

# Transformation of the Rights of Indigenous Peoples in Forest Governance: Legislation Perspective

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## Abstract

The existence of customary community is recognized in some Indonesia laws, including the existence of the customary forests. Those laws are the Ministry of Forestry to recognize the existence of indigenous peoples in the Forestry Minister's Regulation No. 62 / Menhut-II / 2013 concerning Amendments to Forestry Minister's Regulation No.P.44 / Menhut-II / 2012 concerning Inauguration of Forest Areas (Official Gazette of the Republic of Indonesia of 2013 No. 1364), the Law No. 6 of 2014 concerning Villages (State Gazette of the Republic of Indonesia of 2014 No. 7), the Minister of Agrarian and Spatial Regulation / Head of National Land Agency No. 9 of 2015 concerning procedures for establishing communal rights over land of customary law communities and communities within a certain area (State Gazette of the Republic of Indonesia of 2015 No. 742), and the Constitutional Court Decision. The process of transformation of the indigenous peoples into national life is not easy if it relates to the substance of their respective existence, either the essence of indigenous peoples and the essence of national life. Regarding the various conceptions of this state law, the transformation of indigenous peoples will be related to the national regulatory system as a rule of law. Regarding the rights of indigenous peoples in environmental management and forest conservation, this cannot be separated to the idea of development of environmental law based on rights theory influenced by moral or ethical philosophy.

**Keyword:** Transformation; the Indigenous People Rights; Forest Governance.

## 1. Introduction

The existence of customary community is recognized in some Indonesia laws, including the existence of the customary forests.<sup>1</sup> The Constitutional Court Decision states that customary forests are no longer part of state forest. This decision was followed by a new regulation from the Ministry of Forestry to recognize the existence of indigenous peoples in the Forestry Minister's Regulation No. 62 / Menhut-II / 2013 concerning Amendments to Forestry Minister's Regulation No.P.44 / Menhut-II / 2012 concerning Inauguration of Forest Areas (Official Gazette of the Republic of Indonesia of 2013 No. 1364). Another development of it is the Law No. 6 of 2014 concerning Villages (State Gazette of the Republic of Indonesia of 2014 No. 7). It allows for customary villages and the Minister of Agrarian and Spatial Regulation / Head of National Land Agency No. 9 of 2015 concerning procedures for establishing communal rights over land of customary law communities and communities within a certain area (State Gazette of the Republic of Indonesia of 2015 No. 742). It has also been alleviated the requirement for indigenous peoples to obtain recognition of their land ownership.

According to Willem Van der Muur,<sup>2</sup> the urgency of recognizing customary rights states that "Since the decentralization process began in Indonesia, only a few local regulations have been made to recognize the existence of indigenous peoples. The formation of this regulation is usually the result of lengthy negotiations between activists representing a customary community and a particular regional government. In negotiating several cases, the issue of recognizing customary land rights by the government is very important. Getting formal recognition proves to be something very difficult. The law states that an indigenous community must be able to prove that the community is a customary law community. By the way the community, it has an indigenous territory, which guarantees all daily necessities of life can be fulfilled'. In other words, to get recognition of customary land rights, an indigenous community must first have full access to the land. In fact, generally the reason for indigenous peoples seeking formal recognition is because of the existence of a third party who controls their land. This third party is usually a private company, state-owned company or government agency, which has the right to conduct a legal claim on land based on plantation concession permits from the

<sup>1</sup> See Decision of the Constitutional Court No. 35 / PUU-X / 2012 concerning Judicial Review the Law No. 41 of 1999 concerning Forestry Against the 1945 Constitution of the Republic of Indonesia.

<sup>2</sup> Willem Van der Muur, et.al. *The legal Recognition Process of the Ammatoa Kajang Customary Community: a Long and Winding Road*, Leiden Law School, Leiden University. The Research Results of the Dutch Royal Academy of Sciences in the framework of Scientific Programme Indonesia-Netherlands, [http://www.academia.edu/29415451/Proses\\_Pengakuan\\_Hukum\\_Masyarakat\\_Adat\\_Ammatoa\\_Kajang\\_Jalan\\_Panjang\\_dan\\_Berliku](http://www.academia.edu/29415451/Proses_Pengakuan_Hukum_Masyarakat_Adat_Ammatoa_Kajang_Jalan_Panjang_dan_Berliku), accessed 20 May 2018.

Head of Agency National Land or forest clearance permits from the Minister of Forestry. Aside from the legal constraints mentioned above, it should be stressed also that commercial exploitation carried out by third parties usually also serves the economic interests of the local government. Such situations encourage the government to side with the company. As a result, recognition customary land rights can rarely be realized".<sup>1</sup>

