

The Essence of Indigenous Peoples Rights in the Perspective of Special Autonomy in Papua - Indonesia

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ABSTRACT: The need for this land continues to increase due to indefinitely nature, while on the other hand the availability of land is definite. Type of the research is a normative research, as a study that examines the positive provisions, legal principles and legal doctrine so that it can deal the issue. The results show that the essence of arrangement against the protection of the indigenous peoples right is animates the philosophical foundations of a nation, where the existence of such indigenous peoples is given authority and legitimacy. The implementation of arrangement against the indigenous peoples' rights should synchronize and harmonize various policies by pay attention to the indigenous peoples' right regard to cultural aspects. The public has right to speak out, the right to say no, and to negotiate with governments and companies, so that the indigenous peoples' right remain protected even if used by various parties and actual empowerment patterns can be realized. Therefore, it is necessary to see the relevance of various principles in various laws and principles of indigenous peoples with the principles contained to promote public welfare, educate the life of a nation and participate in a world order based on freedom, eternal peace and social justice.

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I. BACKGROUND

The implementation of development as a realization of growth and the development of a region always has implications for the increasing need for land. The need for this land continues to increase due to indefinitely nature, while on the other hand the availability of land is definite. This result in the value and price of land continues to increase and the occupation of land for the community today has shifted the value of social to economic functions. Ultimately, land is an economic commodity that must be controlled both legally and illegally. The reason for the development to take the land of the people and it is often used by the government and the authorities to control the land of the people.

One land that considered belonging to the government, so that it may be taken arbitrarily by the government is customary land. Customary land is not actually owned by the government, nor does it belong to any particular person. This customary land is held to improve the welfare of the whole peoples, so the absence of occupation means that all communities may use the land for their own benefit. Because customs vary among tribes with each other, then the arrangement of customary land also vary, depending on the tribe that controls the customary lands (Budiman, 1996).

In Indonesia, the existence of this customary right is still strong, some are diminish and there are none at all. However, the existence of customary land itself is still recognized. Usually this customary land is owned by a particular tribe or custom group, where the customary land is located. Therefore, customary land is usually identical with customary land and the arrangement is done by indigenous people. It can be concluded that not all places in the archipelago are recognizes the concept of customary rights (*beschikkingsrecht*).

In the Special Regional Regulation (hereinafter referred to as "*Perdasus*") Papua Province No. 23 of 2008 on the Customary Right stipulates that the customary rights of indigenous peoples over land are the right of alliance possessed by certain indigenous peoples over a certain area which is the environment of its citizens including the right to use the land and its contents in accordance with the laws and regulations. *Perdasus* as a derivative rule of the Special Autonomy Act of Papua should refer to the Special Autonomy Act. But the fact that: *first*, the articles of *Perdasus* are proved to define, make new definitions, amend the status of rights and harm the interests of indigenous Papuans beyond what is formulated in its reference rules. This fact is sufficient to sue *Perdasus* into the State Administrative Court because it also contradicts to its reference rule that is the Special Autonomy Act. *Second*, in 2001 legislator misunderstood the concept of "customary law peoples" and deviated from the formulation of the 1945 Constitution and UUPA.

Based on the above comparisons, the local governments do to protect the economic, social and cultural interests of indigenous peoples in the context of the enactment of specificity in the era of regional autonomy. The government may act to ignore the politics of national and regional laws that are not in favor of the interests of the people and dare to take the risk of that choice. Instead of taking power with an iron hand, the government would better facilitate progressive groups to initiate proposals for a special regional regulation that would better represent the aspirations of indigenous peoples in Papua.

As many disadvantaged regions in Indonesia, generally the areas in Papua are faced with 6 (six) major problems, namely low economic growth, lack human resources, lack societal accessibility, socio-cultural characteristics, and lack local financial capacity to encourage development, as well as for Papua is vulnerable to violent conflict. On this basis, the central government undertakes various policy interventions and programs that give priority and favor to accelerate the development in Papua. In many respects, the design of development in Papua needs to be formulated and done carefully, because Papua has special regulation through Act No. 21 of 2001 regarding Special Autonomy for Papua Province. At the same time, the government also recognizes that the implementation of these policies and programs is also confronted with cultural constraints that must be carefully managed.

