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The Harmonization of Law in Regulating the Rights of Customary Community over Natural Resources in Indonesia

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Abstract
This study aims to analyze the harmonization of law that regulates the rights of customary community over natural resources in Indonesia. The legal problem arises from the conflict of interests in regulating the protection of the rights of customary community. The protection is regulated by the 1945 Constitution of the Republic of Indonesia Article 18 B Paragraph (2) and Article 28 I Paragraph (3). The state has, actually, an obligation according to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia to manage the natural resources of the country for the greatest prosperity of the people. This means that the state has a substantial role in a number of policies on resources that have great impacts on the continuity of customary community. A number of regulations related to the protection of indigenous and tribal peoples and their sectoral policies appear to overlap interests that ultimately override indigenous and tribal peoples. This conflict draws willingness to investigate through the concept of harmonization of law. The study used normative juridical research method and based on the legislations and the concepts which are related to the field of study. The research results show that there is no alignment in a number of laws that regulates the rights of customary law community over natural resources if the concept of harmonization of law approach is applied. This is because the integration of all aspects that support the harmony of the regulation has not yet been taken into account in the preparation and implementation of sectoral policies on natural resources.
Keywords: *Harmonization of law, Regulation, Customary community rights, Natural resources*

1. Introduction

Looking at the history of Indonesia as the nation and the state, customary communities had existed long before the establishment of the Unitary State of the Republic of Indonesia. Their presence in Indonesia was almost entirely through natural ways. These communities are referred to, by Soetandyo Wignjosoebroto in Bernadinus Steni (2009: 220), as old existing natives. Their existence is part of the state's existence and should, therefore, be well recognized by the state policies that accommodate their interests. Moreover, the life of customary communities cannot be separated from the natural environment which is part of the territorial order of Indonesia. The legal recognition of indigenous and tribal people in Indonesia has been mandated in the constitution – Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which determines "the State recognizes and respects the units of indigenous and tribal peoples and their traditional rights as long as they live and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia/NKRI, as governed by law. This provision forms the basis of how indigenous peoples, with their rights to land and natural resources, have a strong constitutional legality. They are one of the elements of a nation and therefore, they are supposed to be protected.

However, there is a contradiction to this, the control over natural resources is in the hands of the state. It is evident in Article 33 Paragraph (3) of the 1945 Constitution, which says "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". The law that is actually ideal for the state's goal, which is to bring prosperity to all of its people, is not directly embodied in the regulations and policies regarding land and natural resources. These regulations substantively and in reality do not accommodate the rights of customary law communities. For example, government has issued some permits for the investments that operate in the area of living that has been a shelter of customary law community.

According to Muhammad Ilham Arisaputra (2015: 7) the exploitation of natural resources should equitably and widely benefit the communities as mandated by the Constitution that it is for the greatest prosperity of the people in a just and sustainable manner. However, what is happening today is massive exploitation of natural resources as a source of state's income. Moreover, access to natural resources management is given more widely to capital owners and even foreign investors. This privilege has caused these communities to have limited or even no access to their natural resources.

The problems faced by indigenous and tribal peoples have always been an interesting and often debatable topic, especially when their interests meet with the interests of the state or government. Of the many rights of indigenous and tribal peoples, the rights to natural resources management is an interesting topic to do a research on because natural resources has a major role in maintaining the existence of indigenous and tribal peoples. These people depend their life on the natural resources that exist in the place where they live (Muazzin , 2014:

322)

The existence of conflict between the interests of protecting the rights of indigenous and tribal peoples and the domination of control over natural resources is the focus of the research problems of this study. Regarding this fact, a study on the regulations of customary community rights in the aspect of their harmonization with law is necessary – how to harmonize the existing law regulating the rights of customary community over natural resources with the interests of the indigenous people.

The method used to answer the research problems was normative legal research method with reference to legal reviews and the focus of study that is normatively conducted and based on the doctrine of law. The normative legal research is to examine internal aspects of norms whose objects are the norms that have ever been, are being, and will become positive law. The issue of the law as the norm system. Through this method, the expected results and benefits can be listed below (Fajar ND & Achmad, 2013: 14)

a. Determining the relationship and legal status of all parties in a legal affair.
b. Giving justification assessment to a legal affair whether it is right or wrong.
c. Straightening and maintaining the consistency of the norm system towards basic norms, principles, and doctrines as well as contracts and regulations that are in effect at present or will be enforced.

