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The Form of Legal Protection of Indigenous Peoples under Justice Communal Rights in Mining Sector in Papua

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Abstract
Relationship between the indigenous people and the land is very closely. The relationship is not only because of community customary law requires the land as a source of their livelihood, but also they think that the land has values go beyond economic value. Papua is a region that is very rich in natural resources, especially when viewed from its economic value. However, the abundance of natural resources does not seem to be a blessing for the people of Papua. Article 2 of the Minister of Internal Affairs Decree No. 52 of 2014 on guidelines for the recognition and protection of Indigenous People explains that the governors and/or regents / mayors perform recognition and protection of the indigenous peoples. Article 4 then mentions that the recognition and protection as referred to in Article 2 shall be made through the following phases: (a) Identification of the Indigenous People; (b) Verification and validation of the Indigenous People; and (c) Determination of the Indigenous Peoples. the collected land data can be developed as an information system and integrated land management that includes a database of land tenure throughout Papua, both land owned by the local government, investors, and local communities. Textual and spatial data can be linked to e-government, e-commerce and e-payment, which can attract investors.
Keywords: Legal Protection, Justice Comunnal Rights, Mining Sector.

1. Introduction

Land is one of the most important natural resource for life and survival of mankind. Iman Sudiyat states that soil (land) is a conditio sine qua non (prerequisite) to the existence and sustainability of people.[1] Relationship between the indigenous people and the land is very closely. The relationship is not only because of community customary law requires the land as a source of their livelihood, but also they think that the land has values go beyond economic value. There is a relationship that is emotionally charged, sentiment, religio-magical, sometimes even irrational relationship between them in their traditional territories. It is depicted then as an immutable and not replaceable by any other object.[2]

Mastery region by the customary law can be found in various regions in Indonesia, although their names are different, such as: 'Patuanan' in Ambon, 'Panyampeto / Pawatasan' in Borneo, 'Wewengkon' in Java, 'Prabumian /Payar 'in Bali,' Tatabuan 'in Bolaang Mongondow,' Limpo 'in South Sulawesi,' Nuru 'in Buru,' Torluk 'in Angkola,' the land of the clan 'in Lampung,' Paer 'in Lombok, 'communal' in Minangkabau, etc. , 'The communal' is the term most popular consumer to indicate the existence of indigenous land in territory controlled by the indigenous peoples.[3]

In 'customary law' constructed by C. van Vollenhoven, 'communal rights' is the second pillar of the customary law as 'communion law' (which is the first pillar) - and the 'area of customary law' as a third pillar of customary law, and so on.[4] Existence of the customary law recognized by the Dutch colonial government as mentioned in the provisions of RR ('Reglement op het Beleid van der Regering Netherlands Indies') in particular the provisions contained in Article 75 (old) RR 1854.[5]

On August 17, 1945, Sukarno and Hatta on behalf of Indonesia declared independence of the Republic of Indonesia. The next day, August 18, 1945, PPKI (Indonesian Independence Preparatory Committee) established the Constitution of the Republic of Indonesia.[6] Article II Transitional Provisions of the Constitution of 1945 (before the amendment) provided that: "All state agencies and direct existing regulations still in force, has not been held during the new under this Constitution". Thus, under Article II of the Transitional Provisions of the Constitution of 1945, the customary law and in terms of the communal terms (as set by the Dutch government) continued enforceability of post independence of the Republic of Indonesia to the holding of the new regulation.

The regulation governing land matter is the Law No. 5 of 1960 on the norm of the Basic Agrarian

[1] Iman Sudiyat, *Customary Law,* Liberty, Yogyakarta, 1981, p. 1.
[2] I Gede AB Winata, *Indonesian Customary Law: Its Development from Time to Time*, Citra Aditya Bakti, Bandung, 2005.
[3] See Soerojo Wignjodipuro, *Introduction and Principle of Customary Law*, PT. Gunung Agung, Jakarta, 1967, p. 198. See also, Bushar Muhammad, *Basic Idea of Customary Law*, ed. 10, Pradnya Paramita,2006, p. 104.
[4] See R. Van Dijk, *Inroduction of Customary Law in Indonesia*, Mnadar Maju, Bandung, 2006, p. 67.
[5] Mahadi, *Brief Discussion of Customary Law Since RR, 1854,* ed. 3, Alumni, Bandung, 2003.
[6] See http://id.wikipedia.org/wiki/Undang-Undang_Dasar_Negara_Republik_Indonesia_Tahun_1945.

