

Legal Protection on Indigenous Peoples in the Utilization of Coastal Area and Small Islands

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Abstract

The main purpose of this scientific paper is to know in which extent the State of Indonesia as a sovereign country, able to provide legal protection against indigenous peoples in coastal areas and small islands in the utilization of its territory. During this time, the State's concern in establishing maritime is still pulling out, due to renewal and development in various sectors still tend to be centralized, centered on the land and urban areas. This makes the coastal areas and small islands vulnerable to various obstacles and challenges, including in accommodating the interests of indigenous peoples who are acknowledged to exist in the Basic Agrarian Law. Meanwhile, the existing legislation concerning the use of coastal areas and small islands is more oriented to the exploitation regardless of the sustainability of natural resources. In this case, the existence of indigenous peoples of coastal areas and small island islands play an important role in the management of marine areas throughout Indonesia. The feature of the traditional lives and the behavioral patterns of indigenous peoples that respect nature and the sea which can help its management to be better, maintain ecological balance and sustainable principles. In fact, there are still many indigenous peoples in the coastal areas and small islands that form a legal alliance, far from accessibility. The establishment of various regulations governing the utilization and management of coastal areas and small islands, as well as the limited reference and information of indigenous peoples on the subject, is feared to cause problems and irregularities in the implementation. Therefore, in this matter it is necessary to have further regulation as supervision and control measures. The regulation is expected to engage indigenous peoples in a participatory manner in order to be able to produce inclusive legal products, hence the birth of regulation is no longer tend to overlap or be understood as a paradoxical rule.

Keywords: coastal area, small islands, indigenous peoples, communal right on sea, basic agrarian law

I. Introduction

The establishment of the Unitary State of the Republic of Indonesia confirmed by the establishment of the Constitution of 1945, in fact constitutionally, the existence of indigenous peoples is still given place and legally recognized, as set forth in article 18B (2) that “the state recognizes and respects the autonomous community and their traditional rights as long as they are alive and in accordance with the development of society and the principle of the unitary state of the Republic of Indonesia.”

It can be said that this is a consequence of the recognition of customary law as a living law which has been in existence for a long time and continues until now. Therefore, placing state authority in a policy regulator without involving the community in a participative manner is a disregard for the rights of indigenous peoples.

In the era of globalization, especially the advancement of communication and transportation technology, is demanded various countries to examine the problems that surfaced intensively. Information that goes into the State not only through internal interaction, but cannot be prevented and will continue to be interaction, interconnection and interdependence (interface) between nations. Such interfaces will affect the various stages of knowledge and awareness, both individual and collective against the various problems (politic, economy, social, culture-military, science and technology) and in subsequent developments will affect the assessment and behavior (behavior and attitude) of people or communities concerned.¹

In line with this matter, the presence of various policies contained in the legislation products are often considered tendentious, even overlapping each other that has impact on the bias of certainty and guarantee on legal protection of the rights of indigenous peoples, not least the indigenous peoples who are in coastal areas and outermost small islands.

The common trigger symptom of the problem is when the development and conservation schemes are imposed on indigenous peoples without consultation, participation, and negotiation without respect on their rights. Moreover, if the basic policy is supported by a paradigm that often generalizes the existence of indigenous peoples as an underdeveloped, naive, and poor society, therefore it requires guidance by not examining the characteristics of local indigenous peoples, as if not aware that indigenous peoples are also endowed with rights and freedoms as mankind. Hence the bitter reality is that when people get their forests felled, their lands convert, their valleys are flooded, the sea is polluted, their livelihoods are gone, their areas are occupied, and so on.

¹ Bagir Manan, *Kedaulatan Rakyat, Hak Asasi Manusia dan Negara Hukum*, Jakarta: Radar Jaya, 1996. p. 113

Constitutionally the community of indigenous peoples is recognized its existence including *wilayah pertuanan (ulayat)* both at sea and land. Thus, the need for a balance in the control of coastal areas and waters of small islands by indigenous peoples is associated with the government's policy on boundaries of coastal and marine management authority. Justice in the perspective of territorial control is essentially a balance between stakeholders both state interests and private interests without disregard the interests of indigenous peoples as a priority that must be protected by the State.

Customary Law and National Development Issues

Indonesia currently occupies the fourth position of the world's largest population after China, India and America, as many as +254 million people. Indonesia is an archipelagic country divided into 34 provinces, consisting of more than 13,000 islands, making it the largest archipelago and widest in the world. With over 300 ethnic groups along with their respective cultural identities and different regional and religious languages, different tribes and races make Indonesia very diverse but still one.