According to Terry Hutchinson (2002: 7) *Legal research is a relatively new phenomenon. The legal research is not one dimensional. It includes both doctrinal and non-doctrinal methodology and covers the varied prims of legal activity not encompassed in practice oriented research conducted challenges the reader to broaden their view of possible research perspectives within the legal dicipline area.* It means that legal research is focused on the perspective of legal issues whether they are in the form of act and regulation or the implementation and realization.

This study investigates the existence of norms disharmony in the recognition of indigenous and tribal peoples and their rights in relation to legal instruments of the policies on natural resources policies as implied in the background of the problems. The source of legal material of this study is based on the regulations that recognise customary communities their rights. Finally, the approaches used in this study are legal approach and conceptual approach.

2. Literature Review

2.1 Recognition of Indigenous and Tribal People's Rights and Natural Resources Policy

To indigenous and tribal peoples, natural resources are not only economic objects but also integral part of their lives. They maintain their historical and spiritual relationships with their natural resources with which their community and culture flourish. Therefore, the surrounding of the natural resources is a social space where a culture can reproduce itself from generation to generation. If these natural resources are disturbed or even alienated by the state or the third party/another party, not only will the economic life of these indigenous people be threatened, but also the whole life of them (Wiryani, 2009: 2).

Muhamad Bakri (2007: 46) states that long before the invaders came, there had been what is called *rechtgemeenschap* who have regular citizens, have their own government (head of law alliance and assistants), and have both material and immaterial property. This legal alliance is also called a legal society, namely: a group of people who are regular and fixed, have government / leadership and have their own wealth either in the form of material objects and objects that do not look the eye (immaterial).

Strategic policies on the land natural resources and other agrarian resources are closely related to the existence of indigenous and tribal peoples. The agrarian resources in question are the relationships between people and land and other natural resources including water, forests, gardens and the resources in the soil like minerals. The word *agraria* has now a much wider meaning than it did. In The Law No. 5 of 1960 on Basic Agrarian Law (UUPA), the meaning of *agraria* includes land, water, space and natural resources attached to each of them (Arizona, 2013: 8).

Ahmad Redi (2014: 63) stated that the implementation of the law related to natural resources in Indonesia is based on UUPA and other sectoral laws. Political law is derived from the legal politics of article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The example in Article 2 paragraph 1 of the Law on Law 45 states that earth, water and space include the natural resources contained in it is at the highest level controlled by the state, as the organization of the power of all people. Furthermore, in Article 2 paragraph (2) of the LoGA it is stipulated that the right of control of the state authorizes to

a. Manage and organize the designation, supply and maintenance of the earth, water and space
b. Determining and managing legal relationships between people and soil, water, and space;
a. Determining and managing legal relationships between people and legal acts on soil, water, and space.

According to Maria SW Sumardjono (2008:63), land politics and natural resources are the bases to achieve the goal of the Article 33 Paragraph 3 1945 Constitution of the Republic of Indonesia. Generally the goal is social justice to all people by giving the same opportunities to all of them to get benefits from the land for

themselves and their families.

1. Preventing any acts of enriching oneself, which are unfair to the community.
2. Optimizing land use and minimizing land abandonment
3. Keeping the reasonability of land price so that it is affordable for all parties.
4. Keeping the availability of food.
5. Preserving natural resources, the land and its environment.
6. Protecting individual rights and the rights of customary community.
7. Respecting the individual that is affected by the policy by giving fair physical or non-physical compensation based on the rules that apply.

The government, in regulating the control and management of the land of natural resources and environment, uses legal instrument as the basis (I Nyoman Nurjaya 2006: 16). It is found that, through a critical investigation, the substance of the state law product in the form of the provision/legislation regarding the management of natural resources tend to be centralistic, sectoral, repressive, and use security approaches. The legal instruments with such characteristics do not provide protection for the sustainability of the functions of natural resources and also do not provide appropriate recognition and protection of the access and the rights of indigenous peoples to control and utilize the land and natural resources. This condition results in a situation in which indigenous people lose their rights to the natural resources in their own territory and the politic of legal pluralism ignorance occurs. The legal pluralism is ignored and therefore, marginalised in the management of natural resources.