It can be assumed that the conditions as mentioned by Willem Van der Muur have occurred in almost all cases of Indigenous communities that are in dispute with both the private sector and government, for example in the Ammatoa Kajang case, or other cases in Kalimantan, Papua and West Java. Disputes or cases of neglect of customary rights contained in indigenous peoples are a disregard for the dignity and existence of living law. Even though the existence of customary law existed before modern law was present and monopolized the legal truth. In this context Darji Darmodiharjo and Shidarta explained that "Friedrich Karl Von Savigny analogizes the emergence of the law with the emergence of the language of a nation. Each nation has special characteristics in language. Even so, there is no universal language, there is no universal law. This view clearly rejects the natural way of thinking."<sup>2</sup> Darji Darmodiharjo and Shidarta explained furthermore that the law arose according to Savigny, not because of the orders of the authorities or because of habits but because of feelings in which justice lay within the soul of the nation (instinctive). The nation's soul (*volksgeist*) is the source of law. The law is an expression of the common consciousness or spirit of people". Law is not made, but it grows and develops with the community (*das rechts wird nicht gemacht, es ist und wird mit dem volke*)"<sup>3</sup>

From Von Savigny's point of view, it was explained that in fact the existing law was derived from customary law which was carried out by the community and then formalized by state institutions in accordance with the development of science. Darji Darmodiharjo and Shidarta explained that Puchta was a student of Von Savigny who further developed his teacher's thoughts. Just like Savigny, he argues that the law of a nation is bound to the soul of the nation (*volksgeist*) concerned.<sup>4</sup>

In the study of the school of history, the existence of indigenous peoples and their rights inherent substantially. The national law should provide its appreciation in the form of accommodating the interests of indigenous peoples in the national legal system. It at least recognize their basic rights as a society unique. According to Rosmidah,<sup>5</sup> the term customary law community is still often a topic of debate until now. Some people view indigenous peoples as having confusion between "Customary Laws" and "Customary Law Societies". The term Indigenous Law emphasizes the "legal community", and the term Legal-Customary Society emphasizes Customary Law.

The discourse on the urgency of the customary law community as mentioned above requires the transformation of the rights of indigenous peoples in various issues including environmental development especially in forest governance. This is intended so that the values contained in the customary law community can contribute to national development.

## 2. Transformation in the National Regulatory System

The process of transformation of the indigenous peoples into national life is not easy if it relates to the substance of their respective existence, either the essence of indigenous peoples and the essence of national life. As explained earlier that the indigenous peoples are characteristic in the form of values its life value and system. While national livelihood, in the sense of a modern state system, it also has its own character substantially. The substance of the modern state when referring to the theory seems to be contrary to the substance of what is called the indigenous peoples. Modern countries are generally side by side with the concept of the rule of law which is widely used as a terminology.

The concept of a legal state cannot be separated from two well-known concepts, namely Rechtsstaat and Rule of Law. Rechtsstaat as the concept of European Continental relies on the civil law system which is born as a response to the absolutism of the power system at that time. While the Rule of law (Anglo Saxon) evolves in an

<sup>1</sup> Ibid.

<sup>2</sup> Darji Darmodiharjo dan Shidarta, 2004, *The Principles of Legal Philosophy*, PT.Gramedia Pustaka Utama, Jakarta, p.124.

<sup>3</sup> Ibid.p.125.

<sup>4</sup> Ibid.

<sup>5</sup> See Rosmidah, Legal Recognition of Customary Rights of Customary Law Communities and Implementation Barriers, <https://online-journal.unja.ac.id/index.php/jimih/article/view/.../287>, accessed, 22 May 2018.

evolutionary manner based on a common law system, with judicial characteristics.<sup>1</sup> Bagir Manan<sup>2</sup> states that the concept of state law is closely related to the legal system adopted by the country concerned. In the old literature basically, the legal system in the world can be divided into two major groups, namely the legal system of Continental Europe and the Anglo-Saxon legal system. The concept of a rule of law is originally pioneered by Albert Venn Dicey (the British national) mentioned as the rule of law, developed in Anglo-Saxon countries. This concept emphasizes three aspects of its main elements, namely: a). Supremacy of law (Supremacy of Law; b). Equality before the law; and c). The constitution based on individual rights.

Bagir Manan Furthermore stipulates that there are other legal systems, such as Islamic law, the socialist system, and others, beside to the two legal systems. Grouping of the legal systems are more historically or academically patterned,<sup>3</sup> which in reality will find the followings:

- a. There are legal systems (a country) which at the same time bear the characteristics of the Continental legal tradition and Anglo-Saxon legal tradition or a combination of continental traditions and socialist legal traditions, or a combination of Anglo-Saxon law and socialist legal traditions; and
- b. There are legal systems that cannot be classified into one of the above groups. For example, some countries that identify themselves with legal traditions according to Islamic teachings.<sup>4</sup>

Frederic J. Stahl argues that the concept of a legal state is characterized by 4 (four) main elements, namely:

- a. Recognition and protection of human rights;
- b. The state is based on the political trias theory;
- c. The government is organized by law (Wetmatig bestuur); and
- d. The state administrative court is in charge of handling cases of unlawful acts by the government (onrechtmatige overgheidsdaad).<sup>5</sup>

The basic conditions of rechtstaat proposed by Bunkers, et.al., quoted by Philipus M. Hadjon are:<sup>6</sup>

- a. Principle of legality;  
Every government action must be based on legislation (wetterlijke grondslag). With this foundation, the Law in the formal sense and the Constitution itself is the basic foundation of government action. In this case, the legislator is an important part of the rule of law.
- b. Division of power;  
This condition implies that power the state must not only rest on one hand.
- c. Basic rights (groundrechten);  
Basic rights are a means of protecting the law for the people and at the same time limiting the legislative power.
- d. Court supervision;  
For the people, there is a channel available through a free court to test the validity of government actions (rechtmatigheids toetsing).