(abbreviated: BAL). The arrangement of the customary law as well as the communal rights adopted in the BAL. In fact explicitly, BAL states that: "the land law applies to the earth, water, and air space is the customary law".[1]

In 1997, the monetary crisis hit Indonesia. Its effect was the national economy slumped, the sustainability of national development aground on the road, and the concept of national development in ruins, until the end of Suharto 'resigned' as President of the Republic of Indonesia. The reform era has been begun since 1998.[2] People's Consultative Assembly (MPR) identified that the cause of the failure of national development was the practice of KKN (corruption, collusion, and nepotism). MPR report also stated the name of former President Suharto as a party that needs to be investigated.[3]

The impact of the exploitation of natural resources (SDA) in the era of the New Order government was identified in KNPSDA (National Conference on Management of Natural Resources) in Jakarta, 23-25 May 2000. The conference took place to seek solutions to future improvement. It was attended by 350 stakeholders involved in natural resource management from various regions in Indonesia. The conference issues included economic and business climate, culture, education, politics and civil society, law and natural resource management policies.[4] Based on those issues then, the identification of issues are classified as problems-economic policy, the business climate,[5] as well as the legal and policy issues.[6]

During the New Order government, the construction of large-scale projects required a lot of land which also included a communal land. Intake of the communal land was not always heed the principles and provisions of the law regarding how to obtain the communal land, even sometimes done through coercion by ignoring the sense of justice. The impact seen in the reform era, in which the demands of indigenous peoples to land of the communal rights increased. The communal land has been replaced to HGU (leasehold) / HPH (forest concession) / HKP (Rights Mining). Therefore, after the expiration of those rights, those rights should be returned to the indigenous people as the owner. If those rights will be expanded or renewed by the company, the company must carry out negotiation with the community customary law as the owner of the land.[7]

Papua is a region that is very rich in natural resources, especially when viewed from its economic value. However, the abundance of natural resources does not seem to be a blessing for the people of Papua. The Papuan people feel the injustice of the New Order government in exploiting natural resources in Papua in ways that do not heed the principles of good governance. Imbalance between the exploitation of natural resources dredged from Papua and the condition of the community show that the community customary law is becoming worse in terms of social, economic, political, and even people feel the destruction of the order of values, customs, and local knowledge especially when it related to control of land rights including the communal rights. The situation has become particularly sensitive in the context of Papua since the Papuan people have a history of nationalism and identity that is different from the Indonesian people in other areas. Another thing that will exacerbate the situation in Papua is the atmosphere of life dominated by immigrants - including the 'repression' of culture from the outside - and a military force, so it is fitting management of natural resources in Papua getting attention very specifically.[8]

One of the examples of disputes SDA in Papua is land conflict between the community customary law of Amungme and Kamoro in Tembagapura and PT. Freeport Indonesia. The ownership or control of land rights including the communal rights of the indigenous people is turning into the hands of companies. The company relies on the rule of law particular in regulation and policies of licencing from the Central Government. In this condition, the indigenous people are always in a weak position so that they feel helpless and depressed under the state laws and policies of the Central Government in exploiting the natural resources of Papua.[9]

According to Jack Reynold Ch. Ayamiseba, the type of land disputes in Papua is structurally dispute because groups of the indigenous peoples face with the power of the state, either as perpetrators or guarantor

[1] See Article 7 BAL.
[2]Dumadi Tri Restiyanto and Nanang Yusroni, the Failure of Indonesian Economic Development Caused by Trapping of the Failure Approach of Economic Theory, *Journal Akses*, Vol. 1 (2), 2006, p. 175.
[3] See MPR Decree No. XI/MPR/1998 concerning Establishment of Clean State from Corruption, Collusion, and Nepotism.
[4] KNPSDA Committee, *Executive Summary of National Conference on Management of Natural Resources*, Jakarta, 23-25 Mei 2000.
[5] Ibid, pp.63-66.
[6] Ibid, pp 82-85.
[7] Andi Haeril Sumange, *Legal Settlement of Management Issue of Communal Rights by the Investor as Third Party*, Thesis, Postgraduate of Airlangga University, Surabaya, 2003. See also Anonym, *On behalf of Development (World Bank Human Rights in Indonesia)*, ELSAM, Jakarta, 1995, p. xix. See also R. Yando Zakaria, *Abih Tandeh:Village Community Under New Order Regime*, ELSAM, Jakarta, 2000.
[8] YAPPIKA Team, *the Problem Roots and Alternative Process of Ach, Jakarta, Papua Dispute Settlement*, YAPPIKA, Jakarta, 2001, p. 91.
[9] See William H. Reba, Mediation as an Effort to Solve Environmental Dispute amongst Cummunity Law Amungme and Komoro, *Journal Law Honeste Vivere*, Faculty of Law, University of Christianity Indonesia, Jakarta, Vol XIX, (September) 2005.