2.2 Legal Harmonization

Budiono Kusumahamidjoyo in Teguh Prasetyo and Abdul Halim Barkatullah (2012: 327) states that within the framework of national legal system all of the rules of law are seen as one integrated system, consistency in the rules of law can be considered as legal certainty. This consistency is not something that happens by itself, it but must be created. From the perspective of law enforcement, consistency in the actions of state institutions greatly determines the degree of legal certainty. In other words, inconsistency in such actions will result in legal uncertainty. Legal certainty will be the attention of the people because they have sensitive feeling to injustice.
Harmonization of law in all of its rules is a legal subsystem within the framework of national legal system. With this, it is hoped that the norms of law in the rules of law are not conflicting with each other and there is no duplication or overlap. The urgency of harmonization of law on one hand provides a strong legal basis in accordance with the hierarchy of legislation, on the other hand provides a better legal system and legal principles, so that in its implementation there is no conflict of norms. The main emphasis is how framework of thought can be used in understanding the concept of harmonization of law to overcome contradictions and differences between the rules in the one integrated national legal system. With this there will be no longer contradictions, differences and overlaps. (Prasetyo & Barkatullah, 2012: 327)

3. Result and Discussion

The mandate of the 1945 Constitution of the Republic of Indonesia contains a fundamental foundation for the birth of legal instruments in the legal politics of natural resources, which relate to customary community and the role of the state. According to Ahmad Redi (2014: 6), the doctrine control by the state for the greatest prosperity of the people (stated in Article 33 paragraph (3) of the 1945 Constitution) does not have any clear stated interpretations and this is the weakness of this Article. Detailed limitations of the state control for the greatest prosperity of the people are not clearly and legally stated.

The details of the relations between the existence of customary community and the state policies on natural resources management are given in the Table 1.

TABEL 1
Regulation Dealing with the Harmonization of Customary Law and Human Resource

Instrument of Regulation	**Statement**	**Interpretation**
The 1945 Constitution of the Republic of Indonesia	Article 18 B Paragraph (2) "The State recognizes and respects the units of indigenous and tribal peoples and their traditional rights as long as they live and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia/NKRI, as governed by law."	The recognition of indigenous and tribal peoples is clear with some limitations.
The 1945 Constitution of the Republic of Indonesia	Article 28 I Paragraph (1): "The cultural identity and rights of traditional communities are respected in harmony with the current situation and civilization."	There is recognition of indigenous and tribal peoples through the recognition of traditional rights that cannot be separated from the existence of indigenous and tribal people
The 1945 Constitution of the Republic of Indonesia	Article 33 Paragraph (3): "The land, water and natural resources within are controlled by the State and shall be used for the greatest prosperity of the people.	There is a people's right to welfare, which is directed to all the people. This recognition, for sure, would have been dedicated to the customary community
Decision of the People's Consultative Assembly No IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management	Article 4 letter j The principle of natural resource management recognizes, respects and protects the rights of indigenous and tribal peoples' cultural diversity of agrarian/natural resources.	There is real recognition of the existence of indigenous and tribal peoples
Law No.39 Year. 1999 on Human Rights	Article 6 (1) In the context of the enforcement of human rights, the differences and needs of indigenous and tribal peoples shall be observed and protected by customary and government law (2) The cultural identity of indigenous and tribal peoples, including the right to customary communal lands (*ulayat*) is protected, in harmony with the current situation	There is recognition of the existence of indigenous and tribal peoples
Law No. 4 year 2009 on Mineral and Coal Mining	Article 6 letter e: The determination of mining territory is conducted after coordinating with the local government and consulting with the People's Legislative Assembly of the Republic of Indonesia;	The determination of mining territory is done by the state which means to limit the territory of customary community because mining area is generally located in the areas that are in fact belong to the customary communities' rights.

Law No 41 Year 1999 on Forestry	Article 4 (1) All forest in the territory of the Republic of Indonesia including natural resources shall be controlled by the State for the greatest prosperity of the people (2) Forest control by the State as referred to in paragraph (1) authorizes the government to: a. Organize and manage everything related to forests, forest areas, and forest products. b. Determine the status of a particular area as forest area or forest area as non-forest area; and c. Arranging and establishing legal relationships between people and forests, and regulating legal actions on forestry. (3) Forestry control by the State shall still respect the rights of indigenous and tribal peoples, as long as they still exist and are acknowledged to exist, and do not contradict the national interest.	There is recognition of indigenous and tribal peoples and the state's determination of forest tenure which is the scope of customary community
Law No. 22 year 2001 on Oil and Gas	(1) Oil and Gas as non-renewable strategic natural resources within the Indonesian Legal Mining Territory shall be national assets that should be controlled by the state. (2) The control by the State referred to in paragraph (1) shall be held by the Government as the holder of mining authority	There is a state domination as found in the statement of "the holder of mining authority" because the living area of customary communities is also in the mining area and people are doing the mining activities.
Law No.1 Year 2014 on Amendment to Law Number 27 Year 2007 on the Management of Coastal Areas and Small Islands in Coastal Waters	Article 1 number 33 Law No.1 Year 2014 : The customary community is a group of people who have traditionally settled in a certain geographical area in the Unitary State of the Republic of Indonesia because of the ties to ancestral origins, strong relations with land, territory, natural resources, possessing customary government institutions, and the legal order customs in their customary territories in accordance with the provisions of legislation.	There is recognition of the existence of Indigenous People Community