Regarding the various conceptions of this state law, the transformation of indigenous peoples will be related to the national regulatory system as a rule of law. In fact, in Indonesia, this transformation process is indeed not easy because there are many obstacles and barriers factors. According to an ethnologist, It is better to re-examine the way people view indigenous peoples and their relationship with land, forests and natural resources. Pursuant to James C. Scott<sup>7</sup>, he explains that some countries often make simplifications in managing and establishing regulations (rules) on land and forests. This simplification is called the state simplification in looking at the heterogeneity of culture and indigenous peoples as the owners of customary rights to forests and land. The process of uniformity or heterogeneity does not mean that it is an attempt to reduce people's movements carried out by a state that collaborates with the power of global capital. The historical relation of indigenous peoples

<sup>1</sup> Marbun S.F., et.al, 2001, *The Dimension of Administrative Law Thought* UII Press, Yogyakarta, p.14.

<sup>2</sup> Nurul Qamar, 2010, *Rule of Law or State of Law*, ed. 1, Pustaka Refleksi, Makassar. p. 31.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Niharua Salmon EM, 2010. *The Essence of Regional Lising Authority in Natural Resources Management in the Sea Area*, Dissertationi, PPS UNHAS. Makassar. pp. 29-30.

<sup>7</sup> See I Ngurah Suryawan, 2016. *Land needed but people No; Transformation of the Customary Community in Etinography and Social History*, <http://brwa.or.id/articles/read/273>, accessed, 23 May 2018.

with their land including the forest must be recognized, found out by local knowledge stored in it, and revitalized in the context of the social changes experienced by indigenous people. So that it is useful to be practiced in the lives of indigenous people today. Capturing the complexity of the historical relations of indigenous peoples with their lands / forests and the social transformation that afflicts indigenous peoples now, the perspective of simplifications carried out by the state through the "development-ism" approach is threatened by a lack of language to capture the "heart" of the people and the spirit of social change they want.<sup>1</sup>

It is said further that development clearly requires land to establish physical infrastructure as one form of development, beside the development of human resources in the construction site itself. The presence of development certainly brings new awareness and understanding into the local community. The meeting of new ideas of development with the lives of local people brings various implications. The perspective of the development program towards the community meets with the perspective of society seeing development. According to Paschalis Maria Laksono,<sup>2</sup> the development perspective instilled by the New Order regime is a change that is desired and needed. So that, anything is considered ancient and does not experience change is considered "backwardness". One thing that is considered backward and most important is the traditional culture of the local community which is seen as a barrier to the development process, which is then interpreted narrowly as modernization. Thus, development is synonymous with new awareness that is present and accepted independently of local culture.

The development introduced by the state enters into the consciousness of the local community not as a synthesis of the historical process of local cultures, but through the attractiveness of the successful image of development in advanced industrial countries supported by capital strength. Gradually but surely, the displacement of traditional societies is not solely a matter of the loss of the authenticity of the traditional culture of the local community, but is also a matter of the loss of self and self-confidence of the local community and Indonesian society in general.<sup>3</sup>

In terms of it, I. Ngurah Suryawan<sup>4</sup> states that there is the basic obstacles to the process of transformation of indigenous peoples in the national system, especially with regard to the case of recognizing the fundamental rights of indigenous peoples into the national regulatory system. The reason why is it necessary to elaborate on the urgency of transforming indigenous rights into the national regulatory system, it is because this concerns the status of the state as a legal state, as written in article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia that "Indonesia is a Law State". This confirms that all actions within the framework of administering government are based on law including in environmental development, especially in community-based forest governance.

According to Jimly Assiddiqie,<sup>5</sup> in order to reformulate the main ideas of the concept of a legal state whose application in the Indonesian system today can be reformulated 13 (thirteen) basic principles of the rule of law as developed rightnow. The thirteen main principles of the Rule of Law are: 1). Supremacy of Law; 2) Equality be for the law; 3). Principle of Legality (Due Process of Law) 4) limitation of power; 5) Independent Mixed Organ; 6) Free and impartial justice; 7) State Administrative Courts; 8) Constitutional Court; 9) Human Protection; 10) Democratic (Demokratische Rechtsstaat); 11) serves as a tools to realizing the aim of the State; 12) Transparency and Social Control; 13) The Almighty Belief.

The basic elements of the Indonesian law further are based on the Pancasila and the 1945 Constitution of the Republic of Indonesia are: a). Pancasila as the basis of state ideology; b) Sovereignty is in the hands of the people and carried out according to the Constitution; c). Power based on constitution/Constitution; d) Equality under the law; and e). Free and independent justice.<sup>6</sup>

The presence of the Indonesian Law State has been around for more than sixty years. The qualification as a law state in 1945 reads in the Explanation of the Constitution. In an explanation of the "State government system", it is said that "Indonesia is a country based on law (Rechtsstaat). Furthermore, it is explained that "The Indonesian

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<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Jimly Assiddiqie, *The idea of Rule of Law in Indonesia*, [http://jimly.com/makalah/namafile/57KonsepNegara hukum Indonesia.pdf](http://jimly.com/makalah/namafile/57KonsepNegara%20hukum%20Indonesia.pdf). accessed 6 February 2012.