The problems of social and cultural that often raises the issue of security in Papua, since the culture of the local community still places local culture as a guide to daily activities. The peoples more believe to the chieftain than the norms of government. Government policies and security forces are often ignored to join the chieftain orders. Consequently, government regulation in various dimensions of government and development is often subordinated at the lowest point. Land disputes within communities often occur where the years are increasing and occur almost everywhere in Indonesia both in urban and rural areas. The land issue is so relevant to be studied together and considered in depth and thoroughly in relation to the policy of the land sector so far. This is because the level of policy implementation shown so far has ignored the structural aspects of land tenure which ultimately led to various disputes.

Land matters that often occur when viewed from conflicts of interest of the parties in land disputes include: *First*; the people are faced with state bureaucracy; *Second*; the people are faced with state enterprises; *Third*, the people are faced with private companies; *Fourth*, conflicts between people or between tribes. In the sense that it is important that human's relationship with their land other than in the legal relationship, in the customary law it has a cosmic-magic-religious relationship. This relationship is not between individuals and land, but also among a group of community members of a customary law community (*rechtgemeenschap*) in relation to customary rights.

Hence, it is necessary to provide technical guidance, to provide an explanation to the regional apparatus organization that will form a regional regulation so that the planning of the regional regulations can be arranged in a planned, integrated and systematic manner. This can be achieved if there is good communication and coordination between local government, regional legislative, related vertical institution and community as stakeholders in order to produce quality regulation.

II. METHOD OF RESEARCH

Type of the research is a normative research, as a study that examines the positive provisions, legal principles and legal doctrine so that it can deal the issue. In addition, empirical research is used to obtain a description of the implementation of indigenous peoples' rights along with legislation as an analysis material. The sites were conducted in the provinces of Papua and West Papua as they relate to the protection of the indigenous peoples' right in the natural resources management. This research was to conduct an in-depth study on the essence of the arrangement against the protection of indigenous peoples' right in the perspective of special autonomy in Papua.

III. LAW POLITICAL THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS

The phrase of indigenous peoples' right is restored means the right of indigenous peoples back to the control of indigenous peoples. This phrase indicates that the indigenous peoples' right today is not in their hands. Although in legislations the recognition of indigenous peoples' rights has been established, the reality of the implementation or reactivation of such rights in the hands of indigenous peoples requires real action that they can do without impeded by the State. In addition to the juridical aspects that have been put forward in the previous chapter, the philosophical and sociological aspects also show the importance of the peoples' right is restored to the indigenous peoples.

Indigenous peoples are seen as new objects in international law. Although it would be logical to see them as a minority class that has a distinctive demand to be treated equally in a nation state inhabited by a majority of the descendants. The strength of their demands is not only comes from sentiments in which their ancestors were massacred and as slaves by immigrants, or at least their lands were confiscated that awakened the power of quasi-spiritual. The United Nations has established and declared that 2003 as international year of

the worlds' indigenous peoples. Indeed, indigenous peoples have a very important position in legal system and Indonesia government as a democratic constitutional state.

The 1945 Constitution expressly recognizes the existence of indigenous peoples as an essential element. Until now, the debate on the control rights of State has not provided a satisfactory answer for all parties, both academics and practitioners. Opinions that tend to positivity assume that the control right of the State is the implementation of the transfer of power and sovereignty of the people to the government to manage the needs and welfare.

Harsono (2003) states that the duties, obligations of the State to manage natural resources by their nature are included in the field of public law, it cannot be implemented by the whole Indonesian nation. Thus, the implementation is authorized to the Republic of Indonesia, as an organization of power of all people. According to the author, the concept of the control right of the State have a purpose and objective, so that the State can control vital resources for the common prosperity. This concept does not mean the State dominates or possess, but the State regulates wisely the system of utilization or natural resources management, so that the people become prosperous.