It is seen in Table 1 that the law that regulates the rights of indigenous and tribal people to natural resources overlap and sectoral ego arises to accommodate each party's interests. The existence of Indigenous and tribal peoples are, on one hand, recognized but at the same time the rights of the state to control natural resources are manifested in certain rights or permits that limit or even exclude/omit/neglect the rights of customary law community in their own *lebensraum*.

This results in much concern because the protection of indigenous peoples' rights in doing economic, social and cultural activities is the obligation of the state. Normatively, there have been many rules that provide protection for indigenous peoples but there are also rules that are counterproductive to this purpose. At the implementation level, the state has also tried to protect the rights of indigenous peoples through various policies. However, there are still many deficiencies and unprotected rights indigenous peoples (Primawardani, 2009: 9).

The Legal facts that exist at the juridical level indicate degradation of indigenous law community caused by the government policies that only see economic aspects. To certain parties, custom (*adat*) and customary law are feared as a danger or a threat to democratic civilization and humanitarian values. *Adat* is also considered as a threat to the rational modern political system. This condition is caused because custom and customary law are not considered as a system that organizes and regulates the life in a community (Alting, 2011: 95).

The theoretical approach in harmonization of law, according to Herlambang P Wiratraman, et.al (2014: 3), is to organize the law particularly the rules that has consequences on legal norms and on the institutions that are subject to them. This is to integrate more thoroughly all the rules so as to avoid conflicting regulations and finally to produce the regulations which are applicable and in accordance with their legal hierarchy and legal philosophy. So far, the efforts to harmonize the law have been based on two fundamentals – vertical (hierarchical) harmonization and horizontal harmonization. This relates to the operation of legal principles, namely *lex superiori derogat lege inferiori*, *lex posteriori derogat lege priori*, and *lex specialis derogat lege generalis*.

These efforts are done by identifying the doctrinal collision in normative framework and the big problems that occur in the implementation of the law. This is not only about doctrinal-systematic problems, but this is more about how the already-formulated law provides a social meaning that gives more protection to the rights of the citizens, or in legal sociology this matter is often referred to as social significance. Harmonization of law, in this case, is not merely about the harmonization of texts, but the harmonization of texts with social meaning in the life of the citizens.

In relation to the regulation of the customary community rights over and the policy on state control over natural resources shows the absence of uniformity and regulatory harmony so as to the juridical facts listed in table 1 above, there is no comprehensive integration between the regulatory policies as the basis of each guideline legislation related to indigenous and tribal peoples and natural resource policies.

Harmonization of legislation is at the stage of building the law, which is a continuous series of process. It starts from thinking, designing, shaping, making, composing, and /or upholding the wishes of the people, based on ideal and empirical values, into written law. This law is, then, used as the basis of legal actions in governance, development, community, and individual behavior so as to achieve legal objectives, state goals, social goals, and individual goals (Djajaatmadja, 2005: 87)..

Alignment in the harmonization of law is an entry point. It is not only looking at the control of natural resources by the state but at the integration of human-centered regulation or more commonly called *anthropocentric* – it is not only for the authority owned by the government or the ruler as the state representative to make the rules. Legal certainty will be realized with rules that are made in accordance with formal procedures but if the integration of the aspects, even excluding the basic philosophy of legislation, does not become the basis of the harmonization, the purpose of the law will not be fully achieved. The negligence of the harmony between the rules will not create a good punitive situation for all parties and will not achieve the objectives of the formulated law.

4. CONCLUSION

Harmonization of law in the rules that regulate the rights of indigenous people of customary law to natural resources in Indonesia has not been fully realized because the rules have not been centred on the people they regulate. Principally, to avoid disharmony of norms in the rules that regulate customary community rights to natural resources, all parties must work together to make well-integrated rules. They have to make the rules that are able to repress sectoral ego by taking their hierarchy, synchronization, philosophy and implementation into account. With this, it is hoped that the rules can give benefits to all parties.

Creating the law by making the rules that prioritize harmonization, in an integrated manner, and by holistically paying much attention to the people it regulates is importantly necessary. This is to provide maximum protection for indigenous and tribal peoples and in accordance with the goals of development, which is based on the mandate of Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia.

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