<sup>6</sup> Nurul Qamar, 2010, Op.,Cit, p.35.

state is based on law (rechtstaat), not based on mere power (Machtsstaat)." Over the next decades, the concept is further emphasized through the fourth amendment and incorporated into the body of the constitution, namely Chapter I on "Forms and Sovereignty". In article 1 paragraph 3, it is written that "The Indonesian state is a legal state. Therefore, it actually accommodates the basic rights of indigenous people. In the context of a state of law, it must be started from the constitution and then derived into lower regulations. So that, the transformation of the basic rights of customary society is systemically accommodated in the national regulatory system, and then becomes a good precedent in an effort to provide a formal recognition of the existence of indigenous indigenous peoples as an important part of national life itself.

In a previous research analysis, it was stated that arrangements regarding the existence and rights of indigenous peoples in Indonesia are contained in the 1945 Constitution, laws and other laws and regulations. This shows that the existence and rights of indigenous peoples have been accepted within the applicable legal framework in Indonesia, as follows:

The 1945 Constitution regulates the existence of customary law communities as subject matter that is different from other legal subjects. This has been seen since the first period of the 1945 Constitution in which in the explanatory section of the 1945 Constitution. There is an explanation of the "community law alliance" namely the customary law community who's its existence had existed before the proclamation of the Republic of Indonesia. In the explanation of the 1945 Constitution, it is written that: "In the territory of the Indonesian State, there are approximately 250 *zelfbesturende landchappen and volksgemenschappen*, such as *villages* in Java and Bali, *negeri* in Minangkabau, sub-village and clans in Palembang and so on. These regions have an original structure and can therefore be considered as special areas. The Republic of Indonesia respects the position of these special regions and all state regulations concerning these regions will remember the rights of the origin of the region. "When the amendments to the 1945 Constitution are carried out, the explanation of the 1945 Constitution is abolished. Then the legal basis regarding the existence of indigenous peoples is placed on the body (structure) of the 1945 Indonesia Constitution. At least there are three main provisions in the 1945 Constitution which could be the basis for the existence and rights of indigenous peoples. The three provisions are Article 18B Paragraph (2), Article 28I Paragraph (3) and Article 32 Paragraph (1) and Paragraph (2) of the 1945 Constitution.<sup>1</sup>

Table 1  
 Recognition of Customary Law Community  
 in the Articles of the 1945 Indonesian Constitution

The Article of the 1945 Indonesian Constitution	The Comparison of the Content
Article 18 B paragraph (2)	The State shall recognise and respect their 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 further regulated by law.
Article 28 I paragraph (3)	The cultural identities and right of traditional communities shall be respected in accordance with the development of times and civilisations.
Article 32 paragraph (1) and (2)	(1) The state shall advance the national culture of Indonesia among the civilisations of the world by assuring the freedom of society to preserve and to develop cultural values. (2) The state shall respect and preserve local languages as national cultural treasures.

<sup>1</sup> See Kurnia Warman, *The Map of the Laws Concerning Recognition of the Rights of Customary Law Community*, Report of UNDP, [procurement-notices.undp.org/view\\_file.cfm?doc\\_id=39284](http://procurement-notices.undp.org/view_file.cfm?doc_id=39284), accessed 22 May 2018.

The three provisions as mentioned above are most often referred to be discussed in terms of the existence and rights of the customary law community. However, this does not mean that the constitutional basis for the rights of indigenous peoples is only based on these three provisions. Customary law communities as part of Indonesian citizens also have rights constitutional rights as citizens for example to get a decent life, a good environment, equality before the law and other rights. The three constitutional provisions most often referred to be discussed in the context of the existence and rights of indigenous peoples have a different substance and approach in viewing indigenous peoples.

The constitutional approach to Article 28I paragraph (3) of the 1945 Constitution is a human rights approach. This is evident in the systematics of the 1945 Constitution which places Article 28I paragraph (3) of the 1945 Constitution in Chapter XA concerning Human Rights along with other human rights. Therefore, the most responsible government agency for this constitutional foundation is the Ministry of Law and Human Rights. Furthermore, there are Article 32 paragraph (1) and paragraph (2) of the 1945 Constitution relating to the right to regional culture and language. Both of these provisions relate to the right to culture owned by indigenous peoples, including the right to develop regional cultural and linguistic values. This provision is a complement to other provisions in the constitution relating to the existence and rights of customary law communities.