Indigenous peoples are a representation of heterogeneous people, therein lies the power that contributes to maintaining the integrity and sovereignty of a determination that remains united and guarding the territory of the Unitary State of the Republic of Indonesia. But it cannot be denied, that people have a heart that is very sensitive to things related to the "sense of justice". Therefore, by the State should duly perform its functions in improving the welfare and prosperity of the people, as well as uphold justice through the agencies of justice.

Law is basically a cultural activity that has a function as a tool to maintain social order or as a means of social control in society. The existence of customary law is very important in a pluralistic society. The pioneer of production process of customary law begins with a personal habit. The next development occurs because of the interaction between human beings who gave birth to imitation so that it develops into a habit. From there, then born into custom therefore it produces law. This is what Hilman Hadikusuma¹ refers to as the development of customary law which begins with man through his thoughts, wills and behaviors, which then becomes a habit. From habit developed into custom and then become customary law or law of the people. This is the path that shows the process of shifted terminology from custom (*adatrecht*) as customary laws as a process of order that is accepted as a rule.

According to Soerjono Soekanto, if a habit is accepted as a rule, then the habit has a binding power to be a behavior order. Adat Kontemporer wrote the existence of the requirement to make the habit as law that is as follows:²

1. The community believes that there is a necessity to be implemented (*beseef van behoren*).
2. Recognition or belief that the habit is binding (obligation to be obeyed) or known by the principle of *opinio necessitas*.
3. The existence of inauguration which can be recognition and (*erkenning*) and/or strengthening (*bekrachtiging*) from authoritative decisions (or public opinion, jurisprudence, and doctrine).

Olson Jr., one of the development experts in the 1960s once reminded us to be wary of changes that were too rapid because he thought it would give birth to instability. It is therefore very likely to emerge an anomaly. The consequences that occur very rapidly in society, the various symptoms we can understand, the mental traversing, including the use of violence for certain purposes and intentions are often chosen and sometimes considered morally legitimate by the people. In a society with liquid value and composes from groups of antagonists, information is also easily manipulated. Therefore, a mere rumor can be considered the truth that becoming the base of an attitude and action.³

The Indonesian society have been and are encountering many changes and advancements of lifestyles, from agrarian to industrial society, from rural to urban society, from traditional society to advanced and modern society. Some of members suffer from the disorientation of values that ultimately triggers the tension within them. In many cases, when society fails to compromise itself with rapidly changing environments, the reactions are generally destructive and aggressive. Not only that, an increasingly competitive life sparks competition in social life.

Regardless of the globalization of the law, it is difficult to avoid, but the nation state will not simply surrender their sovereign function, and in a global system will not be free-controlled from the nation state because globalization is not a toll road without mechanisms. The mechanism of how the public relations traffic of a nation state is built on an agreement or contract, convention, so that the difference that was originally a limitation is a national law, then the restriction is an agreement between nation states.⁴

¹ Hilman Hadikusuma, *Hukum Perjanjian Adat*. Bandung: Citra Aditya Bakti, 2003, p. 2

² Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer*. Bandung: Alumni, 2002, p. 12

³ Bagir Manan, *op. cit.*, p. 291

⁴ Satjipto Rahardjo, *Hukum Dalam Perspektif Sejarah dan Perubahan Sosial*, dalam *Pembangunan Hukum dalam Perspektif Politik Hukum nasional*, Artdjo Alkostar, et.al. (Ed.), Jakarta: Rajawali, 1986, p. 27

Conceptions of Tenure Communal Right of Indigenous Peoples in Coastal Areas and Small Islands

Two basic provisions of communal right are; First, the relationship between individual rights and community rights is always determined by the commitment and obligation therein. Here the applicable provision is that the more achievement and capital invested by a person of the land, then the higher public appreciation on his individual rights; and on the contrary, the more the service that is granted in the cultivation of the land, the less likely for the public to appreciate the individual's rights to the land and the higher the possibility of the land being relocated to other members of the community. Second, the transfer of land rights, whether to foreigners or to internal members of the community, is always under the strict control of the community. In many cases, outsiders may have limited land rights based solely on the payment of recognitive money and permission from members. While members of the community themselves are usually exempt from paying the admission fee but still need permission from other community members.¹

Similar to the existence of communal right on land, it appears that communal right on the sea can be regarded as custom traditions that have been held for generations and are respected by indigenous peoples.

