other. The conflict resulted in the loss of life and property, the disruption of daily life, the disruption of the investment and development climate, and even injured the image of the country internationally in the context of human rights. The injury can be seen from the event of disconnection between Indonesia during the administration of President Soeharto with Intergovernmental Group on Indonesia or IGGI which questioned the credibility of the Indonesian government in the implementation of human rights. What have recently happened are the acts of violence against indigenous Papuans by alleged Indonesian military, although this has been formally denied by the competent authority of the military.

In term of conflict, these are the stages of manifestation of a deeper conflict. The insistence or demand of indigenous peoples can be a source to further explore the causes of the problems between indigenous peoples and the State as well as third parties. The social conflicts that have occurred have cause and effect affecting the development in the acquisition of the recognition of the protection of the rights of indigenous peoples.

*The first*, there is discrimination against indigenous peoples. Article 2 paragraph 1 of the International Covenant on Civil and Political Rights explains the meaning of discrimination as an act of distinction on the basis of ethnicity, color, sex, language, religion, political or other views, national or social origin, property, birth or other status. In the case of land rights claims, it is clear that the concept of indigenous peoples’ rights to land has been ignored in the relations of indigenous peoples and the State. Similarly, the right to embrace religion and belief are similar as the establishment of only 6 (six) religions recognized by the State and other basic rights and freedoms. In political view, indigenous peoples have not been able to run their own self-management system as mentioned in the 1945 Constitution (pre-amendment). In various descriptions of indigenous peoples, the result of such discrimination is that indigenous peoples experience a systematic marginalization process of public life.

*The second*, in the Indonesian legislation system, the regulation on the rights of indigenous peoples is conducted by sector. This indicates that indigenous peoples are placed as objects of sector interest in the administration of the State. As a result, each sector law includes a regulation of indigenous peoples according to their interests. This is where conflicts between indigenous peoples and third parties always become their estuary. Act No. 41 of 1999 on forestry, Act No. 11 of 1967 on Mining, Act No. 18 of 2004 on Plantations, Act concerning the Management of Coastal Areas and Small Islands, Act No. 32 of 2009 on the Environment as well as the Basic Agrarian Law are a number of laws that include the setting of indigenous peoples. Sectoralism places indigenous peoples as “exploited objects” rather than as subjects that must be fulfilled their rights as part of the nation. This situation is in fact incompatible with the principles of Pancasila and the 1945 Constitution, which affirm that the State of Indonesia protects the entire nation and the whole of the blood of Indonesia. From the simplest logic, if the situation is not immediately corrected, it can be said that the Government of the Republic of Indonesia is only busy taking care of Indonesia’s homeland for the sake of sector development and ignoring the aspect of “protecting the whole nation of Indonesia”.

*The third*, the arrangement of indigenous peoples in by sector places indigenous peoples such as the chevrotain that must be squeezed between two elephants. A key element in the sector law that is the cause is the granting of permits for companies to exploit natural resources within areas claimed by indigenous peoples. The State gives permit, which substantially implies the legal right of a certain type to the entrepreneur or investor. This right takes the form of forest concessions, the contract of work in the mining sector, principally contrary to the concept of indigenous peoples’ rights to land and natural resources. In such situations, the rights of indigenous peoples have always faced neglected situations.

In customary law, the land has a very important position. In addition to property objects that despite in circumstances whatever are still permanent in the circumstances, in economic, as well as land is a place of

<sup>1</sup> Jeffry Alexander Ch. Likadja. (2015). “Memaknai Hukum Negara (Law Though State) dalam Bingkar Negara Hukum (Rechstaat)”. *Hasanuddin Law Review*, 1(1): 75-86.

residence for indigenous people. Land provides livelihoods to indigenous peoples (using the land to collect and produce from plants that live on the land, as well as hunt for the animals that live there). The people hold harvest festivities with traditional ceremonies, not merely custom nor the joys after they are harvested, but not apart from the joys that their land has yielded, so that the life struggle for tomorrow can be continued. Land is also a place where the customary law community who died was interred, is also where the spirits of the ancestors there.

Land becomes a place and a source of human life especially the customary law community *Malind Anim* and in it there are sacred territories and ancestral graves, so that certain areas cannot be transferred in any form. The ritual process of releasing customary land also varies with ritual process with animal blood or the reading of certain mantras and for indigenous people *Malind Anim* with *toki babi* so that the blood spills over the land.

*Malind Anim* is based on the traditional customs that have existed since the story of creation and the hereditary passed from generation to generation. The ancestor divides the customary territory according to the direction of the wind:<sup>1</sup> (1) *Mayo*: in the South or “*duf*”, (2) *Ezam*: in the North or “*timan*”, (3) *Sosom*: in the East or “*sendawi*” (4) *Imoh*: in the west or “*muri*”.