(giver) rights. The parties who get involve in land disputes beside the government is the holder of the concession (HGU)/ HPH / HKP.[1]

Indonesia finally demanded a public correction of the behavior of Suharto and the New Order regime to undertake reform in the fields of law, economics, and politics. Indonesian hope for improvement is also followed by hope for improvement of Papua with the issuance of the Law No. 21 of 2001 on Special Autonomy for Papua. Hope for Papua by obtaining special autonomy status is to live more prosperous due to abundant natural wealth. The community customary law is not longer only placed as an object of development as in the past, but also it has participated as subjects / agents of development. All the activities of a community-based development particular in terms of natural resource management, the community customary law is recognized, respected and involved. There must be a strong guarantee of legal protection of the rights of indigenous people, either the status of communal rights or the rights of individual of local community customary law.[2]

The existence of the Law No 21 of 2001 does not guareantee that the change will come to admit and respect to the indigenous people. The Law needs elaboration-up with the norm of Special Region (Perdasus) which regulates the recognition, respect, community involvement of the indigenous people, and the protection of their traditional rights. In fact that since the enactment of the Special Autonomy Law 12 years ago, the Papua provincial government recently set up six Perdasus relating to protection of the rights of the indigenous communities, namely:

1. Perdasus No. 18 of 2008 on Populist-Based Economy;
2. Perdasus No. 19 of 2008 on the Protection of Native (Papua) Intellectual Property Rights;
3. Perdasus No. 20 of 2008 on Indigenous Justice in Papua;
4. Perdasus No. 21 of 2008 on the Sustainable Forest Management in Papua;
5. Perdasus No. 22 of 2008 on the Protection and Management of Natural Resources of the Indigenous People of Papua;
6. Perdasus Number 23 Year 2008 on Communal Rights of Community Law and the Rights of Indigenous People on his/her Land.

Those Perdasus as aforementioned above do not work optimally because there are many other rules relating not yet prepared properly, let alone set up.

In addition to the national movement for the recognition of the rights of indigenous communities, the indigenous peoples are also a concern of the international community which considers the values of customary laws and the rights of the indigenous communities as an integral part of human rights (HAM).[3] Indonesia also adopted the integration of human rights principles to the legal protection of the indigenous peoples as set forth in Law No. 39 of 1999 on Human Rights.

Indeed, the existence of customary law communities and recognition of their traditional rights have a constitutional basis in Indonesia. In Chapter VI (Local Government), Article 18 of the Constitution NRI of 1945 (before the amendment) states that "The division of Indonesian area over a large area and small, with the structure of government established by law, with regard and remembrance consultative basis in the system of government, and the rights of its origins in the areas that are special."[4]

The government of the Republic of Indonesia after the establishment of the Constitution 1945 by PPKI on August 18, 1945, it appeared that the attention of state officials more focused on the development of Article 33 rather than Article 18 of the Constitution. This is the impact of the discourse concerning the Republic of Indonesia between the Unitary Republic of Indonesia supporters and those who are more inclined to the RIS (Republic of Indonesia). The pro-Homeland looks stronger than RIS camp, so the mere commonplace if Article 33 of the Constitution NRI 1945 more to get reinforcement.

Embodiment of Article 33 of the Constitution 945 known as the Right of State to Control (RSC) becomes the constitutional basis of 'control of land by the state'. BAL has expressed the communal rights and also adopted the RSC. In fact, in the construction of thought espoused by BAL, the state is the incarnation of the customary law community itself.

Based on the above description, the focus on the author is to elaborate RSC in terms of the communal right of the customary law community. The elaboration of RS will be associated with the interests of state / government to develop the national economy through the development of investment in the field of mining.

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[1] Jack Reynold Ch.Ayamiseba, *Position of Communal Right in Framework of Land Establishment for Public Interest Development*, Dissertation, Postgraduate Program University of Padjadjaran, Bandung, 2004.p.3.

[2] See Susilo Bambang Yudhoyono Speech in TMII Jakarta, 09 August 2006. He stated that the existence of customary law must be recognised and respected in whole life. Those respects must be referred to the principle of Unitary State and governed in such laws.

[3] See the Law No. 5 of 1994 concerning Ratification of Biological Diversity. See also the Law No. 39 of 1999 concering Human Rights.

[4] See article 18 og the Indonesian Constitution (original version before amandement).