Especially with regard to customary rights of coastal and ocean, it has been suggested that there are several elements that indicate the existence of sea of *wilayah pertuanan* of coastal community, namely:²

1. The existence of certain areas in the sea where the community took the materials for life needs.
2. The ability to reach these places
3. Conducted from generation to generation.
4. Performed periodically
5. Always be maintained against other parties entering the territory without the permission of the indigenous peoples

The real tenure of marine and coastal areas by autonomous community relating to their connection or relationships to meet the needs on the areas is something that is hereditary from the ancestors. In the region, it is basically de jure manner that there is authority from autonomous community. The authority intended is related to the management and utilization of natural resources according to the principles of customary law with their own characteristic.

In the context of communal right on sea or waters, it means that the waters which are the marine territory of a specific communal right are entirely under the authority of the autonomous community leadership institution. In Indonesia, in addition to communal right, other types of customary rights such as the tradition of controlling parts of coastal areas for traditional fishing activities in South Sulawesi are known as "*Bagang*".

II. Research Method

This research type is descriptive-analytic. Data primer will be extracted directly from phenomenon, situation and condition of society or legal alliance, attitudes and behavior of its citizens, information of the informant and respondent through observation technique, interview. The data is information about the culture or law culture of society which is also a feedback for the legal system (according to the social science perspective) with the form input-process-output. Secondary data³ is obtained from literature review and documentary study that comes from textbooks, journals, research reports and other written documents-including legal products related to research problems. In addition to be used as a theoretical foundation, documents can be used as supporting data to complement, even reinforce the primary data in data analysis of a doctrinal legal research to make conclusions and recommendations.

Objects used as sampling research, namely indigenous peoples/traditional community residing in District Liukang Tangaya, among others: 1) Sub-District Sapuka; including Sapuka Island, Tinggalungan Island, Kembang Lemari Island. 2) Tumpaang Village; including Tumpaang Island, Aloang Island, Sapinggang Island, and Kawassang Island.

III. Results and Discussion

The Existence of Indigenous Peoples and the Control of Their Communal Right in Coastal Areas and Small Islands

A number of laws have included indigenous peoples (or by the term autonomous community) as a form of recognition of their existence and rights. Among them, Article 18 B of the Second Amendment to the 1945 Constitution of the Republic of Indonesia has given recognition to indigenous peoples. Similarly, Law of the Republic of Indonesia Number 5 Year 1960 on the Basic Agrarian Law, Law of the Republic of Indonesia

¹ Ratno Lukito, Tradisi Hukum Indonesia, Jakarta: IMR Pers, 2013. p. 25

² Titahelu, R.Z., Masyarakat Adat dan Pembangunan; Menuju Keutuhan Makna Pembangunan Manusia dan Masyarakat Indonesia, The 32nd Pattimura University Dies Natalis Oration, Ambon, May 18, 1996. p. 164

³ Salim HS. and Erlies Septiana Nurbani, Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi, Jakarta: Rajawali Pers, 2013. See also Abd. Asis, et.al., Strategic policy of the Government of Indonesia In the Field of Maritime and Fisheries Affairs, International Journal of Scientific and Research Publications, 2016, 6(12): 238-243

Number 23 Year 2014 on Regional Government; Law of the Republic of Indonesia Number 41 Year 1999 on Forestry, Law Number 39 Year 1999 on Human Rights.

Autonomous community are community units which have equipment's capable to stand alone that have a unity of law, a unity of authority and an environmental unity based on the communal right on land and water for all its members, its family law form (patrilineal, matrilineal, or bilateral) affecting its governance system primarily based on agriculture, livestock, fishery and harvesting of forest products and water products, with little addition by hunting wild animals, mining and handicrafts.¹

Furthermore, Soepomo describes the customary legal alliance that the legal alliance in Indonesia can be divided into three namely; (1) based on a genetic (genealogical) relationship; (2) based on the territorial; and (3) an arrangement based on the two foundations (genealogical and territorial).

The above definition represents the existence of indigenous peoples with a communal living order which has the character of togetherness, in which all its members have the same rights and obligations, which are capable of giving birth to the values of *gotong royong* and the help amongst its members.

Likewise, with indigenous peoples in the archipelagic territories, social arrangement on the unity of autonomous community, derived from traditions born from hereditary experiences, and then spontaneously praised and obeyed as they have assured the existence of a harmonious social order for the community concerned. From the practice that is rooted in customary law, some are still original, the results of revitalization, and some are begun to fade. However, a deeper study of internal and external factors, which may influence the shifting pattern of indigenous autonomous community concerned.