The concept of controlled and possessed has a different meaning, because the possessed has connotation to the absolute rights inherent to its subject. While the concept of controlled should be more moderate, because with controlled not necessarily possessed, but there is authority to regulate for the benefit of others or other parties (the community). If talks about agrarian issues, it is sometimes only focused on land matters. Land according to the concept of agrarian covers the surface of the earth in the land and the water, including sea water, while the water includes inland and sea territory of Indonesia.

As above formulations, the author argues that agrarian has a broad sense, not just land. Thus, in order to regulate and its utilization it needs an integrated and comprehensive approach. During this is a sector approach, which sometimes contradicts each other in regulatory, design and utilization and maintenance efforts. The result for the community is the uncertainty in the management and utilization of natural resources. In the use and utilization of various natural resources which are the main factors for improving the welfare, the community must give up their individual and communal rights are castrated by the business actor and the ruler.

Some examples as reference are the management of mines and natural resources at sea, the rights of forest exploitation, the opening of new rice fields, the use of coastal and marine areas, are often not synergistic in handling, as each parties are sectorally accentuates roles, functions and their respective authority, and in many cases incur losses to the surrounding communities.

The implementation of the control right of the State may be authorized to the private and customary law peoples, as necessary and not contrary to the national interest, in accordance with the provisions of the government regulation. The control right of the State cannot be separated from the authority which can be described as the rule of law (*rechts macht*). So, in the concept of public, the authority is relates to the power (Hajati, 2003).

Hence, the rules that must be issued by the government can at least respond to various needs of the community, in an order in balance with the interests of the State or government. Accommodative rules are capable of bridging and facilitating the needs of the community, thereby creating ease for people to have access, both in individual and other social relations. Then the rules must be justified in juridical, philosophical and sociological.

Based on the above concepts and when examined it is less visible in the politics of agrarian in Indonesia. Many of agrarian law are not touching the real life of the community so many cause problems. Until now our farmers have a lot of land under 1 (one) hectare (ha), and even many are called farmers, but do not have land.

Agrarian resources are often exploited for the benefit of certain groups and continue to ignore the interests of many communities, especially indigenous peoples in the rural areas. As a result, indigenous peoples declare themselves as the right holder of their customary territories by making a strict statement that: before the State there were indigenous peoples already existed. Thus, the State should not arbitrarily regulate and exploit the agrarian resources that have been dominated by indigenous peoples.¹

Now for us to re-think the relevance of the concept of control right of the State, in an effort to improve the welfare of society. Since the Indonesian people have tasted the independence, this concept has been developed and implemented in various national laws and regulations. The authors argue, in this regard, that this concept has not had a more meaningful effect on peoples' lives. The centralization of the former power of the central government has now shifted to local government, based on various principles of regional development, and has not been able to add value in the processes of community empowerment, especially indigenous peoples.

¹ The result of Congress Masyarakat Adat Seluruh Indonesia, 2002 in Jakarta

IV. IDEAL CONCEPT THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS

Customary law or factual rights or may be referred to as local law, to certain matters, namely the indigenous peoples' right in relation to the private, other community groups that utilize the natural environment around them, customary land tenure, coastal and marine, mangrove forests, selling and buying agricultural product, plantation and fishery that follow market laws. Especially for coastal and archipelagic management, customary law and factual have been accommodated in provincial and district regulations. It is found that many very small islands have been inhabited by the population since their ancestors and are seen as own. This is a problem when the government often expressed the opinion that small islands cannot be owned by individuals.

The factual right is a right that applies in local communities that are not of customary law. This right is a type of rights that cannot be identified in the types of rights known in the customary law literature. This right is a new right to arise in peoples' lives. An example is the right of people to grow seaweed on the coast of a particular island. Planting seaweed is unknown in their customary law. This right is a new right, as well as the rights to the waters around *rumpon*, the rights to the waters around the cages (*keramba*), the right to the waters around the frame (*bagan*) (these known around the 1960s). Between indigenous peoples and the government, there are frequent conflicts, and the closer the interests of the various parties are interconnected, the higher the conflict occurs among the parties. Conversely, the less the interests of interconnected, the smaller the conflicts arise.