2. The Form of Legal Protection of Indigenous Peoples under Justice Communal Rights In Mining Sector In Papua

Article 2 of the Minister of Internal Affairs Decree No. 52 of 2014 on guidelines for the recognition and protection of Indigenous People explains that the governors and/or regents / mayors perform recognition and protection of the indigenous peoples. Article 4 then mentions that the recognition and protection as referred to in Article 2 shall be made through the following phases:

a. Identification of the Indigenous People;
b. Verification and validation of the Indigenous People; and
c. Determination of the Indigenous Peoples.

Furthermore, Article 5 states:

(1) Regent / Mayor through the sub-district or other identifying designation as referred to in Article 3 (a) with the involvement of indigenous communities or community groups.
(2) The identification referred to in paragraph (1) is done by looking at:
   a. History of the Indigenous People;
   b. Indigenous territories;
   c. Customary law;
   d. Wealth and / or custom objects; and
   e. Institutional / traditional governance systems.
(3) Results of identification as referred to in paragraph (2) will create verification and validation done by the Indigenous Peoples Committee of the district / city.
(4) The results of the verification and validation referred to in paragraph (3) will be announced to the local Indigenous People within 1 (one) month.

The process of identification and verification of the presence of the indigenous peoples is done in accordance with the Minister of Internal Affairs Decree No. 52 of 2014. The process further has the potential to make the indigenous peoples more vulnerable to disputes or conflicts with outsiders, especially if such determination takes a long time. In fact, as stated by Syamsudin,[1] the indigenous peoples are vulnerable people while defending their rights, which are characterized by:

1. A juridicial effort to weaken and destruct the exixtence of the indigenous people. The efforts are conducted by applying national legislation and its implementation through development policies. Those legislation includes: a) The implementation of laws and policies that destroy the rights of indigenous people on an agrarian resources; b) The implementation of laws that destroy the system and institutional forms ofthe indigenous peoples; c) Development policies that negate the rights of the indigenous community in various sectors.
2. A practical effort to weaken and destruct the exixtence of the indigenous people. The efforts are negative actions against the indigenous peoples by government officials, non-governmental and non-indigenous communities. The form of it can be repressive action and socio-political stereotypes.
3. The internal weaknesses. The weaknesses of the indigenous peoples consists of: a). Looseness of kinship ties caused by entering of outsiders into community through the bonds of marriage; b). commercialization of the indigenous resources caused by some changes of economic scale that creates implications for the exploitation of the agrarian resources; c) denial of identity; d) overlapping roles. It means that some functionaries of community law act either as community law functionaries or as village officials, religious leaders, political parties functionaries, and the organization committee of NGOs; e) customary cognitive maps, the maps territorial.

To protect indigenous communities, therefore, at least it is needed strategic approaches to identify and understand the indigenous community. In this level, it is pivotal to find the information relating to: (a) recognize the culture, customs, laws, customary, religion and belief; (b) recognize the social layers and social conflicts that may exist; (c) identify local leaders; and (d) identify the geographical conditions of the indigenous people alliance.[2]

With local autonomy, local government now has greater authority to perform management and land administration. However, after the reform, the people got stronger political influence and could lead to open conflict when land management and land administration was not done openly and properly. Therefore, the local government is required to immediately carry out the management and good land administration. In the era of local autonomy on the ground of procedural irregularities, such as the dominance of the state in the name of development, investment that beat the people's interests, weak law enforcement system which is related to land issues, should be abolished. To fullfil those ideas above, good governance must be reached to embody the idea.

[1] Syamsuddin, Burden of Community Law to Face Legal State, *Journal Hukum of Faculty of Law UII*, Vol.15 (3), Juli 2008, pp.338-351
[2] Ibid.

In terms of it, Papuan Provincial Government is responsible for setting the legal framework and policies that regulate and protect ownership and land rights. Priority responsibility of the local government is to:

a. Form such regulation that establish rights to land and protect these rights from infringement.
b. Maintain transparency and consistency in the enforcement of these regulations, and
c. Implement land dispute resolution efficient and fair.

In addition, it should also maintain land admisntration. The goal is to ensure the implementation of the legal framework and policies are carried out proper, consistent, and responsible. All information about the areas of land and land rights in all regions of mainland Papua Province should be recorded and maintained accurately. The land administration shall include at least 3 (three) things:

1. Complete and accurate records, including detailed maps of all regions and areas of land in Papua, its boundaries and location of the entire territory of Papua.
2. List of land rights along with the rights holders of notes who the primary and the secondary right to the land plot.
3. Information about the transaction and the subsequent changes that affect the legal status of land and land rights holders are recorded on a regular basis and sequentially.