One of the customary law practices in coastal areas is *awig awig* in North Lombok. By seeing at the factors causing coastal conflicts that lead to the destruction of fish resources, the community of Lombok Utara feels compelled to realize and make improvements to the resource management system. Therefore, *awig-awig* is written as the main rule in fisheries management to create sustainable coastal development. The *awig-awig* power that governs the joint management system is a collective consciousness of the people living around the Coastal Coast of North Lombok.²

The practice is similar to the implementation of sanctions that have been applied in the district of Liukang Tangaya. However, until today this sanction has not reached the progress into a written custom sanction such as *awig-awig*. In the sub district of Liukang Tangaya, precisely in Kembang Lemari Island until now has imposed customary sanctions, in the form of fine to people whom perform actions that threaten the security and ecological sustainability in the utilization of sea products.

The Existence of Coastal Indigenous Peoples of Pangkep Island in Liukang Tangaya Sub-District

The prehistoric study reveals that this State was born from migration by sea for thousands of years. After migration, the tribes settled and built their civilization. In the wandering of our ancestors colonized the uninhabited archipelago, as they began to build an inter-island network that underlying the primitive maritime economy.³ The study was strengthened by observing the existence of Indigenous peoples in coastal areas and small islands, including those in Liukang Tangaya Sub-district, Pangkep Regency.

As an effort to maintain the sustainability of the maritime economy mode, people from various tribes expand to small islands in Liukang Tangaya Sub-district, interact, socialize and together build their civilization. This fact can be proved by the fact that small islands in Liukang Tangaya Sub-district, in one island are inhabited by various ethnic groups namely Bugis, Makassar, Mandar, and Bajo.

Basically, the existence of community in some small islands in Liukang Tangaya Sub-district is formed and built through connection or relationships that they create to meet their needs on the region. Generally, what they built is something that is hereditary from the preceding that reflects the pattern the life of the traditional society which they consider a propriety and dignity in maintaining the continuity of human life and natural resources wisely. The knowledge of its local community is accumulated throughout their life history has a very big role in shaping an ordered and sustainable life. This social phenomenon is aligned by Mitche (1997) which stipulates that the concept of a local knowledge system is rooted in local and traditional knowledge and management systems.

If it is seen from the historical aspect, the formation of customary law community in Liukang Tangaya Sub-district was originally formed based on the territorial order which is driven by the characteristic similarity factor that is, as fisherman society or society whose livelihood depends on the result of sea product utilization. Gradually in maintaining their existence and sustainability in the region, there started to be a link between them hence to affect the genealogic factor of indigenous peoples. Therefore, when it speaks today, it can be said that the existence of the legal alliance is formed and awakened based on genealogic territorial.

¹ Hazairin in Toylib Setiadi, *Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan)*, Bandung: Alfa Beta, 2009, p. 77

² Ahmad Solihin and Arif Satria, *Communal Right di Era Otonomi Daerah Sebagai Solusi Pengelolaan Perikanan Berkelanjutan*. *Jurnal Transdisiplin Sosiologi, Komunikasi, dan Ekologi Manusia*, 2017, 1(1): 74.

³ Ade Prasetya, *Ekonomi Maritim Indonesia*, Jakarta: Diandra Kreatif, 2016, p. 1.

Basically, Customary Law in Indonesia has distinctive properties and patterns that are different from other laws. It was first proposed by F.D Holleman in his book entitled "*De Commune Trek in Het Indonesische Rechtsleven*". Holleman constructed 4 (four) common traits of indigenous peoples namely the Religious Magic, Communal, Concrete, and Cash.¹

Referring to the opinion above, based on the results of observation and identification of community characteristics in coastal areas and small islands in Liukang Tangaya Sub-district, which became their distinctive feature in answering their existence as indigenous peoples, among others:

Being Religious Magical

The Nature of Religious Magic is defined as a mindset based on the religiosity of society, namely the belief of society about the existence of something sacred. Before the people came into contact with the religious law, indigenous peoples manifested religiosity with a prelogical mindset, animistic attributed to an object believed to contain the magic matter. This is not much different from the indigenous peoples living in Liukang Tangaya who have known the Religious Law at this time. The people realize this religiosity in the form of trust in God (Allah SWT). Society believes that every deed, regardless of its form, will always get reward and punishment from God according to the degree of its ability. The religious nature of the autonomous community is also seen for example in ceremonial activities such as the implementation of traditional ceremonies conducted every year as a form of gratitude to God for the fish catch.

Communal/Group Living

One of the uniqueness of the small islands located in Liukang Tangaya is a member of the community consists of a wide range of tribes. They live in groups in accordance with the tribe in each village. Therefore, it can be said small islands is a miniature diversity of the archipelago, especially the miniature diversity of tribes, language and culture of Sulawesi. Each tribe group has different traditional tools or methods in the fishing tradition. They manage the marine potential in the traditional way, and derive from the habits of its predecessors in a group seen as wisdom. Although they are based on tribal classification, but in their social realities the management of their communal right is done in a spirit of mutual cooperation and togetherness that respects the philosophy of life maintaining the balance of human and natural relationship.