The customary law area of *Malind Anim* has divided into ownership of customary rights. Based on the mythology of indigenous people *Malind Anim*, the arrangement of area agreed as follows:<sup>2</sup> (1) “*Woyu*” people occupy west boundary that is between *Digoel* river and *Burakasampai* of Kolepom Kimaam island. The language used is “*Wayu*” and most of them are *Gebze* and *Yolmen*. (2) The coastal of the Kondo area that carries a new language that is now commonly called the language of *Malind Pantai*. Led by “*Palma*” or “*Parmo*”. Sub-tribe consists of *Nggawir Anim*, *Kumb Anim* or *Malind* who occupy the coastal between the river *Bian* and *Kumbe*. In the upper waters of the river *Kumbe*, there is a sub-tribe of *Hatih Anim*, *Imayh* or *Imaz Malind* and known as *Muli Anim*.

The sub-tribes are governed by their respective leaders such as *Kanum*, *Yei-nan* or *Bian Anim*. In this arrangement, *Kanum* occupies *Sota* village with *Malind Anim* in Onggaya, Tomer, Tomerau, Kondo and Korkari so that the areas in Papua New Guinea such as Kunji, Meru, Wasikusa, Maikusa to Masinggara and Kondobolo rivers. Tribe *Yeinan* occupies the river Maro to its springs. They are the owners of the Maro and are referred to as “*Maro Anim*”. Sub-tribe *Mbian* occupy the river Bian to the springs. They are the owners of *Mbian* and are called “*Mbian Anim*”. Sub-tribe of *Boadzi* occupies the upper of the river *Wembla*. They reside in their hometowns in Boset, Bafugate and surrounding villages. They are also called “*Kuni Malind*”. Sub-tribes of *Marori Manggey* its area joined to the sub-tribes *Kanum* and *Nggawil Anim*.

In the life of indigenous people, *Malind Anim* has a very close relationship with the natural surroundings; it is known from the ability of indigenous people who has a natural knowledge in maintaining the balance with nature. These noble values begin to underestimate the decline because of the more natural values viewed with economic value thus making the current natural destruction.

The tie of customary law community *Malind Anim* to the land is very strong although in the process of life of these customary law communities have undergone changes in the values of the land so that respect for the land is fading. In the legal community life in indigenous Papua today has also experienced degradation, where currently only the land applied by customary law while other matters concerning customary law is no longer applied, such as marriage, customary institutions and customary crime. This becomes confusing because the ownership of customary rights as long as it is recognized and appreciated and applied the values of customary law in the life of the customary law community will certainly get recognition from the state.

Land conflicts between indigenous Papuans and indigenous Papuans and between indigenous Papuans and non-Papuans. Among the indigenous Papuans with indigenous Papuans is the conflict of border other than that of the inter-family conflicts relating to the release above release. Another thing that concerns is that although the Special District Regulation No. 23 of 2008 on Customary Rights of Indigenous People and Individual Right of Indigenous Peoples over Land, but land conflicts in Papua are not resolved, the community does not resolve the issue of customary rights in accordance with the provisions of applicable law. The last conflict that will be carried out by indigenous peoples is the prohibition or cultivation of a land that has been certified.

Land conflicts between *Malind Anim* or other Papuan with government and non-Papuan communities have taken place since the New Order regime, to suppress indigenous Papuans when voicing the right of ownership are declared separatists or joining the *Organisasi Papua Merdeka* (OPM). Indigenous Papuans feel the freedom of gaining their customary rights after the reform so that lands that have been certified with the state land base and distributed by the Land Office are the targets of prohibition.

The presence of the border areas between Indonesia and Papua New Guinea which is also a customary rights area of indigenous peoples in Merauke is noticed its existence can be a source of new problems. Where the lack of attention to the indigenous people in the border area that makes people feel discriminated against its existence which is part of the Unitary State of the Republic of Indonesia. The ideals of the State of Indonesia

<sup>1</sup> Dendi Sofyandi, p. 102.

<sup>2</sup> Dendi Sofyandi, p. 103

listed in the Preamble to the 1945 Constitution is (i) protecting the entire Indonesian nation and the whole of the blood of Indonesia; (ii) to promote the common welfare; (iii) to educate the life of the nation, and (iv) to participate in a world order based on freedom, eternal peace and social justice. Sociologically, these ideals cannot be achieved if what the indigenous peoples experienced above is not immediately resolved. Discrimination, poverty, exploitation and development victims, ignorance are the experiences of the suffering of indigenous peoples and the Indonesian peoples, especially people living in the border areas must be eliminated so that the road to social justice can be opened more broadly.

## 7. Conclusion

Legal policy for the customary right protection of indigenous people in the border area of southern Papua by the creation of new legal regulations in order to encourage the fulfillment of the indigenous peoples' right in the border areas. Currently, the national legal system has not been able to accommodate the existence of customary rights of indigenous peoples, especially in the border areas. The existence of national legislation cannot accommodate the existence of customary rights of indigenous peoples in the border areas. The policy which becomes the basis for the provision of legal regulation on the protection of customary right in essence to fulfill the recognition of the existence of the customary right of the indigenous peoples by the State in the form of legislation. It is advisable that policies towards the strengthening, recognizing, respect and protection of indigenous peoples' rights are contained in a State policy to ensure the existence of customary rights of indigenous peoples in the border areas.

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