If during this time the government has always suppressed the rights of the indigenous people to their land on the grounds of national unity, these efforts create regional disturbance feeling and interference rejection of the government. In fact, people protection needs related to land rights. Formulation of providing protection is, as follows:

1. Owners of land are to create a map while showing the outer limits of its the communal land. The local governments and NGOs can help to improve the ability/knowledge and their skills in conducting map activities. NGOs can be given a role to facilitate discussion about the location of communal land boundary with the adjacent owners and others in the vicinity.
2. Temporary map must be recognized by the local government and included in the official maps. Customary land surveying and mapping must be made Official Local Land Board at the request of the people concerned and with their full participation.

In relation to the use of natural resources on a large scale by the private sector, other forms of benefits can be provided including taxes, royalties, land rent, compensation, stock, salaries, business contracts, and donations. Other forms of compensation could be cash, land of equivalent, resettlement, or other mutually agreed form, such as endowments, program activities, community economic empowerment, development of facilities / infrastructure, education and skills enhancement in accordance with the needs of society. If there are land disputes, the Local Government must act as mediator to resolve the dispute. If the emerging dispute over land that has been obtained by the present owners to pay off compensation, but not through the mechanism / process that is true, for example, does not involve indigenous peoples, the Local Government may give some of the money resulted from taxes to the public. The rules to be fullfilled in order to get some taxes money from the local government are (a) the claimant is one of the members of the Indigenous People Community (IPC); (b) the suitable program to obtain thefunds from the local government; and (c) theprogram and the money are able to be responsible.

In order to obtain fully protection, recognition, and respect for customary land entire Papua, the lands are still controlled by IPC should not be traded. The indigenous lands can only be rented out to those who need it. Therefore, along with the development of technology, the collected land data can be developed as an information system and integrated land management that includes a database of land tenure throughout Papua, both land owned by the local government, investors, and local communities. Textual and spatial data can be linked to e-government, e-commerce and e-payment, which can attract investors. In addition, the mapping activities in order of registration of land ownership, possession, use and utilization of land can be supported also with information technology.

The use of technology in order to empower and development rights of the indigenous peoples should be addressed to realize the welfare of the indigenous peoples through its participatory, which is active in the empowerment and development of the rights of the indigenous peoples. In other words, the empowerment and the development of community rights, the local government needs to use a comprehensive approach to development that is community-based development are supported by modern science and technology, educational institutions, educational programs, cooperation with international institutions, stakeholders and law enforcement.

In a community-based development activities, the local government acts as a facilitator who can integrate knowledge and local needs / local and community participation towards an activity of sustainable development / environmental. Some considerationof it are:

a. The release of land before 1999 is still recognized, whereas after 1999 must pass through land deed officials (PPAT).
b. The importance of understanding of the land officers officially must have the same perception about

land issues.

c. Recognition can be formed in the form of money or goods to the cummunal owners.

Those consideration as mentioned above also apply to the management or mining investment. The management of exploration and exploitation of mining include production, development, and control the environmental impact. Mining as one type of resources found on the land controlled by the indigenous peoples that should be managed appropriately. Naturally, in the sense of mine management, it should not only benefit investor, but also should be able to improve the welfare ofthe indigenous peoples. This can be realized by placing the mine as one of the resources contained in the indigenous lands. Its management should be based on the principles of respect and recognition as well as economic empowerment of the indigenous people. In this case, the whole process of management should reflect respect and recognition as well as economic empowerment of the indigenous people.

The respect is manifested in the form of communicating to the indigenous people to plan mining activities on the land controlled by the indigenous people. This concrete action should be undertaken by the investor at pre-construction stage. The recognition should be realized in the form of involvement of the indigenous people in the whole process in a rational management of the mine. This means that the investor must involve the indigenous people who are eligible according to the needs of investors / initiator. The economic empowerment of the indigenous people should be realized in the form of compensation for the indigenous people' rights to land and the ming location. The compensation should be given in the form of human resource development program, the development of economic infrastructure, and savings banks.

3. Conclusion

Article 2 of the Minister of Internal Affairs Decree No. 52 of 2014 on guidelines for the recognition and protection of Indigenous People explains that the governors and/or regents / mayors perform recognition and protection of the indigenous people. The recognition and protection are intended to give strength position of the indigenous people in their legal and social life activities. Therefore, in the context of mining, the inclusion of the indigenous people in the whole process rationally mine management is needed. This means that the investor must involve the indigenous people who are eligible according to the needs of investors. The economic development of the indigenous people should be realized in the form of compensation of indigenous rights to the land on which the mine site.

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