Concrete

Concrete is defined as a very clear feature. That every legal relationship that occurs in society is not done secretly. In this case, the Indigenous peoples of the coast and small islands of the Liukang Tangaya, although comprised of diverse ethnic groups, but the applicable law is clear and aggregate in order to accommodate the order of the existing public order on the island. Including in the economic activities of the community, this concrete nature is applied in fisheries management activities in utilizing sea products, which in the concept of protection is known as Sea Customary Rights.

Cash

The nature of this cash means as a participation, especially in terms of achievement fulfillment. Each achievement fulfillment is always accompanied by the given contra-achievement immediately. In this case, the nature of coastal communities and small islands in Liukang Tangaya sub-district can be seen from lease transactions, as well as the provision of customary sanction for anyone who violates customary rules in the utilization and management of coastal areas and communal right on the sea.

Tenure of Communal Right of Coastal Territory and Small Islands Indigenous People in Liukang Tangaya

Basically, the Basic Agrarian Law does not provide criteria on the existence of communal right. However, with reference to the fundamental notions mentioned above, it can be said that the defining criteria of whether or not communal right should be seen in three things:

1. The existence of autonomous community that fulfill certain characteristics as subjects of communal right.
2. The existence of land/territory with certain limits, as lebensraum which is the object of communal right.
3. The existence of the authority of autonomous community to perform certain actions.

With the fulfillment of these three requirements cumulatively, it is quite objective as the criterion of whether or not communal right still exist. However, it cannot be denied that until now it is still a debate on the fulfillment of "cumulative" requirements in the determination of a lebensraum of autonomous community. Some have the opinion that although there is a legal community and there is a land or territory, but if the legal community has no authority to perform these three actions, then communal right can be said no longer exists.

Meanwhile, the result of research conducted by Faculty of Law, Gadjah Mada University in collaboration with DEPDAGRI (Department of Home Affairs of the Republic of Indonesia) in 1975-1979 obtained the

¹ A. Suriyaman Mustari Pide and Sri Susyanti, *Dasar-Dasar Hukum Adat*, Jakarta: Pelita Pusataka, 2008, p. 35

conclusion, as quoted by Maria SW. Sumardjono, among others:¹

1. Autonomous community in the *murni-purwa* meaning as defined by the experts, in the last decades of this century have been scarce. Thus, communal right in the full sense is rare;
2. Communal right as an attribute of customary law generally survives in a society with free psychological-social atmosphere, in the sense of being less restrained by feudalism or colonial politics, for example: the situation in Aceh compared to the situation in North Sumatra, Minangkabau territory compared to the area of Swapraja Village in Java;
3. Although there is no formal autonomous community, yet every government's effort to utilize the people's land first so that it does not cause unrest for the local people. Because the people in general still feel they have the right even though it is not known clearly what its name and how its embodiment.

Fishermen communities inhabiting small islands in Liukang Tangaya Sub-District are one of the areas that have the communal right on sea in safeguarding and exploiting marine resources. Sea tenure is a set of rules or management practices of marine areas and resources contained in it, concerning who has the right to a territory, the type of resources to be caught and the technique of exploiting resources that is permitted.

Referring to the Approach of Fulfillment of Elements of Communal Right on Sea, in Table 1 will illustrate on how the Small Islands in Liukang Tangaya Sub-District in the utilization and its management of communal right on sea.

Table1.

Elements of Indigenous Peoples' Communal right on Sea in Small Islands in Liukang Tangaya Sub-District

No.	Elements of the Elements of the Communal right on Sea	Social Reality	Description
1.	There is a certain area of the sea where the community takes its living necessities;	There are small islands inhabited by groups and forming a legal alliance, taking advantage of the resources (fisheries) around its territory.	Fulfilled
2.	There is ability to reach such places;	Indigenous peoples in the small islands of Liukang Tangaya sub-district comprised of from various tribes. The reality proves that the ability to reach the place form a legal alliance with maritime feature.	Fulfilled
3.	Performed from generation to generation;	Method of fishing based on local wisdom (traditionally) is a habit that is practiced for generations.	Fulfilled
4.	Performed periodically;	The management/ catching of fish cultivation is practiced periodically and communally.	Fulfilled
5.	It is always maintained against other parties entering the territory without permission from indigenous peoples.	Community that inhabits small islands in the Liukang Tangaya Sub-District, always maintains their respective marine management areas from other parties outside the community who have the right to manage the area.	Fulfilled

Source: Researchers' Analysis, 2017

Based on the results of in depth analysis, if compared to the fulfillment of the elements mentioned above, the indigenous people of Liukang Tangaya have fulfilled the five elements intended. Therefore, in this case, there is necessity to strengthen and recognize of the existence of indigenous peoples in the region in providing protection and legal certainty. This recognition is certainly inseparable from the existential condition of indigenous peoples, insofar as in reality it still exists as stipulated in the Law.