What is described above reflects a strong relationship with the sociological aspects namely: the existence of symbols of interaction that is systematic, structured and still in effect today. This shows that there is a fixed norm or rule which, in addition to maintaining order or order in their own environment, is also used to meet the needs of their daily lives (subsistence), even in communities in *Luang* Island and communities in some other places in Maluku Province Indicates that the results are the trading materials used for export purposes. Thus, there is a relationship between the natural resources management according to customary law with the economic aspect and the welfare of the people. Therefore, the legal principles mentioned above need to obtain concrete manifestations in local regulations that give indigenous peoples the right to manage their natural resources based on ownership that has taken place since their ancestors.

This model shows that moral, political, legal and administrative system is a strong network. In the concept of peoples' prosperity, the recognition of the existence of indigenous peoples and customary law over natural resources (land, forest, sea), requires administrative system. It means, the bureaucracy needs to provide or serve all the steps necessary to meet the achievement of the goal. Legal politics is directed towards the achievement of peoples' welfare. The legal morals are associated with distributive and commutative justice that gives the rights of indigenous peoples to the resources around them.

The role of positive law to be discussed below is included within the scope of prescriptions in the legal system. That is, the role placing the provisions in the legislation as the rule that gives the opportunity, which underlies two things: (1) the necessity of government' action or (2) the ability of the community to act in a real way to protect the indigenous peoples' right and at the same time give the opportunity to move or for indigenous peoples to exercise what is part of their rights. This principle is actually a developed principle that departs from the application of goals to achieve the welfare of society.

According to the authors, the rights of the people to the natural resources around them that are based on customary law are a separate system from ancestral roots that have a practical effect and therefore require legal protection. Let the legal protection of existing rights of indigenous people, needs to be established and administered administratively.

Government in taking policy, often using the statement that land has a social function and for the sake of development, then the rights to land should be released by the community. In order to increase the local revenue, rice fields and other agricultural land changed the function for industrial development. The government takes the matter seriously and seeks to seek out solutions or seek other alternatives, in line with the needs of people who have long disenfranchised.

In associated to the problems faced by farmers, Bachriadi (1997:91) writes that how much policy reform at the normative level can be realized, so that seem the torso of some legislation and right legislation are for the peasants and have a perspective of justice, gender equality and ecological balance.

Land maintenance and the environment are more rhetoric, without any follow-up that really touches the needs of the community. Almost every year during the rainy season arrives, floods strike communities everywhere, as well as in big cities like the capital city of Jakarta, and Surabaya, Semarang is an indication that the maintenance of land and the environment is not maximal, because too much tolerance provided by the local government for development without seriously taking into consideration the negative impacts of the development system that are less concerned with the aspects of land and environmental maintenance.

In the era of local autonomy, this situation is getting worse because the direction and policy of local government in the utilization of land through agrarian politics is less synchronized with the national land law system. It is said that because so many regions are divided, so that each region will inevitably make policy

through local regulations, which leads to the management of land and resources and others in order to get as much foreign exchange. According to Act No. 22 of 1999, local governments have the authority to regulate investment as much as possible for the sake of regional development. If investors enter, then of course there must be rules that provide facilities ease, including the provision of land for the benefit of investment in the region.

Facing this reality, it is necessary to handle the problems of land in an integrated and systematic way so as to produce a legal system of land that can guarantee the life of the wider community, including indigenous peoples in the region. Agrarian politics that can protect the interests of the community, especially indigenous peoples that exist in the region, is inseparable from the breath of reform which is exhaled by a transitional government which until now has not fully yield satisfactory results.

According to the 1945 Constitution, the State recognizes and respects the unity of customary law and its traditional rights, as long as it is alive in accordance with the development of society and the principle of the unitary state of the Republic of Indonesia as governed by the Law (See Article 18 B of the Fourth Amendment of the 1945 Constitution). Recognition of the unitary of customary law community should be followed by legal instruments, both national and local, that can provide protection for the indigenous peoples' right. If not then local governments through various policies to encourage investment and take profit from the natural resources management including land will undoubtedly run over the rights of the people, especially related to land management rights. The narrowness of land for the community to develop agricultural and other business activities is largely due to government policies and public awareness of the importance of land for human life. Government policy is more oriented to the economic aspect to increase regional income.