### 3. Position of Indigenous Peoples' Rights in Several National Policies

The regulation of the customary law community is found in a number of laws. In the context of governance, the term customary law community first time was found officially in the applicable law in Indonesia was in Law No. 1 of 1957 concerning the Principles of Regional Government. In the law, customary law communities are considered as part of the republican government which will be located as an autonomous region at the third level, together with the village. Furthermore, in Law No.19 of 1965 concerning the Village as a Form of Transition to Achieve the realization of Level III Regions throughout the Republic of Indonesia. In this law, customary law communities and other territorial-based legal units were designated as third-level regions called *Desapraja*. Even in the law, it was also realized the importance of the role of customary law communities in the success of the revolutionary agenda.<sup>1</sup>

In the context of agrarian law then, the regulation regarding customary law communities is contained in Law No.5 of 1960 concerning Basic Agrarian Principles (UUPA). In Article 2 paragraph (4) of the UUPA, it is stated that the implementation of the control rights of the state in its implementation can be authorized to the “*Swatantra*” areas and customary law communities. In this case, indigenous peoples can receive delegations of state control authority over the earth, water, space and natural resources. If there are land parcels that are directly controlled by the state (state land), including those originating from former land rights, even former land use rights (HGU), their control can be delegated to the customary law community in order to reach the people's prosperity maximumly. The mention of the customary law community is in the regulation of recognizing the existence of customary rights. This is contained in Article 3 of the UUPA which states that the implementation of customary rights and similar rights is from customary law communities, insofar as they are in reality. It must be in accordance with national and state interests, which are based on national unity and must not conflict with other higher laws and regulations.

Regarding the rights of indigenous peoples in environmental management and forest conservation, this cannot be separated to the idea of development of environmental law based on rights theory influenced by moral or ethical philosophy. This philosophical stream considers actions that cause pollution and destruction of the environment to be evil so that the community or state is obliged to punish those acts.<sup>2</sup> This right theory also includes two schools of thought, namely libertarianism and the school of thought of animal rights. Libertarianism rejects the argument from the theory of economic approach which considers pollution and destruction of the environment merely as a problem of inefficiency and injustice in the distribution of natural resources. It explicitly considers acts to pollute and damage the environment as a violation of personal rights and material rights. Therefore, according to libertarianism, environmental law must require businesses to continually minimize the level of pollution or environmental destruction and then completely eliminate pollution and environmental damage. This can be done by formulating laws and regulations that can encourage the birth of technology-forcing pollution control legislation.<sup>3</sup>

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<sup>1</sup> Ibid. p.5.

<sup>2</sup> See Mark Sagoff, 1987, “Where Ickes Went Rights or Reason and Rationality in Environmental Law” *Ecology Law Quarterly*, pp.265-362.

<sup>3</sup> Ibid. p. 279.

For libertarians, if a legal system recognizes the existence of rights to the environment, the right serves as a protection for individual rights holders to reject government decisions or policies that conflict or threaten the right to the environment, even though economic decisions or policies are considered efficient. Therefore, libertarianism rejects the view of the adherents of the economic approach that pollution or environmental damage is detrimental to a number of people can be accepted or tolerated as long as activities that cause pollution and damage to the environment benefit the community as a whole and the benefits exceed the costs incurred by the activity. The environmental rights to be reached by the rights theorists is not only rights for the present generation, but also the rights of future generations.<sup>1</sup>

Stone,<sup>2</sup> furthermore, proposed the need for natural living environments such as land, rivers, forests and animals to be given legal rights and explain the meaning of legal rights, namely: "the entity cannot be tolerated right until some authoritative body it is colorably inconsistent with that right ... something more is needed for legal rights, something more is needed for the authoritative body will review the actions and process of those who threaten it ... As I shall use the terms, holders of rights must be satisfied ... They are, first, that the institute of legal action at its behest; second, that determines the granting of legal relief, and the third, that is a relief that must run to the benefit of it.

From the Stone statement, it can be seen that a new right has meaning for the right holder if it fulfills several conditions. First, the law requires government officials or agencies to assess and review activities that might conflict with or violate that right. Second, rights holders can file a claim on their behalf if their rights are threatened. Third, in determining legal remedies, the court must consider the loss of that right. Fourth, the recovery must be given to the interests of the rights holders.

It is explained, furthermore, the regulation of the rights of indigenous peoples historically in the new order. In the New Order, there were no new laws governing the rights of indigenous people. The Law No. 11 of 1974 concerning Irrigation was the only law whose connection to the idea of customary community. It stipulates that the implementation of state control rights in the irrigation sector still respects the rights held by local indigenous peoples, insofar as they do not conflict with national interests (Article 3 paragraph [3]). This law is now no longer valid because it has been replaced with Law No. 7 of 2004 concerning Water Resources, which also mentions customary law communities that must be considered. Article 6 paragraph (2) of this Law states that the control of water resources by the state is carried out by the Government and / or regional government with recognizing the rights of the local customary law and rights similar to that, insofar as it does not conflict with national interests and legislation. Article 6 paragraph (3) then provides technical direction for the regulation that customary rights of indigenous peoples over water resources remain recognized as long as they are in fact still exist and have been confirmed by local regulations.<sup>3</sup>

Unlike the New Order period, in the post-New Order period since 1998, there were many laws made by the government together with the DPR that regulated the existence and rights of indigenous peoples. In the 15 years, from 1999 to 2014 alone, there have been at least sixteen laws governing the existence and rights of indigenous peoples. Besides that, the regulation of the existence and rights of indigenous peoples is also included in several special autonomy laws.<sup>4</sup> Kurnia Warman shows further that "the large number of these laws shows that the placement of customary communities in legislation, especially in law - laws relating to land and other natural resources, constitute a legislative tendency in the post-New Order era. Quantitatively, there are many laws regarding customary law communities, there are even incompatibilities if the government or prepares laws without including arrangements regarding customary law communities. On the other hand, it can be understood that the post-New Order era or the Reform Order was also an era of the rise of indigenous peoples in the

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<sup>1</sup> Ibid.p. 280.