Basically, the management of Communal right of indigenous peoples in Liukang Tangaya Sub-District can be said to be well patterned. Unlike the utilization of communal right on forests for indigenous peoples in land, the tendency of conflict is when local community is confronted by policy and development interest and investor which are systematically able to shift the existence of communal right. Nevertheless, the issue of destructive fishing gear also becomes an obstacle even almost to trigger of conflict by the island's indigenous peoples. Sources of information stipulate that there are certain islands where fishing community is contaminated to catch fish with methods that possibly threaten marine ecosystems. The method used makes almost all of the Communal right on sea to be damaged, so inevitably they have to find and catch fish in the communal right on sea territory of neighboring islands.

The use of destructive fishing gear is caused by the lack of public awareness of the importance of coral reef management and rehabilitation, in addition to economic demands which is resulted community to take a 'shortcut' in exploiting marine resources.

¹ Maria SW. Sumardjono in Ilyas Ismail, Kedudukan dan Pengakuan Communal right dalam Sistem Hukum Agraria Nasional, Jurnal Kanun, No. 50 April 2010 Edition, p. 58. Accessed at <http://www.jurnal.unsyiah.ac.id/kanun/article/viewFile/6287/5178>

Regulation of Management and Utilization of Coastal Areas and Small Islands in Accommodating the Interests of Indigenous Peoples

The regulation of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides recognition of the existence of autonomous community with them entitle rights therefore it can be interpreted that the State also recognizes the diversity of the legal system within the State, and guarantees the applicability of various existing legal systems, is the customary law system. Unfortunately, various laws and regulations in Indonesia tend to recognize and respect the rights of indigenous peoples on land, but the problem of communal right/*hak pertuanan* on sea has not been a common concern.

The rights of indigenous peoples are related to *hak pertuanan* on sea in their journeys can be found in Law of the Republic of Indonesia Number 27 Year 2007 on the Management of Coastal Areas and Small Islands, State Gazette of the Republic of Indonesia Year 2007 Number 84, Addition to the State Gazette of the Republic of Indonesia Number 4739.

Law of the Republic of Indonesia Number 27 Year 2007 is considered not to provide adequate state authority and responsibility for coastal waters and small island management. As its consequences, several articles need to be refined in accordance with the development and legal necessity in the community. In its embodiment, the Concession Rights of Coastal Waters (HP3) is contradictory to Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia in relation to the phrase “to use for the greatest prosperity of the people”.

Subsequently, Law of the Republic of Indonesia Number 1 Year 2014 was born concerning the Amendment of Law of the Republic of Indonesia Number 27 Year 2007 on the Management of Coastal Areas and Small Islands. There were six rationales for the establishment of Law of the Republic of Indonesia Number 1 Year 2014, such as:

1. Vulnerability of coastal areas and small islands will be damaged by natural disasters as well as resource utilization activities.
2. Accumulation of exploitation activities of coastal resources and small islands that do not concern to the sustainability of resources.
3. The absence of legislation that is oriented towards the sustainability of coastal resources and small islands.
4. Lack of awareness of the strategic value of the management of coastal areas and small islands in a sustainable, integrated, and community-based manner.
5. Lack of respect for the rights of indigenous peoples/local communities in the management of coastal resources and small islands.
6. Limited space for community participation that shows that it has not yet integrating resource management system with development activities.

Thus, in the revision of the Law on Management of Coastal Areas and Small Islands, there are several important points namely:

1. The existence of community participation in the action plan for management of coastal areas and small islands (Article 14).
2. Coastal water concession rights (HP3) is converted into a licensing mechanism (Article 16).
3. HP3 has been unable to switch, transferred, and used as a debt guarantee (Article 20).
4. There is reinforcement on the rights of indigenous peoples in coastal areas without reducing state authority (Articles 21 and 22).
5. There is an opportunity for foreign investors who want to invest their capital by maintaining national interest with strict requirements (Article 26A).
6. Any additional penalties in the form of material or duration of imprisonment for any person who does not have the permit as referred in Article 16.