The lack of community knowledge and awareness of the importance of land for their lives, now or future generations has resulted in the community casually selling their farms, for wanting or obtaining substantial amounts of fresh funds but unable to manage them or use them to obtain agricultural land or new rice fields. As a result, local communities and indigenous peoples are increasingly marginalized - in their own territory to become increasingly powerless and impoverished. As described above, in reality, it turns out that government policy to organize the system of management and utilization of land through national agrarian politics as well as on local government tends not to serve the interests of people. Conceptually, there are formulations that recognize and respect the rights of people to land and natural resources, but it turns out even more difficult of land problems in Indonesia.

Agrarian politics as developed by the government tends to relinquish peoples' rights to land and it is not oriented to regulate the use and utilization of land through an alternative legal system. For example, the local regulation of East Java Provincial on land, which is contradict is more likely to debate the issue of sale and buy land and dispute and how consignment procedures should be taken if occur a dispute. Should be the local regulations in the framework of structuring and utilization of land in the area should not be contradictory, with the principles of higher legislation. One matters more important is how to formulate an alternative for preventing the land rights transfer, both agricultural land and housing that often losing the society itself.

Referring to the Japanese state which is very wise in the management and utilization of land for the people, as a source of life, where the land is not arbitrarily traded but there are rules that require land can only be rented in a certain time, so that no transfer of rights fully to others. With such a regulatory system, it is possible for individuals or families who own land, not to sell their land, but if any party needs land then it can only be contracted and the owner can enjoy the results together and not lose the full rights of the land.

In the national agrarian politics, the government should be wiser in making the rules that not only provide treatment and protection for the public but provide significant added value to how to defend the rights to the land. If not, then the coming generations will live in a degradation and helplessness in the territory that once had land as the inheritance of the ancestors that should have been preserved for generations.

So, the politics of national agrarian law should really serve the interests of the State and also the sustainability and welfare of the people. Thus, this continuity needs to get a keen spotlight and wide through various government policies. This is actually not too difficult, because the Basic Agrarian Law has provided a formula on the types of rights that can be owned by individuals, legal entities and the state. Furthermore, how to elaborate in the legal product that ensures its sustainability and also provides awareness to ensure the survival and continuity in defending those rights.

The position of communal rights of Customary Law Peoples in the legal system of national land is referring to the General Explanation II (2) of the Basic Agrarian Law in relation between the State and the land there are three land entities: (1) state lands whose authority is public, (2) rights land is owned by an individual or legal entity whose authority is civil; (3) customary land of customary law peoples whose authority is public and civil.

How the communal rights of customary law peoples over the land are meant by the ministry' regulation? for communal rights whose legal subjects are customary law peoples, it certainly cannot be meant in the category of communal rights because the communal rights are only civil dimension. What is the communal

right of the customary law people as the right to land according to BAL with all the contents of its authority is transfer, inherit, make the rights to the land as a debt guarantee with burdened by dependent rights? apparently this is also not a characteristic of the communal rights because Article 14 of the Ministerial Regulation stipulates that the communal rights of the customary law people have been certified to be cooperated with a third party.

Perhaps if the communal rights of customary law peoples are juxtaposed with the customary rights of customary law peoples can be observed the conception of *ulayat nagari* and *ulayat kaum* in Minagkabau. *Ulayat nagari* is a customary right that is juridical intended in Article 3 of UUPA Nagari includes a group of people who have territories with certain border, have their own government and must own wealth, complete with its arrangement. *Ulayat kaum* does not belong to the category of customary land is technically juridical, but it is a communal property land that is communal or community-owned land. *Kaum* is a group that has one field or several fields communally and descending under the leadership of the chief of heir. Perhaps by the communal right of customary law peoples over the land in this regulation as the characteristics of the community land.