<sup>2</sup> See Christopher D. Stone, 1972, "Should Trees Have Standing? Toward Legal Rights for Natural Objects", *Southern California Law Review*, Vol.45,1972, p.457.

<sup>3</sup> Ibid.

<sup>4</sup> See Law No. 39 of 1999 concerning Human Rights, Law No. 41 of 1999 concerning forestry, Law No. 22 of 2001 concerning Oil and Natural Gas, Law No. 20 of 2003 concerning the National Education System, Law No. 24 of 2003 concerning the Constitutional Court, Law No. 27 of 2003 concerning Geothermal Energy, Law No. 7 of 2004 concerning Water Resources, Law No. 18 of 2004 concerning Plantation, Law No. 31 of 2004 concerning Fisheries, Law No. 26 of 2007 concerning Spatial Planning, Law No. 27 of 2007 concerning Management of Coastal Areas and Small Islands, Law No. 30 of 2009 concerning Electricity, Law No. 32 of 2009 concerning Protection and Management of the Environment, Law No. 18 of 2013 concerning Prevention and Eradication of Law No.1 of 2014 concerning Forest Destruction concerning Amendments to Law No.27 of 2007 concerning Management of Coastal Areas and Small Islands, Law No. 6 of 2014 concerning Villages.

legislative process. This of course can also be said as a result of the struggle of civil society for the rights of indigenous peoples even though it is only at the legislative stage.<sup>1</sup>

### **3.1 The Rights of Customary Law Communities in Environmental Preservation in Legislation**

In reality, the indigenous people have a close relationship with their environment. Even they have basic principles related to the land where they live. With these principles, the indigenous people have a wisdom in preserving their environment. However, in many situations, especially when indigenous peoples begin to come into contact with other community members, it often creates problems in the process of environmental preservation. According to Sandra Moniaga, the rights of indigenous peoples in relation to environmental preservation in Indonesia can be stated, as followings:

“Another dimension of indigenous peoples and environmental relations is the fact that some indigenous people also work alongside to cooperation with some parties to develop environmental damage activities. In this case, there are individuals involved in activities of deforestation and large-scale mining both as employees and as individuals and or groups of people who do not have alternative sources of income. In this context, insofar as these activities are not a collective decision of the indigenous peoples concerned, they must be placed as individual activities and responsibilities of the perpetrators. While if these activities are indeed decided according to their customs, then they must be accepted as a decision of the group and no to be responsible for all indigenous peoples. In the Dayaks - Kalimantan – believe that "Land is Our Life and Breath"; in West Papua, almost all indigenous peoples believe that "Our Land, Our Life", and among indigenous peoples in America they looked "Everybody is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect that is holy and memory of my people.”<sup>2</sup>

It is further explained that land and the natural environment is the source of life and is very meaningful in all aspects of life. Some of them liken the earth as their mother. Damaging nature is like hurting their mother. Likewise polluting the earth. In the days of the Dutch East Indies, the development of legal systems, including judiciary, from (the Netherlands) Europe was clearly an abuse of the existence of customary laws throughout the region. Although there was a small group of forward-looking scientists struggling for indigenous people's customary law but their voices and influence are very limited only at the level of agrarian law. In the political system, judicial and economic systems are completely destroyed. This policy was continued by the old order regime, and was even made worse by the New Order regime which negated the existence of customary rights to land by enacting the Law No. 5/1967 concerning Forestry, the Law No. No. 11/1967 concerning Mining supported by the Law on investment. The destruction of the political system in the New Order era was carried out with the stipulation of the Law No. 5/1979 on Village Government. The material of these laws and regulations clearly means human rights violations, let alone enforcement.<sup>3</sup>

The enactment of all of laws as stipulated above is the beginning of the massive practice of natural resource exploitation by state and foreign and national private companies. With the enactment of the Basic Forestry Law, the government has set unilateral state forest areas covering 143 million hectares, or approximately 70% of the total land area of the Republic of Indonesia. This determination is carried out unilaterally and is not based on the recognition of the existence of indigenous territories that existed before this country was established. In 143 million hectare area, the forest concession rights (HPH and HPHTI) are designated as production forest areas. Until 1998, more than 400 concessions have been granted. Outside of forestry activities, the government through the Ministry of Mining provide mining concessions anywhere where mines and minerals are found. The case between Amungme and Komoro people with PT Freeport McMoran Indonesia is an example where mining concessions are granted on indigenous territories.<sup>4</sup>

The national legislation system in Indonesia has shown a good faith in providing protection from the juridical side of the rights inherent in the existence of indigenous peoples. Although in many annotations, it also shows that legal protection for the existence of indigenous peoples is still largely inferred. However, the concept of legal protection begins to be realized in the national regulatory system. Basically, the existence of law in society

<sup>1</sup> See the Law No. 21 of 2001 concerning Special Autonomy of Papua Province, the Law No. 11 of 2006 concerning the Aceh Government, the Law No. 13 of 2012 concerning Special Region of Yogyakarta.