However, the legal reconstruction effort through regulation in such law has not implicitly provided the regulation of customary rights existence of coastal community and outermost islands. Instead, it emphasizes the element of considering indigenous peoples in the management of coastal areas and small islands. Moreover, the existing regulation still gives a gap of vertical conflict between indigenous peoples and the government. And it can have an impact on shifting the existence of indigenous peoples along with their hereditary rights, because of the opening of access for foreign investors who want to invest their capital.

Furthermore, Law of the Republic of Indonesia Number 32 Year 2014 on Marine, State Gazette of the Republic of Indonesia Year 2014 Number 294, Additional to the State Gazette of the Republic of Indonesia Number 5603, which in reality also has not been able to provide an implicit legal basis for the existence of autonomous community in the Coastal and Small Island in managing its Communal right.

The scope of Marine Law of the Republic of Indonesia Year 2014 includes regulation of marine areas, marine development, marine management, marine spatial management and marine environment protection, defense, security of law enforcement and marine safety as well as management order and institutional.

Recognition on indigenous peoples and customary law on marine resources management is closely linked to marine territorial arrangements, marine development and management and marine spatial management and marine environmental protection. In the Maritime Law, autonomous community participate in marine development both in policy making, marine management, marine development, and providing input in evaluation and supervision.¹

In relation to decentralization, the state constitution should determine the delegation of authority over resource management and how far regional government has the power to create and enforce law and regional regulation that accommodate autonomous community.

The authority on coastal area management and small islands is also regulated in Article 19 of Village Law *jo* Article 33 of Government Regulation of the Republic of Indonesia Number 43 Year 2014. Village as a government organization that is politically has certain authority to manage and organize its citizen or community (self-governing community). With such position, a village has a very important role in supporting the success of national government widely. Village becomes the front guard in reaching the success of all affairs and programs of the Government. In order to carry out its role in managing and organizing its community, the village under the provisions of Article 19 of Village Law *jo* Article 33 Government Regulation of the Republic of Indonesia Number 43 Year 2014, granted the authority which includes:²

1. authority based on the right of origin;
2. local authority at village scale;
3. authority assigned by the Government, Provincial Government, or Regency/City Government; and
4. other authorities assigned by the Government, Prvincial Government, or Regency/City Government in accordance with the provisions of legislation.

Various changes and regulation arrangements in relation to the recognition and protection of autonomous community in the Coastal Zone and Small Islands are in fact also unable to accommodate the interests of marine management based on communal right on sea of indigenous peoples. The impact of this explicit regulation will cause detriment of indigenous peoples who have had certain rights in the management of natural resources in the sea hereditarily. The absence of a legal basis for regulating the authority of indigenous peoples on these small islands is also part of the restriction on the rights and powers of indigenous peoples themselves.

On the other hand, an inevitable trend is that community living dependently on the sea that practice management and utilization by custom tend to demand the ownership of an exclusively claimed marine area called communal right on sea. Meanwhile, there are unresolved concerns to accommodate the interests of fellow fishermen, or even other Indonesian children, who have a sailor ship tradition, which is more demanding on the principle of open sea (open access). Therefore, the study of communal right on sea needs to be done thoroughly and comprehensively in Indonesia so that there can be a deliberation that produces conventions at the national level that regulate everything on sailor ship and marine utilization in Indonesia.

The Role of Customary Law on the Management and Utilization of Coastal Areas and Small Islands Based on Local Wisdom.

If observed, coastal communities have lived very close to the resources that give them benefits. They consider the sea as an important and integrated part of their life pattern. Therefore, they do not only utilize these resources, but they also maintain and manage these marine resources. Therefore, basically they have a principle of management based on local wisdom.

The juridical recognition of the existence of autonomous community and their local wisdom can be seen in Article 1 paragraph 30 of Law he Republic of Indonesia Number 32 Year 2009 states that the local wisdom is the glorious values applicable in society's living order to protect and sustainably manage the environment eternally.

Law of the Republic of Indonesia Number 31 Year 2004 on Fishery article 6 paragraph 2 states that the management of fishery management is for the benefit of fishery and fish cultivation should consider the participation of the community. Similarly, Law of the Republic of Indonesia Number 27 Year 2007 Concerning the Management of Coastal Zones and Small Islands in Article 61 Paragraphs (1) and (2), that the Government recognizes, respects and protects the rights of indigenous peoples, traditional communities and local coastal areas and small islands that have been utilized hereditarily and used as reference in sustainable management of coastal areas and small islands.