The communal right is defined as “a common right to the land of a customary law peoples or a common right on the land of a customary law peoples or a common right to a land that given to a community in a forest or plantation areas” (Article 1 Point 1 of the ministry’ regulation). A definition is intended to provide an understanding of a matter that will be used repeatedly in the formulation of the articles of the legislation. The definition must be firm so as not to create multiple interpretations. Thus, the definition of communal rights is unusual because it unifies two distinct groups of characteristics in one dimension.

As the ministerial regulation, the communal rights shall consist of two groups of subjects, namely the right of common property to the land subject of the customary law people and to the land subject of non-customary law peoples. The two groups are different can be observed in Article 3 Paragraph (1) and (2) of ministry’ regulation, each related to the requirements of customary law peoples and non-customary law people.

Although the existence of two rights subjects is determined by the regent/mayor or governor, it should be emphasized that against the customary law peoples, the determination must be interpreted as a confirmation of the existence of customary law peoples which is declarative as stipulated in Decision of the Constitutional Court No. 85/PUU-XI/2013 against Act No. 7 of 2004 on water resources, and that the communal right is actually located on the land owned by the custom itself (See Decision of the Constitutional Court No. 35/PUU-X/2012 against Act No. 41 of 1999 on Forestry). On the contrary, to the existence of non-customary law peoples, the determination of the official is constitutive and the granting of the communal rights is done on State land which has been released from forest or plantation areas.

The fourth issue is the revocation of the Agrarian State Minister/Head of the National Land Agency No. 5 of 1999 due to the confusion between customary rights and communal rights, it is worth questioning the revocation of the regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 5 of 1999. Article 17 Permen can be interpreted as giving an opportunity to the customary law peoples and their customary right is recognized and confirmed its existence (generally through the local regulation) to be given the communal rights on its land.

V. CONCLUSION

The essence of arrangement against the protection of the indigenous peoples right is animates the philosophical foundations of a nation, where the existence of such indigenous peoples is given authority and legitimacy. The implementation of arrangement against the indigenous peoples’ rights should synchronize and harmonize various policies by pay attention to the indigenous peoples’ right regard to cultural aspects. Arrangements against the protection of the indigenous peoples’ right in the perspective of special autonomy should take account of local wisdom and legal protection in the context of law enforcement and respect for the community as an obligation of legal State, thereby to realize the legal protection of against the indigenous peoples’ right through the product of local law.

The public has right to speak out, the right to say no, and to negotiate with governments and companies, so that the indigenous peoples’ right remain protected even if used by various parties and actual empowerment patterns can be realized. Therefore it is necessary to see the relevance of various principles in various laws and principles of indigenous peoples with the principles contained in the Constitution to establish an Indonesian government that protects the entire nation of Indonesia and the entire blood of Indonesia, to promote public welfare, educate the life of a nation and participate in a world order based on freedom, eternal peace and social justice.

REFERENCES

- [1]. Arif Budiman, 1996, *Fungsi Tanah dan Kapitalis*, Jakarta: Sinar Grafika.
- [2]. Bachrul Amiq, *Aspek Hukum Pengawasan Pengelolaan Keuangan Daerah: Dalam Perspektif Penyelenggara Pemerintahan yang Bersih*. LaksBang PRESSindo, Yogyakarta, 2010.
- [3]. Karianga, H. (2016). New Paradigm for Local Financial Management: A Review of Local Budgeting System. *Hasanuddin Law Review*, 2(3), 398-408. doi: <http://dx.doi.org/10.20956/halrev.v2i3.700>
- [4]. Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2005.
- [5]. Purnomo, H. *Era Baru Kebijakan Fiskal*. Jakarta: PT Kompas Media Nusantara, 2009.
- [6]. Roy Bahl.W & Johannes F. Linn, *Urban Public Finance in Developing Countries*, A World Bank Book, Oxford University Press, New York, 1998.
- [7]. Yosef Riwu Kaho, *Prospek Otonomi Daerah di Negara Republik Indonesia*, PT Radja Grafindo Persada, Jakarta, 2002.

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