<sup>2</sup> See Sandra Moniaga, 2002. “The Rights of Customary Law and its Problems and preservation of Environmental Law in Indonesia”, *Jurnal WACANA HAM, Media Pemajuan Hak Asasi Manusia*, No. 10/Tahun II/12 Juni 2002, Jakarta, p. 3.

<sup>3</sup> Ibid.p. 4.

<sup>4</sup> Ibid.



has aimed to create peace, order and orderliness of the people. It is expected then that the relationship and interaction between one citizen and other community members can be maintained. Therefore, Satjipto Rahardjo<sup>1</sup> emphasized that these interests must be arranged in such a way as to build a community structure in such a way that it might avoid collisions and rebellion.

In connection with those issue as discussed above, the law takes a role to give the role of protection of human interests in the form of norms or rules. This is in line with Sudikno's point of view<sup>2</sup> which emphasizes that law as a collection of rules or methods contains general and normative contents. According to Sudikno, meaning of publicity applies to everyone and is normative. It means that it determines what is allowed to be done and things that are not allowed to be done, and determine how to implement compliance with the principles and norms. The manifestation of the role of law in society is to provide protection to community members whose interests are disrupted, so that conflicts and disputes occur within the community must be resolved according to applicable law. On that basis, the actions and behavior of citizens are contrary to the rule of law, including "vigilante" behavior must be prevented by legal rules. The main objective of the law as protection of human interests is to create an orderly society. So that, the lives of individuals in society are expected to be balanced. This is in accordance with the views of Roscoe Pound who emphasizes that "the law is the realization of a balance of interests".<sup>3</sup> Roscoe Pound then proposes 3 (there) categories of interest groups, namely public, social and personal interests. Roscoe Pound<sup>4</sup> categories the public interest into:

1. The state's interests as a Legal Entity in maintaining its personality and nature.
2. The interests of the state as guardians of social interests.

Subekti<sup>5</sup> expresses the purpose of the law, which essentially serves the purpose of law to bring prosperity and happiness to its people. It can be understood that basically there is a relationship between legal subjects and legal objects which are then protected by law and cause liability. Rights and obligations arising from the legal relationship must be protected by law to create community members feel safe in carrying out their interests. In relation to government actions, there are at least three reasons why citizens should and should obtain legal protection. Therefore, based on this theory analysis as shown above, it can be seen that the legal protection of some basic rights of the indigenous people is reflected, especially in the context of the continuity of community existence. According to Kurnia Warman, the fundamental rights of the indigenous people are:<sup>6</sup>

1. The right to regulate and take care of themselves;
2. The Customary rights;
3. The Individual rights.

### **3.2 The management of Indigenous Peoples' Forests in the National Forest Regulation**

Forest as natural resources must be utilized for the greatest prosperity of the people as mandated in Article 33 of the 1945 Constitution. The legal basis for the use of forests in Indonesia rests on the meaning of article 33 paragraph 3 which is aimed at maximizing the people's prosperity. The Law No. 5/1967 concerning Basic Forestry. It intends to implement these objectives through a timber management approach, but it does not accommodate a comprehensive management pattern in forest management or ecosystem management that accommodates also social, culture, economic aspects and sustainable environmental sustainability.<sup>7</sup>

Forests are so urgent for indigenous peoples. In various places in Indonesia, customary law applies including forest clearing for other agricultural and agricultural businesses, livestock grazing, hunting of wildlife and collection of forest products, and in various forest areas managed sustainably by customary law communities as the source of his life with all his wisdom. The existence of various forest management practices by indigenous peoples is known as various like Mamar in East Nusa Tenggara, Lembo to Dayak communities in East

<sup>1</sup> Satjipto Raharjo, 2000, *Legal Science*, Penerbit PT. Citra Aditya Bakti, Bandung. p.166.

<sup>2</sup> Sudikno Mertokusumo. 2003, *Legal Acknowledge: An Introduction*, Liberty, Yogyakarta, p..39.

<sup>3</sup> Bernard L. Tanya, et.al., 2007, *Legal Theory: Strategy to Create Order to Human Beings Life in Space and Generation*, CV.Kita, Surabaya, p.180.

<sup>4</sup> Ibid., pp.181-183.

<sup>5</sup> Ibid.

<sup>6</sup> Kurnia Warman, op.cit., pp. 96-97.

<sup>7</sup> See Martua Sirait, Chip Fay dan A. Kusworo, 2000. *How the Rights of the Indigenous People in Natural Resource Management is Governed?*, Southeast Asia Policy Research Working Paper, No. 24, ICRAF SE-Asia Southeast Asian Regional Research Programme, Bogor, p. 2.