In general, issues related to the Management of Coastal Areas and Small Islands generally show almost the same phenomenon. Decline of environmental quality of marine waters and also river is a problem not only caused by activity in waters but more caused by activity in the mainland. Therefore, the settlement of

¹ Tim Pengkajian Hukum Adat Tentang Kontribusi Hukum Adat dalam Pengembangan Hukum Laut di Indonesia, Kontribusi Hukum Adat dalam Mendukung Perkembangan Hukum Laut di Indonesia. Accessed at www.bphn.go.id/data/documents/kontribusi_hukum_adat_dlm_pengembangan_hkm_laut_di_indonesia.pdf

² Moh. Saleh, Kewenangan Pemerintahan Desa Dalam Pengelolaan Wilayah Pesisir dan Pulau-Pulau Kecil Journal the Spirit of Law, 2015, 1(1): 18.

environmental degradation problems needs to be done in an integrated manner by all relevant sectors.¹

Management and utilization of coastal areas and small islands based on indigenous peoples, can be seen from the practice of management of communal rights on sea as a tradition of fishermen community that has been going on for generations and respected by the indigenous peoples concerned. In making catch or fish cultivation, these communities are still referring to the rules of custom which has grown and become a living law in the territory of its alliance.

The concept of living law in the soul of the society (*volksgeist*) from Friedrich Carl von Savigny is affirmed by the initiator of sociology of law of Eugene Ehrlich which mentions the fact of law and living law of people. Living law theory of Eugene Ehrlich states that in every society there are living law rules. All law is regarded as a social law, in the sense that all legal relations are marked by socioeconomic factors. The reality of social law that produces law including the world of human experience, and thus is regarded as normative ideas. There are four paths of non-normative to be normative: Habit, Effective power, Effective possession, Statement of personal will.²

Looking at the features and patterns of community life in the small islands of the Liukang Tangaya District, it is illustrated that people are spontaneously aware that humans are part of nature, and a belief system that emphasizes respect for the natural environment is a very positive value for sustainable development. In implementing sustainable principles, indigenous peoples are strongly influenced by religious leaders, customary law, as well as regional governments such as villages or *dusun*. The power of these three elements has become a unity that cannot be separated in coastal areas and small islands.

Basically, a society have been practicing community-based fisheries management (PPBM) which has proven effective in managing fishery resources in a sustainable manner and equally allocate resources to local community. PPBM practices are not limited to marine waters but include inland waters. Community-based fisheries management carried out on the basis of clearly defined territory by community institutions and supervision of resources conducted by local fishermen themselves and the rules enforced by the local institution authority morally and politically.

IV. Conclusion

The existence of autonomous community in its social reality is based on the identification of the distinctive style of maritime and traditional behavioral patterns of the community in Liukang Tangaya Sub-District, representing the existence of a lebensraum of autonomous community alliance. Therefore, it can be used as the basis for the recognition and protection of the rights of Indigenous peoples of Coastal and Small Islands by referring to the fulfillment of elements of control of the Communal right on Sea. Although in reality, they still common to name of their community as indigenous peoples who are constitutionally acknowledged.

Regulations related to the utilization of coastal areas and small islands both Law of the Republic of Indonesia Number 27 Year 2007 and Law of the Republic of Indonesia Number 1 Year 2014 as its amendment, is still oriented to the exploitation of the territorial waters and has not implicitly accommodate the interests of indigenous peoples in the coastal area because of the existing regulation still open the gap for foreign investors to take part in the management and utilization of coastal areas and small islands as the article 26A Law of the Republic of Indonesia Number 1 Year 2014. Accordingly, Customary Law has an important role to harmonize Management and Utilization of Coastal Areas and Small Islands Based on Local Wisdom. By applying the principle of sustainability through customary law, it indirectly assists the Government in protecting its waters from ecological damage and also realizing the welfare of the people.

V. Recommendation

It is necessary to have further regulation as supervision and control effort. The regulation is expected to engage indigenous peoples in a participatory manner in order to create an inclusive legal product, therefore the regulation produced is no longer tend to overlap or be understood as a paradoxical rule.

A clear data collection of islands in coastal areas and small islands is required as a step to establish and mapping the governance areas of autonomous community including their institutions.

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¹ Vita Elysia, *Kajian Pengelolaan Wilayah Pesisir Dan Pulau-Pulau Kecil di Kabupaten Kaimana, Papua Barat*, Jurnal Forum Ilmiah, 2014, 11(3): 8.

² Hayatul Ismi, *Pengakuan dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat dalam Upaya Pembaharuan Hukum Nasional*, Jurnal Ilmu Hukum, Vol. 3 No. 1, p 11. Accessed at <https://media.neliti.com/media/publications/9126-ID-pengakuan-dan-perlindungan-hukum-hak-masyarakat-adat-atas-tanah-ulayat-dalam-upa.pdf>.

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