Kalimantan, Tembawang to Dayak people in West Kalimantan, Repong to Peminggir Community in Lampung, Tombak to Batak people in North Tapanuli. The practice shows that indigenous peoples have and are able to manage natural resources including their forests for generations. These patterns are known to have a system that is closely related to the management of natural forests, plantations, gardens and agricultural businesses so that their forms are very diverse, dynamic, integrated which produces various benefits for society and the environment, both economically, socio-cultural, religious, and ecological. The Law No. 5 of 1960 concerning The Basic Agrarian Law has tried to realize the recognition of customary law. It means that customary law is placed in the national legal system. But in practice, the application and regulation of its derivatives is far from reality. Since the capital-intensive private sector and BUMN in the 1970s were given a "major" opportunity in forest utilization in the form of HPH, HPHH, HTI, the communities around and within the forest, especially indigenous and tribal peoples were disadvantaged in forest use because customary forests were considered national "property". So that there is excessive forest exploitation, illegal logging, and conflicts with customary law communities that are prolonged over the ownership and ownership of indigenous forest benefits in indigenous territories.

Martua Sirait elaborates further that the protracted conflict over land and forest resources creates adverse socio-political and economic effects. It needs to be avoided or resolved through the regulation of the recognition of the rights of indigenous peoples, especially regarding the territories of indigenous peoples in state forest areas. The Decree of the Minister of Forestry and Plantation No. 677 / Kpts-II / 1998 concerning Community Forestry, the Government Regulation No. 6 of 1998 concerning Production of Production Forests as well as the Law No. 5 of 1967 on Basic Forestry are examples of policies that clearly regulate and limit access of local communities in utilization of forest areas, especially the rights of customary law communities. The existence of MPR Decree Number XVII of 1998 concerning Human Rights show that the right to promote and protect the existence of customary law communities including communal land has been accommodated (articles 30,31 and 42) which can later be used as a reference in resolving conflicts over the legal community custom of forest area so that forest sustainability can be achieved<sup>3</sup>. Moreover, with the issuance of the Law No. 22 of 1999 on Local Government, the Agrarian Minister Regulation / Head of BPN No. 5 of 1999 concerning Guidelines for Resolving Customary Rights Issues of Customary Law Communities as well as the issuance of the Law No. 41 of 1999 on Forestry. It becomes clear that recognition the rights of customary law communities can be immediately carried out in their respective regions and it is hoped that not only recognition will provide legal certainty but also be followed by the restoration of their rights.<sup>1</sup>

This reflexive legal model has the following characteristics. The community rights are formulated ambiguity. It means that on the one hand its existence is acknowledged but on the other hand it is absolutely limited and even explicitly ignored in the legislation. The criminological stigmas are included to displace existence community rights to natural resources. With the title "forest encroachers", "forest product looters", "wild cultivators", "shifting cultivators", "miners without permission", wild grazers ", " forest destroyers ", and so on. The prominence of criminal sanctions for people is done for people who violate legal norms, but do not apply to government officials who do not carry out their obligations. It also prioritizes the appearance of legal officers with a security approach.

Of the many conflicts is involving indigenous peoples, especially in the plantation sector, mining, agriculture, forestry, and infrastructure development. The customary communities are victims of various activities. Customary law communities who are victims of agrarian conflicts and the use of natural resources by the state and the private sector on the one hand and indigenous peoples are on the other. Countries with the right to control the earth, water and space as well as the natural resources contained therein have the power to determine their use and the private sector as capital owners can collaborate in using them by ignoring the people, especially indigenous people.

The pattern of the management conducted by the customary law community generally is based on the original knowledge that exists and grows in the community with all norms and sanctions. This pattern develops very dynamically according to the development of the times. This dynamic nature in general does not explicitly define the management of natural resources in the form of forest, garden or farm business so that sufficient understanding is needed by the local government about these patterns.<sup>2</sup> The existence of forms of recognition in the national regulatory system implies that indigenous peoples' wisdom with a unique system of social or social

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<sup>1</sup> Ibid. p.3.

<sup>2</sup> Ibid.p.46.

systems provides protection so as to enable more thorough implementation local indigenous peoples' wisdom in conducting environmental management, especially in the preservation of customary forests.

#### 4. Conclusion

It can be concluded that the right of indigenous people in forest governance has been transformed into some Indonesia laws, such as Law No. 39 of 1999 concerning Human Rights, Law No. 41 of 1999 concerning forestry, Law No. 22 of 2001 concerning Oil and Natural Gas, Law No. 20 of 2003 concerning the National Education System, Law No. 24 of 2003 concerning the Constitutional Court, Law No. 27 of 2003 concerning Geothermal Energy, Law No. 7 of 2004 concerning Water Resources, Law No. 18 of 2004 concerning Plantation, Law No. 31 of 2004 concerning Fisheries, Law No. 26 of 2007 concerning Spatial Planning, Law No. 27 of 2007 concerning Management of Coastal Areas and Small Islands, Law No. 30 of 2009 concerning Electricity, Law No. 32 of 2009 concerning Protection and Management of the Environment, Law No. 18 of 2013 concerning Prevention and Eradication of Law No.1 of 2014 concerning Forest Destruction concerning Amendments to Law No.27 of 2007 concerning Management of Coastal Areas and Small Islands, Law No. 6 of 2014 concerning Villages.

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